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M&A Brokers Effecting the Purchase or Sale of Privately-Held Companies Not Required to Register As Brokers with the SEC in Certain Situations

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On January 31, 2014 the staff of the Securities and Exchange Commission's (the "SEC") Division of Trading and Markets (the "Division") published a No-Action Letter ("Letter") in which the Division advised that it would not recommend enforcement action to the SEC under certain facts and circumstances if a person (an "M&A Broker") were to effect M&A Transactions[1] between buyers and sellers of "privately-held companies" without registering as a broker or dealer under the Securities Exchange Act of 1934, as amended (the "Exchange Act").

For purposes of its analysis, the Division defined a "privately-held company" as a company that does not have any class of securities registered, or required to be registered, with the SEC under Section 12 of the Exchange Act, or with respect to which the company files, or is required to file, periodic information, documents, or reports under Section 15(d) of the Exchange Act. The privately-held company must be a going-concern that has actually been conducting business, including soliciting or effecting business transactions or engaging in research and development activities. For purposes of the Letter, a privately-held company does not include a shell company, other than a business combination related shell company.

In reaching its decision, the Division noted the following key facts which contributed to its decision and which should be considered by any party relying on this Letter:

1. The M&A Broker would not have the ability to bind a party to the M&A Transaction.

2. The M&A Broker would not directly, or indirectly through any of its affiliates, provide financing for the M&A Transaction.

3. The M&A Broker would not have custody, control, or possession of, or otherwise handle funds or securities issued or exchanged in connection with the M&A Transaction or other securities transaction for the account of others.

4. The M&A Transaction would not involve a public offering and would be conducted in compliance with an applicable exemption from registration under the Securities Act of 1933, as amended (the "Securities Act"), and no party to the M&A Transaction would be a shell company, other than a business combination related shell company.

[1] For purposes of the Letter, the Division defined "M&A Transactions" as "mergers, acquisitions, business sales, and business combinations."

5. To the extent the M&A Broker represented both buyers and sellers, the M&A Broker would provide clear written disclosure as to the parties it represents and would obtain written consent from both parties to the joint representation.

6. The M&A Broker would facilitate the M&A Transaction with the group of buyers only if the group was formed without the assistance of the M&A Broker.

7. The buyer, or group of buyers, in the M&A Transaction would, upon completion of the M&A Transaction, control and actively operate the company or business[2].

8. The M&A Transaction would not result in the transfer of interests to a passive buyer or group of buyers.

9. Any securities received by the buyer or M&A Broker in the M&A Transaction would be "restricted securities" under the Securities Act.

10. The M&A Broker (and each officer, director or employee of the M&A Broker): (i) would not have been barred from association with a broker-dealer by the SEC , any state or self-regulatory organization, and (ii) would not have been suspended from association with a broker-dealer.

The Division staff noted in the Letter that different facts and circumstances may cause it to reach a different conclusion.

The Letter harmonizes what historically has been an anomalous difference between asset transactions and stock transactions/ mergers and is welcome guidance from the Division in the M&A community. Should you have any questions please do not hesitate to contact the attorneys below or your regular Seyfarth contact.

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[2] The Division noted that the necessary control will be presumed to exist if, upon completion of the transaction, the buyer or group of buyers has the right to vote 25% or more of a class of voting securities; has the power to sell or direct the sale of 25% or more of a class of voting securities; or, in the case of a partnership or limited liability company, has the right to receive upon dissolution or has contributed 25% or more of the capital.