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November 2, 2020

Via Email to rule-comments@sec.gov

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Release No. 34-90112; File No. S7-13-20
Notice of Proposed Exemptive Order Granting Conditional Exemption from the Broker Registration Requirements of Section 15(a) of the Securities Exchange Act of 1934 for Certain Activities of Finders

Dear Ms. Countryman,

OpenDeal Inc. (collectively with its subsidiaries, "Republic") respectfully submits this letter in response to the request for comment by the Securities and Exchange Commission (the "Commission"), on its Notice of Proposed Exemptive Order Granting Conditional Exemption from the Broker Registration Requirements of Section 15(a) of the Securities Exchange Act of 1934 for Certain Activities of Finders release, File No. S7-13-20 (the "Proposal"). We thank the Commission for its efforts in publishing the Proposal and the opportunity to provide our comments.

Republic supports the Proposal and believe that its adoption will resolve longstanding uncertainties with respect to Finders' participating in unregistered offerings, encouraging capital formation for small, emerging and underserved private companies. The current health pandemic (the "COVID-19 Pandemic") and the economic uncertainty it has thrown the country (and world) into, has accelerated the need for small businesses to secure operating capital; we believe the adoption of the Proposal is one of many ways the Commission can provide relief during these uncertain times.[1] While we support the Proposal, we do believe, as proposed, it may be too narrow in parts, and too ambiguous in others, to fully achieve the Commission's stated goal of helping small businesses connect with investors in the private market, particularly in regions that lack robust capital raising networks.[2] Therefore we are recommending that the Proposal be amended so that certain entities may avail themselves of the safe harbor, clarity is provided with respect to certain restrictions placed on Tier I Finders, and additional safeguards are provided with respect to certain permissible activities to be conducted by Tier II Finders.

I. Republic's business with respect to unregistered offerings

As a family of companies that includes a registered crowdfunding portal, a registered broker-dealer, an exempt reporting adviser and a game development platform financing its ventures through Regulations A and D, Republic is in the business of servicing and facilitating a wide range of offerings exempted from registration under the Securities Act of 1933, as amended (the "Securities Act"). Republic was founded with the two-sided goal of helping founders traditionally underserved by venture capitalist, broker dealers and the private equity community find funding and support which in turn allows everyday Americans to

[1] As the Commission recently acknowledged in Release No. 33-10781 at 2, ". . . many small businesses are facing challenges accessing urgently needed capital in a timely and cost-effective manner."
[2] Proposal at 4.

become "angel investors" in companies they believe in, real estate projects in their communities and the video games that they play with their friends and family. Republic acts as an aggregator and connector for otherwise underserved opportunities, many of which are under the $5 million dollar offering threshold the Commission identified as necessary to attract traditional funding sources.[3] Despite Republic's focus on small business, as a group of regulated companies, Republic's own listing standards require that the potential issuers display traction before qualifying for Republic's platform. Therefore the first dollars a small business raises are the most critical to its founding and path to future capital. As the Commission acknowledges " . . . so-called "finders," who may identify and in certain circumstances solicit potential investors, often play an important and discrete role in bridging the gap between small businesses that need capital and investors who are interested in supporting emerging enterprises."[4] Finders may also help bridge gaps between traditionally underrepresented founders, such as women and minorities and VC and start-up capital. Republic's interactions with issuers of every ilk has revealed that many would like a way to compliantly compensate persons who introduce them to capital, but are uncomfortable with, or unable to receive, guidance from counsel as to how to do so, reducing the utility of the possible connections.[5] Therefore, Republic believes the time for clear guidance with respect to the use of Finders is now. As the Commission has separately acknowledged, the COVID-19 Pandemic has slowed economies all over the world and small business, startups and early stage companies are facing an unexpected and unprecedented need for capital.[6] By providing an incentive for those, with previously closed rolodexes of prospective investors, to open them to private businesses they believe may prove compelling investment opportunities, and by providing those same companies with a way to incentivize the Finder, the Proposal may help fight the damaging effects the COVID-19 Pandemic has had on small and emerging business in the United States as well a further foster small and emerging business in less economically tumultuous times.

II. Baseline Finder Requirements

The Commission largely modeled the baseline requirements for the Tier I Finder safe harbor, and to a lesser extent, the Tier II Finder safe harbor (what we refer to collectively as the "*baseline requirements*") on the *Paul Anka*, SEC Staff No-Action Letter (July 24, 1991) ("*Paul Anka* Letter"). The *Paul Anka* Letter sees the party seeking relief propose to be compensated solely by the issuer for providing contact information of persons the Finder reasonably believed to be accredited and to which the Finder takes no part in the negotiations between issuer and prospective investor, nor makes any recommendation. The Commission granted conditional relief from the registration requirements of the Exchange Act of 1934 (the "Exchange Act") without providing clear guidance as to why it provided such relief. The *Paul Anka* letter has led to precedent in the courts with similar but not always clearly distinguishable distinctions made between permissibly unregistered Finders versus those that must register as brokers.[7] The Commission later

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[3] Proposal at 4.

[4] *Id*. at 5.

[5] As acknowledge by the Commission, "As a result of this uncertainty, individuals potentially could be engaging in unregistered brokerage activity, or alternatively, not serving the market because of the regulatory uncertainty associated with playing even a limited role in a capital raise." Proposal at 6.

[6] See New York Times (April 13, 2020, updated April 20, 2020), available at https://www.nytimes.com/2020/04/13/business/coronavirus-economy.html., and MetLife & U.S. Chamber of Commerce Special Report on Coronavirus and Small Business (April 3, 2020), available at https://www.uschamber.com/sites/default/files/metlife_uscc_coronavirus_and_small_business_report_april_3.pdf ("With high levels of concern about COVID-19 reported in every sector and region of the country, one in four small businesses (24 percent) report having already temporarily shut down. Among those who haven't shut down yet, 40 percent report it is likely they will shut temporarily within the next two weeks. Forty-three percent believe they have less than six months until a permanent shutdown is unavoidable.").

[7] See also *SEC v. Offill, Civil Actio*n No. 3:07-CV-1643-D (N.D. Tex. Jan. 26, 2012) ("*Offill*") ("If an individual is a "Finder" rather than a broker or dealer, he is not required to register under the Exchange Act. 'The distinction drawn

distinguished the *Paul Anka* Letter against others such as *John Loofbourrow Associates, Inc*. Staff No-Action Letter (June 29, 2006), in which the Commission denied a no action request due to the party intending to pay the Finder being a registered broker dealer subject to rules prohibiting transaction based payments to unregistered persons. After reviewing the case law and no action letters outstanding, we believe that the *baseline requirements* are appropriately modeled. For example, we agree that an issuer's failure to comply with an exemption from registration under the Securities Act should not by itself affect the Finder's ability to rely on the safe harbor, but that the Finder's activities should be imputable on to the issuer if the Finder is acting as an agent; this is due to our belief that this concept will encourage issuer's to take reasonable steps to vet and gain comfort with the Finders they engage. We believe that issuers should be shielded from the bad actor status of a Finder if the issuer took reasonable steps to determine that the Finder was not subject to statutory disqualification, as the term is defined in Section 3(a)(39) of the Exchange Act, such steps could include receiving a representation from the Finder as well as conducting basic due diligence on the Finder through publicly available resources such as the Commission's website. We also agree with the Commission that Finders should only be able to provide contact information for or in the case of Tier II Finders, contact, those investors to which they know to be, or have a reasonable belief are, accredited investors. Our experience has shown that investors of all levels of sophistication and ability to incur risk are very interested in private investment opportunities. We continue to believe that these opportunities, when available to unaccredited investors on a basis any larger than the 35 non-accredited persons allowable under Regulation D, Rule 506(b), should take place on a regulated crowdfunding platform or through an offering statement qualified by the Commission under Regulation A. We also believe the prohibition on general solicitation is necessary and proper for the Proposal to provide the right balance of investor protections coupled with opportunities to form capital around early stage companies. A Finder should have a pre-existing substantive relationship with anyone the Finder solicits as this will reduce the risk of fraudulent inducement by Finders and also better ensure Finders only solicit those persons they know to be, or reasonably believe to be, accredited investors. Finally, we agree that Finder should not be able to avail themselves of the Finder safe harbor if they were involved in structuring the transaction or negotiating the terms of the offering. Due to this prohibition, we believe no limit with respect to the offering exemption utilized by the issuer and the size of such offering should be placed on the Finder, as the Finder will not have the ability to control such matters nor will they always be privy to them.

With respect to persons prohibited from utilizing the Finder safe harbor, we agree with the Commission that a Finder utilizing the safe harbor set forth by the Proposal should not be an associated person of a broker dealer. With the adoption of Regulation Best Interest ("Reg BI"), we believe that a person associated with a broker dealer should not be able to utilize the safe harbor *lest* it be a gateway to circumventing Reg BI. We also believe the prohibition should be extended to registered investment advisers and those persons under their supervision for the same rationale as to why associated persons of registered broker dealers should not be able to avail themselves of the safe harbor. However, we do not believe the *baseline requirements* should be limited to natural persons. Many individuals conduct their businesses and matters through entities for tax, liability, estate planning and other innocuous purposes. From a professional corporation to a single member limited liability company used to shield the personal assets of its member, the Proposal's application solely to natural persons will reduce its utility, as it may make groups of persons who wish to act as Finders in concert due to shared contacts, unable to do so without entering in to multiple agreements severally with an issuer. Therefore we propose that the Commission adopt a rule which allows entities to utilize the Proposal's safe harbor *provided* the entity is not (i) a FINRA-member or controlled by a FINRA-member, (ii) registered or required to register with the Commission under the Exchange Act, Investment Company Act of 1940, or Investment Advisers Act of 1940, (iii) is not, and is not owned or controlled by those person who are, subject to statutory disqualification, as the term is defined in Section 3(a)(39) of the Exchange Act and (iv) was not established to be, and is not conducting the business of being solely or primarily, a Finder. Further, we do not believe the safe harbor should be limited to natural persons

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between the broker and the Finder or middleman is that the latter bring[s] the parties together with no involvement on [his] part in negotiating the price or any of the other terms of the transaction.'").

residing in the United States as this may provide the appearance that foreign persons or those not residing in the United States are not subject to the Exchange Act's registration requirements. We also believe the Commission should provide a templated "Finder's agreement" to which the Commission can set best practices for the written agreement provision of the *baseline requirements*.

III. Observations with respect to Tier I Finders

We believe that the current proposed language for Tier I Finders creates an ambiguity as to whether Tier I Finders may participate in one instance of finding *per* issuer *per* 12-month period or *solely* one instance of acting as a unregistered Finder under the Tier I safe harbor per 12-month period. We support the concept of the "Tier I" Finder, however we do not believe the legacy positions of the Commission support the notion that the unregistered Finder should be limited to engaging in Finder activity once per 12-month period. Previous no action letters did not provide clear guidance on timing and parallel finding activities to any substantive extent, and when these issues were discussed, the Commission historically aired on the side of less restriction.[8] We believe, just as the Commission does, that safe harbors and exemptions should be narrowly drawn in order to promote both investor protection and the integrity of the brokerage community,[9] but that this must be balanced with a practical assessment of the stated goals of the safe harbor and the risks therein. Specifically, we see no distinguishing factor that should prevent a Finder utilizing the Proposal's Tier I with more than one issuer in any 12-month period. If the stated goal of the Proposal is to connect small businesses with investors in the exempt market, particularly in regions that lack robust capital raising networks,[10] we believe tying the hands of those willing to do so to one time in any one twelve month period will needlessly hamper the potential benefits of adopting Tier I. We appreciate that the Commission has stated that no presumption shall arise that a person has violated Section 15(a) of the Exchange Act if such person is not within the terms of the proposed exemption; rather—consistent with how questions under Section 15(a) have been evaluated—it would depend on the facts and circumstances of the situation. However, we do not believe that this presumption will provide enough confidence for Finders wanting to take advantage of the Tier I safe harbor's guidance more than once with different issuers if Tier II is outside of the scope of the activities they intend to conduct. Therefore we believe the Commission should provide for a safe harbor from integration of Tier I Finders' activities if the issuers to which the Tier I Finder is providing services to are wholly independent of one another. Additionally, we believe the Commission should require that an issuer which engages a Tier I Finder should be required to tell any prospective investors contacted, which Finder provided their contact information, as Paul Anka represented he would to the Commission, in order to promote transparency.[11]

IV. Observations with respect to Tier II Finders

While generally supportive of the Tier II Finder proposal, we are concerned that the permissible activities the Proposal would allow an unregistered Finder to perform may encourage those who would traditionally need to be under the supervision of a FINRA-member broker dealer, to operate outside of this tried and true regulatory scheme while receiving the same economic benefits. Most concerning is the ability of a Tier II Finder to (i) discuss issuer information including any offering material provided such discussion does not amount to investment advice and (ii) participate in meetings with the issuer and prospective investor.[12] These two activities have generally been impermissible absent the Finder's (X) registration as a broker, (Y) ability to act in the capacity as a registered or exempt from registration investment adviser, or

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[8] See *Corporate Forum, Inc*. SEC Staff No-Action Letter (Dec. 10, 1972).
[9] See *Persons Deemed Not to Be Brokers,* Exchange Act Release No. 22172, 1985 WL 634795 (June 27, 1985) ("Rule 3a4-1 Adopting Release")
[10] Proposal at 4.
[11] See *Paul Anka* Letter.
[12] See *Statement on Proposed Exemptive Relief for Finders*, Commissioner Caroline A. Crenshaw, October 7, 2020.

(Z) ability to rely on SEC Rule 3a4-1.[13] We are concerned that a Finder's presence may be a form of implicit investment advice and therefore suggest that the Proposal be amended to disallow a Finder's participation in meetings between issuer and prospective investor(s). While we support the Proposal's requirement for a Tier II Finder to provide each potential investor a disclosure form at the time of, or prior to the time of, solicitation we note that the requirements of the proposed disclosure closely mirror Form CRS', further suggesting the requirement is modeled after those that a register broker would be subject to. Therefore, like registered brokers, we believe that Tier II Finders must keep records of all written disclosures provided to prospective investors for at least five years from the date of delivery. Tier II Finders should be required to provide such records to a regulatory of competent jurisdiction if so requested without the need for a subpoena or other order. We propose that the method and manner by which records should be kept should be a reasonableness standard, with the standard deemed met if such records are maintained by an independent third party such as a licensed attorney, notary public or another regulated party. Finally, we believe the commission should amend Form D and its related guidance to provide for the disclosure of any Tier II Finders that have participated in an offering requiring the filing of Form D, in order to encourage transparency with respect to their activities.

V. Encouraging Liquidity

We believe the Proposal should be extended to secondary transactions to encourage liquidity. Private market participants suffer from an illiquidity discount due to the limited methods by which unregistered securities may be re-sold. We believe Tier I Finders should be allowed to receive transaction based compensation from current holders of unregistered securities, provided, a valid offering and sale method by the holder is utilized, in order to help reduce the illiquidity discount that affects unregistered securities, to the benefit of private market participants.

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Thank you for the opportunity to comment on the Proposal. We are available to discuss our comments or any questions the Commission or its Staff may have.

Sincerely,

Maxwell R. Rich
Deputy General Counsel

cc: Kendrick Nguyen
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[13] See *Offill*. See also Proposal at 29, noting that the safe harbor would not insulate a Finder from the requirement to register under the Advisers Act.