DFPG INVESTMENTS

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VIA EMAIL (rule-comments@sec.gov)

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

Re: Proposed "Finders" Exemption (File No. S7-13-20)

Dear Ms. Countryman:

DFPG Investments, LLC ("DFPG"), appreciates the opportunity to submit its thoughts and comments on the Securities and Exchange Commission's (the "SEC") proposed exemption from the broker registration requirement in Section 15 of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), for certain natural person "finders" ("Finders"), who assist issuers with raising capital in private offerings.[1]

As set forth in more detail below, DFPG believes that the proposed exemption (the "Proposed Exemption"), would, if adopted, have the undesirable effect of permitting Finders – who are not licensed and who may not be even passingly familiar with the requirements of the federal securities laws or have an appreciation for the best interests of investors - to facilitate private capital raising activities for issuers while in possession of a salesman's stake in the outcome. DFPG therefore opposes the Proposed Exemption as being inconsistent with the SEC's mission to act in the public interest and, particularly when granting an exemption from Section 15(a), to act in a way designed to foster the protection of investors.

DFPG is a broker-dealer registered as such with the SEC under Section 15(a) of the Exchange Act and is a member in good standing with the Financial Industry Regulatory Authority ("FINRA"). DFPG representatives regularly work with their clients on a host of complex investments, including those that are privately offered in accordance with one or more of the exemptions from registration provided under the Securities Act of 1933, as amended (the "Securities Act"), as well as rules and regulations adopted by the SEC thereunder, including most importantly Regulation D. Based on the firm's experience with the private capital marketplace, it believes that the Proposed Exemption would allow unlicensed personnel to work directly for issuers with prospective investors on potentially complex transactions, and in doing so sacrifice long-standing and important investor protections in the name of permitting issuers to raise capital in a more expedient fashion. We believe that the SEC should find another way to allow investors and issuers to come together for capital raising purposes that does not

[1] Section 15(a)(2) of the Exchange Act authorizes the SEC to conditionally or unconditionally exempt from the registration requirements of Section 15(a)(1) any broker or class of brokers as it deems consistent with the public interest and the protection of investors. Section 36(a)(1) of the Exchange Act authorizes the SEC to exempt, either conditionally or unconditionally, any person, security, or transaction (or any class or classes thereof), from any provision of the Exchange Act or any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

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involve allowing persons with a substantive role and a possible salesman's stake in the outcome to facilitate capital formation without appropriate licensure and supervision.

I. The Proposed Exemption

On October 7, 2020, the SEC proposed a new exemption that would permit natural persons to engage in certain activities on behalf of issuers in the context of unregistered offerings (i.e., offerings not registered under the Securities Act, without registering as brokers under Section 15 of the Exchange Act. The Proposed Exemption provides for two classes of Finders - Tier I Finders and Tier II Finders - with corresponding conditions for each class tailored to their activities. Both Tier I and Tier II Finders would be permitted to accept transaction-based compensation under the Proposed Exemption.

As proposed, the suggested approach would provide a non-exclusive safe harbor from broker registration for qualifying Finders. Accordingly, no presumption would 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. Also, the Proposed Exemption would not affect a Finder's obligation to comply with all other applicable laws, including the anti-fraud provisions of the Securities Act, the Exchange Act, and state law, and is not intended to affect the rights of the SEC (or any other party) to enforce compliance with applicable law.

A. Conditions for both Tier I and Tier II Finders

The Proposed Exemption for Tier I and Tier II Finders would be available only where:

- the issuer is not required to file reports under Section 13 or Section 15(d) of the Exchange Act (i.e., it is not a reporting company);
- the issuer is conducting the offering in reliance on an applicable exemption from registration under the Securities Act;
- the Finder does not engage in "general solicitation;"
- the potential investor is an "accredited investor" as defined in Rule 501 of Regulation D under the Securities Act (or the Finder has a reasonable belief that the potential investor is an "accredited investor");
- the Finder provides services pursuant to a written agreement with the issuer that includes a description of the services provided and the compensation paid;
- the Finder is not an associated person of a broker-dealer; and
- the Finder is not subject to statutory disqualification, as that term is defined in Section 3(a)(39) of the Exchange Act, at the time of his or her participation.[2]

[2] The Proposed Exemption would be limited to Finder activities conducted in connection with primary offerings and only cover the activities defined for each tier of Finder. A Finder could not rely on the Proposed Exemption to engage in broker activity beyond the scope of the Proposed Exemption, such as to facilitate a registered offering, a resale of securities, or the sale of securities to investors that are not accredited investors (or to investors that the Finder does not have a reasonable belief are accredited investors).

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B. Tier I Finders

In addition to compliance with the general conditions for Finders set forth above, a Tier I Finder would be limited to providing contact information of potential investors in connection with a single capital raising transaction by a single issuer in a twelve-month period. Such contact information could include, among other things, name, telephone number, e-mail address, and social media information. A Tier I Finder could not have any contact with a potential investor about the issuer.

C. Tier II Finders

A Tier II Finder could solicit investors on behalf of an issuer if: (i) the general conditions for Finders set forth above are followed; and (ii) the Finder's solicitation-related activities are limited to: (a) identifying, screening, and contacting potential investors; (b) distributing issuer offering materials to investors; (c) discussing issuer information included in any offering materials, provided the Tier II Finder does not provide advice as to the valuation or advisability of the investment; and (d) arranging or participating in meetings with the issuer and investor.

Tier II Finders would also need to satisfy certain disclosure requirements and other conditions to rely on the proposed exemption. In particular, Tier II Finders would need to provide a potential investor, prior to or at the time of the solicitation, with: (i) the name of the Tier II Finder; (ii) the name of the issuer; (iii) a description of the relationship between the Tier II Finder and the issuer, including any affiliation; (iv) a statement that the Tier II Finder will be compensated for his or her solicitation activities by the issuer and a description of the terms of such compensation arrangement; (v) any material conflicts of interest resulting from the arrangement or relationship between the Tier II Finder and the issuer; and (vi) an affirmative statement that the Tier II Finder is acting as an agent of the issuer, is not acting as an associated person of a broker-dealer, and is not undertaking a role to act in the investor's best interest.[3]

D. Prohibited Activities for Finders

Importantly, eligible Finders could not: (i) be involved in structuring the transaction or negotiating the terms of the offering; (ii) handle customer funds or securities or bind the issuer or investor; (iii) participate in the preparation of any sales materials; (iv) perform any independent analysis of the sale; (v) engage in any "due diligence" activities; (vi) assist or provide financing for an investor's purchase of securities; or (vii) provide advice as to the valuation or financial advisability of the investment.

II. Policy Rationale

According to the SEC, the exemption is intended to facilitate capital formation, particularly for small businesses, and to provide regulatory clarity to investors, issuers, and finders while preserving appropriate investor protections. As stated by the SEC, observers have noted that small businesses

[3] These disclosures could be made orally so long as the oral disclosure is supplemented by written disclosure that satisfies the above requirements no later than the time of the investment in the issuer's securities. A Tier II Finder would have to obtain from the investor, prior to or at the time of investment in the issuer's securities, a written acknowledgment of receipt of the required disclosures.

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frequently encounter challenges connecting with investors in the exempt market, particularly in regions that lack robust capital raising networks. Citing to the U.S. Department of Treasury's 2017 white paper entitled "A Financial System that Creates Economic Opportunities: Capital Markets,[4] the SEC notes that "[f]or a small business seeking to raise capital, identifying and locating potential investors can be difficult. It becomes even more challenging if the amount sought (e.g., less than $5 million) is below a level that would attract venture capital or a registered broker-dealer, but beyond the levels that can be provided by friends and family and personal financing. The number of registered broker-dealers has been falling, and few registered broker-dealers are willing to raise capital in small transactions."[5]

In the SEC's view, persons who 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. Finders may also help bridge gaps between traditionally underrepresented founders, such as women and minorities and VC and start-up capital." Additionally, and again according to the SEC, "given the role of intermediaries with respect to capital formation and investor protection, especially for smaller issuers," it is important "to address the regulatory status of persons who engage in certain limited securities-related activities on behalf of issuers." Finally, in presenting its Proposed Exemption, the SEC stated that it "believes that this exemption would provide clarity to investors and issuers and establish clear lanes for both registered broker activity and limited activity by finders that would be exempt from registration."

III. The Proposed Exemption draws the Line in the Wrong Place

DFPG does not disagree with statements made by the SEC regarding the important role played by intermediaries in the capital raising process for private offerings and issuers. Furthermore, it agrees that providing regulatory clarity to this situation is both necessary and appropriate. In DFPG's view, however, having clarity as a goal is important, but it should not cause the SEC to give license to unregistered and unlicensed persons to essentially perform roles that have, in the past, been characterized by the SEC and the courts as involving conduct that is a hallmark of broker-dealer regulation.

A. Existing Approach. The SEC has long approached the question of broker registration by taking the position that "a person who identifies and solicits potential investors for an issuer or other party could be viewed as engaging in activity that indicates broker status." By its own admission, the SEC acknowledges that it has viewed "solicitation" as "any affirmative effort intended to induce a securities transaction, including, but not limited to, telephone calls, mailings, advertising (online or in

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[4] Available at https://home.treasury.gov/system/files/136/A-Financial-System-Capital-Markets-FINALFINAL.pdf ("2017 Treasury Report")

[5] The SEC also cited the following sources: Report and Recommendations of the American Bar Association Business Law Section Task Force on Private Placement Broker-Dealers (June 2005) (stating that small issuers are almost "never interesting" to professional capital and will seldom be able to attract fully licensed members to participate in offerings of less than $5 million); and Gregory C. Yadley, "Notable by Their Absence: Finders and Other Financial Intermediaries in Small Business Capital Formation," (June 2015)("Funding of start-up and new companies is often sought in amounts of $100,000 or less, and rarely more than $5 million. Accordingly, these offerings are not of interest to many professional investors such as venture capital or private equity funds.").

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print), and conducting investment seminars."[6] Further, although it conditions its statement by noting that such is "not required to establish broker status and is not in itself determinative of broker status," the SEC states in the release announcing the Proposed Exemption that "the receipt of transaction-based compensation in connection with securities activities, such as solicitation of potential investors, has been considered by courts as a factor indicating that registration as a broker may be required."

Taking all that into account, DFPG believes that the Proposed Exemption clearly draws the line between conduct that requires regulation and conduct that does not in the wrong place. In regard to its proposed approach to Tier II Finders in particular, DFPG believes that the SEC's Proposed Exemption would permit unlicensed persons to act in a fashion that has historically and, we believe, appropriately, been limited to broker-dealers and their associated persons. Even with the constraints to be imposed on their activities under the Proposed Exemption,[7] the activities to be allowed to Tier II Finders will make them practically indistinguishable from registered persons when it comes to working with clients on their potential participation in private placements and unregistered offerings generally, but without any of the education, supervision, licensure and other requirements required of on brokers who perform an important role in these activities now.

B. Investor Confusion

Tier II Finders, even if required to make the disclosures when and as stated in the SEC's proposing release (see part 1.C., above), will be operating in ways that makes them functionally indistinguishable from registered persons. We have far fewer concerns with the SEC's view of an eligible Tier I Finder, as the mere transmission of names, addresses and contract information to an issuer will not cause the Tier I Finder to perform activities generally performed by registered persons, particularly since such Tier I Finders will not be able to make contract with potential investors on behalf of the issuer or its offering. The latitude provided to Tier II Finders under the SEC's Proposed Exemption, however, will allow unlicensed persons to perform activities that are currently performed under supervision and care (and in compliance with Regulation Best Interest, in many situations), by persons associated with registered broker-dealers that are also FINRA members and as such subject to myriad FINRA rules that go to many aspects of the same process envisioned for Tier II Finders.

In fairness, the SEC acknowledges in its release that "the absence of a regulated intermediary may raise investor protection concerns." Apart from acknowledging said concerns, however, the SEC's Proposed Exemption does little to alleviate them, particularly as it relates to Tier II Finders. The SEC points to the requirement that eligible Finders work only with "accredited investors" as a means of establishing that the recipients of these services are able to effectively fend the for themselves. In the first instance, we question how Finders will establish the requisite knowledge about the persons that they approach,

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[6] According to the SEC, solicitation includes "efforts to induce a single securities transaction as well as efforts to develop an ongoing securities-business relationship."

[7] To reiterate an earlier point, the Proposed Exemption would not permit Finders to: (i) be involved in structuring the transaction or negotiating the terms of the offering; (ii) handle customer funds or securities or bind the issuer or investor; (iii) participate in the preparation of any sales materials; (iv) perform any independent analysis of the sale; (v) engage in any "due diligence" activities; (vi) assist or provide financing for an investor's purchase of securities; or (vii) provide advice as to the valuation or financial advisability of the investment.

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particularly insofar as it touches on their potential accredited investor status. ,The SEC also points to the disclosures required of Tier II Finders, and to the activities that eligible Finders are explicitly not permitted to engage in. We acknowledge that barring eligible Finders from structuring the transaction or negotiating the terms of the offering is a useful control, as are the proposed prohibitions on a Finder handling customer funds or securities or binding the issuer (or investor), participating in the preparation of sales materials, performing any analysis of the sale, engaging in any "due diligence" activities, assisting or providing financing for such purchases, or providing advice as to the valuation or financial advisability of the investment.[8]

While the SEC's attempts to show how these limits placed on the behavior of Finders will serve important investor protection goals, it is simply the case that these limits involve sophisticated concepts and it is simply unrealistic to believe that Finders will be able to comply with them in the course of their activities. In particular, the Proposed Exemption will block Finders from engaging in "general solicitation," but apart from a brief survey of that term set forth in several footnotes, the SEC's release does not provide guidance on what that term means in the context of a Finder that is not regulated as a broker, nor does it envisage an effective regime for policing compliance with this requirement, nor a tailored remedy for dealing with the consequences to an issuer and/or its offering when the "no general solicitation" requirement has been breached. Limits and conditions are necessary and, if drawn correctly and enforceable as written, important components of investor protection. In the case of the Proposed Exemption, however, they are neither and are therefore not likely to promote the avowed goal of investor protection.

C. The Salesman's Stake

The limitations suggested by the SEC are laudable and important, and perhaps could form the basis for a workable exemption if they were consistently applied and enforceable. But there is a further aspect of the Proposed Exemption that fatally undermines the potential value of any such limits. To wit, as envisioned by the SEC, a Finder (either Tier I or Tier II) could receive transaction-based compensation for its finder-related activities. Even with the limits cited by the SEC and listed above , allowing Finders – especially Tier II Finders - to be paid on and even potentially compensated ONLY in respect of the success of a transaction that they have brought to an investor on behalf of an issuer clearly and fatally undermines any and all applicable protections. From the dawn of the federal securities laws in the US in the 1930s, Congress and the SEC have placed additional burdens on those who deal with investors while representing issuers. It is this "salesman's stake" that can and will be possessed by individuals acting as Finders that is worrisome and warrants additional investor protection.

The Proposed Exemption proceeds on the basis that this stake, this proprietary interest, can be ignored in this instance because of other protections placed on the activities of Finders by the Proposed

[8] As the SEC noted, a Finder could not rely on the Proposed Exemption to engage in broker activity beyond the scope of the proposed exemption, "such as to facilitate a registered offering" or a "resale of securities." In addition, the SEC made it clear that a Finder that "takes advantage of the safe harbor provided by the Proposed Exemption" may also need to "consider whether it is acting as another regulated entity, such as an investment adviser or municipal advisor."

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Exemption. Those protections are by and large likely to be useful in the sense that they will lead to fewer unauthorized transactions and/or asset conversion by Finders. What they will not do, however, is reduce the incentive of the Finder who is paid on a transaction basis to get a transaction done whether or not it is suitable for the investor and/or likely to generate a profitable outcome. Or meet any other qualifications that broker-dealers and their representatives are required to focus on, whether it is a current hot button issue like protecting seniors to ones that go to the core of investor protection, including concentration, liquidity and cost.

The SEC adopted an entire regulation designed to make these concerns an essential aspect of a broker-dealer's duty and behavior to its clients. Compliance with the regulation has mandated education, training and new processes to limit or eliminate conflicts of interests that were perceived to have a negative impact on the advice given by brokers to their clients. It is simply neither good policy nor appropriate practice to unleash a category of persons – many of whom may have been regulated in the past as brokers - on the community of investors looking at or for private investment opportunities, and allow them to carry a salesman's stake in the outcome of their effort. It is impossible not to believe and expect that such a course will create investor protection problems and issues that would literally counter the goals of the SEC in adopting Regulation Best Interest.

Investor protection cannot take a back seat in this instance to expediency and a desire to foster capital formation. That would not square with the SEC's past record nor with the agency's mission, as established by Congress. And inasmuch as it would undermine decades of efforts by the SEC and FINRA to ensure that brokers bring with them a host of education, training and supervision to the offer and sale of private offerings to their clients, it would undo those decades of efforts in the name of capital raising ease, surely an ironic mis-prioritization by the SEC.

IV. Conclusion

There are aspects of the SECs Proposed Exemption that are workable, in our view. In particular, there is compelling logic behind the idea of giving Tier I Finders some relief from the broker-registration provisions of the Exchange Act, particularly if they come with the conditions to be imposed on their activities by the SEC under the Proposed Exemption. That said, however, allowing unlicensed persons to have a stake in the success of a transaction (or offering) when dealing with investors exceeds any sensible standard otherwise applicable to this issue. For that reason, the SEC should withdraw its Proposed Exemption as drafted and pose one in its stead that does more to protect investors.

Sincerely,

DFPG Investments, LLC
Michael A. Bendix
CEO

Cc: John H. Grady, Esquire