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MEMORANDUM

Privileged and Confidential

FROM: Lev & Berlin P.C.

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RE: The SEC issues no action letter providing relief to M&A Brokers from broker-dealer registration requirements

On January 31, 2014, the Securities and Exchange Commission's ("SEC") Division of Trading and Markets (the "Division") granted no-action relief (the "No-Action Relief") to "M&A Brokers" (defined below) that engage in certain activities in connection with the purchase or sale of privately-held companies from the broker-dealer registration requirements of Section 15(b) of the Securities Exchange Act of 1934, as amended (the "Exchange Act").

M&A Broker Defined

The No-Action Relief defines the term "M&A Broker" to mean "a person engaged in the business of effecting securities transactions solely in connection with the transfer of ownership and control of a privately-held company through the purchase, sale, exchange, issuance, repurchase, or redemption of, or a business combination involving, securities or assets of the company, to a buyer that will actively operate the company or the business conducted with the assets of the company."

The two key concepts in this definition are that the company in question be “privately-held” and that the buyer will actively operate the acquired business. The Relief is also conditioned upon the company being an operating company, that is, not a shell company, and that the transaction does not involve a public offering. Each of these concepts is discussed further below.

Companies to Which the No-Action Relief Applies

The No-Action Relief applies only to transactions involving privately-held companies that are not “shell” companies.

The No-Action Relief defines the term “privately-held company” to mean “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 No-Action Relief is further conditioned upon the company being an “operating company” as opposed to a “shell company.” For this purpose, a “shell company” is a company that has no or nominal operations and has no or nominal assets, assets consisting solely of cash and cash equivalents or a combination of cash, cash equivalents and nominal other assets.

Transactions to Which the No-Action Relief Applies

The No-Action Relief imposes two conditions on applicable transactions. First, the No-Action Relief does not apply where the applicable transaction involves a public offering. Second, the No-Action Relief only applies where 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.” For this purpose, “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.” Control is presumed to exist if the buyer or group of buyers has the right:

- >To vote 25% or more of a class of voting securities;
- >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, to receive upon dissolution or has contributed 25% or more of the capital.

In addition, the buyer or group of buyers must actively operate the company or business conducted with the assets of the company.

Permitted Activities

An M&A Broker that is not otherwise excluded from the SEC's No-Action Relief (see discussion below) can, without registering with the SEC as a broker-dealer:

- >Receive transaction based compensation;
- >Participate in the transaction and advertise a company for sale with information such as the description of the business, general location, and price range;
- >Advise the parties to a transaction to issue securities or otherwise to effect the transfer of the business by means of securities or assess the value of any securities sold; and
- >Participate in the negotiations of the M&A transaction.

Prohibitions Imposed Upon the M&A Broker

The SEC's No-Action Relief is not available to an M&A Broker that:

- >Is involved in the formation of the group of buyers;
- >Provides financing for the transaction directly, or indirectly through an affiliate;
- >Has the ability to bind a party to a transaction;
- >Has custody, control or possession of or otherwise handles funds or securities issued or exchanged in connection with the applicable transaction or other securities transactions for the accounts of others; or
- >Is, (and if the M&A Broker is an entity, any officer, director or employee of the M&A Broker is) barred from association with a broker-dealer by the SEC, any state, or any self-regulatory organization.

Application to "Finders"

While the No-Action Relief does not specifically mention finders, i.e., persons who on an occasional or one time basis are paid a fee for bringing a transaction to a third party, there is nothing in the Relief that would seem to prohibit its use by such persons, so long, of course, as the transaction in question would otherwise meet the requirements and conditions of the No-Action Relief, and such person does not run afoul of the prohibitions applicable to M&A Brokers. That is, there would appear to be no reason for the SEC to prohibit use of the No- Action Relief by persons, such as finders, as may be engaged in only occasional M&A related activity rather than as a regular business activity.

State Blue Sky Laws Still Apply

It is important to stress that the No-Action Relief is limited to broker-dealer registration issues under the Federal securities laws and does not pre-empt or otherwise override state laws. Accordingly, it is possible that an M&A Broker could still find itself subject to a state registration or other requirement or prohibition imposed by state law. M&A Brokers are urged to consider how the laws of the jurisdictions in which they do business may apply to them and the transactions in which they are involved.