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SECURITIES REGULATION AND COMPLIANCE ALERT

RECENT REGULATORY RELIEF AFFORDED TO PRIVATE COMPANY M&A BROKERS

On January 31, 2014 the U.S. Securities and Exchange Commission ("SEC") issued a no-action letter ("No-Action Letter") that conditionally permits a private business broker to effect securities transactions in connection with the transfer of ownership of a privately-held company without registering as a broker-dealer under the Securities and Exchange Act of 1934 ("Exchange Act"). Prior to the issuance of the No-Action Letter, a private business broker that effected the sale of a company through a securities transaction had been required to register as a broker-dealer with the SEC, despite the fact that the sale of securities of a company that is the subject of a merger or acquisition does not pose the same abusive practices risks that the Exchange Act intends to prevent. The No-Action Letter, as revised on February 4, 2014, may be found at http://www.sec.gov/divisions/marketreg/mr-noaction/2014/ma-brokers-013114.pdf.

The No-Action Letter

Relief to M&A Brokers. The No-Action Letter states that the SEC will not recommend enforcement action under Section 15(a) of the Exchange Act against an M&A Broker that facilitates mergers, acquisitions, business sales, and business combinations (collectively "M&A Transactions") between buyers and sellers of privately-held companies without registering as a broker-dealer under Section 15(b) of the Exchange Act. The term "M&A Broker" is defined in the No-Action Letter as "a person engaged in the business of effecting securities transactions solely in connection with the transfer of ownership and control of a privately-held company through the purchase, sale, exchange, issuance, repurchase, or redemption of, or a business combination involving, securities or assets of the company, to a buyer that will actively operate the company or the business conducted with the assets of the company."

Conditions to Relief. The relief afforded by the No-Action Letter, however, is subject to the fulfillment of the following conditions:

1) The M&A Broker must not have the ability to bind a party to the M&A Transaction;
2) The M&A Broker may not directly or indirectly provide financing for the M&A Transaction, provided, however, that the M&A Broker may assist the purchaser to obtain financing from unaffiliated third parties in accordance with applicable legal requirements;
3) The M&A Broker shall not have custody, control, or possession of, or otherwise handle, funds or securities issued or exchanged in connection with the M&A Transaction;
4) The M&A Transaction must not involve a public offering, and any offering or sale of securities shall be conducted in compliance with an applicable exemption from registration under the Securities Act of 1933;
5) The M&A Broker may facilitate the M&A Transaction with a group of buyers only if the group is formed without the assistance of the M&A Broker;

6) At the conclusion of the M&A Transaction, the buyer, or group of buyers, will control and actively operate the company or the business conducted with the assets of the business;

7) The M&A Transaction must not result in the transfer of interests to a passive buyer;

8) Any securities received by the buyer or M&A Broker in the M&A Transaction must be restricted securities within the meaning of Rule 144(a)(3) of the Securities Act of 1933; and

9) The M&A Broker (and each of its officers, directors, or employees, if applicable) must not be: (i) barred from association with a broker-dealer by the SEC or any state or self-regulatory organization; or (ii) suspended from association with a broker dealer.

Considerations and Conclusion

Under the relief provided by the No-Action Letter, a private business broker who concentrates its business on effecting M&A Transactions for privately-held companies may now consider not applying for SEC registration as a broker-dealer or even withdrawing its broker-dealer registration, if already registered. This would relieve the M&A Broker of overcoming significant regulatory burdens, such as the incurrence of sizable registration expenses and continued compliance with onerous net capital maintenance requirements. The No-Action Letter, however, does not provide relief for an M&A Broker's assistance in obtaining financing for a purchaser. M&A Brokers who assist purchasers in obtaining financing, other than through bank loans, may still be required to register with the SEC as a broker-dealer. Accordingly, before pursuing any of the relief in the No-Action Letter, M&A Brokers and broker-dealers should assess their ability to comply with the conditions set forth in the No-Action Letter as well as the implications at the state level of conducting M&A Transactions without SEC registration.

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