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BROKERAGE SIMPLIFICATION ACT

By Thomas D. Georgianna, Esq.
Brought to you by Boyd Law, APC

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Overview

- ▣ Prior to Act, only “no action letters.”
- ▣ Would brokers be subject to SEC enforcement actions for putting together stock deals?
- ▣ Technically, yes, but SEC said it would not take action.
- ▣ Scary!

I. History

2014 No Action Letter:

- ❑ Broker not an underwriter.
- ❑ Sale is for controlling interest.
- ❑ Buyer to actively manage.
- ❑ Not a public offering.



DIVISION OF
TRADING AND MARKETS

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC 20549

January 31, 2014
[Revised: February 4, 2014]

Faith Colish, Esq., Carter Ledyard & Milburn LLP
Martin A. Hewitt, Esq., Attorney at Law
Eden L. Rohrer, Esq., Crowell & Moring, LLP
Linda Lerner, Esq., Crowell & Moring, LLP
Ethan L. Silver, Esq., Carter Ledyard & Milburn LLP
Stacy E. Nathanson, Esq., Crowell & Moring, LLP

RE: M&A Brokers

Dear Ms. Colish, Mr. Hewitt, Ms. Rohrer, Ms. Lerner, Mr. Silver and Ms. Nathanson:

In your letter dated January 31, 2014, you requested assurances that the Division of Trading and Markets would not recommend enforcement action to the Commission under Section 15(a) of the Securities Exchange Act of 1934 ("Exchange Act") if an "M&A Broker" (as that term is defined below) were to engage in the activities described in your letter in connection with the purchase or sale of a privately-held company without registering as a broker-dealer pursuant to Section 15(b) of the Exchange Act.

Based on the facts and representations in your request (in particular those described below), and without necessarily agreeing with your analysis, the Division would not recommend enforcement action to the Commission under Section 15(a) of the Exchange Act if an M&A Broker were to effect securities transactions in connection with the transfer of ownership of a privately-held company under the terms and conditions described in your letter without registering as a broker-dealer pursuant to Section 15(b) of the Exchange Act. Different facts and circumstances may cause us to reach a different conclusion. The relief in this letter is limited solely to the transactions described in your letter.

An "M&A Broker" for purposes of this letter is 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 (as defined below) 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

I. History

- ▣ Campaign for Clarity.
- ▣ 2006.
- ▣ IBBA.
- ▣ Effort to get codification of no action letter.

I. History

- ▣ Brokerage Simplification Act.
- ▣ Enacted December 29, 2022.
- ▣ Effective March 20, 2023.
- ▣ No retroactivity.

II. Content

The Brokerage Simplification Act creates an exemption for qualifying brokers and transactions from federal securities laws requiring a securities license (such as a Series 7 license) to sell a business through a stock sale.

II. Content

Size Cap - Business size not to exceed:

- ▣ \$250M Gross Revenue; or
- ▣ \$25M EBITDA.

II. Content

Business must be private

- ▣ No publicly traded businesses;
- ▣ No pink sheets businesses.

II. Content

Restrictions on transaction structure:

- ▣ Sale must be of a controlling interest (defined as 25% of stock or greater);
- ▣ Buyer must be actively involved in management after the transaction; and
- ▣ The securities sold must be those of the seller (no new issue/underwriting).

II. Content

There are other restrictions as well, such as no adverse FINRA actions, so check the statute before you proceed.

III. Implications

Here is what it means:

- ▣ SEC/FINRA oversight is no longer a concern;
and
- ▣ Fractional stock sales are viable if compliant.

IV. The Problem

The Brokerage Simplification Act is federal only.

- ▣ California blue sky laws still apply;
- ▣ The scope of securities transactions in which a broker with a real estate license can engage is limited by 10 CCR 260.204.1.

IV. The Problem

An exemption from the provisions of Section 25210 of the Code is hereby granted, as being necessary and appropriate in the public interest and for the protection of investors, to any person who is a real estate broker as defined in Section 10131 of the Business and Professions Code, duly licensed to engage in the business of a real estate broker in this state, and whose business as a broker-dealer, in addition to any transactions within Section 25206 of the Code, is limited to any or all of the following:

(a) Transactions involving all of the outstanding securities of an existing business if the transactions have been negotiated as transactions for the purchase or sale of real estate or substantially all of the assets of the existing business, or both, but excluding those transactions involving a merger, consolidation, or other reorganization; or

(b) Transactions in the shares or memberships of mutual water companies in connection with a sale of an interest in real property; or

(c) Transactions in investment contracts sold or offered for sale with, or as part of, residential condominium units or time share uses or estates, if the sale of such investment contracts has been qualified pursuant to Chapter 2, (commencing with Section 25110), Part 2, Division 1, Title 4 of the Code; or

V. Summary

What does this mean?

- ▣ The SEC is no longer a concern for qualifying transactions;
- ▣ California limitations still apply;
- ▣ California law needs to be harmonized with federal law; and
- ▣ Until then, business as usual.

Questions?

Please forward questions to: tg@boydlawapc.com

Thank you

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WHAT ARE SOME OF THE
REOCCURRING
INDEMNIFICATION ISSUES IN
LARGER/SOPHISTICATED SALE
TRANSACTIONS?

1. Definition (California Civil Code Section 2772)

“Indemnity is a contract by which one engages to save another person from a legal consequence of the conduct of one of the parties, or of some other person.”

2. Scope of Indemnification

(a) Reps and Warranties (distinguishing fundamental representations)

(b) Agreement Covenants

(c) Claims and Liabilities from Pre- or Post-Closing Operation of the Business

3. Parties Covered by Indemnification

4. Limitations on Indemnification Obligations

(a) Basket and Cap – primarily for Reps and Warranties

(b) Exclusions of Certain Types of Damages

(c) Time Limitations for Bringing Claims

(d) Insurance Ramifications

(e) Mitigation Obligations

(f) Exclusive Remedy?

5. Procedural Requirements and Legal Counsel Defense Issues

6. Sources of Indemnification Recovery

(a) Indemnification Escrow

(b) Set-Offs

(c) Direct Payment by Indemnifying Party

Questions?

1. The Financing Contingency in the CABB Form APA sets time limits for:

Loan Application Submittal (within ___ days from Signing)

- Conditional Approval Letter (within ___ days from Signing)
- Obtain Funding (within ___ days from Signing)

Best efforts, from both parties, are required to satisfy the contingencies within the timelines.

2. If the timelines are not met, either party may terminate, and the deposit is returned.

- a. Should a buyer waive the contingency prior to funding (and prior to closing)?
- b. Should CABB remove the “out?”
- c. Should the funding contingency be timed to the Closing rather than the Signing?

Questions?