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Title 22@ Social Security

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Division 1@ Employment Development Department

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Subdivision 1@ Director of Employment Development

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Division 2.5@ WITHHOLDING TAX ON WAGES

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Chapter 1@ GENERAL PROVISIONS

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Section 4304-8@ Specific Application of Rules for Determination of Employment Status to Circumstances in the Security Dealer's Industry

4304-8 Specific Application of Rules for Determination of Employment Status to Circumstances in the Security Dealer's Industry

(a)

To determine whether services are performed as an employee or independent contractor refer to the common law rules contained in Section 4304-1 of these regulations. Section 4304-1 provides that "to determine whether one performs services for another as an employee, the most important factor is the right of the principal to control the manner and means of accomplishing a desired result."

Section 4304-1 lists factors which are evidence of the existence or absence of the right of control, to be considered when making an employment determination.

Section 4304-8 provides standards to be used when applying the common law rules specifically to security dealers and is intended to make clearer those circumstances under which a security dealer is an independent contractor or an employee.

(b)

Definitions. (1) A broker/dealer (B/D) means any individual, corporation, partnership, association, joint stock company, business trust, unincorporated organization or other legal entity designated as a B/D and engaged in the business of effecting transactions in securities for the account of others or his or her own account, but does not include a bank. (2) A registered representative (RR) is a

person associated with a B/D, including assistant officers other than principals, who is engaged in the investment banking or securities business for the B/D including the functions of supervision, sales, solicitation or conduct of business in securities or who is engaged in the training of persons associated with a B/D for any of these functions. (3) The National Association of Securities Dealers (NASD) is a self-regulatory organization that creates, maintains, and monitors compliance with standardized rules of practice for the industry for the benefit of its brokers and registrants.

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(c)

The following are examples of the circumstances under which an RR would definitely be an employee and, conversely, definitely an independent contractor. If

the circumstances of the status under review do not fit these definite examples then subsection (d), and its determination factors, shall be used.(1) REGISTERED REPRESENTATIVE AS EMPLOYEE -- A RR performing services for a B/D in the following manner would definitely be an employee. The B/D requires the RR to perform services during set hours, on the B/D's premises, and the B/D provides furniture, equipment, supplies, and support staff at no charge to the RR. The RR is paid a salary or draws against commission, with no provision for reimbursement of amounts drawn in excess of commissions earned, and is reimbursed for expenses incurred. The RR is required to attend sales meetings, furnish reports, meet sales quotas, and follow-up on leads which are provided by the B/D. The RR performs services solely for one B/D. (2) RR AS INDEPENDENT CONTRACTOR -- A RR performing services for a B/D in the following manner would definitely be an independent contractor. The RR has a separately established business location accessible to the public or clients. The RR offers a variety of services and investment products in addition to those of the B/D, such as life insurance, real estate, financial planning, or accounting services that are not offered on behalf of the B/D. The RR provides his/her own furniture, equipment, and support staff. The RR is paid strictly by commission, with no draws against commissions, and is not reimbursed for expenses incurred. The RR is not required to attend sales meetings, furnish reports, meet sales quotas, and is not required to follow-up on leads provided by the B/D.

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a salary or draws against commission, with no provision for reimbursement of amounts drawn in excess of commissions earned, and is reimbursed for expenses incurred. The RR is required to attend sales meetings, furnish reports, meet sales quotas, and follow-up on leads which are provided by the B/D. The RR performs services solely for one B/D.

(2)

RR AS INDEPENDENT CONTRACTOR -- A RR performing services for a B/D in the following manner would definitely be an independent contractor. The RR has a separately established business location accessible to the public or clients. The RR offers a variety of services and investment products in addition to those of the B/D, such as life insurance, real estate, financial planning, or accounting services that are not offered on behalf of the B/D. The RR provides his/her own furniture, equipment, and support staff. The RR is paid strictly by commission, with no draws against commissions, and is not reimbursed for expenses incurred. The RR is not required to attend sales meetings, furnish reports, meet sales quotas, and is not required to follow-up on leads provided by the B/D.

(d)

Determination Factors: To determine whether one performs services for another as an employee, the most important factor is whether or not the principal has the right to control the manner and means of accomplishing a desired result. To the extent that control is exerted only to comply with State, Federal or NASD regulatory requirements, and is the minimum required by regulation, it will be considered an indication of employment, but is insufficient alone to hold an employer-employee relationship. Each of the following factors shall be used to determine if an employment relationship exists. Not all factors listed in this section (4304-8) are necessary to make a determination that a particular relationship exists. A

determination of whether services are being performed as an employee or independent contractor will depend upon a grouping of the factors that are significant in relationship to the services being performed. (See following factors.)

TABLE OF DETERMINATION FACTORS -- SECURITY DEALERS EVIDENCE OF:

| FACTOR | EMPLOYEE | INDEPENDENT CONTRACTOR | WEIGHT |
|--------------------------------------|---|--|---|
| (1) Policies or Rules of Conduct | Set by B/D, extend beyond minimum regulatory requirements, and are followed by the RR. | Absence of dress code, set hours, and required floor time. | The factors of policy setting, procedures, instructions, supervision, and review carry great weight. The right of the B/D or B/D's principal to direct and control the manner and means of how services are performed, even as to the details of the work, is the primary test. If that right exists, whether or not exercised, an employment relationship exists. |
| (2) Procedures in Selling Securities | Established by B/D and are followed by the RR. B/D dictates sales presentations and supplies leads. | RR establishes his or her own procedures for selling securities, including who and how to prospect for clients and how to handle an account. | To the extent that the B/D or B/D's principal, exercises control over the manner and means of how the services are performed through rules, procedures, supervision, review of work, etc., it is evidence that the B/D has the right to control the services, and that this right to control is complete and authoritative and carries great weight. Evidence of the absence a B/D's ability to control the manner and means of the service provided by a RR is equally indicative of an independent contractor relationship. |
| (3) Supervision on the Job | RR subject to supervision from security B/D or his or her agent. | Details of work not supervised. | To the extent that the B/D or B/D's principal, exercises control over the manner and means of how the services are performed through rules, procedures, supervision, review of work, etc., it is evidence that the B/D has the right to control the services, and that this right to control is complete and |

authoritative and carries great weight. Evidence of the absence a B/D's ability to control the manner and means of the service provided by a RR is equally indicative of an independent contractor relationship. (4)Review of Work Processes and ProductsB/D, or his or her agent, reviews the performance of the RR, such as the amount of sales, follow up on leads and customer relations.No reviews of work processes, behavior, or productivity.To the extent that the B/D or B/D's principal, exercises control over the manner and means of how the services are performed through rules, procedures, supervision, review of work, etc., it is evidence that the B/D has the right to control the services, and that this right to control is complete and authoritative and carries great weight. Evidence of the absence a B/D's ability to control the manner and means of the service provided by a RR is equally indicative of an independent contractor relationship. (5)TrainingTraining provided by B/D. Attendance is required. Orientation and/or ongoing training. RR paid for time at training.Attendance at training is not required. RR is not paid for time at training.Training given by B/D that includes instructions about how to do the work, e.g., dress code, product presentation, sales pitch, customer relations, is evidence that B/D or his or her agent has the right to control services and carries high weight. If substantially all of the RRs attend training it would indicate that the training is required. (6)MeetingsRR expected to attend meetings. RR's paid for time at meetings. Meeting held to discuss securities to sell, work processes, performance, appearance and conduct.Attendance at meeting is not mandatory and non-attendance is viewed without negative consequence. Time at meetings is not paid for or meetings are not held.The act of holding informational meetings, by itself, is not a strong indication of employment. Like training, if the intent and conduct of the meeting conveys rules, procedures, and instructions relating to the manner and means of how to do the work, it is evidence that the RR is not in

control of services, and is not self-employed, and carries great weight.

(7) Reports Reports are required regarding activities, e.g., number of contacts made, results of lead follow-ups, client reactions, hours worked, amount of sales, status of sales, and planned activities. No reports required. Reporting requirements can be viewed as an extension of the factor "review of work" and would be given medium to great weight depending on the purpose and content of the reports whether verbal or written. Reports that are used to monitor the RR's performance are considered principal controls over the manner and means of the work. "Reports" refer to reports prepared by the RR, not to reports prepared by the B/D for internal use.

(8) Work Schedules Set by B/D or B/D's agent e.g., floor and/or phone coverage. Set by the RR. No required floor time or phone coverage. "When and where" the service is performed are considered aspects of the "details of the work." These factors would be given medium to great weight. Where the B/D sets start time, quit time, breaks, etc., it is strong evidence of the right to control and carries great weight. Fewer controls would carry medium weight. If the RR controls these aspects, and accomplishes an end result for the B/D by operating his or her own separate business, it tends to show independence.

(9) Location of Work B/D mandates that all, or a certain amount, of the RR's time will be spent on the B/D's business premises. RR chooses where he or she will perform the services. If RR chooses to perform services on B/D's premises then RR may come and go as he or she pleases. "When and where" the service is performed are considered aspects of the "details of the work." These factors would be given medium to great weight. Where the B/D sets start time, quit time, breaks, etc., it is strong evidence of the right to control and carries great weight. Fewer controls would carry medium weight. If the RR controls these aspects, and accomplishes an end result for the B/D by operating his or her own separate business, it tends to show independence.

(10)B/D and RR ContractContract between the RR and the B/D gives the B/D or B/D's agent control over the manner and means of the work.Contract states the clear intention of the parties to enter into an independent contractor agreement. Contract forbids B/D and/or agent from directing the RR as toTerminology used in written agreement is not conclusive of the relationship, but is evidence of the relationship intended so long as the actual practice of the parties is consistent with the contract. details and provides that RR shall pay his/her own expenses. The contract provides that RR will not receive any benefits made available to B/D's employees.Written agreements do not necessarily depict the actual relationship. The actual practices of the parties in a relationship are more important than the wording of an agreement in making a determination. An agreement in which the B/D expresses only an interest in an end result and abandons the right to control the manner and means of the work is strong evidence of independence, so long as the actual practice of the parties is consistent with the contract.

(11)TerminationBoth the B/D and the RR have the right to terminate relationship at will without prior notice and without any further contractual liability (except for work already performed).Either B/D or RR may terminate upon reasonable written notice without cause or immediately for cause.The right to terminate conveys an inherent power of the B/D over the RR. The right to terminate at will is strong evidence of employment. With this right, the B/D can demand many things of the RR, and the RR, fearing fiscal repercussions, would be obliged to follow such demands. The right to terminate without cause upon thirty days notice is evidence of an independent contractor relationship and carries medium weight.

(12)Engagement in a Distinct BusinessThe RR does not operate his/her own business. Services performed are a direct and essential part of the B/D's business. The RR does not advertise his/her services to the general public. The RR performs

services solely under the B/D's trade name. The RR only sells securities through one B/D. The B/D carries liability insurance covering the RR. RR does not bear risk of loss for B/D. B/D owns RR's book of clients. The RR operates an independent business separate from that of the B/D, has a phone directory listing, advertises under his/her own trade name, and has a business license where required. RR has investment and expenses in the business which subject him or her to an entrepreneurial risk of loss. RR has the ability to sell other types of non-security investments or services away from the B/D. If the RR is in a separate business, distinct from that of the B/D, and the services in question are performed in the furtherance of that business, great weight would be given toward independence.

(13) Custom in Industry and Location. Wirehouse (Major) brokerage firms have traditionally treated their RR's as employees. RR's who operate independent financial planning firms have traditionally been treated as independent contractors by brokerage firms. This factor, by itself, is neutral. This is because each determination must stand on its own facts regarding the B/D's right to direct and control. Industry custom merely gives an inference or direction to the determination. (14) Required Level of Skill of RR In this particular industry, both employees and independent contractors are required to take and pass an extensive test to receive a license from the NASD to perform RR services. Therefore, in this industry, this factor is neutral. Level of skill, by itself, generally does not weigh heavily. However, a high level of technical skill will weigh more heavily when combined with other factors such as having a separate and distinct business. A low level of technical skill weighs heavily in favor of employment. As the level of skill declines, the worker has less room to exercise the discretion necessary for independence. (15) Duration of Service RR's services are on a continuous basis for one B/D. Services are on a sporadic, per order basis. This factor, by itself, should be

given light weight. Contractors usually perform work on a per job basis for shorter and pre-designated periods of time. Employment is usually of open-ended duration. In this industry independent contractors are frequently associated with the same B/D for extended periods of time, however, services they perform for that B/D are sporadic. (16)Whether the B/D or the RR Supplies Instrumentalities, Tools, and Place of WorkThe B/D provides the RR with such items as office space, desk, chair(s), telephone, photo-copies, fax, support services, forms, supplies, and instrumentalities.The RR pays for his or her own office, equipment, support services, forms, supplies, and instrumentalities.This factor carries great weight in this industry. If the RR has established his/her own office, and pays all the expenses connected with that separate office, there is a strong indication of independence. On the other hand, if the RR generally works out of the B/D's office where all necessities are provided and paid for by the B/D, then there is a strong indication of an employment relationship. (17)Methods of Payment.Payment is based on time worked or draws against future commissions. Payment is made at regular intervals and in regular amounts. Payment is by salary. Benefits are provided. Compensation/commission is set by the principal. Expenses are reimbursed. RR receives payment whether or not the client pays.Payment is by commission only. The RR pays his/her own expenses. No benefits are provided. RR does not receive payment if the client does not pay. Commissions are negotiated as to the percentage to be paid. No draws or unsecured advances are made.This factor by itself is not controlling. It is only an indication of the type of relationship. For example, a RR may be paid solely by commission, but control over the manner and means of the work is sufficient to hold an employer/employee relationship. (18)Belief of PartiesBoth parties believe the relationship is an employment relationship. Either B/D or RR believe the relationship is an employment

relationship. All parties agree that relationship is one of independence. This factor, by itself, is not controlling. The belief of parties only infers the relationship intended. (19) Part of Regular Business of B/D Services are an integral or normal part of the B/D's regular business activities. Activities are central to selling the securities sold by the B/D. The RR's services are only supportive of the business activities and are not an integral part of the agency's or principal's business activities. This factor is given medium to great weight. The presumption is that if the service is an integral (regular/normal/central) part of the B/D's business, the B/D, by business necessity, needs to maintain control over the service.