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Alert | Financial Regulatory & Compliance

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Congress Codifies Longstanding M&A Broker Exemption from SEC Registration

On Dec. 29, 2022, President Biden signed into law H.R. 2617, the "Consolidated Appropriations Act of 2023." Among the routine federal funding provisions, Title V of the bill, the "Small Business Mergers, Acquisitions, Sales and Brokerage Simplification" (Title V), contains a provision on qualifying mergers and acquisitions brokers. The new subsection is a codification of the U.S. Securities and Exchange Commission (SEC)'s Division of Trading and Markets M&A Brokers No-Action Letter dated Jan. 31, 2014, (amended Feb. 4, 2014) (the M&A No-Action Letter), which exempted certain brokers from registering with the SEC as broker-dealers or associated persons of broker-dealers, but contains some notable differences, in particular a limitation on the size of eligible privately held companies. Title V will take effect March 30, 2023.

Title V provides an exemption from broker-dealer registration for certain brokers by amending Section 15(b) of the Securities Exchange Act of 1934 to add new subsection 13. Subsection 13 defines an "M&A Broker" as a broker engaged in the business of effecting securities transactions solely in connection with the transfer of ownership of an eligible privately held company, regardless of whether the broker acts on behalf of a seller or buyer, through the purchase, sale, exchange, issuance, repurchase, or redemption of, or a business combination involving, securities or assets of the company. To be eligible for the exemption, the broker must reasonably believe, among other requirements, that upon consummation of the transaction, any person(s) acquiring securities or assets of the company will control the company; and directly or indirectly, will be active in the management of the company.

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Title V then departs from the M&A No-Action Letter by placing a size cap on an "eligible privately held company," which is defined as a company that has: (1) no class of securities registered or required to be registered under Exchange Act Section 12; and (2) EBITDA less than $25 million or gross revenues less than $250 million. The M&A No-Action Letter, however, has not yet been revoked.

Notwithstanding this newly codified exemption from registration, M&A Brokers may still want to register as a broker-dealer or an associated person of a broker-dealer for several reasons, including the following:

- Title V does not change a broker's need to be registered to conduct non-M&A securities transactions such as capital raising or M&A transactions not involving a change of control. As a result, even if most of a broker's business pertains to M&A transactions, and is therefore covered by the exemption, they would need to be registered in order to engage in any capital raising or minority transactions.
- State securities laws still apply; Title V does not preempt or replace state laws and regulations. Most states have not adopted the No-Action letter as law; ; therefore, a banker who is not registered with FINRA would need to meet individual state requirements, which vary, and can require that M&A Brokers be registered. The state registration process in some states mirrors FINRA registration.
- Brokers who are registered can provide clients with a broader suite of services. They can create financing groups, secure investors, and shape transactions flexibly in a way that M&A Brokers cannot.

Those with questions about this newly codified exemption, including firm qualification criteria and broker-dealer registration, should consult with experienced financial regulatory and compliance counsel.

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