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NEW EXEMPTION FROM FEDERAL BROKER-DEALER REGISTRATION FOR M&A BROKERS

A new Federal law has created an exemption from broker-dealer registration for an M&A broker who effects securities transactions in connection with the transfer of ownership of an eligible privately held company, which is a company with EBITDA of less than $25 million and gross revenues of less than $250 million for its last fiscal year and that satisfies certain other criteria. The transaction must be with a buyer (or buyers) that, after the transaction, will control, and, directly or indirectly, will be active in the management of, the target company. In this article, the author summarizes (1) the background and policy reasons for the new law, (2) key definitions in the new law, including "M&A broker," "eligible privately held company," and "control," (3) excluded activities in which the broker cannot engage while remaining eligible for the exemption, (4) broker disqualifications, and (5) various interpretative issues, questions, and observations. The new Federal law does not preempt state law in this area.

By Daryl B. Robertson *

The Consolidated Appropriations Act, 2023, H.R. 2617 (the "2023 Act"), was passed by Congress and signed into law by President Biden on December 29, 2022, and contained new amendments (the "Amendments") to Section 15 of the Securities Exchange Act of 1934, as amended (the "1934 Act").[1] The Amendments became effective March 29, 2023. The Amendments allow an "M&A broker" to engage in securities transactions in connection with the purchase and sale of an "eligible privately held company" without registering as a broker-dealer under Section 15 of the 1934 Act.

BACKGROUND AND REASONS

A "broker" is defined by the 1934 Act to be any person engaged in the business of effecting transactions in securities for another person's account.[2] Because the US Supreme Court has held that the sale of all of the outstanding shares of a privately held company involves the sale of a security,[3] there has been for many years a concern that business brokers should register as securities brokers and become members of FINRA. Compliance with the broker-dealer registration requirements is costly and involves substantial time and effort. SEC no-action letters on the topic of exempting

[1] Public Law No. 117-328; H.R. 2617, Consolidated Appropriations Act, 2023, Division AA, Title V- Small Business Mergers, Sales, and Brokerage Simplification, § 501. Registration Exemption for Merger and Acquisition Brokers.

[2] 1934 Act §3(a)(4)(A).

[3] *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985).

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