

[Highlights and annotations]

15 USCS § 78o

Current through Public Law 118-62, approved May 13, 2024.

United States Code Service > TITLE 15. COMMERCE AND TRADE (Chs. 1 — 123) > CHAPTER 2B. SECURITIES EXCHANGES (§§ 78a — 78rr)

§ 78o. Registration and regulation of brokers and dealers

(a) Registration of all persons utilizing exchange facilities to effect transactions; exemptions.

(1) It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.

(2) The Commission, by rule or order, as it deems consistent with the public interest and the protection of investors, may conditionally or unconditionally exempt from paragraph (1) of this subsection any broker or dealer or class of brokers or dealers specified in such rule or order.

(b) Manner of registration of brokers and dealers.

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This is a conditional registration exemption, not an exclusion from the definition of a "broker".

(13) Registration exemption for merger and acquisition brokers.

Key defined term below.

(A) In general. Except as provided in subparagraph (B), an M&A broker shall be exempt from registration under this section.

(B) Excluded activities. An M&A broker is not exempt from registration under this paragraph if such broker does any of the following:

Nine prohibitions and a disqualification.

(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 Commission under section 12 [[15 USCS § 78l](#)] or with respect to which the issuer files, or is required to file, periodic information, documents, and reports under subsection (d).

(iii) Engages on behalf of any party in a transaction involving a shell company, other than a business combination related shell company.

(iv) Directly, or indirectly through any of its affiliates, provides financing related to the transfer of ownership of an eligible privately held company.

(v) Assists any party to obtain financing from an unaffiliated third party without—

(I) complying with all other applicable laws in connection with such assistance, including, if applicable, Regulation T (12 C.F.R. 220 et seq.); and

This does not include capital-raising to fund the transaction.

- (ii) disclosing any compensation in writing to the party.
  - (vi) Represents both the buyer and the seller in the same transaction without providing clear written disclosure as to the parties the broker represents and obtaining written consent from both parties to the joint representation.
  - (vii) Facilitates a transaction with a group of buyers formed with the assistance of the M&A broker to acquire the eligible privately held company.
  - (viii) Engages in a transaction involving the transfer of ownership of an eligible privately held company to a passive buyer or group of passive buyers.
  - (ix) Binds a party to a transfer of ownership of an eligible privately held company.
- (C) **Disqualification.** An M&A broker is not exempt from registration under this paragraph if such broker (and if and as applicable, including any officer, director, member, manager, partner, or employee of such broker)—
- (i) has been barred from association with a broker or dealer by the Commission, any State, or any self-regulatory organization; or
  - (ii) is suspended from association with a broker or dealer.
- (D) Rule of construction. Nothing in this paragraph shall be construed to limit any other authority of the Commission to exempt any person, or any class of persons, from any provision of this title [[15 USCS §§ 78a](#) et seq.], or from any provision of any rule or regulation thereunder.
- (E) Definitions. In this paragraph:
- (i) **Business combination related shell company.** The term “business combination related shell company” means a shell company that is formed by an entity that is not a shell company—
    - (I) solely for the purpose of changing the corporate domicile of that entity solely within the United States; or
    - (II) solely for the purpose of completing a business combination transaction (as defined under [section 230.165\(f\) of title 17, Code of Federal Regulations](#)) among one or more entities other than the company itself, none of which is a shell company.
  - (ii) **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 if, upon completion of a transaction, the buyer or group of buyers—
    - (I) has the right to vote 25 percent or more of a class of voting securities or the power to sell or direct the sale of 25 percent or more of a class of voting securities; or
    - (II) in the case of a partnership or limited liability company, has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital.
  - (iii) Eligible privately held company. The term “eligible privately held company” means a privately held company that meets both of the following conditions:
    - (I) The company does not have any class of securities registered, or required to be registered, with the Commission under section 12 [[15 USCS § 78l](#)] or with respect to which the company files, or is required to file, periodic information, documents, and reports under subsection (d).

These are alternate size caps on the target private company.

(II) In the fiscal year ending immediately before the fiscal year in which the services of the M&A 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):

Actual unadjusted statements.

(aa) The earnings of the company before interest, taxes, depreciation, and amortization are less than \$25,000,000.

i.e., EBITDA.

(bb) The gross revenues of the company are less than \$250,000,000.

For purposes of this subclause, the Commission may by rule modify the dollar figures if the Commission determines that such a modification is necessary or appropriate in the public interest or for the protection of investors.

(iv) M&A broker. The term "M&A broker" means a 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 the 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, if the broker reasonably believes that—

(I) upon consummation of the transaction, any person acquiring securities or assets of the eligible privately held company, acting alone or in concert—

Control presumed at 25% ownership/capital contribution.

(aa) will control the eligible privately held company or the business conducted with the assets of the eligible privately held company; and

(bb) 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, including without limitation, for example, by—

(AA) electing executive officers;

(BB) approving the annual budget;

(CC) serving as an executive or other executive manager; or

(DD) carrying out such other activities as the Commission may, by rule, determine to be in the public interest; and

E.g., the seller will invest rollover equity in the buyer/issuer.

(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 the management of the issuer 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 offer, and information pertaining to the management, business, results of operations for the period covered by the foregoing financial statements, and material loss contingencies of the issuer.

(v) Shell company. The term "shell company" means a company that at the time of a transaction with an eligible privately held company—

(I) has no or nominal operations; and

(II) 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 5 years after the date of the enactment of this paragraph [Dec. 29, 2022], and every 5 years thereafter, each dollar amount in subparagraph (E)(iii)(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, 2020; and

(II) multiplying such dollar amount by the quotient obtained under subclause (I).

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

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## History

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### HISTORY:

June 6, 1934, ch 404, Title I, § 15, 48 Stat. 895; May 27, 1936, ch 462, § 3, [49 Stat. 1377](#); June 25, 1938, ch 677, § 2, [52 Stat. 1075](#); Aug. 20, 1964, [P. L. 88-467](#), § 6, [78 Stat. 570](#); Dec. 30, 1970, [P. L. 91-598](#), § 11 [7](d), [84 Stat. 1653](#); June 4, 1975, [P. L. 94-29](#), § 11, [89 Stat. 121](#); Dec. 19, 1977, [P. L. 95-213](#), Title II, § 204, [91 Stat. 1500](#); May 21, 1978, [P. L. 95-283](#), § 9, [92 Stat. 260](#); June 6, 1983, [P. L. 98-38](#), § 3(a), [97 Stat. 206](#); Aug. 10, 1984, [P. L. 98-376](#), §§ 4, 6(b), [98 Stat. 1265](#), 1266; Oct. 28, 1986, [P. L. 99-571](#), Title I, § 102(e), (f), [100 Stat. 3218](#); Dec. 4, 1987, [P. L. 100-181](#), Title III, § 317, [101 Stat. 1256](#); Nov. 19, 1988, P. L. 100-704, § 3(b)(1), 102 Stat. 4679; Oct. 15, 1990, P. L. 101-429, Title V, §§ 504(a), 505, 104 Stat. 952, 953; Nov. 15, 1990, P. L. 101-550, Title II, § 203(a), (c)(1), 104 Stat. 2715, 2718; Dec. 17, 1993, P. L. 103-202, Title I, §§ 105, 106(b)(2)(B), 109(b)(2), 110, 107 Stat. 2348, 2350, 2353; Dec. 22, 1995, P. L. 104-67, Title I, § 103(a), 109 Stat. 756; Oct. 11, 1996, P. L. 104-290, Title I, § 103(a), 110 Stat. 3420; Nov. 3, 1998, P. L. 105-353, Title III, § 301(b)(8), 112 Stat. 3236; Nov. 12, 1999, P. L. 106-102, Title II, Subtitle A, § 205, 113 Stat. 1391; Dec. 21, 2000, P. L. 106-554, § 1(a)(5), 114 Stat. 2763; July 30, 2002, P. L. 107-204, Title VI, § 604(a), (c)(1)(B), 116 Stat. 795, 796; Sept. 29, 2006, P. L. 109-291, § 4(b)(1)(A), 120 Stat. 1337; July 21, 2010, P. L. 111-203, Title I, Subtitle C, § 173(c), Title VII, Subtitle A, Part I, § 713(a), Subtitle B, §§ 762(d)(4), 766(d), Title IX, Subtitle A, §§ 913(g)(1), (h)(1), 919, Subtitle B, §§ 921(a), 925(a)(1), 929L(3), 929X(c), Subtitle D, § 942(a), Subtitle H, § 975(g), Subtitle I, § 985(b)(5), 124 Stat. 1440, 1646, 1761, 1799, 1828, 1829, 1837, 1841, 1850, 1861, 1870, 1896, 1923, 1933; April 5, 2012, P. L. 112-106, Title III, § 305(d)(1), Title VI, § 601(b), 126 Stat. 323, 326; Dec. 4, 2015, P. L. 114-94, Div G, Title LXXXV, § 85001(2), 129 Stat. 1797; [Dec. 29, 2022, P.L. 117-328, Div AA, Title V, § 501\(a\), 136 Stat. 5538.](#)

Date of enactment of this section. 