



# IDAHO

DEPARTMENT OF FINANCE

C. L. "BUTCH" OTTER  
Governor

GAVIN M. GEE  
Director

September 13, 2011

Re: Opinion Regarding the Sale of Common Stock

Dear

We received your September 8, 2011 request for an interpretation concerning whether the sale of common stock in a business sale transaction requires the registration of the agent facilitating the transaction who is receiving a commission. Your request asks for an opinion as to the requirements of the Idaho Uniform Securities Act 2004 (IUSA), the Idaho Real Estate Commission and "Idaho Law". This opinion extends only to the requirements of the IUSA.

It appears that the transaction in question is a sale of assets which primarily consists of the business inventory, receivables, and common stock. We cannot give an opinion based on hypotheticals or multiple scenarios. Thus, our opinion is based on your representation that the buyer may acquire 75% of the common stock outstanding, and the current owner will retain the remaining 25%. The contemplated sale is to an individual who will operate the business utilizing the existing company's corporate structure. There are no outside, passive investors involved in any part of this transaction. The seller of the business will pay the agent, who is a licensed real estate broker, compensation equal to 2.2% of the sales price of the business.

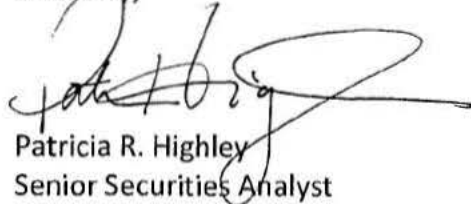
Arguably, because the transaction in question involves the sale of common stock, it constitutes a transaction involving a security as that is defined in Section 30-14-102(28) of the IUSA. However, even if the transaction is deemed to involve the offer and sale of a security, and therefore subject to the requirements of the IUSA, it is our opinion, based on the facts presented to our office, that the transaction in question would be exempt under Section 30-14-202(18) of the IUSA and the agent facilitating the transaction would meet the exemption from registration provided by Section 30-14-402(4) of the IUSA.

Although the transaction and the agent involved appear to be exempt from registration, if this transaction is deemed to involve a security, the IUSA would apply to the offer and sale of the business. Therefore, both the seller and agent are required to provide full and fair disclosure of all material aspects of this offer and sale.

**SECURITIES BUREAU**  
Bureau Chief – Marilyn T. Chastain  
800 Park Boulevard, Suite 200, Boise, ID 83712  
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Please be advised that our foregoing opinion is based solely on your representation of the facts in this matter. Should those facts change or differ in any way from this representation, our opinion may also change.

Sincerely,

A handwritten signature in black ink, appearing to read 'Patricia R. Highley', with a long horizontal flourish extending to the right.

Patricia R. Highley  
Senior Securities Analyst  
Idaho Department of Finance

## **Patty Highley**

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**From:**  
**Sent:** Thursday, September 08, 2011 3:16 PM  
**To:** Patty Highley  
**Cc:**  
**Subject:** Written Opinion regarding the potential sale of a Corporation/Business selling it assets, stock etc September 8, 2011

Idaho Department of Finance  
Patty Highley  
332-8077  
Jim Burns  
332-8080

Re: Written Opinion  
Sale of a Idaho Corporation/Business  
Idaho Law - Compensation to Idaho Real Estate Broker  
No Idaho Security License  
Rules Pursuant to the Idaho Uniform Securities Act (2004)

Hello Patty

Here are some of the facts as we discussed today with you and Jim Burns. Please review the facts and provide us with an opinion by the Idaho Department of Finance if we are permitted to receive a real estate commission on the sale of an Idaho Corporation/Business that has assets, stock, inventory and receivables etc.

Thank you for you help. If you have additional questions please let me know...

Beat regards.

Idaho Broker

### **Facts:**

1. Listing a Idaho Corporation/Business for sale... it has common stock, accounts receivable, inventory, real estate assets (Land, Building and Equipment)
2. Seller will compensate the Idaho Real Estate Broker - Compensation Agreement/Exclusive Right to Sell Agreement - Seller agrees to pay a fee of 2.2%

3. As an Idaho Real Estate Broker are we permitted by Idaho Law, the Idaho Department of Finance and Idaho Real Estate Commission to receive a Real Estate Commission fee from the sale of this Corporation/Business.
4. The new buyer may purchase just the assets or they may purchase the stock and will have approximately 75% ownership of the existing Corporation/Business, the new buyer will manage the Corporation/Business on a daily basis and will not be a Passive Investor.
5. We understand that this transaction maybe an Asset Purchase or Stock Purchase.

### **Sample Draft of Compensation Terms**

Seller, ( ) as and Idaho Corporation and/or its individual stockholders

Provides hereinafter referred to as (Broker), the sole and exclusive right to sell, lease, option, exchange, or other transaction which causes an effective change in ownership, hereinafter referred to as (Disposition), of the above Corporation, Business, Real property, assets, stock, or part thereof, hereinafter referred to as (Business),

In the event of a stock sale, the purchase price shall be deemed to be the fair market value of assets sold, defined as purchase price plus corporate liabilities.

The minimum acceptable purchase price shall be \$ Unknown as of this Date, or \$ Unknown per share if applicable, payable with the following terms: \_\_\_\_\_, or whatever lower price or terms Seller may accept. This listing price is based upon current balance sheet dated \_\_\_\_\_. Any variance in asset and liability levels shall automatically adjust this purchase price up or down on a dollar for dollar basis at closing.

Seller agrees to pay Broker a commission of two point two percent (2.2%) of the gross asset sale price and anything over, cash at closing, regardless of the amount, terms and conditions accepted by the Owner upon any Disposition of the Business during the period of this agreement or through the efforts of Broker as noted below. All commissions are payable in full at closing or upon tender of closing by a purchaser who satisfies the above terms.

Seller understands that as a sole and exclusive listing the above commission shall be paid to Broker upon any disposition of the Corporation/Business or property during the listing period, or as noted below, whether made by Broker or anyone else.

Seller agrees to indemnify Broker for any loss he may suffer for false information provided by Seller. A disposition of the Corporation/Business shall be deemed to have occurred if a ready, willing and able buyer is procured and all contingencies to closing have been satisfied. Attorney fees shall be payable if Broker successfully prevails in an action to collect any commission. Seller agrees that, if within one year after the listing period ends, the commission shall be paid to Broker if a disposition of the business occurs to any person with whom negotiations occurred during the listing period or who was referred to the business through the efforts of the broker

**R&D Notes:**

**Buying or Selling A Business:** If you're buying or selling a business, the deal will almost always be structured either as an acquisition (through an **asset purchase** or a **stock purchase**) or as a **merger**.

**Asset Purchase:** In concept, the easiest way to buy a business is to purchase a seller's assets, free and clear of any liabilities. The purchaser is not actually buying the business entity itself. Thus, an asset purchase is much like buying the seller's merchandise without buying the store.

As a rule of thumb, a buyer will usually prefer an asset purchase agreement. Some of the reasons why are:

- The buyer has the ability to acquire assets only, without assuming any liabilities of the seller. The buyer can also pick and choose which assets to acquire. Conversely, the seller can choose which assets to keep.
- The buyer gets a "stepped-up" tax basis on the assets being acquired.
- The buyer usually has the option but not the obligation to hire employees of the seller's business.
- The buyer also has the ability to pick and choose which contracts to assume.

**Stock Purchase:** In simple terms, a stock purchase may require only that the selling shareholders swap their stock certificates for a check from the buyer. In contrast to an asset purchase, the buyer is actually taking over the seller's store and not just purchasing the merchandise. In essence, the buyer steps into the shoes of the selling shareholders.

- All other things being equal, sellers will usually prefer a stock purchase agreement because of favorable tax consequences. They may be able to realize capital gains treatment on the sale of stock. This avoids "double taxation" that can result with an asset purchase where the business entity is first taxed on sales proceeds, and the shareholders are then taxed again on distributions that may then be made to them.
- The result can be a seamless change of ownership. The "store" may look like it is under new management but title to corporate assets and everything else can remain the same. Thus, there is a better chance of preserving the status quo. Employees can remain in place. It may not be necessary to change title to assets or assign existing contracts to a different business entity. Good will and other intangible assets remain with the seller's business.
- Buyers are wary of stock purchases because they end up assuming liabilities of the seller. Thus, a seller must anticipate that a buyer will expect some concessions. The buyer may, for example, insist on very strong indemnification language from the seller. The purchase price may also be adjusted accordingly.

**Merger ???:** A merger is a marriage of two businesses. It shares a lot of the characteristics of both an asset purchase and a stock purchase. In most cases, a "surviving" corporation will issue new stock to shareholders of a "disappearing" corporation in exchange for their stock in the disappearing corporation. The surviving corporation then takes title to all the disappearing corporation's assets, and the disappearing corporation ceases to exist.

- A merger is the time-tested vehicle for recognizing the united strength of combining two or more business entities into a single venture. There is no "buyer" or "seller" in a merger so the "us against them" mentality tends not to get in the way.
- A merger will also allow for economies of scale. While employees in duplicate positions may be laid off, the intent is to improve the bottom line by cutting overhead and increasing efficiencies. Tax consequences can be neutralized or deferred. Properly structured, swapping stock will not result in any taxable gain to the shareholders of either of the merging organizations.
- There are many hidden pitfalls to any merger or acquisition, so it is essential to get good legal and financial advice before agreeing to anything.

**Acquisition Agreements:** Most acquisition agreements involve many of the same kinds of provisions, including the following:

- Introductory provisions. The agreement typically begins with a recital of the parties and a description of the transaction, and contains the definitions of terms.
- Terms of the transaction. Every acquisition agreement contains a description of the structure of the transaction, the purchase price, the time and method of payment of the purchase price, and other matters relating to the terms of the transaction.
- Closing. The acquisition agreement contains a provision as to the time and place of the closing and the documents to be delivered by the purchaser and the seller.
- Conditions to the obligations of the purchaser. After the acquisition agreement is signed, there are typically other steps that need to be taken before the transaction can be closed, such as filing documents with the Securities and Exchange Commission. There are also a variety of conditions that must be met for the purchaser to be obligated to close the transaction. For example, the agreement sets out representations and warranties made by the seller and states that the purchaser can terminate the agreement if those representations and warranties are not met. Also, the sale can be conditioned on the approval of the shareholders. Further, if there is a material change to the business or financial condition of the seller, the purchaser can terminate the agreement.
- Conditions to obligations of the seller. The agreement also includes conditions to the seller's obligations to close the transaction. While the purchaser typically makes very limited representations and warranties in a cash transaction, it makes significantly more if it is issuing stock or debt instruments to the selling company or the selling shareholders. These include many of the same representations and warranties made by the seller.

Source: Tom Pedreira Lawyers.com - Buying or Selling a Business

<http://business-law.lawyers.com/buying-selling-businesses/Buying-Or-Selling-A-Business-The-Basics.html>