

**BUSINESS BROKERS: COMPLY WITH THE BUSINESS BROKERS ACT  
OR YOUR FEES AND RIGHT TO PRACTICE MAY BE ON THE LINE**

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The necessity that business brokers comply with the requirements of the Illinois Business Brokers Act of 1995 (815 ILCS 307/10-1 *et seq.*, the “Act”) was driven home by recent decisions in *Global Tech & Trading, Inc. v. Satyam Computer Servs.*, 2014 U.S. Dist. LEXIS 113045 (N.D. Ill. 8/14/14) and *Sheth v. SAB Tool Supply Company*, 2013 Il. App. (1<sup>st</sup>) 110156\* 55, 990 N.E. 2d 738, 750 (1<sup>ST</sup> Dist. 2013).

In *Global Tech & Trading, Inc. v. Satyam Computer Servs.*, *supra*, summary judgment was entered against an Illinois company seeking \$600,000 in commissions for assisting a foreign company in acquiring a company headquartered in Illinois. The Court denied both the business broker’s *quantum meruit* and promissory estoppel claims because plaintiff was not registered as a broker and did not have a written brokerage contract with its client, both being requirements of the Illinois Business Brokers Act<sup>1</sup>. In dismissing the *quantum meruit* and promissory estoppel claims the Court relied on earlier decisions where implied contract claims were denied because express contract claims had been barred pursuant to statute. As the *Global Tech & Trading* Court held at 2014 U.S. Dist. LEXIS 13045\*10, it is “axiomatic that the law will not allow a party to do indirectly that which he is precluded from doing directly<sup>2</sup>.” Referencing prior decisions, including *Sandra F. Monroe & Company v. Nat’l Equip. Servs., Inc.*, 2000 U.S. Dist. LEXIS 5480 (N.D. Ill. 2000) discussed *infra*, “th[e] *Global Tech & Trading* Court f[ou]nd that Plaintiff’s quasi-contract claims [like its oral contract claim] are also barred under the Act.” 2014 US. Dist. LEXIS 113045\*11.

In *Sheth*, *supra*, the dismissal of a business broker’s breach of contract claim seeking payment of a brokerage fee was affirmed because of multiple violations of the Act, including the failure to have a signed business broker services agreement

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<sup>1</sup> The Court’s ruling followed an earlier dismissal of plaintiff’s oral breach of contract claim for indefiniteness. *Global Tech & Trading, Inc. v. Satyam Computers Servs.*, 2011 U.S. Dist. LEXIS 8292 (N.D. Ill. 2011).

<sup>2</sup> The *Global Tech & Training* Court quoted from the decision in *Greiner v. Dominick’s Finer Foods, Inc.*, 273 Ill. App. 3d 1037, 1044 (1<sup>st</sup> Dist. 1995). The same language was quoted in *Sandra Monroe & Company v. Nat’l Equip. Servs., Inc.*, 2009 U.S. Dist. Lexis 5480\*17 (N.D. Ill. 2000).

with the client, as well as the failure to disclose certain information and maintain certain records<sup>3</sup>.

The Act's regulatory scheme requires those involved in the business of brokering other businesses<sup>4</sup> to: (1) register with the Secretary of State (the "Secretary"); (2) have an accurate self-made form "disclosure statement" on file with the Secretary as part of the registration process, and which disclosure statement is tendered to certain clients; (3) maintain certain records and information available for inspection at the broker's offices; and (4) only do business through written client engagement agreements.

There may be an issue as to the scope of the Act. The requirements of the Act apply to any business broker (whether or not based in Illinois) when either the person or entity retaining the business broker is "domiciled" in Illinois or the company or business sought to be sold has its principle place of business in Illinois (*See*:815 ILCS 307/10-105). In *Sandra F. Monroe & Co. v. National Equip. Servs.*, 2000 U.S. Dist. LEXIS 5480 (N.D. Ill. 2000) an action seeking a broker's fee was dismissed, where a Massachusetts corporation with its principal place of business in Massachusetts sought a brokerage fee for the work it did in connection with the sale of companies to a Delaware incorporated company that had its principal place of business in Illinois.

In *Sandra F. Monroe & Co*, *supra*, 2000 U.S. Dist. LEXIS 5480 at 9-11, the Court determined that the intent of the Illinois Business Brokers Act was to protect Illinois consumers who use the services of a business broker. Therefore, the Court gave the Act a broad interpretation<sup>5</sup>. Significantly, the Court not only dismissed the broker's contractual claim because of the Act, but also dismissed the broker's non-contractual *quantum meruit* claim for the reasonable value of the broker's services

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<sup>3</sup> In *Sheth*, *supra*, the business broker was claiming a 10% commission on a \$7.2 million dollar sale so the monies at issue were significant. 2012 Ill. App. (1<sup>st</sup>) 110156\* 27-30.

<sup>4</sup> The term "business broker" is defined very broadly in the Section 10-5.10 of the Act (815 ILCS 307/10-5.10) to include those involved in various aspects of the sale of a business, as well as those who hold themselves out as business brokers. Section 10-80 (815 ILCS 307/10-80) excludes certain persons from the Act's reach, including Illinois licensed attorneys and certified public accountants engaged in their respective practices and whose service in relation to the transaction is incidental to the attorney's or accountant's practice, persons licensed under the Illinois Real Estate License Act, who act as a business broker on an "incidental basis", as well as certain persons licensed under state or federal securities laws. *See: Iron Range Capital Partners, LLC v. Osprey Capital, LLC*, 2014 U.S. Dist. LEXIS 143551\*12 (N.D. Ill. 2014): The Business Brokers Act does not apply to transactions involving securities. There are other limited exemptions including one for a publisher and its employees whose sole service is to publish an advertisement for the sale of a business.

<sup>5</sup> The Act provides a private cause of action in Section 10-60 (815 ILCS 307/10-60) to clients who sustain actual damages as a result of a broker's material violation of the Act, for the actual damages the client sustains, but limited to the amount of fees the client has paid the broker, together with interest and attorney's fees.

on the basis that to allow such a claim “would circumvent the purpose of the [Business Brokers Act].” *Id* at 17.

Section 10-10 of the Act requires every person or entity engaged in the business of brokering other businesses in Illinois to register under the Act. In the case of *In the Matter of Rose Realty, Inc.*, File No. 0700011 (Ill. Sec. of State Securities Dept. 12/03/07 & 1/20/08), the Secretary entered a Temporary and then Permanent Administrative Order prohibiting an Illinois incorporated and based entity from engaging in the brokering of other businesses because the company had not filed an application for registration as a business broker with the Secretary. As evidence that the company was holding itself out as a business broker in Illinois, the Secretary relied on a listing for the company on the web-site known as “bizbuysell.com.” *In the Matter of Rose Realty, Inc.*, *supra*, suggests that the Secretary of State interprets the scope of the Business Brokers Act broadly to apply to anyone holding him/her/itself out as a business broker as there was no reported evidence that the broker had actually entered into a contract with an Illinois domiciled client nor that the broker was involved in the sale of a company with its principal place of business in Illinois.

In addition to the limited statutory exceptions to registration under the Business Brokers Act referenced in footnote 4 of this Memorandum, there may also be a case law exception. In *Sweig v. ABM Indus.*, 2008 U.S. Dist. LEXIS 47772 (N.D. Ill. 2008) the district court denied a motion to dismiss an Illinois resident’s oral breach of contract claim and alternative *quantum meruit* claim that he was entitled to a “business opportunity fee” for recommending a potential acquisition target to his employer and introducing his employer to the Chairman of the Board of that acquisition target, which the employer subsequently purchased. Relying on Section 10-105 of the Act (entitled “Scope of the Act”), the district court held the Business Brokers Act did not apply to the Illinois resident’s claim for a business opportunity fee because his employer was not domiciled in Illinois and there was no evidence that the company that was acquired had its principal place of business in Illinois. While *Sweig* could be interpreted as allowing an Illinois person or entity to receive a business opportunity fee or finder’s fee so long as neither the “client” nor the acquired company were Illinois based, *Sweig* should probably be read more narrowly and relied upon cautiously. In *Sweig*, the plaintiff did not hold himself out as a business broker and he was engaged in the isolated/limited acts of recommending an acquisition target and making an introduction for his employer. Under narrow facts like those involved in *Sweig*, a person may be able to receive a finder’s fee or business opportunity fee without complying with the Business Brokers Act. However, if there is any question regarding whether or not a person’s or entity’s conduct constitutes acting as a

business broker in Illinois, that person or entity should register under the Act and comply with all of its requirements in order to protect the right to compensation and avoid the possibility of costly sanctions.

The holdings in *Global Tech & Trading, Sheth* and *Monroe* indicate that failure to adhere to the Act's requirements can lead to the broker being denied compensation for successfully selling a business. The failure to abide by the Act's mandates can also lead to the imposition of sanctions, including fines, as well as a denial, suspension, or revocation of the business broker's registration to legally engage in the business brokerage profession in Illinois. In the case of *In the Matter of Imerge Advisors, Inc. f/n/a EBIZBROKERS, Inc.*, File No. 0700553 (Ill. Sec. of State Securities Dept. 3/5/09 & 4/30/09), a Massachusetts business broker and its principals were temporarily and then permanently prohibited from engaging in the business of brokering businesses in Illinois because they had offered to assist an Illinois resident with the purchase of a business at a time when neither the broker nor its principals were registered under the Act<sup>6</sup>.

**(1) REGISTRATION AND RENEWAL OF REGISTRATION PURSUANT TO 815 ILCS 307/10-10 AND 10-20**

Pursuant to § 10-10 of the Act, every business (including sole proprietorships) engaged in the business of brokering other businesses in Illinois is required to register<sup>7</sup> on forms provided by the Secretary<sup>8</sup>. These preprinted forms require various disclosures regarding the applicant's business and financial background and that of the applicant's principals. The applicant is also required to file a "disclosure statement" pursuant to § 10-30 of the Act as part of its application (§ 10-10a (1)). The application also must also include a signed, "consent to service of process" preprinted form, pursuant to which the registrant consents to having the Secretary be the registrant's agent for service of process in all noncriminal proceedings against the registrant arising from violation of the Act (§§10-10a(1) & 10-10(d))<sup>9</sup>.

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<sup>6</sup> *In the Matter of Imerge Advisors, Inc.*, *supra*, as in a number of other cases, the Department relied on a listing of the broker on the "bizbuysell"/Wall Street Journal web-site as evidence to support the Department's charges. See: discussion of *Rose Realty, Inc.*, *supra*, and *Alliance Financial Services*, *infra*, pages 3 and 6 respectively.

<sup>7</sup> Persons employed, contracted by or working on behalf of businesses that are registered need not register if they are identified by the registrant who employs them in that business' registration.

<sup>8</sup> The form, designated as IL Form BBO1- "Application for Registration as a Business Broker" is accessible on-line.

<sup>9</sup> The consent to service of process form is Illinois Form BB10 and is available on-line. Section 10-125 (815 ILCS 307/10-125 appears to provide that, unless exempted from the Act's application, any person acting as a business broker in Illinois is deemed to have appointed the Secretary to receive process in any action arising out of the person's business brokerage activities.

Section 140.100 of the administrative regulations provides that the application and accompanying documents are to be filed with the Illinois Secretary of State's Securities Department. Section 10-20 of the Act requires the business broker to annually renew its application (*See also*: 815 ILCS 307/10-10)<sup>10</sup>. The renewal is to disclose any material change in the information provided in prior applications. The failure to list material changes in a renewal application was an issue in the case of ***In the Matter of Sequoia Group, Inc.***, File Nos. 1000376 & 1000404 (Ill. Sec. of State Securities Dept. 10/12/11). In ***Sequoia***, *supra*, the failure to list on a renewal application: (a) a civil judgment, (b) a disciplinary suspension of the broker because of improper handling of escrowed funds, and (c) the pendency of a criminal proceeding against the broker; were listed as part of the facts supporting the Secretary's Order permanently prohibiting the broker and its principal from engaging in the business of brokering businesses.

The application or its renewal is to be accompanied by any fees charged by the Secretary in connection with the registration or renewal. (815 ILCS 307/10-25). Section 10-85(b) of the Act prohibits any non-exempt person from acting as a business broker without first registering. This subsection also prohibits a business broker from engaging in business unless all required documents are filed and all specified records are maintained pursuant to the Act and the applicable regulations.

The failure of a business broker to register under the Act was one of the issues in the recent case of ***In the Matter of Turnkey Business Brokers, Inc. et al.***, File No. 1400149 (Ill. Sec. of State Securities Dept. 6/12/14) where the Secretary entered a Temporary Order of Prohibition prohibiting certain entities and their principal from providing business brokerage services in or from the State of Illinois for a 90 day period and subject to the Secretary's further order<sup>11</sup>. Subsequently, a Consent Order was filed in which the respondents agreed to both pay a fine and to an additional one month prohibition on registration, after which the Securities Department agreed to process Turnkey's registration application. (*Id.*, 12/29/14). Similarly, in the case of ***In the Matter of Eric Jareczek and Aspire Business Brokers, Inc.***, File No. 12-00074 (Ill. Sec. of State Securities Dept. 7/8/13 & 9/25/13), the Secretary entered a Temporary Order and thereafter, a Final Order of Prohibition prohibiting a company and its principal from acting as a

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<sup>10</sup> Section 140.200 of the Regulations provides that the renewal is to be made on preprinted Illinois Form BB04.

<sup>11</sup> The Order provided that the business brokerage entities and their principal had thirty days to request a hearing on Temporary Order of Prohibition or the Order would constitute an admission of the facts alleged in the Temporary Order and a sufficient basis to make the Order a final order.

business broker in Illinois because of the company's failure to renew its annual registration<sup>12</sup>.

In the case of *In the Matter of Alliance Financial Services of Illinois, Ltd., et al.*, File No 0300674 (Ill. Sec. of State Securities Dept. 9/24/07 & 3/10/09), the Secretary temporarily and then permanently prohibited Alliance Financial and its principal from acting as Illinois business brokers and fined the respondents \$10,000. *In the Matter of Alliance Financial Services, supra*, a Consent Stipulation was entered (with the respondents neither admitting or denying the truth of the allegations), that Alliance and its principal had held themselves out as Cook County brokers offering to sell a business in a listing on the "bizbuysell"/Wall Street Journal web-site even though neither was registered in Illinois as a business broker. The Orders entered *In the Matter of Alliance Financial Services, supra*, further noted that Alliance's principal had been permanently prohibited from registering as a business broker as a result of an earlier 1998 Order and that Alliance's principal had attempted to register as a business broker in 2007 in derogation of the 1998 Order.

Section 10-60 of the Act further provides that, if in connection with a broker's contract, the broker commits a material violation of either the Act's application and renewal provisions or the disclosure statement's requirements, the contract with the prospective client is void, and the prospective client is entitled to a return of the all sums paid to the broker, with interest and attorneys fees' incurred in enforcing the client's rights under the section. The foregoing is part of the private statutory cause of action created under Section 10-60 for clients and prospective clients of business brokers. (See: discussion at footnote 5, *infra*, page 2).

## **II. THE DISCLOSURE STATEMENT REQUIRED BY 815 ILCS 307/10-30 AND CERTAIN EXEMPTIONS PURSUANT TO 815 ILCS 307/10-30.5**

Section 140.300 of the implementing regulations (14 Adm. Code §140.300) requires that a business broker provide all non-exempt clients with a written disclosure statement that complies with the requirements of Section 10-30 of the

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<sup>12</sup> In the case of *In the Matter of Buysellenterprise.com*, File No. 0600456 (Ill. Sec. of State Securities Dept. 3/6/06 & 3/7/07), the Secretary of State also temporarily and then permanently prohibited certain entities from engaging in the business of brokering businesses in Illinois because the entities failed to register under the Act. The case of *In the Matter of Janas Associates*, File No. 021002 (Ill. Sec of State Securities Dept. 7/12/04 & 2/23/05), involved an unregistered California business broker that entered into a contract with an Illinois based oil company to sell the oil company's business. Without admitting liability, the out of state business broker entered into a Consent Order in which it agreed to file all documents and pay all fees required to register as a business broker in Illinois within 30 days, as well as pay a \$10,000 fine within 60 days.

Act, at least seven (7) days before the earlier of the time the client or proposed client signs a business broker services contract or before the broker receives any consideration for the contract<sup>13</sup>.

Section 10-30 provides that a client has seven (7) days from the date of signing a contract with a business broker to rescind the contract and receive a refund of any payments made to the broker. While the Secretary “recommends” in Regulation Section 140.300 (c) that the broker have the client sign and date a receipt acknowledging when the disclosure statement was provided, Section 10-75 requires the broker to maintain a copy of the disclosure statement with an acknowledged receipt signed by the client. The objective of the disclosure statement “is to ensure that clients and proposed clients of business brokers have full disclosure of the material terms of the business broker’s contract with the client, have an opportunity to review those terms, and at the client’s request, have an attorney review the contract.” (14 Ill. Adm. Code §140.301(a)). The Secretary of State’s web-site section on business brokers notes that: “[t]he most frequent problems encountered in registering as a business broker are questions regarding the disclosure statement...”

Section 10-30 provides that the disclosure statement shall have a cover sheet and shall provide in at least 10-point boldface capital letters “**DISCLOSURES REQUIRED BY LAW**” and that under that title in at least 10 point (boldface<sup>14</sup>) type that the following is to be stated: “**THE SECRETARY OF STATE HAS NOT REVIEWED AND DOES NOT APPROVE, RECOMMEND OR SPONSOR ANY BUSINESS BROKERAGE CONTRACT. THE INFORMATION CONTAINED IN THIS DISCLOSURE HAS NOT BEEN VERIFIED BY THE SECRETARY OF STATE. IF YOU HAVE ANY QUESTIONS, SEE AN ATTORNEY BEFORE YOU SIGN A CONTRACT OR AGREEMENT**”. The only other writing that may appear on the cover sheet of the disclosure statement is the broker’s name, address, telephone number, facsimile number and any other information authorized by the Secretary.

The body of the second page or additional pages of the disclosure statement is to include the information required by Subsections 10-30(b) (3)-(6). These subsections require basic information regarding the broker, including the name and form of the broker’s organization, the names under which the broker has been

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<sup>13</sup> Section 140.300(a) of the Regulations appears to conflict with 815 ILCS 307/10-30 of the Act which only requires that a broker provide the written disclosure document “at the time or before the client signs a contract for the services of a business broker or at the time or before the business broker receives any consideration upon the contract.”

<sup>14</sup> While the statute only seems to require that the phrase “DISCLOSURES REQUIRED BY LAW” be in boldface, Sections 140.302 and 303 require that the whole required statement be in 10-point boldface.

doing business, as well as the name of any parent organization or affiliate. The disclosure statement is also to include names and addresses of the broker's officers, directors, trustees, general partners, general managers, principal executives and any other person performing similar duties. The disclosure statement is to further provide a detailed description of the actual services the broker is going to perform; and a specific statement of the circumstances under which the broker is entitled to obtain or retain consideration from the party with whom the broker has contracted. However, if the underlying contract details the services that the broker is to undertake and when consideration is earned, the disclosure statement need not include that information. The statute also provides that the broker is required to file an amendment of the disclosure statement with the Secretary whenever it is necessary to prevent it from containing any false or misleading statement of fact.

Section 140.303(b) and (c) of the Secretary's Regulations, provides an example of what needs to be included on the cover sheet and second page of the disclosure statement and a layout of the disclosure statement.

Both case law and the regulations indicate that substantial compliance with the disclosure statement provisions will be sufficient. Section 140.301 of the regulations provides that a "broker shall be deemed to have complied with Section 10-30..., if the client or proposed client has been provided with all material information [that is] required... and has had a reasonable opportunity to review and consider the information, to review the broker's contract, and to have the business broker's contract reviewed by an attorney." In *Equity Bus. Brokers, Ltd. v. Adair*, 383 Ill. App. 3d 323 (3<sup>rd</sup> Dist. 2008), the court held that a broker was entitled to its contractual fee, where the broker's disclosure statement substantially complied with the requirements of Section 10-30. In *Equity Bus. Brokers, Ltd., supra*, the broker's disclosure statement failed to have the required disclosure in bold-face print and improperly included information that was not supposed to be on the disclosure statement cover sheet. However, the Court ruled in favor of the broker, because all the required information was included on the disclosure statement, the client's signature on the statement indicated he knew he could have consulted an attorney before signing, and the broker's affidavit that the client chose to sign the contract without consulting an attorney was not contradicted.

Section 10-30.5 (a) of the Act provides that the broker is not required to tender a disclosure statement to potential high net worth or high net income clients. Specifically, the broker does not have to tender a disclosure statements to persons he reasonably believes have a joint net worth with their spouse of over \$1,000,000 at the time the brokerage services contract is executed or joint annual income of \$200,000 in the most recent fiscal year. Nor does a broker have to tender a

disclosure statement to a company where the broker reasonably believes that it has: (a) a total asset value of \$1,000,000 or gross revenue or sales of \$200,000 in the most recent fiscal year and has been in existence for at least nine months; or (b) that 90% of the equity interest in the company is owned by a person who has a joint net worth with his/her spouse of a million dollars in assets at the time of the brokerage agreement or jointly made \$200,000 in the most recent fiscal year.

Under Section 10-30.5(b) a broker is also exempted from giving a disclosure statement to a client that “has had an attorney review the business broker’s contract” with the client.

Pursuant to Section 140.803 of the Regulations a “broker [can] rely upon a statement executed by the client” that the client either falls within one of the net-worth disclosure exemptions of Section 10-30.5(a) of the Act or had an attorney review the business broker contract for the purposes of Section 10-30.5(b)’s exemption from the requirement that a disclosure statement be tendered to the client.

### **III. THE REQUIREMENT OF A WRITTEN CONTRACT PURSUANT TO 815 ILCS 307/10-35**

Section 10-35 of the Act requires that, in order to be enforceable, the broker’s services contract with his client must be in writing and signed by all the contracting parties. The client is statutorily entitled to a copy of the signed contract, which is to be provided to the client within one week of execution<sup>15</sup>. The original contract maintained by the broker must have an account number on it as required by Section 10-75, which also requires that the account number must also appear on all instruments related to that contract. In *Sheth v. SAB Tool Supply Company*, 2013 Il. App. (1<sup>st</sup>) 110156\* 55, 990 N.E. 2d 738, 750 (1<sup>ST</sup> Dist. 2013), the appellate court affirmed the dismissal of an oral brokerage contract claim as void and unenforceable because there was no written contract signed by the parties.

### **IV. BROKER’S RETENTION OF CERTAIN RECORDS FOR A SIX YEAR PERIOD AS REQUIRED BY 815 ILCS 307/10-75**

Pursuant to Section 10-75 of the Act, business brokers are required to maintain a register that, for each business broker agreement sets forth the account number assigned to the agreement, the agreement’s date, the client’s name, the

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<sup>15</sup> In the recent case of *In the Matter of Turnkey Business Brokers, Inc.*, File No 140149 (Ill. Sec. of State Securities Dept., 6/12/14 and 9/2/14), it was noted in the allegations that the client never received a signed copy of the brokerage agreement.

amount of fees charged, and the cost and type of insurance required. Additionally, the broker is also required to retain a record for each client that sets forth the client's name, a copy of the signed broker agreement, a copy of any papers or instruments used in connection with the agreement, including any disclosure statement with an acknowledged receipt by the client. The broker must also maintain a record of the fees paid to the broker, and if there is an unpaid balance, the status of collection efforts. The broker must further maintain all receipts from or for each client's account and all disbursements to or for a client's account so that the transactions are readily identifiable. The broker is also required to keep copies of all advertising and any sale kits or literature used in the solicitation of clients. All of these records are to be maintained at the broker's office for a six year period. However, after a period of two years the information may be maintained on magnetic, digital or other electronic medium so long as it may be readily retrieved.

## **V. THE ACT'S SYSTEM FOR POLICING THE CONDUCT OF BUSINESS BROKERS**

Most of the remaining provisions of the Act establish a system by which the Secretary of State can police the conduct of business brokers through regulatory, investigatory, and adjudicatory process. For example, under Section 10-40, the Secretary has the power to deny, suspend or revoke the registration of a business broker for various reasons, including insolvency, a violation of the act, a registration containing false statements of material fact, a conviction for fraud, a finding by a court or an agency of fraudulent behavior. The Act further provides the Secretary with broad powers to conduct investigations, hold hearings and enter orders of both a temporary and permanent nature (See: 815 ILCS 307§§ 10-45 to 10-55). In Section 10-85, the Act sets forth a basic rule of conduct for business brokers by prohibiting a broker from directly or indirectly engaging in any "device, scheme or artifice to defraud" in connection with any brokerage contract. Additionally, Section 10-65 provides that willful violations of the Act are Class 4 felonies.

Along with the failure to register as a broker or renew that registration, the other frequently raised issue in proceedings before the Secretary of State has been a broker's improper handling of earnest money. In the case of ***In the Matter of Business Brokers of America***, File No. 0700326 (Ill. Sec. of State Securities Dept. 9/5/08 & 8/21/09), a party tendered \$10,000 to be held by the broker in an escrow account. The would-be buyer and seller were unable to agree on final terms and decided to cancel the deal. As part of the cancellation of the purchase contract, the parties agreed that the \$10,000 held in escrow would be returned to the prospective

buyer, but the broker refused to return the deposit as required under the parties' agreement. The Secretary ruled that the broker's conduct was "fraudulent" and initially suspended the registration of the broker and its principal from the brokerage business until further order of the Secretary.

In the case of *In the Matter of Sequoia Group, Inc.*, File Nos. 1000376 &1000404 (Ill Sec. of State Securities Dept. 12/2/10 &12/17/10), a summary order of suspension was entered where the business broker and its principal were alleged to have failed to return money to would-be purchasers that had been placed in escrow with the broker where the sales of businesses were not completed without fault of the purchaser. The broker's failure to return the escrowed funds under these circumstances was deemed to be a fraudulent practice. Subsequently, a permanent order prohibiting the broker and its principal from acting as business brokers was entered as were \$10,000 fines on the broker and the principal. (See: Order of Revocation and Fine entered in the above matter on 10/12/11).

In the recent case of *In re: Ajinder Sandhu and US. Business Brokers*, File No. C 1200093 (Ill. Sec. of State Securities Dept. 8/2/14), the Secretary suspended the broker's registration and prohibited the broker and its principal from engaging in the broker business in part because the broker failed to return a would-be purchaser's \$10,000 deposit after the contemplated sale of a gas station fell through. The suspension was also premised on the failure of the broker's principal to appear for a deposition that the Department had subpoenaed in its investigation of the broker's failure to return the deposit. In entering a Summary Order of Suspension, the Secretary determined that the failure to appear for the subpoenaed deposition constituted a violation of Section 10-85(2) of the Act which provides that a business broker shall not "**Fail to file with the Secretary of State any application, report, document or answer required under the provisions of the Act...**" (Emphasis added).

In the case of *In the Matter of Terrence and Amy Donati and Brighton Hill Enterprise, Inc.*, No C 0800278 (8/6/08 & 9/30/10) principals and their brokerage business were temporarily suspended based on allegations that the principals had converted earnest money for their own personal use. Subsequently, it was determined that the stepson/employee of one of the principals had misappropriated the earnest money which "was not properly segregated", but that Respondent had paid back the missing earnest money to the purchaser (*Id* at 9/30/10). Accordingly, the Secretary dismissed the case, but allowed the prohibition of the broker entity to engage in business to remain in effect (*Id*).

While the Secretary's primary regulatory goal is to protect consumers of business brokerage services, there is no dispute that "conforming" business brokers play a vital and positive role in the marketplace. Accordingly, the Secretary has "worked with" business brokers, who have been alleged to have violated the Act, to ensure compliance and thereafter, allow the broker to engage in business. In the recent case of ***In the Matter of Turnkey Business Brokers, Inc.***, *supra*, the Secretary agreed to the entry of a Consent Order, which required the payment of a fine, but also provided that, after a one month period, the registration of the brokerage company would be processed<sup>16</sup>.

## CONCLUSION

The Illinois Business Brokers Act and its implementing regulations provide a detailed statutory and regulatory framework to which business brokers who wish to engage in this occupation in Illinois must adhere<sup>17</sup>. The failure to abide by the statutes and regulation not only may result in the loss of the broker's compensation, but can also result in the broker and its principals being prohibited from engaging in the business of brokering businesses in Illinois.

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<sup>16</sup> Turnkey Business Brokers, Inc. is currently registered. At the time the Consent Order was entered, Turnkey had been prohibited, pursuant to the Secretary's June 12, 2014 Order, from providing brokerage services for over six months. The Secretary agreed to the December 29, 2014 Consent Order notwithstanding that one of Turnkey's officers had been involved with a now defunct brokerage business that was the subject of earlier administrative proceedings before the Secretary.

<sup>17</sup> In addition to the provisions covered in this Memorandum, Section 10-115 of the Act and Sections 140.150 & 140.152 of the implementing regulations provide a business broker with a lien to secure payment of the broker's commission or compensation and set forth the rules for obtaining and maintaining the lien. While the broker's lien statute and implementing regulations contain protections for consumers, the ultimate aim of Section 10-115 and the referenced regulations is to create a lien right for business brokers. Consequently, these provisions have a different focus than the remainder of the Act which is geared toward prescribing and proscribing broker conduct in order to protect the consumers of the broker's services.