New Federal Exemption from SEC Registration for M&A Brokers Takes Effect Shortly

W. Raymond Felton
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What You Need to Know

- Under legislation recently passed by Congress, M&A brokers now have a statutory federal exemption from SEC registration as a broker-dealer effective March 29, 2023.
- The statute explicitly defines the qualifying characteristics of an "M&A broker" and provides for certain exclusions to the exemption safe harbor.
- The new exemption does not provide an exemption from any state securities regulatory agency with which a broker-dealer must register, and it should be noted that New Jersey does not have a statutory provision similar to the new federal legislation.

There has long been a degree of uncertainty about the necessity for smaller investment banks and business brokers to register as broker-dealers with the Securities and Exchange Commission (SEC) under the Securities Exchange Act of 1934. While such parties arguably fit within the statutory definition of broker-dealer, the regulatory scheme under the Exchange Act does not fit within the nature of their business. Since 2014, these professionals have relied on a no-action letter issued by the SEC that year.

As part of the recently enacted Consolidated Appropriations Act, Congress addressed this concern by adding a new Section 15(b)(3) to the Exchange Act providing an exemption from registration for mergers and acquisitions (M&A) brokers, as defined by this legislation. Thus, an M&A broker that fits within the parameters of Section 15(b)(3) need not register with the SEC as a broker/dealer when representing the seller or purchaser

Attorneys
W. Raymond Felton

of an eligible privately-owned company effective March 29, 2023. This new statutory language provides a more reliable exemption than the 2014 no-action letter, which is subject to change by the SEC as it determines from time to time.

M&A Broker Definition

Since the basic principle of Section 15(a)(13) is that an M&A broker is exempt from registration as a broker-dealer, the definition of an M&A broker is key. That term is defined as "a broker, and any associated person, engaged in the business of effecting securities transactions solely in connection with the transfer of ownership of an eligible privately-held company, regardless of whether the broker acts on behalf of a seller or buyer, through the purchase, sale, exchange, issuance, repurchase, or redemption of, or a business combination involving, securities or assets of the eligible privately-held company."

An eligible private company is one with prior-year EBITDA less than $25 million or prior-year gross revenue less than $250 million. To be exempt, the broker must reasonably believe that the purchaser who will control the acquired company will be directly or indirectly active in the management of that company.

Exclusions

The new statute provides for certain exclusions from the safe harbor it creates for brokers who handle customer funds, engage in a public offering, or provide financing, among other things. An individual who has been barred or suspended from associating with a broker or dealer by the SEC, any state or any self-regulatory organization is ineligible for exemption from registration.

State Regulation: New Jersey

The new statute provides an exemption from registration with the SEC but not with any state securities regulatory agency with which a broker-dealer must register. New Jersey does not have a statutory provision similar to the new federal M&A broker legislation, nor in the regulations administered by the New Jersey Bureau of Securities under the New Jersey Uniform Securities Law. That law, however, does provide other exemptions to registration that may be beneficial to the M&A brokers who benefit more directly from the new federal legislation.

Please contact the author of this Alert with questions concerning the new statute or to discuss your specific circumstances.

W. Raymond Felton
Chair, Corporate Department
rfelton@greenbaumlaw.com
732.476.2670