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November 7, 2020

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: SEC 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:

John R. Fahy, George Lee, Michael Laussade, Carol Mattick, Daryl Robertson and Dan Waller are all members of the Securities Law Committee of the State Bar of Texas Business Law Section. Mr. Fahy chairs that Committee. The views expressed herein are those of the authors of this comment letter and do not represent the views of the State Bar of Texas, its Business Law Section, the Securities Law Committee or their respective law firms. None of us will receive compensation in connection with this letter.

We are experienced Texas securities and corporate attorneys who appreciate the opportunity to comment on the proposed exemptive order for Tier I and Tier II Finders recently released by the Securities and Exchange Commission (the "Commission").[1] We are generally in favor of allowing smaller non-public business entities that need capital to reward persons who introduce or refer potential investors to them. These business entities usually lack the network to backers of larger or publicly traded businesses and often do not need funds in sufficiently large amounts to warrant the interest of registered broker-dealers. Any of these businesses would benefit by being able to compensate those people with large business and financial networks for helping them identify potential investors. We anticipate that the vast majority of Finders will be engaged in other businesses and that few will seek to be employed as a Finder on a full-time basis.

Assuming the Commission's proposed exemptive order is approved and issued, we view that state requirements concerning Finders will remain as the greatest area of legal uncertainty for Tier I and Tier II Finders. The Commission has not proposed any preemption of state broker-dealer registration requirements for either Tier I or Tier II Finders. So, it would be useful for the Commission to take into account and consider various state requirements relating to Finders. For example, please see Appendix A to this comment letter for a summary of existing and proposed laws and regulations in Texas, California, Michigan and New York relating to Finders.

[1] SEC Release No. 34-90112; File No. S7-13-20

Tier I and Tier II Finder Proposal

Under both of the proposed Tier I and Tier II Finder exemptions proposed by the Commission, a Finder would be exempt from the broker-dealer registration requirements of Section 15(a) of the Exchange Act if: 1) the issuer does not file reports under Section 13 or Section 15(d) of the Exchange Act, 2) the offering has an applicable Securities Act registration exemption, 3) the Finder does not use general solicitation, 4) the potential investors are accredited investors, and 5) the Finder provides services pursuant to a written agreement, 6) is not an associated person of a broker-dealer and 7) has no statutory disqualification.

The proposed Tier I Finder exemption also requires that the Finder's activity be limited to providing contact information of potential investors in connection with only one capital raising transaction by a single issuer within a 12-month period, provided that the Tier I Finder does not have any contact with the potential investors about the issuer.

Under the proposed Tier II Finder exemption, the Finder may identify, screen and contact prospective investors, distribute issuer offering materials, discuss issuer information in the offering materials without advising as to valuation or advisability of the investment, and arrange and participate in meetings between the issuer and the investor, provided that written disclosures must be provided to investors containing specified information including any material conflicts of interest resulting from the Finder arrangement and the compensation to be paid to the Finder.

Multiple Bad Actor Disqualification Lists

Bad actor disqualifications are an overarching issue in the exemption proposal. The exemption proposal uses Exchange Act Section 3(a)(39).[2] But, the exempt offering issuers will likely be subject to the bad actor provisions of the recently harmonized SEC Rules 262(a)[3] and 506(d)[4] SEC Rules 262(a) and 506(d) are applicable to finder-related transactions because these rules condition the issuer securities registration exemption on whether any person being compensated for the sale of securities by the issuer is subject to those rules' bad actor provisions. Moreover, in question 19, the Commission asks about the potential applicability of SEC Rule 206(4)-3 (as proposed) if finders are to receive compensation from private fund advisers or their affiliates when advised by a SEC-registered adviser.[5] Proposed SEC Rule 206(4)-3 defines "ineligible solicitor"[6] as those solicitors having a "disqualifying Commission order" [7] or a "disqualifying event."[8]

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[2] 15 U.S.C. §78c(a)(39).
[3] 17 CFR 230.262(a).
[4] 17 CFR 230.506(d) These two rules were recently harmonized via SEC Release Nos. 33-10884; 34-90300; IC-34082; File No. S7-05-20, November 2, 2020.
[5] "Investment Adviser Advertisements; Compensation for Solicitations," SEC Release no. IA-5407, (November 4, 2019) found at https://www.sec.gov/rules/proposed/2019/ia-5407.pdf.
[6] *Id* at pp. 262-285.
[7] *Id* at proposed rule 206(4)-3(a)(3)(iii)(A); *see also* pp. 268-269.
[8] *Id* at proposed rule 206(4)-3(a)(3)(iii)(B); pp. 477-478.

Thus, finders will functionally be subject to two non-harmonized but overlapping bad actor disqualifications lists for most finder transactions (i.e. the relevant issuers will use the SEC Regulation A or SEC Rule 506 exemptions) and three non-harmonized but overlapping bad actor disqualification lists for finder transactions related to private funds advised by a SEC-registered adviser (adding the ineligible solicitor disqualification list).

We strongly urge that the Commission require finders to comply with just one disqualification list, rather than two or three separate disqualification lists. Further, we suggest that the Commission use SEC Rule 506(d) as the template because the non-public issuer will require the finder to comply with that rule anyway. Issuers using exempt offering safe harbors should already have a SEC Rule 262(a) or 506(d) compliance processes. The Commission will have greater certainty of compliance if both the issuer and the finder independently follow the same disqualification list.

Responses to Questions Asked in Release.

Our views and comments on selected questions raised by the Commission in its release follow:

1. Have we accurately and completely identified the legal uncertainties, if any, around the involvement by Finders in connecting investors with small firms in need of capital?

If the proposed exemptive order is adopted as is, perhaps the biggest issue will be the continuing applicability of the state securities statutes and regulations. The States have yet to develop a uniform response, even though the Texas Finder rule was adopted 14 years ago. The proposed Commission exemption does not address the state registration requirements. It would be helpful if the final order did more to address the relationship of the order to state requirements and exemptions. We view it likely that the Commission's Finder exemption might not be fully used on a national scale unless or until the relevant states adopt substantively similar Finder exemptions or limited purpose (and examination-free) broker-dealer registrations, or until the states are preempted from adopting rules inconsistent with federal requirements.

Further, we think that the proposed exemptive order appropriately requires that Finders not engage in specific activities such as advising on the transaction structure or offering terms, engaging in general solicitation, handling customer funds or securities, having legal authority to bind the issuer, participating in preparing sales materials, engaging in due diligence activities, assisting or providing financing for securities purchases, or advising as to valuation or financial costs and benefits of the securities investment. Such a specific checklist of prohibited activities provides securities attorneys the opportunity to adequately draft Finder's agreements and to gather information that allows issuer compliance staff to confirm that these Finder limitations have been honored.

2. Have we appropriately defined Tier I Finders and Tier II Finders? Should there be two tiers of Finders or instead should there be multiple tiers of Finders? Should there be only one tier of Finders?

We think that the Tier I/Tier II Finder differentiation is not particularly useful. We anticipate that Finders will typically have at least some very general communication with potential investors, which likely would be non-substantive or very light on substance. Perhaps only investor lead brokers may be able to take advantage of the Tier I Finder exemption, as proposed, due to the bar on communications with prospective investors. We do not anticipate advising Tier I Finders (other than lead brokers) in our practices. Consequently, we recommend that the Commission exempt only one tier of Finders – the Tier II Finders and that the disclosure requirements should apply to all Finders.

3. Should the definition of Finder be limited to natural persons?

We think that the Finder rule should be limited to natural persons. This benefits issuers in that they will be able to confirm that such person is free of safe harbor disqualifications with greater ease. The Texas Finder registration is limited to individuals, i.e. natural persons. We also suggest that if the Commission limits the proposed safe harbor to natural persons, it also provide guidance as to whether such natural persons can hire agents to work on the matter, transact business through a sole proprietorship that may have employees and independent contractors, file assumed name or trade name certificates with governmental authorities, or use unfiled aliases.

We ask that the meaning of "natural person" be defined to include a limited liability company chartered in a US state or territory that is solely owned by a single natural person and included in such natural person's US tax returns as a disregarded business entity for income tax purposes. There may be tax benefits to such natural persons using this structure (especially when the Finder is paid in securities) and would allow the natural person to segregate the Finder business from his or her other business activity. The Commission may want to bar such LLCs from having employees or independent contractors (other than the Finder) as having such employees or independent contractors could be an indicator of the Finder being "engaged in the business" per the definition of "broker" in Section 3(a)(4) of the Exchange Act.

4. Should the definition of Finder be limited to a natural person resident in the U.S.?

We recommend that the definition of Finder be limited to US residents. From the issuer's perspective, it would be much easier to conduct a reasonable investigation as to eligibility and safe harbor compliance if the safe harbor is only available to US residents. However, the Commission should be clear in its exemption order that "US resident" is not a reference to citizenship or immigration status. Issuers should be able to take reasonable steps to confirm US residency without delving into the technicalities of US immigration law.

5. Have we appropriately identified the activities in which each tier of Finder should and should not be able to engage? Does the proposed exemption provide a workable path for Finders to be engaged in this activity?

We have no comment on this very general question. Our comments below to more specific questions should be construed to apply to this question where appropriate.

6. Have we appropriately limited the types of investors whom a Finder can "find" or solicit?

Instead of limiting potential investors to those the Finder reasonably believes are accredited investors, should investors identified by Finders be subject to investment limitations, regardless of the exemption being relied upon, such as a dollar limit on the size of the investment? If so, please specify.

First, the reasonable belief that the referred party is an accredited investor is very appropriate if, as generally expected, the relevant issuers will rely primarily on the Commission's Rule 506 registration exemption. Indeed, the Finder exemption order proposal limits eligible issuers to non-reporting issuers. Consequently, most eligible issuers will likely limit themselves to accredited investors, especially if the issuer is using either the Rule 506(c) registration safe harbor or using the SEC Rule 506(b) registration safe harbor but has not generated the financial information required by SEC Rule 502(b).

We think that limiting investment candidates to accredited investors is also a useful proxy for assessing who should be investing in nonpublic issuers.

7. Should the Finder be prohibited from engaging in general solicitation as proposed? Would this create practical problems for a Finder? For example, would a Finder be able to establish a pre-existing substantive relationship with investors in order to not engage in general solicitation?

The prohibition on general solicitation seems reasonable. The typical Finder is the person who introduces the issuer to a friend or business acquaintance – that is to a person with whom the Finder already has a pre-existing substantive relationship. Moreover, allowing Finders to engage in general solicitation could potentially expand the proposed safe harbor to e-mail spammers and robo-callers, who are unlikely to have any basis for a reasonable belief that the proposed investor is an accredited investor.

8. Should we limit the proposed exemption to offerings of a specific size threshold? If so, how should we define such threshold?

We do not favor the proposed exemptive order requiring specific thresholds or limits on the size of the offering associated with the payment of a fee to a Finder. Over years of inflation, a size threshold or limit would grow outdated. Also, we do not see any policy argument why the size of

the issuer's offering should dictate whether a Finder making an introduction of a potential investor is exempt.

9. Have we appropriately limited the number of offerings a Tier I Finder can participate in on an annual basis?

We think one "capital transaction" per six-month period is a more reasonable Tier I standard. That is a low enough frequency that Finder referrals should merely be an ancillary activity for the Tier I Finder, but would also allow those businesses in need of fresh capital to use the Tier I Finder's network more than once a year.

10. Is the limitation that Tier I Finders do not have any contact with potential investors about the issuer workable? Should we instead permit Tier I Finders to have some contact with potential investors?

We think that the investor communication prohibition for Tier I Finders is unreasonable. That is not the way business referrals typically operate. We think that Tier I Finders should be able to make brief email or telephonic introductions between the potential investor and the issuer. Otherwise, the Tier I Finder is not providing an introduction. The Commission's restrictions appear to allow a Finder to merely sell a "lead list." Further, we also anticipate that the prospective investor will likely at some point initiate contact with the Tier I Finder. The Tier I Finder needs to be able to say something in such conversations that is not off-putting and bureaucratic. We have not thought about how to draft such language.

We also think that the prohibitions on the Tier I Finder providing only specified "contact information" to the issuer in unduly restrictive. The Finder should be free to provide the issuer with other information about the potential investor – e.g., types of investments of interest to the investor, mailing address of the investor, nature of accredited investor status of the investor, typical size of the investor's past investments, the Finder's views on the sophistication and investment experience of the investor, occupation and educational history of the investor, etc.

11. Should we define "capital raising transaction" for purposes of Tier I? If so, how?

We seek clarification as to whether "one capital raising transaction" refers to the offering as a whole or a single investment by a single investor in such offering. Moreover, if it is the latter, what happens if that single investor makes more than one investment in the issuer (for example, both an equity and debt investment) initially or over the course of time? Does the Tier I Finder's ability to receive compensation just apply to the initial investment?

Further, "capital raising transaction" should specifically exclude commercial loan transactions and transactions that are not in connection with "securities" as defined by the Exchange Act.

12. Have we appropriately defined the conditions that should apply to the proposed exemption for each tier of Finder? Is more clarity, specificity or flexibility required with respect to the proposed conditions? Are there other or different conditions that should apply to the proposed exemption?

The proposed exemptive order does not address whether an issuer affiliate could be a Finder for such issuer. This is an area that the Commission should address. The conflicts of interest could be much more complex if, for example, the offering proceeds could be used to pay compensation to the issuer's personnel, including the affiliated Finder. Further, while non-affiliated Finders will generally not have an information advantage about the prospective investment over the referred party, that would not be accurate for affiliated Finders who will have significant informational advantages and access to the issuer's confidential information and trade secrets. Finally, the affiliated Finder could potentially be in the position of effectively signing the Finder's agreement as both the Finder and on behalf of the issuer.[9] *The Finder's fee could potentially not have been negotiated in an arms' length transaction. The Commission should seriously consider whether it is appropriate to extend the proposed Finder exemption to issuer affiliates and what additional disclosure or procedural requirements should be imposed for affiliated Finder referrals and investments from referred investors.*

The Commission should consider whether a written agreement is necessary for Tier I Finders, who have no or de minimis contact with the investor about the proposed investment. The Commission should also consider being clearer as to the timing of when the written agreement should be in place. Often an issuer pays Finder's fees as a reward for referrals to important investors without the Finder's fee arrangement having been finalized at the time of the relevant investment.

As to Tier II Finders, the disclosure requirements would require some pre-planning, at which point a written agreement can be signed.

13. Should Finders be able to "find" or solicit investors only for exempt offerings, as proposed? Should Finders be able to "find" or solicit investors only for offerings under certain exemptions from registration? If so, which ones?

The primary justification for Finders is to enhance the ability of smaller nonpublic issuers to raise capital. Moreover, these issuers will not likely be seasoned or capitalized enough to conduct an initial public offering. If a company's stock is listed on a securities exchange, it should have access to capital sources and not need referrals from Finders. But, the Commission should consider whether to allow for small reporting issuers who are not listed and have annual revenues below a to-be-determined limit to use Finders. Despite their reporting status, such issuers may find themselves out of favor with registered broker-dealers due to the small offering amounts involved.

[9] *The "having no legal authority to bind the issuer" requirement can easily be structured around.*

14. Should Finders be able to "find" or solicit for all non-Exchange Act reporting companies or should they be able to solicit for a narrower or wider range of companies?

Please see our response to question 13.

15. Should Finders only be able to "find" or solicit for primary offerings? Should we expand the scope of the proposed exemption to secondary offerings, such as transactions facilitating the sale of equity by employees holding options or warrants?

The purpose of the proposed Finder exemption is to help smaller nonpublic issuers who may not be well-served by the broker-dealer community in meeting capital needs. Those would be primary, not secondary, sales of securities.

As to using Finders to sell equity by employees owning options or warrants, this perhaps needs more study. What are the market conditions or shortfalls in arranging for the secondary sale by employees of equity derived from options or warrants? Do firms such as Second Market and its competitors provide an adequate market to arrange for the sale of such securities by employees? The Commission may want to return to this issue after data is gathered by the Division of Trading Markets or potentially derived from other commentators answering this question.

16. Should the proposed exemption include limitations on the types of securities for which a Finder can "find" or solicit investors?

The proposed exemption should not limit the types of securities for which a Finder can find or solicit investors because that would require the Commission to anticipate all types of securities going forward and their purposes. Indeed, the Enforcement Division routinely finds new structures that it deems to be investment contracts.

17. Is more clarity or specificity required with respect to the specific written disclosures that are a condition of the proposed exemption for Tier II Finders? Should we provide more guidance about any of the specific written disclosures?

We believe that there should be more flexibility as to the timing of oral and written disclosures. We appreciate that the initial disclosure at the time of the solicitation can be oral, but we think that even that would be unworkable in certain settings. Indeed, if a Finder runs into a prospective investor at a social gathering, the Finder may be acting gauchely if he or she must stop the conversation and deliver the required disclosure before talking about the issuer. We suggest that instead that the required disclosure be provided as soon as reasonably practical following the initial solicitation, if the disclosures are provided before the prospective investor has purchased the relevant securities. This would ensure that the prospective investor has received this information before making the investment decision.

18. Are there any specific written disclosures to investors that should be required, beyond those that are a condition of the proposed exemption for Tier II Finders? Should the disclosures be required to be written or should the Finder be permitted to provide them orally? Should the written disclosures be required at all?

We recommend that Tier II Finders should not be required to represent that they are acting as an agent for the issuer. We do not think that a referral and introduction would constitute an agency relationship with the issuer in most cases. Moreover, a finder could refer some in its network and refuse to refer other or refer investors to a second or third issuer at the same time, actions inconsistent with an agent's fiduciary duties. Indeed, the proposed exemption's condition that finder as an agent carries a plethora of fiduciary duties to the issuer under state law that Finders will not fulfill, including the requirement to act solely for the benefit of the principal and not acting as a finder for other issuers without consulting with the issuer.

The Texas Supreme Court held:

> *Under the common law of most jurisdictions, including Texas, agency is also a special relationship that gives rise to a fiduciary duty. The Restatement (Second) of Agency sets forth in general terms the concept that "unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency." In elaborating on the extent of this fiduciary duty, the Restatement (Second) says:*
>
> *The agreement to act on behalf of the principal causes the agent to be a fiduciary, that is, a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking. Among the agent's fiduciary duties to the principal is the duty to account for profits arising out of the employment, the duty not to act as, or on account of, an adverse party without the principal's consent, the duty not to compete with the principal on his own account or for another in matters relating to the subject matter of the agency, and the duty to deal fairly with the principal in all transactions between them. Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 200 (Tex. 2002)*

The Commission should be concerned about imposing all these state law agent fiduciary duties on finders for the benefit of issuers. Indeed, the avoidance of such liability may cause qualified finders to avoid helping undercapitalized issuers. The effect of eliminating the "agent" disclosure would be mitigated by retaining the disclosure that the finder 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.

Finally, the requirement noted on page 28 of the SEC Release that the finder cannot bind the issuer is a final indication that the finder is not the issuer's agent and does not act with the authority of the issuer.

19. Should we adopt comparable disclosure requirements with disclosures required under the proposed changes to Rule 206(4)-3 under the Advisers Act for solicitations of investors in private funds, if adopted? Should the disclosures required by Tier II Finders be deemed to satisfy the disclosure requirements under the proposed changes to Rule 206(4)-3 under the Advisers Act for solicitations of investors in private funds, if adopted?

On November 4, 2019 the Commission proposed changes to Rule 206(4)-3 that would require solicitors who solicit investors for a private fund adviser registered under the Investment Advisers Act to comply with Rule 206(4)-3.[10] *The proposed amendments would require solicitors that solicit for registered private fund advisers to (1) enter into a written agreement with the registered adviser and (2) that the solicitor or the registered adviser provide certain written disclosures at the time of solicitation or as soon as practical thereafter.*

We believe if an outside solicitor for private fund investors complies with the requirements of a Tier II Finder, the solicitor and the registered investment adviser shall be deemed to have complied with the requirements of Rule 206(4)-3, including the written agreement and disclosure requirements.

Further, private fund advisers cannot compensate solicitors if the adviser knows or should have known that the solicitor is an ineligible solicitor, which is defined as being subject to any disqualifying event or Commission action. If the Commission applies the proposed private fund solicitor standards to finders who refer private fund investors to private fund advisers, it should conform these disparate delivery standards so that the finder will be required to comply with only one disclosure regime. Moreover, we think that the material conflict standard in the proposed finder exemption order will be sufficient for private fund investors, provided that the finder is not a person affiliated with the private fund, its sponsor or its advisor.

20. Should Tier II Finders be required to receive an acknowledgment of receipt of the required disclosure from the investor? If so, are there methods other than an acknowledgment, for example, a read receipt for e-mail, that could serve to validate that investors received the required disclosure?

We do not think that the Commission should require acknowledgements of the receipt of disclosure from the investor. However, we would not be surprised if the Finder or the issuer obtain such an acknowledgment anyway as a compliance protocol during the investment process. Such a required acknowledgement may also put undue emphasis on this discrete disclosure matter to the detriment of more material disclosures regarding the issuer's financial condition, prospects, business, outstanding securities, management, etc.

[10] "Investment Adviser Advertisements; Compensation for Solicitations," SEC Release no. IA-5407, (November 4, 2019) found at https://www.sec.gov/rules/proposed/2019/ia-5407.pdf.

21. Should Tier I Finders be subject to a disclosure and acknowledgment requirement?

As drafted in the proposal, the Tier I Finders would not be communicating with the prospective investors which would certainly inhibit disclosure delivery and obtaining acknowledgement. So, such duties should not be imposed on the Tier I Finder. But, we anticipate that it would be common for issuers to provide disclosure of the payment of Finders' fees in their offering materials and subscription agreements. Indeed, if an issuer is paying Finder's fees as part of an offering, it may be prudent to disclose such payment of Finder's fees to all prospective investors, not just those referred by a Finder.

22. Should Tier II Finders be required to enter into a written agreement with the issuer where the issuer, without affecting the Finder's obligations, also assumes liability with respect to investors for the Finder's misstatements in the course of his or her engagement by the issuer?

Tier II Finders should not be required to enter into a written agreement in which the issuer assumes liability for the Finder's misstatements during the course of the engagement. It is possible that this issue would be a point of negotiation between the issuer and the Finder and a mutual indemnification could be agreed upon. But, this should be a contractual requirement, not a Commission requirement.

23. Should the proposed exemption be conditioned on a Finder filing a notice with the Commission of reliance on the exemption from registration? Why or why not? If so, when should Finders be required to file the notice? What, if any, disclosures should be required in the notice?

We anticipate that almost all offerings which involve Finders will be conducted under the Commission's Rule 506 safe harbor. This rule requires the filing of a Form D with the Commission, which also includes disclosure of the amount of any Finders' fees expenses.

We also ask that the Commission view Finders not as a profession, but as a well-connected person doing a favor for an issuer in a manner that is ancillary to the Finder's primary activities or business. There should be no technical notice filing requirements that do "not pertain to a term, condition or requirement directly intended to protect that particular individual or entity" (i.e., the investor).[11]

24. Should there be any limitations on the amount of fee a Finder can receive?

For Finders who are unaffiliated with issuers, the Commission should have confidence in the arm's length bargaining between the two contractual parties and also have confidence that issuers in need of capital will attempt to keep costs under control. But, Finders who are affiliated with the relevant issuer present different concerns. The fee amount may not be negotiated in an arms' length manner, and the same person could potentially sign the agreement for both sides. [12] *We*

[11] 17 CFR §230.508(a)(1).
[12] *The "having no legal authority to bind the issuer" requirement can easily be structured around.*

previously queried whether the proposed Finder exemption should be available to issuer affiliates and under what terms. If the Commission chooses to allow issuer affiliates to be Finders, then it should provide some guidance as to the limits by which the issuer-affiliated Finder may be compensated.

25. Should we impose limitations on the form of compensation Finders can receive? Should Finders be prohibited in certain circumstances from receiving transaction-based compensation, and instead be required to receive compensation that is not tied to the success of the transaction (that is a fixed fee or other arrangement)? If so, under what circumstances and how should Finders then be compensated?

There should be no limits on the form of compensation as the Commission should allow the parties to work out the form of compensation. Please see response to Question 26 below.

The exemption should allow contingent, transaction-based compensation because that is a more efficient use of cash capital, than a fixed-fee arrangement, for smaller nonpublic companies needing capital.

26. Should a Finder be able to receive a financial interest in an issuer as compensation for its services? Why or why not?

The form of compensation to be provided to Finders should be the decision of issuer management, not the Commission. Some issuers may seek to preserve cash and issue equity, changing the Finder's short-term compensation into a long-term investment. Also, we note that Finders and issuers will not be exempt from the anti-fraud provisions and will be required to disclose such financial interest, if material.

27. Are the explicit limitations on the activities in which Finders can or cannot engage appropriate for each tier of Finder? What other activities should be expressly permitted or prohibited for each class of Finder?

Except as otherwise noted in response to other specific questions, we approve of the activities limitations provided in the exemptive order proposal.

28. Should we provide guidance on how a Finder can establish that he or she did not know and, in the exercise of reasonable care, could not have known, that the issuer had failed to comply with the conditions of an exemption?

This question relates to footnote 58 (page 18):

> *"An issuer's failure to comply with the conditions of an exemption from registration under the Securities Act for an offering would not, in itself, affect the ability of a Finder to rely on the proposed exemptive order provided the Finder can establish*

> *that he or she did not know and, in the exercise of reasonable care, could not have known, that the issuer had failed to comply with the conditions of an exemption. However, a Finder that, through its activities on behalf of an issuer, causes an issuer's offering to be ineligible for an exemption from registration, would not be able to rely on the proposed exemption"*

We agree that a Finder may not fulfill the exempt offering element of the proposed Finder exemption if the Finder causes the offering to not comply with the applicable exemption (e.g. Finder having a Rule 506(d) disqualification). We also agree that a standard based on the Finder's knowledge of the issuer's compliance with an offering exemption is also acceptable. But, this knowledge element should be limited to the information available at the time of the referral of the investor because the Finder may have little or no involvement after that. If the Commission adopts a standard of "in the exercise of reasonable care, could not have known," then: 1) this standard should be limited to the time of the referral of the prospective investor because the Finder may have little or no involvement after that; and 2) the Commission should publish guidance as to what steps a Finder can take to meet this reasonable care standard as to the issuer's offering registration exemption compliance.

29. Should we provide further guidance on the solicitation-related activities in which Tier II Finders can engage on behalf of an issuer, for example, guidance surrounding a Tier II Finder's discussion of issuer information and arrangement and participation in meetings with issuers and investors?

We believe further guidance on these permitted activities should be provided because this area will be a crucial part of compliance with the Tier II Finder requirements. Some examples of permitted and impermissible conduct would be helpful.

30. Should we provide guidance regarding activities of private fund advisers, M&A Brokers as defined in the *M&A Broker* Letter, or real estate brokers that may require registration under Section 15(a) of the Exchange Act? Should we consider codifying the *M&A Broker* Letter?

Yes, we believe that the Commission should provide guidance regarding activities of private fund advisers, including confirmation that supervised persons who qualify as Tier II Finders are exempt for registration under Section 15(a). We also believe that providing exemptive orders for M&A brokers and real estate brokers would be very useful.

31. Are there other areas in which the Commission should provide guidance regarding the registration requirements of Section 15(a) of the Exchange Act to other types of limited- purpose broker-dealers?

No comment.

32. If the proposed exemption is adopted, which staff letters, if any, should or should not be withdrawn, and why?

These no-action letters should be withdrawn upon issuance of a final order because such exemptive order would supersede the matters stated therein.

Brumberg, Mackey & Wall, P.L.C., May 17, 2010

Hallmark Capital Corporation, June 11, 2007

John W. Loofbourrow Associates, Inc., June 29, 2006

Paul Anka, July 24, 1991

33. Have we appropriately defined the disqualification condition for Finders?

The Commission's Rule 506(d) "bad actor" disqualification applies to "any person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with such sale of securities."[13] Regulation A Rule 262 has a similar disqualification list.[14] Since we anticipate that almost all offerings relevant to Finders will use the Rule 506 exemption and this provision of Rule 506(d) applies to Finders, Finders in actual effect will need to be free of Rule 506(d)'s list of disqualifying orders, convictions and judgments.

Thus, if the Commission were to apply a list of disqualification standards, it should strongly consider Rule 506(d)'s list because issuers will presumably be checking for such disqualifying orders, convictions and judgments with their Finders anyway. Introduction of different, new disqualification standards based on Section 3(a)(39) of the Exchange Act is not warranted.

of the Exchange Act, it should reference this requirement in order for the securities bar to understand why the Commission will in effect require two separate disqualification analyses when a Finder is involved in a Rule 506 offering.

34. Have we appropriately limited the proposed exemption to individuals who are not associated persons of a broker-dealer?

We view the proposed exemptive order as appropriately limiting Finders to individuals who are not associated persons of a broker-dealer. Indeed, if a person was an associated person of a broker-dealer, FINRA Rule 3280(c) relating to private securities transactions of an associated person for compensation would apply. The associated person's broker-dealer would be required to approve the associated person's participation in the Finder transaction, record the transaction on the broker-dealer's books and supervise the transaction's compliance with FINRA rules,

[13] 17 CFR §230.506(d)(1).
[14] 17 CFR §230.262.

federal securities laws and the broker-dealer's written supervisory procedures. Thus, it is appropriate to bar associated persons from acting as Finders due to the potential applicability of FINRA Rule 3280(c) to such transactions.

35. Should the proposed exemption include a limitation such that it would not be available to individuals who were associated persons of a broker-dealer within the previous 12 months?

SEC Rule 3a4-1 provides an exemption from the broker-dealer registration requirements for issuer "associated persons" who "was not a broker or dealer, or an associated person of a broker or dealer, within the preceding 12 months," assuming the Rule's other conditions are met.[15] We have no objection to the broker-dealer exemption safe harbor for Finders having the same former associated person of a broker or dealer waiting period as the broker-dealer exemption safe harbor for issuer employees.

36. Should the proposed exemption be limited to individuals who are not associated persons of a municipal advisor or investment adviser representatives of an investment adviser?

If the Commission is using SEC Rule 3a4-1 as its model, the 12 month limitation applies only to former associated persons of broker and dealers and not to former investment adviser representatives or municipal advisor associated persons. The Commission should be consistent and thus not apply the 12 month waiting period to "Finders" who had previously been investment adviser representatives or municipal advisor associated persons.

37. Should the proposed exemption be limited to individuals who are not associated persons of an issuer? Why or why not?

See our responses to Question nos. 12 and 24.

38. Would the proposed exemption provide sufficient investor protections while promoting capital formation for small businesses?

We view the proposed exemptive order as providing sufficient investor protections because Finders have ancillary roles in the actual sale. The investor will be dealing directly with the issuer when deciding whether to make an investment.

39. Would the proposed exemption have a competitive impact on registered brokers?

We anticipate that there would not be a material competitive impact on registered brokers. Indeed, the Commission's Small Business Committee pointed out that the early-stage, undercapitalized issuers have not been receiving capital through broker-dealers. Moreover, with the advent of Regulation BI's best interest standard, we think that broker-dealers are now even

[15] 17 CFR 3a4-1.

less likely to support this segment of issuers, at least in connection with their non-institutional accounts.

40. With respect to the activities permitted for Tier I Finders, what are the practical implications of the requirements if they were subject to broker registration? What about for Tier II Finders?

Obviously, if the Finder activities were subject to a broker registration, those activities would be highly discouraged. Most Finders planning to engage in those kinds of limited activities would simply not spend the time and resources needed to obtain a full-blown broker registration. Such a registration requirement would not solve the issues intended to be addressed by the exemptive order. Please see our comment to Question 41 below for a discussion of an alternative simpler form of limited-purpose registration requirement for Finders.

As proposed, Tier I Finders can provide investment leads to an issuer for "one capital transaction" per 12 month period. This ensures that such persons would not be engaging in this activity as their primary business and is not consistent with the "engaged in the business" approach of the definition of "broker" in the Exchange Act, so Tier I Finders are likely to take the position they are not "brokers" within the meaning of the Exchange Act and not subject to any broker registration requirement.

41. Should we instead take an alternative approach for either class of Finders?

Any alternative Finder registration requirement should resemble the Texas Finder rule.[16] *This rule is an actual broker-dealer registration, but without examinations, written supervisory procedures, FOCUS reports, audited financial statements using the PCAOB standard, etc. In sum, the Texas approach allows Finders to engage in such referrals as a side-activity to their primary work. The current requirements for a FINRA registration would impose too many burdens on such a referral business.* M*oreover, it would not be appropriate for the Commission to outsource Finder regulation to FINRA due to FINRA's fee schedule and regulatory approach.*

42. Are there areas related to the proposed Finders framework for which the Commission should provide guidance?

Please see our responses to other more specific questions. In particular, the Commission should provide guidance on the meaning of "capital transaction" for Tier I Finders.

43. Should we coordinate with other regulators to provide clarity and consistency on what types of activities Finders and other limited purpose brokers may engage in?

We urge the Commission to work with NASAA and various state securities authorities to conform their approaches to Finders with the approach taken by the Commission. We note that

[16] 15 TX. ADMIN. CODE §115.11.

California, Texas and Michigan, which contain approximately 23.66% of the US population, have adopted Finder exemptions or limited purpose registrations.

44. Are there any other sources of data or information that could assist the Commission in analyzing the consequences of the proposed exemption? We request that commenters provide any relevant data or information.

Please see Appendix A which summarizes certain state Finder registrations and exemptions.

We appreciate the opportunity to submit this comment letter and look forward to the Commission's consideration of this important proposal.

Very truly yours,

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Appendix A
Selected State Finder Registrations and Exemptions

We appreciate the Commission's recognition of a need for smaller non-public companies to compensate finders for investor introductions and referrals. Some of the existing state requirements for finders might be useful to mirror in the Commission's final exemptive order.

Texas Finder Limited-Purposes Broker-Dealer Registration

In 2006, the Texas State Securities Board adopted a limited finder broker-dealer registration rule[1] ("Texas Finder Registration"). Briefly, the Texas Finder Registration requires that the prospective finder (who must be a natural person) submit a completed application to the State Securities Board. After licensure, the registered Texas finder may not engage in any of the following acts relating to securities transactions:

1) Be involved in a transaction involving non-accredited investors;
2) Participate in negotiating any of the terms of an investment;
3) Give advice to an accredited investor or an issuer regarding the advantages or disadvantages or disadvantages of entering into an investment;
4) Conduct due diligence on behalf of a potential issuer or potential investor, provide valuation, or provide other analysis to an accredited investor regarding an investment;
5) Advertise to seek investors or issuers;
6) Have custody of an investor's funds or securities;
7) Serve as an escrow agent for the parties; or
8) Disclose information about the issuer or the securities to the investor other than:
    a. Securities issuer's name, address and telephone number
    b. The name, a brief description and price of the offered security;
    c. Brief description of the issuer's business in 25 words or less;
    d. The type, number and aggregate amount of the offered securities;
    e. The name, address and telephone number of the person to contact for additional information.

Further, the registered finder must disclose the following to the prospective investor:

1) that compensation will be paid to the finder;
2) that the finder can neither recommend nor advise the accredited investor with respect to the offering; and
3) any potential conflict of interest in connection with the finder's activities.

[1] 15 TX. ADMIN. CODE §115.11.

Finally, the registered Texas finder must maintain certain records but is not required to have supervisory requirements as such finder must be an individual and may not have agents. Thus, they have no person to supervise. Finally, Texas does not impose securities examination requirements on finders.

The Texas State Securities Board reports that Texas currently has 61 registered finders.[2]

In our experience, the Texas Finder Registration has not been widely used because there is no corresponding federal broker-dealer registration or exemption. Effectively, a Texas finder could only be involved in a transaction where the securities issuer, the finder and the investor all reside in Texas and relying on the exception in Section 15(a) of the Securities Exchange Act of 1934, as amended ("Exchange Act"), for a broker or dealer "whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange."

California Finder Exemption.

California has a detailed statutory broker-dealer registration exemption (effective January 1, 2016) that is limited to transactions under $15,000,000.[3] The prohibited activities for a finder include:

1) Participating in negotiating the securities transaction;
2) Advising a party to the transaction as to the value of the securities or the advisability of the securities transaction;
3) Conducting due diligence;
4) Selling securities owned by the finder as part of the transaction;
5) Having custody of funds or securities relating to the transaction;
6) Having no knowledge of a securities registration violation; and
7) Making disclosure other than the limited disclosure of the name, address and contact information for the issuer, the issuer's industry and years in business, and the name, type, price and aggregate amount of securities being offered by the issuer.

The California Finder exemption also has information filing requirements with and filing fee payments to the California Department of Financial Protection and Innovation.

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[2] Per email from Marlene Sparkman, General Counsel – Texas State Securities Board, October 26, 2020.
[3] California Corporations Code § 25206.1 found at http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CORP&sectionNum=25206.1.

Michigan Finder Registration.

Like Texas, Michigan also has a limited scope broker-dealer registration available for finders and defines a finder "as a person who, for consideration, participates in the offer to sell, sale, or purchase of securities by locating, introducing, or referring potential purchasers or sellers."[4] But, Michigan law on finders is a morass of uncertainty. In 2015, the Michigan Court of Appeals ruled that finders are not required to be registered under the Michigan Securities Act because: 1) the word "finder" was not included in the definition of "broker-dealer" in the Act; and 2) the definition of broker-dealer requires that the broker-dealer be "in the business of effecting transactions in securities for the account of others or for the person's own account."[5] The Court of Appeals held that difference between the finders' statutory requirement to "participate" and the broker-dealer's statutory requirement to be "in the business of effecting transactions in securities" cover separate activities and thus the finder, as defined, is not included in the Act's broker-dealer registration requirements.[6] Michigan has four Court of Appeals districts, so it is not clear that those conducting finder activities in Michigan may be able to fully rely on this ruling.

New York Finder Proposal.

In May 2020, New York's Department of Law Investment Protection Bureau proposed a "finder" registration for those effecting securities transactions on behalf of others but limited to introducing prospective investors to brokers, dealers or salespersons.[7] Such finders will be required to be registered with the Bureau and have passed designated securities industry examinations. Importantly, this definition of finders does not include referrals of prospective investors to securities issuers. The proposal remains pending.

[4] Michigan Compiled Law Service § 451.2102(i).
[5] Michigan Compiled Law Service § 451.2102(d).
[6] *Pransky v. Falcon Group, Inc.* 874 NW2d 367, 373-377 (Mich. App. 2015).
[7] Found at https://ag ny.gov/sites/default/files/full-text-13nycrr10.pdf