Subject: File No. S7-13-20
From: Marc Wilson
Affiliation:

Nov. 12, 2020

Dear Ms. Countryman,

I previously submitted comments by e-mail with a PDF attachment, but after reading some of the other comments submitted so far, I wanted to add the following supplemental remark:

There are hundreds of "business brokers" in the United States who are responsible for matching parties for purposes of buying and selling business assets. (One example in my part of the country, with whom I have no affiliation, is ABMI Mergers & Acquisitions, www.abmi.net.) To the extent these business brokers assist in effecting transactions in assets, they are not a concern of securities regulators. In my experience as a transactional attorney, the vast majority of transactions of this type happen as asset purchases and sales, and with financing that does not involve issuance of securities to passive, arm's-length investors (e.g., bank, SBA, or private finance company debt; borrowing from a family member; self-directed 401(k), etc.).

As mentioned in my previous comments at n.7, most transactions begin with the intent to be asset purchases or sales. There are good reasons for that having nothing to do with securities regulation. Asset transactions are generally preferred for reasons of taxation and reduced tail liability. Occasionally, though, the particular needs of a buyer or seller demand that the transaction be restructured as a sale of equity or debt. Only when this happens do securities laws come into play.

Asset purchase and sale matchmaking is a massive, thriving, legitimate business that almost certainly accounts for more small business transactions, economic growth and job creation than results from the purchase and sale of small business securities. From the perspective of those involved in these transactions -- the parties, their business broker, and their professional advisors – it is not intuitive that securities regulators should all of a sudden become a concern when a late-breaking decision is made to effect the transaction in securities. (Don't worry, guys like me remind them.) Their attitude is, "We do this all the time, why does this change make a difference?"

The M&A Broker Letter provides an important stop-gap to get these deals done. If, as usual, the advice the business broker provides fits the criteria of the M&A Broker Letter, the transaction can be documented accordingly and proceed. (Notwithstanding a review of state securities laws, of course.) If the guidance in M&A Broker Letter was not available, a certain portion of these deals would not close, and that would have a negative effect on job creation and economic growth.

The M&A Broker Letter strikes the right regulatory balance for this small business transaction matchmaking market, the great majority of which is not the focus of securities regulators. As the SEC points out in the Release, the anti-fraud securities laws would apply to any transaction in securities, even those described above. In my experience, though, the very presence of a matchmaker / finder is to make sure their customer has their ducks in a row, that what is being bought or sold is the real deal. This is true whether the transaction is asset- or equity-based.

Finally, I would like to reiterate that having the M&A Broker Letter codified by regulation is what this segment of the market needs for legal certainty. I feel like a broken record reminding investors and issuers of securities of the consequences to each of utilizing an unregistered broker-dealer. Likewise regarding reliance on a series of no-action letters, as opposed to a clear regulation.

The M&A Broker Letter has been utilized since 2014, and its forebears for years before that. The fact that the SEC is now considering utilizing this tried-and-true framework for certain securities offerings tells me that there have been no serious gaps of flaws associated with its use by market participants.

If that is indeed the case, it is time to codify the M&A Broker Letter into a regulation upon which the capital markets may rely. The proposed requirements of written agreements and notices when a finder is involved enhances all deal participants' understanding of the limited role of the finder, and provides notice to participants that the transaction is proceeding in accordance with the law.

Thank you again for the opportunity to comment on this important potential exemption, consideration of which is long overdue.

Marc S. Wilson

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