

Client Alert

Current Issues Relevant to Our Clients

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The SEC Issues No-Action Relief Exempting M&A Brokers from SEC Registration

The staff of the Securities and Exchange Commission (the “SEC”) recently issued a no-action letter providing that brokers (“M&A Brokers”) that facilitate certain merger and acquisition transactions of privately-held companies could receive transaction-based compensation without being required to register with the SEC as a broker-dealer. Absent no-action relief, any person that engages in the business of effecting the sale of a business through the sale of securities is generally required to register with the SEC as a broker-dealer. The no-action letter is available [here](#).

Who is covered - What is an M&A Broker?

An M&A Broker is 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. A “privately-held company” is a company generally required to file reports under the Securities Exchange Act of 1934 and that is an operating company and a going concern and not a shell company. An M&A Broker (or, if the M&A Broker is an entity, each officer, director and employee of the M&A Broker) that is barred or suspended from association with a broker-dealer is not covered by the no-action letter.

actively operate the company or the business conducted with the assets of the company. A buyer possesses the requisite control if it has the power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract or otherwise, and is generally presumed at a 25% ownership level.

- The M&A Transaction must not result in the transfer of interests to a passive buyer or group of passive buyers.
- Any securities issued in an M&A Transaction will be restricted securities within the meaning of Rule 144(a)(3) under the Securities Act of 1933.

What types of transactions are covered?

- Mergers, acquisitions, business sales and business combinations between sellers and buyers of privately-held companies.
- There is no limitation on the size of the privately-held company.
- The M&A Transaction must not involve a public offering.
- No party to any M&A Transaction may be a shell company, other than a business combination shell company.
- Upon completion of an M&A Transaction, the buyer, or group of buyers in the transaction, must control and

Permissible activities for an M&A Broker

The no-action letter allows an M&A Broker to:

- Receive transaction-based compensation for effecting an M&A Transaction despite not being registered as a broker-dealer with the SEC;
- Represent both parties to an M&A Transaction so long as the M&A Broker provides clear written disclosure as to the parties it represents and obtains written consent from both parties;
- Advertise a privately-held company for sale with information such as the description of the business, general location and price range;
- Facilitate the M&A Transaction with a group of buyers, if such group was formed without the assistance of the M&A Broker;

- Participate in the negotiations of the M&A Transaction; and
- Assist purchasers in obtaining financing from unaffiliated third parties.

Prohibited activities for an M&A Broker

The no-action letter does not allow an M&A broker to:

- Take custody, control, or possession of or otherwise handle the funds or the securities issued or exchanged in connection with the M&A Transaction;
- Have the ability to bind a party to an M&A Transaction; and
- Provide financing for the M&A Transaction directly or indirectly through any affiliate of the M&A broker.

For More Information

To discuss any topic covered in this alert, please contact a member of our Investment Management Group or our Mergers and Acquisitions Group, or visit us online at Chapman.com.

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