

# 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. 78o(b) 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(b) 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) 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** –
  - (1) **IN GENERAL** – The term “eligible privately held company” means a company meeting both of the following conditions:
    - (aa) 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. 78o(b), 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).

(bb) 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 –

(1) 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. 78o(b), 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

(2) has no or nominal operations; and

(3) 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 (D)(ii)(II) shall be adjusted by –

(1) 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

(11) multiplying such dollar amount by the quotient obtained under sub clause (1).

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