

February 21, 2014

The SEC Provides Significant Relief from Registration Requirements for M&A Brokers

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On January 31, 2014, the Securities and Exchange Commission (SEC) issued an important no-action letter¹ in which the staff of the SEC's Division of Trading and Markets declared that it would not recommend enforcement action against an unregistered broker in the acquisition or sale of a privately-held operating company, under certain terms and conditions. The letter represents a significant departure from the previous stance of the SEC, which was to require intermediaries receiving transaction-based compensation in connection with a transfer of control to register as brokers under the Securities Exchange Act, except in limited circumstances.

The no-action letter relief is subject to the following conditions:

- The broker will not have the ability to bind any party to the merger, acquisition, business sale or business combination.
- The broker will not directly or indirectly provide financing for the transaction. A broker that assists purchasers in obtaining 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.
- The broker will not have custody, control, or possession of or otherwise handle funds or securities issued or exchanged in connection with the transaction for the account of others.
- The transaction will not involve a public offering of securities. Any offering or sale of securities in connection with the transaction will be conducted in compliance with an applicable exemption from registration under the Securities Act.

¹ No-action letter, dated January 31, 2014 [revised February 4, 2014], to Faith Colish, Martin A. Hewitt, Eden L. Rohrer, Linda Lerner, Ethan L. Silver and Stacy E. Nathanson.



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- No party to the transaction will be a shell company, other than a business combination related shell company.
- If the broker represents both buyers and sellers, it will provide clear written disclosure as to the parties it represents and obtain written consent from both parties to the joint representation.
- The broker will facilitate a transaction with a group of buyers only if the group is formed without the assistance of the broker.
- The buyer, or group of buyers, will, upon completion of the transaction, control and actively operate the company or the business conducted with the assets of the business. A buyer, or group of buyers collectively, would have the necessary 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. In addition, the buyer, or group of buyers, must actively operate the company or the business conducted with the assets of the company.
- The transaction will not result in the transfer of interests to a passive buyer or group of passive buyers.
- Any securities received by the buyer or broker in the transaction will be restricted securities within the meaning of Rule 144(a)(3) under the Securities Act.
- Neither the broker nor any officer, director or employee of the broker (i) has been barred from association with a broker-dealer by the SEC, any state or any self-regulatory organization or (ii) is suspended from association with a broker-dealer.

A no-action letter merely states the position of the SEC staff based on facts recited in the no-action letter, and is not binding on the SEC or other parties, including private plaintiffs or the Financial Industry Regulatory Authority (FINRA). In addition, registration requirements continue to exist under some state laws. Accordingly, the no-action letter does not eliminate all of the risks of acting as or employing an unregistered intermediary.



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About the Authors

Bonnie J Roe is a partner in the Corporate group of Cohen & Gresser LLP, where she represents publicly and privately held companies and investment funds. Ms. Roe has over thirty years of experience advising public and private companies on securities law, corporate governance, and mergers and acquisitions. She has served as counsel for issuers and investors in private equity and venture capital financings and purchasers and sellers in public and private company acquisitions. Ms. Roe was named as one of New York's *Super Lawyers* for Securities & Corporate Finance in 2011, 2012, and 2013 and is mentioned in *Who's Who in America* and *Who's Who in American Law*.

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