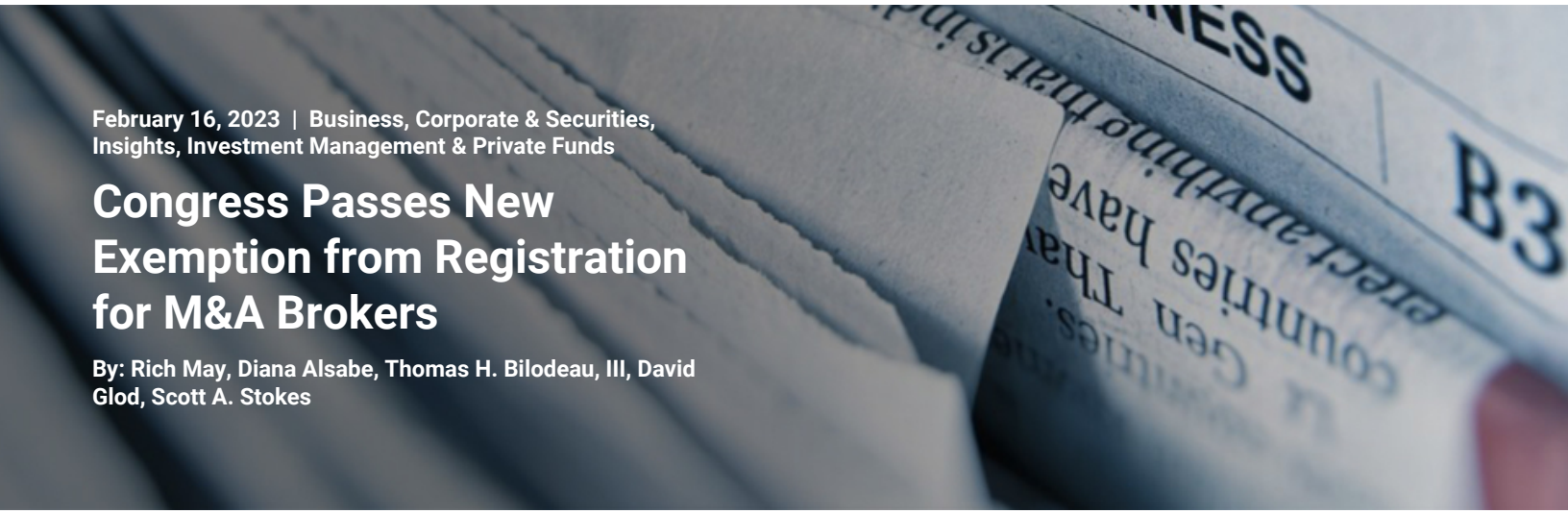

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Congress Passes New Exemption from Registration for M&A Brokers

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Overview

In a positive development for qualifying mergers and acquisitions brokers ("M&A Brokers"), Congress passed updated legislation that modifies Section 15(b) of the Exchange Act to exempt M&A Brokers from federal registration with the Securities and Exchange Commission. The legislation was signed by President Biden on December 29, 2022, and takes effect on March 30, 2023.

Background on Registration Obligations for M&A Brokers

Historically, M&A Brokers have maintained a fraught relationship with Section 15 of the Exchange Act, which mandates SEC registration for securities brokers. Section 15(a) of the Exchange Act sets forth the general definition and registration obligations for brokers and dealers. Section 15(b) identifies the manner of registration for brokers and dealers, in addition to exemptions from registration where applicable.

The SEC has relied extensively on the January 31, 2014 SEC M&A Brokers No Action Letter (the "No-Action Letter"), which provided that M&A Brokers in private M&A transactions would be exempt from SEC registration under Section 15(b) of the Exchange Act, provided certain criteria were satisfied. The No-Action Letter held that M&A Brokers may advertise a privately held company of any size for sale, with information regarding the business description, the general location of the business, and a price range, without acting in contravention of registration requirements under Section 15.

The North American Securities Administrators Association ("NASAA"), which regulates state-level securities activity, issued a Model Rule Exempting Certain Merger & Acquisition Brokers ("M&A Brokers") From Registration (the "Model Rule") in September 2015. While NASAA's Model Rule is not SEC-enforceable, it is consistent with the substance of the new amendments to the Exchange Act.

The Good News for M&A Brokers

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The newly-passed *Division AA, Title V, Small Business Mergers, Acquisitions, Sales and Brokerage Simplification* ("Title V") provides that certain M&A Brokers are exempt from registration under Section 15(b), by implementing a Subsection (13) ("Subsection (13)") that defines an M&A Broker, and carves out exemptions from the registration requirements. Subsection (13) draws extensively from both the No-Action Letter, and the NASAA Model Rule, to provide a framework of relief for M&A Brokers.

Subsection (13) now 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. Further, Subsection (13) provides that the M&A Broker must reasonably believe that upon conclusion of the transaction, any persons acquiring securities of the company shall control the company and directly or indirectly be active in management of the company.

Subsection (13) provides an exemption from SEC registration for M&A Brokers, provided the broker does not engage in any of the following prohibited activities: (a) possessing funds to be transmitted or exchanged by parties to the transaction; (b) engaging on behalf of an issuer in a public offering of a security that is or should be registered with the SEC; (c) engaging in a transaction involving a shell company; (d) providing direct or indirect financing relating to the transfer of ownership; or (v) assisting any party to obtain financing from any unaffiliated third-party without complying with all applicable laws and disclosure obligations.

Subsection (13) also defines an "eligible privately company" as a private company that (a) has no class of securities registered, or required to be registered under the Exchange Act, AND (b) had less than $250 million in gross revenue during its last fiscal year or less than $25 million in EBITDA in its last fiscal year. Subsection (13) also provides for an inflation adjustment five years after the date of enactment and every five years thereafter.

The Bad News for Bad Actors

Like the original No Action Letter that the SEC relied on for guidance surrounding M&A Brokers, M&A Brokers subject to Subsection (13) must not have been previously barred or suspended from association with a broker or dealer.

When is This Exemption Effective?

The amendment set forth in Title V was enacted on December 29, 2022, and takes effect on March 30, 2023. It is unclear whether (or when) the SEC will withdraw the No-Action Letter in connection with the effectiveness of the exemption.

How Does This Affect Me as an Actual or Potential M&A Broker?

If you are not an M&A Broker at this time, but considering engaging in the types of transactions that would qualify you as one pursuant to SEC guidance, consider that customary registration obligations are still in effect until March 30, 2023. Absent withdrawal of the No-Action Letter, however, an M&A broker could still rely on the No-

Action Letter, even after the exemption is effective.

M&A brokers currently relying on the No-Action Letter now may be eligible to rely on a federal exemption once effective. Those who do not fall within its parameters will want to pay close attention to whether the SEC withdraws the No-Action Letter. All M&A brokers should stay tuned for SEC and state regulatory developments.

Disclaimer: This summary is provided for educational and informational purposes only and is not legal advice. Any specific questions about these topics should be directed to attorneys Thomas Bilodeau III, Scott Stokes, David Glod, or Diana Alsabe.