



November 11, 2020

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

Re: 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:

The American Securities Association (“ASA”)¹ writes to express our opposition to the proposed exemptive order for “finders” (“Proposed Order”) issued by the Securities and Exchange Commission (SEC) on October 7th, 2020. We believe the Proposed Order is not supported by any evidence of a market failure that warrants any type of an exemption from broker-dealer regulation. The Proposed Order substantially weakens critical investor protections and limits transparency in the private markets while increasing the risk of fraud for Main Street investors.

More fundamentally, the ASA remains concerned over the SEC’s continued efforts to undermine the decades-old broker-dealer regulatory regime that has helped Americans reach their financial goals while helping small businesses access our capital markets to grow and create jobs. The Proposed Order’s attempt to exempt Finders and M&A advisors comes on the heels of the SEC rolling back protections for investors in the municipal bond market, which the ASA strongly opposed.² With these actions, the SEC is attempting to make new law on its own in direct contravention of the statutory determinations made by Congress. We again, remind the SEC that regulators cannot adopt new laws outside of the parameters set forth by Congress. Thus, we believe the SEC should permanently table the Proposed Order and refrain from creating dangerous loopholes that Congress never intended.

I. No Evidence of a Market Failure to Support Approval of the Proposed Order.

The ASA generally supports efforts by Congress and the SEC to reduce regulatory burdens for small business looking to raise capital. However, we believe deregulatory efforts should only be undertaken if an evidence-based analysis illustrates that the costs of existing regulations outweigh the purported benefits of such regulations to investors and the broader market.

¹ The ASA is a trade association that represents the retail and institutional capital markets interests of regional financial services firms who provide Main Street businesses with access to capital and advise hardworking Americans how to create and preserve wealth. The ASA’s mission is to promote trust and confidence among investors, facilitate capital formation, and support efficient and competitively balanced capital markets. This mission advances financial independence, stimulates job creation, and increases prosperity. The ASA has a geographically diverse membership base that spans the Heartland, Southwest, Southeast, Atlantic, and Pacific Northwest regions of the United States.

² <https://www.americansecurities.org/post/asa-urges-sec-to-halt-muni-advisor-regulatory-rollback>





Regrettably, the Proposed Order includes no such analysis, and instead relies on anecdotal recommendations based on conjecture and flawed assumptions.

For example, the Commission states in the Proposed Order 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” – without providing any type of context as to how many businesses looking to raise capital in the private markets are actively seeking the assistance of unregulated “finders” as opposed to registered broker-dealers. ASA members operate in all parts of the country and help businesses in virtually every industry communicate with investors to raise capital. We are unaware of any measurable ‘gap’ that exists in current markets that broker-dealers are unwilling or unable to serve.

In fact, ASA members focus predominately on serving small and middle-market businesses in parts of the country that are largely ignored by the largest financial institutions. The Proposed Order completely fails to take into account how the adoption of this loophole would impact competition in the markets and among regulated and unregulated entities. In short, we believe the SEC is tipping the scales again in favor of unregulated actors over regulated ones.

Congress has not authorized this policy change and it did not change current law to authorize the SEC to engage in broad policy making without an evidentiary basis. This is another example, in a long line of them, where the Commission continues to seek to make policy outside the scope of its statutory authority.

II. The Proposed Order Weakens Investor Protections for Main Street Investors.

Broker-dealers are subject to a comprehensive regulatory regime that includes suitability requirements, “know your customer” obligations, recordkeeping requirements, minimum capital standards, fair commission and pricing standards, proper custody of customer assets, and rules governing sales practices and communications with investors. Broker-dealers are also subject to regular examinations by the Financial Industry Regulatory Authority (FINRA) and, for brokers involved in municipal securities transactions, they are subject to rules promulgated by the Municipal Securities Rulemaking Board (MSRB).

The Proposed Order notes that the SEC possesses the means to provide for narrow, facts-and-circumstances exemptions for individuals from broker-dealer registration in cases where they provide a company with information regarding potential investors. For example, the *Paul Anka* no-action letter generally permits an individual to provide an issue with the names and telephone numbers of potential investors believed to be “accredited” investors for a fee, provided that the individual has no further contact with the investors. We note that this type of policy making is already highly questionable under the Administrative Procedure Act.

The Proposed Order goes well beyond a narrow exemption as it would provide a blanket exemption for individuals that engage in the solicitation of investors and distribute offering materials on behalf of an issuer. This intentionally blurs the line between exempt “finders” and





registered broker-dealers while creating a regulatory loophole that leaves Main Street investors vulnerable to the whims of con-artists, ponzi schemes, and bad actors.

We echo the concerns raised by Commissioner Lee, who stated that with the Proposed Order, the SEC is “simply propos[ing] to permit unregistered activity that meets the traditional definition of brokerage without adding basic protections such as recordkeeping requirements or the ability to inspect for compliance.”³ Put simply, the Proposed Order represents an enormous risk for investors and will empower fraudsters and those who are otherwise ineligible to register as broker dealers to call themselves “Finders”.

III. The Proposed Order Seeks to Create an Unregulated M&A Advisory Loophole.

We also noticed a random question in this Proposed Order that would allow individuals to engage in M&A advisory services without registering as a broker or working for a broker-dealer. We object to this kind of policymaking because it falls significantly outside of the acceptable parameters of what is legal under APA and this loophole is bereft of any facts to support its inclusion in this Proposed Order.

Here, Congress has specifically decided not to speak on this issue. As the SEC is aware, a bill to change to M&A advisor registration failed to pass both chambers of Congress and was never signed into law by any President. As a result, any SEC action on this matter to create a loophole in advisor regulation would reflect complete disdain to the will of Congress. Action here would effectively turn the SEC into an unaccountable legislative policymaking body that believes it can act outside of its delegated authority.

The broker-dealer regulatory framework has for decades provided valuable educational and supervisory support to the industry, including:

- The ongoing education and testing of Advisors to insure key levels of proficiency;
- Clear rules of ethical conduct that are objective, transparent and enforceable;
- Public disclosure of any disciplinary actions, liens or judgments;
- Supervisory overview of client communications, including sales literature, to support honest, factual and fair transactions;
- The prohibition of excessive compensation;
- Requiring compliance with State security laws; and
- Cybersecurity and customer data protection.

Registered brokers are tested on an ongoing basis and are subject to a code of ethical conduct that is transparent, and most importantly, enforceable. Small business owners have recourse against excessive broker compensation and other abuses. Additionally, regulated brokers must also demonstrate compliance with a variety of other important public policies, such as the United States anti-money laundering rules and state securities laws. The limited rules that apply to M&A transactions protect all parties, including the public, and the existing regulatory structure is

³ <https://www.sec.gov/news/public-statement/lee-proposed-finders-exemption-2020-10-07>





functioning exceedingly well. Registration of broker-dealers is straightforward and a nominal expense that does not affect the business owner.

IV. Conclusion.

The Proposed Order would weaken investor protections and create a massive loophole for individuals that should be required to register as broker dealers as Finders and M&A advisors.

The regulated broker-dealer regime has worked successfully in our markets since the Great Depression and any erosion of it can only be undertaken after a healthy public debate among publicly elected members of Congress, not unelected regulators.

The Commission's continued attempt to engage in this type of ultra vires policymaking is very troubling because it fundamentally undermines due process, investor confidence, and the integrity of our markets.

We urge the SEC to permanently shelve this initiative and focus its resources instead on protecting Main Street investors and improving transparency in the private capital markets.

Sincerely,

Christopher A. Iacovella

Christopher A. Iacovella
Chief Executive Officer
American Securities Association

