UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
TRADING AND MARKETS

March 29, 2023

Faith Colish, Esq., Carter Ledyard & Milburn LLP
Martin A. Hewitt, Esq., Fried, Frank, Harris, Shriver & Jacobson LLP
Eden L. Rohrer, Esq., K&L Gates LLP
Linda Lerner, Esq., Halloran Farkas + Kittila LLP
Ethan L. Silver, Esq., Lowenstein Sandler LLP
Stacy E. Nathanson, Esq., Enterprise Community Investment, Inc.

RE: M&A Brokers

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

By letter dated January 31, 2014, and revised February 4, 2014 (the "M&A Broker Letter"), the Division of Trading and Markets stated that it would not recommend enforcement action to the Commission under Section 15(a) of the Securities Exchange Act of 1934 ("Exchange Act") against certain persons who engaged in a limited securities business as described in the letter.[1] As discussed therein, those persons would effect securities transactions in connection with the transfer of ownership and control of a privately-held company under certain terms and conditions without registering as a broker-dealer.

As you may know, Congress recently adopted an exemption from the broker-dealer registration requirement in Section 15(b) of the Exchange Act for a class of defined "M&A Brokers."[2] M&A Brokers under the statute are permitted to engage in conduct that is largely similar to that discussed in the M&A Broker Letter, subject to certain additional conditions and limitations. Notably, under the new exemption, an "eligible privately held company" that is the subject of the securities transaction must not have exceeded certain specified earnings and gross revenues in the preceding fiscal year.[3]

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[1] Letter from David Blass, Chief Counsel, Division of Trading and Markets, SEC to Faith Colish, Esq., Carter Ledyard & Milburn LLP, et al. re: M&A Brokers (dated Jan. 31, 2014, rev. Feb. 4, 2014).

[2] Consolidated Appropriations Act, 2023, H.R. 2617, 117th Cong. § 501 (2022) (codified in Sec. 15(b)(13) of the Exchange Act, 15 U.S.C. 78(b)(13)).

[3] Exchange Act Sec. 15(b)(13)(E)(iii)(II), 15 U.S.C. 78(b)(13)(E)(iii)(II).

In light of the new statutory exemption regarding the permissible scope of activity by unregistered persons engaged in these activities, the staff believes it is appropriate to withdraw the M&A Broker Letter effective immediately.

If you have any questions regarding this letter or the application of the statutory exemption to your clients' activity, please contact the Office of Chief Counsel of the Division of Trading and Markets at (202) 551-5550.

Sincerely,

Russell, Emily
Digitally signed by Russell, Emily
Date: 2023.03.29 12:08:18
-04'00'

Emily Westerberg Russell
Chief Counsel and Associate Director

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC 20549

DIVISION OF
TRADING AND MARKETS

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

Withdrawn March 29, 2023

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

Withdrawn March 29, 2023

the business conducted with the assets of the company. A buyer could actively operate the company through the power to elect executive officers and approve the annual budget or by service as an executive or other executive manager, among other things.

A "privately-held company" for purposes of this letter is a company that does not have any class of securities registered, or required to be registered, with the Commission under Section 12 of the Exchange Act, or with respect to which the company files, or is required to file, periodic information, documents, or reports under Section 15(d) of the Exchange Act. Any privately-held company that is the subject of this letter would be an operating company that is a going concern and not a "shell" company.[1]

You requested relief on behalf of M&A Brokers that facilitate mergers, acquisitions, business sales, and business combinations (together, "M&A Transactions") between sellers and buyers of privately-held companies, without regard to the size of the privately-held companies. Your letter contemplates that the M&A Broker may advertise a privately-held company for sale with information such as the description of the business, general location, and price range.

In issuing this letter, we note in particular your representations that:

1. The M&A Broker will not have the ability to bind a party to an M&A Transaction.

2. An M&A Broker will not directly, or indirectly through any of its affiliates, provide financing for an M&A Transaction. An M&A Broker that assists purchasers to obtain financing from unaffiliated third parties must comply with all applicable legal requirements, including, as applicable, Regulation T (12 CFR 220 *et seq.*), and must disclose any compensation in writing to the client.

3. Under no circumstances will an M&A Broker have custody, control, or possession of or otherwise handle funds or securities issued or exchanged in connection with an M&A Transaction or other securities transaction for the account of others.

4. No M&A Transaction will involve a public offering. Any offering or sale of securities will be conducted in compliance with an applicable exemption from registration under the Securities Act of 1933 ("Securities Act"). No party to any M&A Transaction will be a shell company, other than a business combination related shell company.[2]

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[1] A "shell" company is a company that: (1) has no or nominal operations; and (2) has: (i) no or nominal assets; (ii) assets consisting solely of cash and cash equivalents; or (iii) assets consisting of any amount of cash and cash equivalents and nominal other assets. In this context, a "going concern" need not be profitable, and could even be emerging from bankruptcy, so long as it has actually been conducting business, including soliciting or effecting business transactions or engaging in research and development activities.

[2] The term "business combination related shell company" means a shell company (as defined in Securities Act Rule 405) that is: (1) formed by an entity that is not a shell company solely for the purpose

Withdrawn March 29, 2023

5. To the extent an M&A Broker represents both buyers and sellers, it will provide clear written disclosure as to the parties it represents and obtain written consent from both parties to the joint representation.

6. An M&A Broker will facilitate an M&A Transaction with a group of buyers only if the group is formed without the assistance of the M&A Broker.

7. The buyer, or group of buyers, in any M&A Transaction will, upon completion of the M&A Transaction, control and actively operate the company or the business conducted with the assets of the business. A buyer, or group of buyers collectively, would have the necessary control if it has the power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. The necessary control will be presumed to exist if, upon completion of the transaction, the buyer or group of buyers has the right to vote 25% or more of a class of voting securities; has the power to sell or direct the sale of 25% or more of a class of voting securities; or in the case of a partnership or limited liability company, has the right to receive upon dissolution or has contributed 25% or more of the capital. In addition, the buyer, or group of buyers, must actively operate the company or the business conducted with the assets of the company.

8. No M&A Transaction will result in the transfer of interests to a passive buyer or group of passive buyers.

9. Any securities received by the buyer or M&A Broker in an M&A Transaction will be restricted securities within the meaning of Rule 144(a)(3) under the Securities Act of 1933 because the securities would have been issued in a transaction not involving a public offering.

10. The M&A Broker (and, if the M&A Broker is an entity, each officer, director or employee of the M&A Broker): (i) has not been barred from association with a broker-dealer by the Commission, any state or any self-regulatory organization; and (ii) is not suspended from association with a broker-dealer. This staff position is limited to the registration requirements of Section 15(a) of the Exchange Act. Other provisions of the federal securities laws, including but not limited to the anti-fraud provisions, continue to apply. The staff expresses no view with respect to any other questions raised by an M&A Transaction, including, but not limited to, the applicability of other federal or state laws to the operation of M&A Brokers.

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of changing the corporate domicile of that entity solely within the United States; or (2) formed by an entity that is not a shell company solely for the purpose of completing a business combination transaction (as defined in Securities Act Rule 165(f)) among one or more entities other than the shell company, none of which is a shell company.

If you have any questions regarding this letter, please call Joseph Furey, Joanne Rutkowski, Darren Vieira, or me at (202) 551-5550.

Sincerely,

David W. Blass
Chief Counsel and Associate Director

Withdrawn March 29, 2023

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

January 31, 2014

David W. Blass, Esq.
Chief Counsel and Associate Director
Division of Trading and Markets
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Request for No Action Letter — M&A Brokerage Activities

Dear Mr. Blass:

We are writing to you on our own behalf as attorneys who have represented clients in connection with mergers and acquisitions and similar business brokerage transactions. We respectfully request assurance that the staff of the Division of Trading and Markets (the "Staff") of the Securities and Exchange Commission (the "Commission") will not recommend enforcement action to the Commission under Section 15(a) of the Securities Exchange Act of 1934 (the "Exchange Act") if a person were to engage in the activities described in this 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.

Background

A long-standing issue in the area of broker-dealer regulation concerns the treatment of persons who help to facilitate the sale of operating businesses. For many years there was an open question as to whether a sale of all of or a controlling interest in a business was a securities

transaction or effectively a sale of the assets of the company (and not a securities transaction).[1] In *Landreth Timber Co. v. Landreth*[2] (involving the transfer of 100% of the stock of a closely held corporation), and a companion case, *Gould v. Reufenacht*[3] (involving the transfer of 50% of the stock of a closely held corporation), the U.S. Supreme Court answered the question definitively. The Court held that this type of transaction involves a sale of "securities" within the meaning of the Securities Act of 1933 (the "Securities Act") and the Exchange Act.

As a result, a person that is in the business of effecting the sale of operating businesses through the sale of securities generally could be viewed as falling within the meaning of the term "broker" as defined in Section 3(a)(4) of the Exchange Act. Absent an exception or exemption, that person would be required to register as a broker-dealer pursuant to Section 15(a) of that Act and become a member of a self-regulatory organization.[4] If, however, the transaction were structured as an asset sale and did not involve the sale of securities, a person could engage in the same types of "brokering" activities without registering as a broker-dealer.

This is an anomalous result, in that the transaction structure is generally determined based on accounting or tax considerations, rather than on the applicability of the federal securities laws to the transaction or the broker. Further, mergers, acquisitions, business sales, and business combinations (together, "M&A Transactions") between sellers and buyers of privately owned companies are qualitatively different in virtually every respect from traditional retail or institutional brokerage transactions. Most notably, the active role of the buyer and seller in an M&A Transaction distinguishes these transactions from the purchase and sale of securities by retail and other investors for passive investment purposes, which is appropriately effected through the services of a registered broker-dealer.

- A buyer that seeks to acquire control and operate all or part of a seller's business will want to conduct due diligence, often with the assistance of legal counsel, accountants,

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[1] *See, e.g.*, Barbara Black, "*Is Stock a Security?-- A Criticism of the Sale of Business Doctrine in Securities Fraud Litigation,*" (1983), Pace Law Faculty Publications 8; available at http://digitalcommons.pace.edu/lawfaculty/8.

[2] 471 U.S. 681 (1985).

[3] 471 U.S. 701 (1985).

[4] A person that is in the business of effecting the sale of operating businesses through the sale of securities would need to be a member of a national securities association. *See* Exchange Act Sections 15(b)(8) and (9). At present, the only registered national securities association is the Financial Industry Regulatory Authority ("FINRA"). If the person in question is an individual, he or she could become registered as a representative of a FINRA member, provided that the FINRA member was engaged to effect the sale.

and other business consultants. Depending on the size of the transaction, a buyer may engage the services of an intermediary in connection with due diligence, valuation issues, structuring concerns and various business-related issues.

- A seller, in turn, is also actively involved. The seller of a business may need to provide access to both current and historical business-related information.[5] An intermediary also may assist a seller with, among other things, advice about potential buyers, valuation issues, due diligence, structuring concerns and various business-related issues.

The particular services to be provided by an intermediary will differ depending on the facts and circumstances of the particular M&A Transaction. There is no "one-size-fits-all" M&A Transaction template. Rather, there are a number of variables that can affect the structure, timing and ultimate outcome of an M&A Transaction. The terms and conditions of these transactions are typically subject to negotiation between the seller and buyer, and memorialized in a series of transaction-related agreements that may involve legal counsel, accountants, commercial bankers, and other business consultants for either or both of the parties.

Intermediaries in M&A Transactions can perform a valuable function in preserving and creating jobs, and maximizing shareholder value. They can assist buyers by, among other things, bringing potential acquisitions to their attention. They can benefit sellers as well by exposing their businesses to a wider range of potential purchasers than the seller itself might be able to identify. Such exposure can result in competing bids, thus assisting the seller to maximize the sale price and perhaps shortening the time to conclude a sale.

As the ABA Task Force on Private Placement Broker-Dealers noted in its 2005 Report, broker-dealer registration imposes significant costs, as well as a regulatory model that is not "right-sized" to accommodate the particular role played by these intermediaries.[6] The registration process is lengthy, and costs and fees, together with start-up and first-year expenses, including legal, accounting and operating costs, can equal several hundred thousand dollars. Persons effecting only one or several transactions a year simply cannot bear this financial burden. These firms do not hold customer funds or securities, and many merely introduce the parties to one other and transmit documents between the parties, not participating in structuring or negotiating these transactions or otherwise advising the parties. Both buyers and sellers in this type of transaction are typically represented by legal counsel who can assist with due diligence, draft the transaction documentation and advise their clients on structure, tax considerations and

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[5] This information and related documentation is commonly prepared for management or tax purposes, rather than for presentation to prospective buyers.

[6] This and other concerns related to unregistered "finders" were discussed at length in the American Bar Association Report and Recommendation of the Task Force on Private Placement Broker-Dealers, dated June 20, 2005.

contractual provisions, and there are remedies, both contractual and by operation of law, that are available to the parties to these types of transactions.

For the reasons explained above, efforts should be made to expand, not contract, the number of persons who can provide this service. We believe that the active roles and business objectives of each seller and buyer, together with the nature of the underlying transactions and the availability of remedies, both contractual and by operation of law, provide significant protections for the parties, and so form a basis for relief for the intermediaries from the requirements and costs associated with registration as a broker-dealer under Section 15(b) of the Exchange Act. Moreover, we note that state securities and other laws regulate various aspects of these activities.[7]

Limitations on the Applicability of Relief under Current No-Action Letters

The Staff has issued two letters providing limited relief in this area. *Country Business, Inc.* (SEC No-Action Letter, November 8, 2006) ("*Country Business*"), and *International Business Exchange Corporation* (SEC No-Action Letter, December 12, 1986) (individually, a "Letter", and collectively, the "Letters"). In *Country Business*, the Staff agreed not to recommend enforcement action under Section 15(a) if Country Business engaged in certain limited activities without registering as a broker-dealer. The Staff based its relief on representations that:

> (1) if a decision is made to effect the transaction by a sale of securities, Country Business would have a limited role in negotiations between the seller and potential purchasers or their representatives and would not have the power to bind either party in the transaction;
>
> (2) the business represented by Country Business would be a going concern and not a "shell" organization;
>
> (3) the selling company satisfies the size standards for a "small business" pursuant to the Small Business Size Regulations issued by the U.S. Small Business Administration;
>
> (4) only assets would be advertised or otherwise offered for sale by Country Business;
>
> (5) if the transaction is effected by means of securities, it would be a conveyance of 100% of the equity securities to a single purchaser or group of purchasers formed without the assistance of Country Business;

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7 The states will still have all the registration and enforcement tools presently available to them, and we note that historically there has been little need for state regulatory intervention in these transactions. In addition, we are seeking relief from registration under Section 15 only. The other provisions of the federal securities laws, including the anti-fraud provisions, will of course continue to apply.

(6) Country Business would not advise the two parties whether to issue securities, or otherwise to effect the transfer of the business by means of securities, or assess the value of any securities sold (other than by valuing the assets of the business as a going concern);

(7) the compensation of Country Business would be determined prior to the decision on how to effect the sale of the business, would be a fixed fee, hourly fee, a commission, or a combination thereof, based upon the consideration received by the seller, regardless of the means used to effect the transaction and would not vary according to the form of conveyance (*i.e.*, securities rather than assets);

(8) the compensation of Country Business would be received in the form and at the times described below; and

(9) Country Business would not assist purchasers with obtaining financing, other than providing uncompensated introductions to third-party lenders or help with completing the paperwork associated with loan applications.

Significantly, *Country Business* permits the intermediary to receive transaction-based compensation. Under the Letter, the compensation must be determined prior to the decision on how to effect the sale of the business and must be payable in cash. Additionally, the parties may agree, prior to the decision on how to effect the sale of the business, to defer the intermediary's compensation to the same extent that the consideration paid by the purchaser to the seller is deferred (*i.e.*, if consideration to the seller from the purchaser is paid in part upon, and in part after, closing, the intermediary could likewise receive its compensation in part upon, and in part after, closing).

Country Business imposed significant restrictions on the role, and hence the utility, of the intermediary. Only the assets of the business may be listed for sale. The intermediary cannot advertise or otherwise promote the sale of securities. Any decision to effect the transfer of a business by means of a securities sale must be made solely by the purchaser and seller without the recommendation of the intermediary. If a decision is made to effect the transaction by a sale of securities, the intermediary must limit its role to the following:

(1) transmitting documents between the parties;

(2) valuing the assets of the business as a going concern;

(3) providing the seller with administrative support; and

(4) assisting the seller with preparation of financial statements.

An intermediary seeking to rely on *Country Business* also cannot otherwise be involved in negotiating the terms of the sale between or among the parties, or offer advice to either the purchaser or seller about the value of the securities, other than valuing the assets of the business as a going concern. Although the intermediary may prepare a detailed description of the seller's

company based on information supplied by the seller, including historical financial data and publicly available information, the intermediary must apprise potential purchasers that it makes no representations about the accuracy of the information provided.

International Business Exchange Corporation, which was issued 20 years earlier, differed from *Country Business* in two significant ways. First, it did not include any reference to the size of the business being sold but excluded only entities that are not closely held. Second, *International Business Exchange Corporation* did not require that a compensation determination be made prior to determining the structure of the transaction, but only that compensation not vary by the type of transaction.[8]

A person seeking to rely on the Letters cannot engage in negotiations on behalf of a client, advise the client whether to issue securities, or assess the value of any securities sold. Transactions are limited to the sale of 100% of the equity of the company to be acquired. Moreover, the Letters leave unclear whether alternative fee arrangements are permissible in connection with the sale of larger businesses.[9] Finally, transaction size limits and the seemingly arbitrary distinction between asset sales and securities transactions may have unintended consequences. Among other things:

- The limitations on the size of the transaction may preclude certain intermediaries from participating in transactions that may impact the greatest number of employees and potentially have the greatest economic impact, as well as in the large number of transactions that may fall short of the 100% equity requirement but nonetheless involve a change in control. Although parties to larger transactions may wish to select from the wide array of services offered by sophisticated investment bankers that are registered broker-dealers, we do not believe that buyers or sellers in large transactions should be unduly restricted in their choice of an intermediary.

- An intermediary may seek to limit its participation to transactions involving the sale of assets, rather than securities transactions, to avoid violation of broker registration requirements. However, a securities transaction may be of greater benefit to the buyer

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8 Although *Country Business* is silent in this regard, it is generally viewed as modifying *International Business Exchange Corporation* in those respects.

9 The Letters have created ambiguity about permissible compensation arrangements. *International Business Exchange Corporation* permits the receipt of commissions, but it does not explicitly permit alternative fee arrangements like hourly fees or fixed fees. In contrast, *Country Business* explicitly permits a range of fee arrangements, including commissions and alternative fee arrangements, but only in the context of the sale of small businesses.

and/or seller for tax reasons, or may permit a higher sales price than if the transaction does not involve the transfer of securities. Even when a transaction is structured as a sale of assets, the issuance of promissory notes in connection with the transaction may, depending on the terms of those notes and the holders, result in the unintended consequence of a securities transaction having been effected. It is important for an intermediary to be able to provide assistance as needed in these transactions, regardless of how the principals determine to structure the transaction.

Request for Relief

As noted above, we request assurance that the Staff would not recommend enforcement action to the Commission under Section 15(a) of the Exchange Act if an M&A Broker (as defined below) were to effect securities transactions in connection with the transfer of ownership of a privately held company under the terms and conditions described in this letter.

For purposes of the relief we request, an "M&A Broker" is:

> a broker 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 the business conducted with the assets of the company.[10]

A company is a "privately-held company" if it does not have any class of securities registered, or required to be registered, with the Commission under Section 12 of the Exchange Act or with respect to which the company files, and is not required to file, periodic information, documents, or reports under Section 15(d) of the Exchange Act.

Any privately-held company that is the subject of an M&A Transaction will be an operating company that is a going concern and not a "shell" company.[11]

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[10] An M&A Broker may be involved as well in the purchase, sale, exchange, issuance, repurchase, or redemption of, or a business combination involving, only assets of the company. Absent a securities transaction, those activities would not require broker-dealer registration.

[11] A "shell" company is one that: (1) has no or nominal operations; and (2) has: (i) no or nominal assets; (ii) assets consisting solely of cash and cash equivalents; or (iii) assets consisting of any amount of cash and cash equivalents and nominal other assets. *See* Securities Act Rule 405(i). In this context, a "going concern" need not be profitable, and could even be emerging from bankruptcy, so long as it has actually been conducting

(continued...)

Based on the discussion above, the requested relief would:

1. Permit the M&A Broker to represent either the buyer or the seller of the business, or both of them, so long as the M&A Broker provides clear written disclosure to both parties as to which parties it represents and has obtained written consent from both parties to any joint representation.

2. Permit an M&A Broker to facilitate an M&A Transaction with a buyer or a group of buyers formed without the assistance of the M&A Broker that, upon completion of the M&A Transaction, will control the company or the business conducted with the assets of the company.[12] A buyer, or group of buyers collectively, would have the necessary control if it has the power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. The necessary control will be presumed to exist if, upon completion of the transaction, the buyer or group of buyers has the right to vote 25% or more of a class of voting securities, has the power to sell or direct the sale of 25% or more of a class of voting securities, or, in the case of a partnership or limited liability company, has the right to receive upon dissolution or has contributed 25% or more of the capital. The buyer, or group of buyers, must actively operate the company or the business conducted with the assets of the company.

3. Permit an M&A Broker to facilitate an M&A Transaction involving the purchase or sale of a privately-held company (as defined herein), without regard to the size of the privately-held company.

4. Permit the M&A Broker to participate in M&A Transactions and allow the M&A Broker to advertise a company for sale with information such as the description of the business, general location, and price range.

5. Permit the M&A Broker to advise the parties to issue securities, or otherwise to effect the transfer of the business by means of securities, or assess the value of any securities sold.

(continued…)

business, including soliciting or effecting business transactions or engaging in research and development activities.

12 Such role could be fulfilled through the power to elect executive officers and approve the annual budget, or by service as an executive or other executive manager.

6. Permit the M&A Broker to receive transaction based or other compensation, as agreed by the parties, in connection with an M&A Transaction.

7. Permit the M&A Broker to participate in the negotiations of the M&A Transaction.

8. Apply only in an M&A Transaction that does not involve a public offering. Any securities received by the buyer or M&A Broker in an M&A Transaction will be restricted securities within the meaning of Rule 144(a)(3) under the Securities Act of 1933 because the securities would have been issued in a transaction not involving a public offering.

Under no circumstances will an M&A Broker have custody, control, or possession of, or otherwise handle, funds or securities issued or exchanged in connection with an M&A Transaction or other securities transaction for the account of others.[13] The requested relief would not be available in connection with an M&A Transaction that results in the transfer of interests to a passive buyer or group of passive buyers. The requested relief would also not be available in connection with an M&A Transaction in which any party to the transaction is a shell company, other than a business combination related shell company.[14] The M&A Broker will not have the ability to bind a party to an M&A Transaction. The M&A Broker will not directly, or indirectly through its affiliates provide financing for any M&A Transaction. An M&A Broker that assists purchasers to obtain financing from unaffiliated third parties must comply with all applicable legal requirements, including, as applicable, Regulation T (12 CFR 220 et seq.), and must disclose any compensation in connection with the financing in writing to the client. Finally, any offering or sale in connection with an M&A Transaction will be conducted in compliance with an applicable exemption from registration under the Securities Act. The requested relief would not be available if the M&A Broker (and, if the M&A Broker is an entity, any officer, director or employee of the M&A Broker): (i) has been barred from association with a broker-dealer by the Commission, any state or other U.S. jurisdiction or any self-regulatory organization; or (ii) is suspended from association with a broker-dealer.

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[13] We acknowledge that the handling of investor funds and securities in connection with securities activity could require a person to register as a broker-dealer.

[14] The term "business combination related shell company" means a shell company (as defined in Securities Act Rule 405) that is:

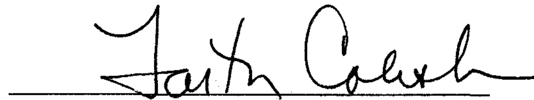
(1) Formed by an entity that is not a shell company solely for the purpose of changing the corporate domicile of that entity solely within the United States; or

(2) Formed by an entity that is not a shell company solely for the purpose of completing a business combination transaction (as defined in Securities Act Rule 165(f)) among one or more entities other than the shell company, none of which is a shell company.

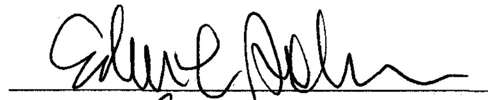
Conclusion

Based upon the foregoing, we request assurance that the Staff would not recommend enforcement action with respect to the M&A Broker activities as described in this letter.

Sincerely,


Faith Colish, Esq., Carter Ledyard & Milburn LLP

Martin A. Hewitt, Esq., Attorney at Law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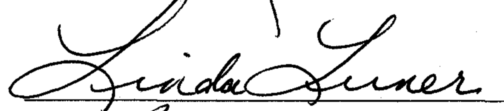
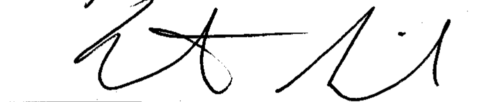

Linda Lerner, Esq., Crowell & Moring LLP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