

Venture Capital & Emerging Companies Alert

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Registration Requirements Eased for Brokers and Financial Advisors in M&A Transactions

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We are often asked whether a financial advisor or business broker may advise on mergers and acquisitions and similar business combinations of a privately held company in a stock transaction without having to register as a broker-dealer. Until recently, the answer was no, as it would violate the Securities Exchange Act of 1934. However, a recent No-Action Letter issued by the SEC on January 31, 2014 (the “No-Action Letter”) reflects a significant change of view by the SEC; now the answer is – YES! Based on the No-Action Letter, financial advisors or business brokers providing these services (“M&A Brokers”) may advise on many M&A activities even if stock is being issued as part of the consideration, without having to register as a broker-dealer.

Background

Previously, M&A Brokers were in most cases required to register as broker-dealers when facilitating stock deals. Ironically, M&A Brokers were generally not required to register as broker-dealers when facilitating asset deals. This made little practical sense. Whether the transaction was a stock or an asset deal is generally determined based on accounting or tax considerations, without regard to the applicability of the securities laws or the role of the M&A Broker. The authors of the No-Action Letter argued that this was an “anomalous result.” The SEC agreed. This is a sea change to the registration requirements for M&A Brokers and significantly reduces the regulatory burden on such professionals.

No-Action Letter

The No-Action Letter permits M&A Brokers to facilitate M&A stock transactions of privately held companies without registering as broker-dealers. Further, under the new, lighter regulatory paradigm, an M&A Broker may receive success-based compensation notwithstanding the lack of registration. An M&A Broker must satisfy a number of conditions to qualify for this benefit, including the following:

- The buyer must control and actively operate the company after the closing.
- The transaction must not result in the transfer of interests to passive buyers.
- The M&A Broker may not bind a party to the transaction.
- Neither the M&A Broker nor its affiliates may finance the transaction, but may assist purchasers with arranging financing.
- The M&A Broker may not possess or otherwise handle funds or securities issued or exchanged in connection with the transaction.
- The transaction may not involve a public offering.

- The M&A Broker may facilitate a transaction with a group of buyers only if it did not assist in forming the group.
- Securities received by the buyer or M&A Broker in the transaction must only be restricted securities under Rule 144(a)(3) of the Securities Act of 1933.
- The M&A Broker and its officers, directors, and employees have not been barred or suspended from association with a broker-dealer.

For further information regarding this historic change that reduces the regulatory burden on M&A Brokers, please contact the authors of this alert or your regular counsel at Mintz Levin.

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