WILLKIE FARR & GALLAGHER LLP

NEW YORK WASHINGTON PARIS LONDON MILAN ROME FRANKFURT BRUSSELS

CLIENT MEMORANDUM

SEC's Division of Trading and Markets Issues No-Action Letter on M&A Broker Registration

February 11, 2014

AUTHORS

Howard L. Kramer | **Martin R. Miller** | **Gordon R. Caplan** | **Neil W. Townsend**

The Staff of the Securities and Exchange Commission ("SEC") recently issued a no-action letter ("SEC Letter") that allows "M&A Brokers" under specified circumstances to engage in the business of finding buyers or sellers of private companies through transactions that involve the purchase and sale of securities without registering as securities broker-dealers.[1]

An M&A Broker is defined in the SEC 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.

[1] Letter dated January 31, 2014, from David W. Blass, Chief Counsel and Associate Director, Division of Trading and Markets, Securities and Exchange Commission, to Faith Colish, Martin A. Hewitt, Eden L. Rohrer, Linda Lerner, Ethan L. Silver, and Stacy E. Nathanson, Re M&A Brokers. It is available here.

Background

Previously, except in very limited circumstances,[2] the SEC had permitted business brokers to broker the sale and purchase of a business without being registered as broker-dealers only if the transaction involved the sale and purchase of assets and not of securities. The SEC Letter will enable M&A Brokers to broker a sale of a business in a transaction that involves the purchase of securities without registering with the SEC as broker-dealers as long as the conditions in the letter are met.

The SEC Letter

The SEC Letter was issued in response to a no-action request by several attorneys who argued that it made little sense for a business broker to be required to register as a broker-dealer with the SEC if the sale of a business involved a sale of securities but not if the sale of a business involved only a sale of assets. The attorneys asked the SEC to remove this anomaly if certain conditions were met. As noted above, the SEC Letter provides that for the relief to be available for the M&A Broker, the sale of the business could only involve a privately-held company and the purchaser would have to control and actively operate the company or the business conducted with the assets of the company. Additionally, the M&A Broker cannot (1) have the ability to bind a party to an M&A transaction;[3] (2) provide financing for the transaction;[4] or (3) have custody, control or possession of or otherwise handle securities or funds from the transaction or any other securities transaction for the account of others. The transaction also cannot involve a public offering, result in the transfer of interests to a passive buyer or group of passive buyers, or have a shell company as a party to the transaction. The M&A Broker may only facilitate a transaction with a group of buyers if the group is formed without the assistance of the M&A Broker. Further, any securities received by the buyer will be restricted securities within the meaning of Rule 144(a)(3) of the Securities Act of 1933 and the M&A Broker (and its officers, directors or employees) cannot have been barred or suspended from association with a broker-dealer.

The incoming letter from the group of attorneys requesting this relief from the SEC staff includes several interesting points. For example, the incoming letter provides that the M&A Broker could advise the parties to a transaction to issue securities, participate in the M&A transaction negotiations, and receive compensation based on the size or success of the transaction ("transaction-based compensation") in connection with the transaction. While the SEC Letter does not specifically mention these points from the incoming letter, it does not reject or refute them either. Probably the most interesting of the points is the one involving transaction-based compensation. Historically, the SEC has viewed the

---

2 See Country Business, Inc. (SEC No-Action letter, Nov. 8, 2006) and International Business Exchange Corporation (SEC No-Action letter, Dec. 12, 1987).

3 The SEC Letter provides M&A transactions for this purpose would be mergers, acquisitions, business sales and business combinations.

4 The SEC Letter also provides that an M&A Broker that assists purchasers to obtain financing from unaffiliated third parties must comply with all applicable legal requirements, including, as applicable, Regulation T, and must disclose any compensation in writing to the client.

receipt of transaction-based compensation as one of the most important indicia of acting as a securities broker-dealer.[5] The SEC has been reluctant to allow persons involved in securities transactions in any manner to receive transaction-based compensation without being required to register as broker-dealers. Permitting M&A Brokers to receive transaction-based compensation, albeit in the limited circumstances of the SEC Letter, may portend a less rigid position in this area generally.

Although the SEC letter provides relief from the SEC's broker-dealer registration requirements for M&A Brokers following the guidelines in the letter, such firms would still be subject to state registration requirements applicable to securities broker-dealers doing business in a state as well as state business broker statutes. M&A Brokers may in some states be able to conduct their activities so as to rely on exemptions from state securities broker-dealer registration for firms doing business only with certain institutions in the state. However, the entities considered "institutions" for this purpose vary from state to state and in many states the exemption is not available if a firm has a place of business in the state.

Practical Considerations

The SEC Letter may have significance for managers of private funds. Last year, David Blass, the signer of the SEC Letter, outlined in a speech the need for private fund managers to consider their potential obligation to register as broker-dealers if their employees were performing certain securities-related tasks.[6] While that speech raised concerns about broker-dealer obligations for private fund managers, Mr. Blass also indicated an intention for the SEC staff to reconsider past policies in this area. Although the SEC Letter did not address all the issues raised in the Blass speech, including the issue of deal-based fees for private equity fund managers, the letter may be an indication of a willingness by the SEC Staff to reexamine prior positions. Additionally, the issue of deal-based fees was not presented to the SEC staff in the incoming letter. It remains to be seen if and how the SEC will address deal fees for private equity firms. In any event, managers of private funds and private equity funds considering transactions involving M&A Brokers will now have more certainty in the regulatory requirements applicable to such M&A Brokers.

---

5 *See* Securities Exchange Act Release No. 27172 (June 27, 1985) adopting Rule 3a4-1, Part II.B. *See also* In the Matter of Ranieri Partners LLC and Donald W. Phillips, Respondents, SEC Release 34-69091, Administrative Proceeding File No. 3-15234 (March 8, 2013).

6 A Few Observations in the Private Fund Space. David W. Blass, Chief Counsel, Division of Trading and Markets, U.S. Securities and Exchange Commission, at the American Bar Association, Trading and Markets Subcommittee, Washington, D.C., April 5, 2013. Available here. Please also see our client memorandum, "Private Funds and Broker-Dealer Registration: Comments by the Chief Counsel of the SEC's Division of Trading and Markets" (April 12, 2013).

If you have any questions regarding this memorandum, please contact Howard L. Kramer (202-303-1208, hkramer@willkie.com), Martin R. Miller (212-728-8680, mmiller@willkie.com), Gordon R. Caplan (212-728-8266, gcaplan@willkie.com), Neil W. Townsend (212-728-8272, ntownsend@willkie.com), or the Willkie attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Paris, London, Milan, Rome, Frankfurt and Brussels. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.

February 11, 2014

Copyright © 2014 Willkie Farr & Gallagher LLP.