

Certain Merger and Acquisition Brokers Escape SEC Registration

SECURITIES AND DERIVATIVE LITIGATION | JULY 8, 2014



Susan L. Spencer

The SEC recently issued a no-action letter that allows private company M&A brokers who satisfy specific criteria to avoid registering as broker-dealers with the SEC.

Historically, an intermediary in a private M&A transaction where securities change hands would generally be considered a broker-dealer required to register. But for some brokers, registration is no longer required if 10 criteria are satisfied. These include that the broker not be authorized to bind a party to the deal; not provide financing for the deal; not obtain possession of customer funds or securities; and not have been barred or suspended from association with a registered broker-dealer. Additionally, the deal must involve a public offering.

Brokers who satisfy all required criteria can facilitate due diligence, negotiate deal terms (including those concerning securities issuance), advertise companies for sale, provide valuation advice on securities being sold, and receive transaction-based consideration – conduct that in many cases would have forced them to register in the past.

Being registered with the SEC is cumbersome and costly, and subjects parties to significant regulatory burdens. Brokers who facilitate only private company M&A deals and who satisfy all 10 criteria can now decide if SEC registration is worth the burden and expense. In addition, private companies entertaining M&A transactions can now obtain advice from a larger number of advisors.

However, the relief granted by the SEC does not mean that brokers don't have to comply with other federal laws, including anti-fraud laws. Nor does it mean they don't have to comply with any registration or other requirements imposed under the laws of any states where they conduct business. Many states exempt from registration out-of-state brokers who are registered with the SEC, so brokers engaged in multi-state operations may want to continue being registered with the SEC.

Clearly, any decisions to de-register or remain unregistered should be carefully made.