REQUEST FOR PUBLIC COMMENT

PROPOSED AMENDMENTS TO NASAA MODEL RULE EXEMPTING CERTAIN MERGER & ACQUISITION BROKERS ("M&A BROKERS") FROM REGISTRATION
January 4, 2024

Deadline for Public Comments: February 3, 2024

The Broker-Dealer Market and Regulatory Policy and Review Project Group and the Broker-Dealer Section Committee (together, the "Committees") of the North American Securities Administrators Association ("NASAA") are proposing amendments to NASAA Model Rule Exempting Certain Merger & Acquisition Brokers ("M&A Brokers") From Registration (the "Model Rule"). The revisions to the Model Rule proposed herein are intended to update the Model Rule in light of amendments to subsection 15(b)(13) of the Securities Exchange Act of 1934 ("Exchange Act") to exempt certain M&A Brokers from broker-dealer registration (the "SEC M&A Broker Exemption"). In particular, the Committees propose that NASAA amend the rule to:

(1) expand the list of excluded activities for which an M&A Broker is not exempt;

(2) reword the disqualifications section;

(3) add a definition for "Business Combination Related Shell Company";[1]

(4) amend the definition of "Control" to:

   a. remove the clause "is a director, general partner, member, or manager of a limited liability company or officer exercising executive responsibility (or has a similar status or functions)," and

   b. increase the percentage of voting stock and capital contributions from 20% to 25%;

(5) include a provision with discretion for regulators to modify the dollar amounts for the eligibility of a privately held company;

(6) include more specificity as to what types of transactions a Mergers and Acquisitions Broker can effect; and

(7) amend the definition of a "shell company" to no longer include public companies.

Details regarding each of these proposed revisions are set forth below.

Comments on this proposal are due on or before the date specified above. We are only accepting comments by electronic mail. Please email your comments to NASAAComments@nasaa.org, and please cc: Broker-Dealer Market and Regulatory Policy and Review Project Group Chair Amy Kopleton (kopletona@dca.njoag.gov) and Broker-Dealer Section Chair James Nix (Jnix@ilsos.gov). All comments received in response to this request will

[1] Under proposed subparagraph (B)(iii), an M&A Broker may qualify for an exemption if it engages on behalf of a business combination related shell company.

be posted to NASAA's website (www.nasaa.org) without edit or redaction, though inappropriate comments will not be posted. Please do not include any information in your comment letter that you do not wish to become publicly available.

Thank you.

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I. BACKGROUND AND INTRODUCTION

United States Securities & Exchange Commission ("SEC") No-Action Letter

On January 31, 2014, SEC Staff issued a No-Action Letter to Faith Colish, Esq., et. al. ("Colish No-Action Letter"). The Colish No Action-Letter states that SEC Staff recommends no enforcement action against M&A Brokers who: (1) receive transaction-based compensation for facilitating mergers, acquisitions, business sales, and business combinations between sellers and buyers of eligible privately-held companies ("M&A Transactions"); (2) do not arrange for financing between such buyers and sellers; and (3) do not register as "broker-dealers" with the SEC pursuant to Section 15(b) of the Exchange Act. The Colish No-Action Letter applied to M&A Transactions of any size. Until December 2022, the Colish No-Action Letter was the applicable guidance for any exemption from federal securities registration for M&A Brokers.

Current NASAA Model Rule

In January 2015, by authorization of the NASAA Board, the BD Section requested public and internal comments to a proposed rule for the exemption of certain M&A Brokers from registration as "brokers," "dealers," "agents," and/or "broker-dealers" pursuant to state securities laws. The proposed rule and the federal legislation pending at the time were intended to provide broader relief from securities registration than does the Colish No-Action Letter.[2] The current

[2] Notable differences between the Colish No-Action Letter and the Model Rule were:

(1) The Model Rule contained a transaction size limitation of $250,000,000 (as adjusted by inflation) for the M&A transaction whereas the Colish No-Action Letter did not contain such a limitation.

(2) The Model Rule broadened the "bad actor" provisions contained in the Colish No-Action Letter.

(3) The Model Rule included the requirement that certain financials be provided to a buyer while the Colish No-Action Letter was silent on this point.

(4) The Model Rule defines buyer "control" at 20% ownership. The Colish No-Action Letter defined "control" at 25% ownership.

(5) The Model Rule is silent on the issues of financing arrangements while the Colish No-Action Letter more directly controlled and disallowed M&A Brokers from certain financing conduct. The Colish No-Action Letter prohibited an M&A Broker from: (a) arranging a group of buyers; (b) directly or indirectly financing of an M&A Transaction; and (c) binding a party to an M&A Transaction.

Model Rule was adopted on September 29, 2015.[3] Presently, about 21 states have adopted the Current M&A Exemption Model Rule or provided similar no-action relief.

Federal Legislation

On, December 29, 2022 President Joseph Biden signed the Consolidated Appropriations Act, 2023 (H.R. 2617) into law. At page 1080, is a provision amending subsection 15(b)(13) of the Exchange Act to exempt certain M&A Brokers from broker-dealer registration (the "SEC M&A Broker Exemption"). The SEC M&A Broker Exemption, effective March 29, 2023, permits certain M&A Brokers to effect securities transactions in connection with their eligible M&A business without registration as a broker-dealer. The SEC M&A Broker Exemption diverges from the current NASAA Model Rule in certain areas as described below.

The Proposed Amendments

The Project Group recommends amendments to the current Model Rule to achieve uniformity with the federal law. Many of these amendments are not material changes, but are language edits. The amendments that may have a substantive effect include:

(1) an expansion of the list of excluded activities for which an M&A Broker is not exempt;

(2) a rewording of the disqualifications section;

(3) the addition of a definition for "Business Combination Related Shell Company";[4]

(4) an amendment of the definition of "Control" to:

   a. remove the clause, "is a director, general partner, member, or manager of a limited liability company or officer exercising executive responsibility (or has a similar status or functions)," and

   b. increase the percentage of voting stock and capital contributions from 20% to 25%;

(5) a provision with discretion for regulators to modify the dollar amounts for the eligibility of a privately held company;

(6) more specificity as to what types of transactions an M&A Broker can effect; and

(7) an amendment of the definition of a "shell company to no longer include public companies.

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[3] The Current M&A Exemption Model Rule is available at https://www.nasaa.org/wp-content/uploads/2011/07/MA-Broker-Model-Rule-adopted-Sept-29-2015-corrected.pdf.

[4] Under proposed subparagraph (B)(iii), an M&A Broker may qualify for an exemption if it engages on behalf of a business combination related shell company.

II. REQUEST FOR PUBLIC COMMENT

The Committees request public comment on these proposed revisions to the Model Rule. Attached as Exhibit A are redlines showing the proposed revisions against the current text of the Model Rule, as well as clean text of the proposed amended Model Rule.

EXHIBIT A

Model Rule Exempting Certain Merger & Acquisition Brokers ("M&A Brokers") From Registration

Adopted September 29, 2015; Amended [xx/xx/2024]

Text of Model Rule

Rule _____. Registration Exemption for Merger and Acquisition Brokers

(A) IN GENERAL – Except as provided in paragraphs (B) and (C), a Merger and Acquisition Broker shall be exempt from registration pursuant to _____ under this section.

(B) EXCLUDED ACTIVITIES – A Merger and Acquisition Broker is not exempt from registration under this paragraph if such broker does any of the following:

(i) Directly or indirectly, in connection with the transfer of ownership of an eligible privately held company, receives, holds, transmits, or has custody of the funds or securities to be exchanged by the parties to the transaction.

(ii) Engages on behalf of an issuer in a public offering of any class of securities that is registered, or is required to be registered, with the United States Securities and Exchange Commission under Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. 78*l* or with respect to which the issuer files, or is required to file, periodic information, documents, and reports under the Securities Exchange Act of 1934 Section 15 subsection (d), 15 U.S.C. 78o(d).

(iii) Engages on behalf of any party in a transaction involving a ~~public~~ shell company, other than a business combination related shell company.

(iv) Directly, or indirectly through any of its affiliates, provides financing related to the transfer of ownership of an eligible privately held company.

(v) Assists any party to obtain financing from an unaffiliated third party without –

(I) complying with all other applicable laws in connection with such assistance, including, if applicable, Regulation T (12 C.F.R. 220 *et seq.*); and

(II) disclosing any compensation in writing to the party.

(vi) Represents both the buyer and the seller in the same transaction without providing clear written disclosure as to the parties the broker represents and obtaining written consent from both parties to the joint representation.

(vii) Facilitates a transaction with a group of buyers formed with the assistance of the Merger and Acquisition Broker to acquire the eligible privately held company.

(viii) Engages in a transaction involving the transfer of ownership of an eligible privately held company to a passive buyer or group of passive buyers.

(ix) Binds a party to a transfer of ownership of an eligible privately held company.

(C) DISQUALIFICATIONS – A Merger and Acquisition Broker is not exempt from registration under this paragraph if such broker is subject to (and if and as applicable, including any officer, director, member, manager, partner, or employee of such broker) –

(i) ~~Suspension or revocation of registration under Section 15(b)(4) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(b)(4)~~Has been barred from association with a broker or dealer by the United States Securities and Exchange Commission, any State, or any self-regulatory organization; or

(ii) ~~A statutory disqualification described in section 3(a)(39) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(39)~~Is suspended from association with a broker or dealer~~;~~.

~~(iii) A disqualification under the rules adopted by the United States Securities and Exchange Commission under Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (15 U.S.C. 77d note); or~~

~~(iv) A final order described in paragraph (4)(H) of Section 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(b)(4)(H).~~

(D) RULE OF CONSTRUCTION – Nothing in this paragraph shall be construed to limit any other authority of this _____(Commission, Agency) to exempt any person, or

any class of persons, from any provision of this title, or from any provision of any rule or regulation thereunder.

(E) DEFINITIONS – In this paragraph:

(i) BUSINESS COMBINATION RELATED SHELL COMPANY. The term "Business Combination Related Shell Company" means a shell company that is formed by an entity that is not a shell company –

(I) solely for the purpose of changing the corporate domicile of that entity solely within the United States; or

(II) solely for the purpose of completing a business combination transaction (as defined under 17 C.F.R. 230.165(f)) among one or more entities other than the company itself, none of which is a shell company.

(ii) CONTROL. The term "Control" means the power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. There is a presumption of control ~~for any person who~~if, upon completion of a transaction, the buyer or group of buyers –

~~(I) is a director, general partner, member, or manager of a limited liability company, or officer exercising executive responsibility (or has similar status or functions);~~

~~(II)~~(I) has the right to vote ~~20~~ 25 percent or more of a class of voting securities or the power to sell or direct the sale of ~~20~~ 25 percent or more of a class of voting securities; or

~~(III)~~(II) in the case of a partnership or limited liability company, has the right to receive upon dissolution, or has contributed, ~~20~~ 25 percent or more of the capital.

~~(ii)~~(iii) ELIGIBLE PRIVATELY HELD COMPANY. ~~IN GENERAL~~ The term "Eligible Privately Held Company" means a privately held company ~~meeting~~ that meets both of the following conditions:

(I) The company does not have any class of securities registered, or required to be registered, with the United States Securities and Exchange Commission under Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. 78*l*, or with respect to which the company

files, or is required to file, periodic information, documents, and reports under subsection (d), 15 U.S.C. 78o(d).

(II) In the fiscal year ending immediately before the fiscal year in which the services of the Merger and Acquisition Broker are initially engaged with respect to the securities transaction, the company meets either or both of the following conditions (determined in accordance with the historical financial accounting records of the company):

(aa) The earnings of the company before interest, taxes, depreciation, and amortization are less than $25,000,000.

(bb) The gross revenues of the company are less than $250,000,000.

For purposes of this subclause, the _____ (Commission, Agency) may by rule modify the dollar figures if the _____ (Commission, Agency) determines that such a modification is necessary or appropriate in the public interest or for the protection of investors.

~~(iii)~~(iv) MERGER AND ACQUISITION BROKER. The term "Merger and Acquisition Broker" means ~~any~~ a broker and any person associated with 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 ~~that~~ 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 eligible privately held company if the broker reasonably believes that –

(I) ~~if the broker reasonably believes that~~ upon consummation of the transaction, any person acquiring securities or assets of the eligible privately held company, acting alone or in concert~~,~~ –

(aa) will control and, directly or indirectly, will be active in the management of the eligible privately held company or the business conducted with the assets of the eligible privately held company; and

(bb) directly or indirectly, will be active in the management of the eligible privately held company or the business conducted with the assets of the eligible privately held company, and with the assets of the eligible privately held company, including without limitation, for example, by –

(AA) electing executive officers;

(BB) approving the annual budget;

(CC) serving as an executive or other executive manager; or

(DD) carrying out such other activities as _____ (Commission, Agency) may, by rule, determine to be in the public interest; and

(II) if any person is offered securities in exchange for securities or assets of the eligible privately held company, such person will, prior to becoming legally bound to consummate the transaction, receive or have reasonable access to the most recent fiscal year-end financial statements of the issuer of the securities as customarily prepared by ~~its~~ the management of the issuer in the normal course of operations and, if the financial statements of the issuer are audited, reviewed, or compiled, any related statement by the independent accountant; a balance sheet dated not more than 120 days before the date of the ~~exchange~~ offer~~;~~, and information pertaining to the management, business, results of operations for the period covered by the foregoing financial statements, and ~~any~~ material loss contingencies of the issuer.

~~(iv)~~(v) ~~PUBLIC~~ SHELL COMPANY. The term "~~Public~~ Shell Company" ~~is~~ means a company that at the time of a transaction with an eligible privately held company –

~~(I) has any class of securities registered, or required to be registered, with the United States Securities and Exchange Commission under Section 12, 15 U.S.C. 78l, or with respect to which the company files, or is required to file, periodic information, documents, and reports under subsection (d), 15 U.S.C. 78o(d); and~~

~~(II)~~(I) has no or nominal operations; and

~~(III)~~(II) has –

(aa) no or nominal assets;

(bb) assets consisting solely of cash and cash equivalents; or

(cc) assets consisting of any amount of cash and cash equivalents and nominal other assets.

(F) INFLATION ADJUSTMENT –

(i) IN GENERAL – On the date that is five years after the date of the enactment of the rule, and every five years thereafter, each dollar amount in subparagraph (E)(ii)(II) shall be adjusted by –

(I) dividing the annual value of the Employment Cost Index For Wages and Salaries, Private Industry Workers (or any successor index), as published by the Bureau of Labor Statistics, for the calendar year preceding the calendar year in which the adjustment is being made by the annual value of such index (or successor) for the calendar year ending December 31, ~~2012~~2020; and

(II) multiplying such dollar amount by the quotient obtained under sub clause (I).

(ii) ROUNDING – Each dollar amount determined under clause (i) shall be rounded to the nearest multiple of $100,000.

Model Rule Exempting Certain Merger & Acquisition Brokers ("M&A Brokers") From Registration

Adopted September 29, 2015; Amended [xx/xx/2024]

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(i) Directly or indirectly, in connection with the transfer of ownership of an eligible privately held company, receives, holds, transmits, or has custody of the funds or securities to be exchanged by the parties to the transaction.

(ii) Engages on behalf of an issuer in a public offering of any class of securities that is registered, or is required to be registered, with the United States Securities and Exchange Commission under Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. 78*l* or with respect to which the issuer files, or is required to file, periodic information, documents, and reports under the Securities Exchange Act of 1934 Section 15 subsection (d), 15 U.S.C. 78o(d).

(iii) Engages on behalf of any party in a transaction involving a shell company, other than a business combination related shell company.

(iv) Directly, or indirectly through any of its affiliates, provides financing related to the transfer of ownership of an eligible privately held company.

(v) Assists any party to obtain financing from an unaffiliated third party without –

(I) complying with all other applicable laws in connection with such assistance, including, if applicable, Regulation T (12 C.F.R. 220 *et seq.*); and

(II) disclosing any compensation in writing to the party.

(vi) Represents both the buyer and the seller in the same transaction without providing clear written disclosure as to the parties the broker represents and obtaining written consent from both parties to the joint representation.

(vii) Facilitates a transaction with a group of buyers formed with the assistance of the Merger and Acquisition Broker to acquire the eligible privately held company.

(viii) Engages in a transaction involving the transfer of ownership of an eligible privately held company to a passive buyer or group of passive buyers.

(ix) Binds a party to a transfer of ownership of an eligible privately held company.

(C) DISQUALIFICATIONS – A Merger and Acquisition Broker is not exempt from registration under this paragraph if such broker is subject to (and if and as applicable, including any officer, director, member, manager, partner, or employee of such broker) –

(i) Has been barred from association with a broker or dealer by the United States Securities and Exchange Commission, any State, or any self-regulatory organization; or

(ii) Is suspended from association with a broker or dealer.

(D) RULE OF CONSTRUCTION – Nothing in this paragraph shall be construed to limit any other authority of this (Commission, Agency) to exempt any person, or any class of persons, from any provision of this title, or from any provision of any rule or regulation thereunder.

(E) DEFINITIONS – In this paragraph:

(i) BUSINESS COMBINATION RELATED SHELL COMPANY. The term "Business Combination Related Shell Company" means a shell company that is formed by an entity that is not a shell company –

(I) solely for the purpose of changing the corporate domicile of that entity solely within the United States; or

(II) solely for the purpose of completing a business combination transaction (as defined under 17 C.F.R. 230.165(f)) among one or more entities other than the company itself, none of which is a shell company.

(ii) CONTROL. The term "Control" means the power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. There is a presumption of control if, upon completion of a transaction, the buyer or group of buyers –

(I) has the right to vote 25 percent or more of a class of voting securities or the power to sell or direct the sale of 25 percent or more of a class of voting securities; or

(II) in the case of a partnership or limited liability company, has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital.

(iii) ELIGIBLE PRIVATELY HELD COMPANY. The term "Eligible Privately Held Company" means a privately held company that meets both of the following conditions:

(I) The company does not have any class of securities registered, or required to be registered, with the United States Securities and Exchange Commission under Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. 78*l*, or with respect to which the company files, or is required to file, periodic information, documents, and reports under subsection (d), 15 U.S.C. 78o(d).

(II) In the fiscal year ending immediately before the fiscal year in which the services of the Merger and Acquisition Broker are initially engaged with respect to the securities transaction, the company meets either or both of the following conditions (determined in accordance with the historical financial accounting records of the company):

(aa) The earnings of the company before interest, taxes, depreciation, and amortization are less than $25,000,000.

(bb) The gross revenues of the company are less than $250,000,000.

For purposes of this subclause, the _____ (Commission, Agency) may by rule modify the dollar figures if the _____ (Commission, Agency) determines that such a modification is necessary or appropriate in the public interest or for the protection of investors.

(iv) MERGER AND ACQUISITION BROKER. The term "Merger and Acquisition Broker" means a broker and any person associated with 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 eligible privately held company if the broker reasonably believes that –

(I) upon consummation of the transaction, any person acquiring securities or assets of the eligible privately held company, acting alone or in concert –

(aa) will control and, directly or indirectly, will be active in the management of the eligible privately held company or the business conducted with the assets of the eligible privately held company; and

(bb) directly or indirectly, will be active in the management of the eligible privately held company or the business conducted with the assets of the eligible privately held company, and with the assets of the eligible privately held company, including without limitation, for example, by –

(AA) electing executive officers;

(BB) approving the annual budget;

(CC) serving as an executive or other executive manager; or

(DD) carrying out such other activities as _____ (Commission, Agency) may, by rule, determine to be in the public interest; and

(II) if any person is offered securities in exchange for securities or assets of the eligible privately held company, such person will, prior to becoming legally bound to consummate the transaction, receive or have reasonable access to the most recent fiscal year-end financial statements of the issuer of the securities as customarily prepared by the management of the issuer in the normal course of operations and, if the financial statements of the issuer are audited, reviewed, or compiled, any related statement by the independent accountant; a balance sheet dated not more than 120 days before the date of the offer, and information pertaining to the management, business, results of

operations for the period covered by the foregoing financial statements, and material loss contingencies of the issuer.

(v) SHELL COMPANY. The term "Shell Company" means a company that at the time of a transaction with an eligible privately held company –

(I) has no or nominal operations; and

(II) has –

(aa) no or nominal assets;

(bb) assets consisting solely of cash and cash equivalents; or

(cc) assets consisting of any amount of cash and cash equivalents and nominal other assets.

(F) INFLATION ADJUSTMENT –

(i) IN GENERAL – On the date that is five years after the date of the enactment of the rule, and every five years thereafter, each dollar amount in subparagraph (E)(ii)(II) shall be adjusted by –

(I) dividing the annual value of the Employment Cost Index For Wages and Salaries, Private Industry Workers (or any successor index), as published by the Bureau of Labor Statistics, for the calendar year preceding the calendar year in which the adjustment is being made by the annual value of such index (or successor) for the calendar year ending December 31, 2020; and

(II) multiplying such dollar amount by the quotient obtained under sub clause (I).

(ii) ROUNDING – Each dollar amount determined under clause (i) shall be rounded to the nearest multiple of $100,000.