

Statement of Policy

Registration of “M&A brokers” under the Tennessee Securities Act of 1980

The Securities Division of the Tennessee Department of Commerce and Insurance (“Division”) sets forth this Statement of Policy regarding the registration of “M&A brokers” under the Tennessee Securities Act of 1980 (“Act”), as amended, Tenn. Code Ann. §§ 48-1-101 through 48-1-201 (2017). For purposes of this Statement of Policy, “M&A broker” generally means any 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.

Background

Like Tennessee, federal law requires any person who engages in the business of effecting securities transactions for the account of others to register as a broker-dealer unless the person qualifies for an exemption from registration.¹ In June, 2013, the 113th United States Congress took up a bill entitled the Small Business Mergers, Acquisitions, Sales, and Brokerage Act of 2013, which would establish a new exemption from federal registration for M&A brokers.² While the legislation was pending, the Securities and Exchange Commission (“SEC”) took up the issue in the form of a No-Action Letter.³ In the letter, dated January 30, 2014 (revised February 4, 2014), the SEC advised that it would not recommend enforcement against unregistered M&A brokers who effect the purchase or sale of eligible privately held businesses, subject to certain conditions.⁴

Despite unanimous support for the 2013 bill in the House of Representatives, the Senate declined to extend the exemption from federal registration to M&A brokers. An identical bill was introduced the following session, but it too ultimately failed, with minority members of the House Committee on Financial Services noting that many of the investor protections contained in the SEC No-Action Letter were missing from the proposed legislation.⁵

While Congress considered the 2015 legislation, the North American Securities Administrators Association (“NASAA”) took on the issue with its adoption of the Model Rule Exempting

¹ T.C.A. § 48-1-109; 15 U.S.C. § 78o.

² H.R. 2274, 113th Cong. (2013)

³ Colish, Hewitt, Rohrer, Lerner, Silver, & Nathanson, SEC No-Action Letter, Jan. 31, 2014, available at <https://www.sec.gov/divisions/marketreg/mr-noaction/2014/ma-brokers-013114.pdf>.

⁴ Id.

⁵ H.R. Rep. No. 114-400, at 31 (2016).

Certain Merger & Acquisition Brokers (“M&A Brokers”) From Registration.⁶ The Model Rule was based upon the federal legislation originally proposed in 2013⁷ and contains some of the conditions set forth in the SEC No-Action Letter. A handful of states⁸ have adopted the Model Rule, or a version thereof, since its publication in September, 2015, and a new version of the Small Business Mergers, Acquisitions, Sales, and Brokerage Act was introduced for consideration by the 115th House of Representatives on January 12, 2017⁹. The new legislation, virtually identical to the Model Rule, was passed by the House of Representatives under Title IV of The Financial CHOICE Act of 2017, but its fate remains undetermined by the Senate.¹⁰

Registration of M&A Brokers in Tennessee

The Division is working to promulgate a rule which will provide for a limited exemption from registration for M&A brokers, which will include provisions that are substantially similar to those contained in the NASAA Model Rule. During the pendency of the new rule, the Division will continue to uphold the registration requirements of the Act; however, it will not recommend enforcement actions against M&A brokers who meet the qualifications and conditions set forth under the NASAA Model Rule, published below.

⁶ Model Rule Exempting Certain Merger & Acquisition Brokers (“M&A Brokers”) From Registration, North American Securities Administrators Association, Sept. 29, 2015, available at <http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2011/07/MA-Broker-Model-Rule-adopted-Sept-29-2015-corrected.pdf>.

⁷ Letter from North American Securities Administrators Association, Inc. to Hon. Joe Manchin and Hon. David Vitter, United States Senate, Sept. 8, 2014, available at <http://www.nasaa.org/wp-content/uploads/2013/10/NASAA-Letter-to-Senators-Manchin-and-Vitter-Re.-S.-1923-09.08/2014-Final-PDF.pdf>.

⁸ What Business Brokers and M&A Advisors Need to Know About: The Campaign for Clarity, and HR 868 and S 1010, AM&AA Winter Conference, Jan. 14, 2016, available at <http://www.amaaonline.com/wp-content/uploads/2016/01/AMAA-CFC-Update-1-13-16-1.pdf>.

⁹ H.R. 477, 115th Cong. (2017).

¹⁰ H.R. 10, 115th Cong. (2017); see also H.R. 10 – Financial CHOICE Act of 2017, available at <https://www.congress.gov/bill/115th-congress/house-bill/10>.

**Model Rule Exempting Certain Merger & Acquisition
Brokers**

**(“M&A Brokers”) From
Registration**

*Adopted September 29,
2015**

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. 78l 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.

(C) DISQUALIFICATIONS – A Merger and Acquisition Broker is not exempt from registration under this paragraph if such broker is subject to –

- (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);
- (ii) A statutory disqualification described in section 3(a)(39) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(39);
- (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) **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 –

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

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

- (ii) **ELIGIBLE PRIVATELY HELD COMPANY –IN GENERAL** – The term “eligible privately held company” means a company meeting 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. 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).

- (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.
- (iii) Merger and Acquisition Broker – The term “Merger and Acquisition Broker” means any 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 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 –
- (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, 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
 - (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 management 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) PUBLIC SHELL COMPANY – The term “public shell company” is 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) has no or nominal operations; and

(III) 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; 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.