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November 11, 2020

VIA E-MAIL: rule-comments@sec.gov

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

Re: SEC File No. S7-13-20
Release No. 34-90112 (the “Release”)
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:

We are writing to comment on the above-referenced exemptive order proposed by the Securities and Exchange Commission (the “Commission”) on October 7, 2020. These comments are provided by the Corporations Committee (the “Committee”) of the Business Law Section (the “Business Law Section”) of the California Lawyers Association. The Business Law Section is comprised of attorneys regularly engaged in advising business enterprises in California; the Committee is comprised of attorneys regularly advising California corporations and out-of-state corporations transacting business in California. The views expressed in this comment are those only of the Committee and not those of the Business Law Section or California Lawyers Association.

This letter provides responses to certain questions posed by the Commission in the Release. We do not address other queries posed in the Release. For convenience of cross reference, the specific questions addressed in this letter retain the numbering of them set forth in the Release.

Preliminary Comments

The Committee applauds the Commission for continuing its efforts to expand small business capital formation and to address the difficulties faced by small issuers in finding investors. We support the underlying principles behind the Commission's Proposed Exemptive Order and encourage the Commission to proceed with issuing exemptive relief in this area.

Our comments below offer additional recommendations to further improve the Proposed Exemptive Order, while still furthering the Commission's goals to promote capital formation, expand investment opportunities and maintain appropriate investor protection.

We note that the Release does not state whether this exemption would preempt state laws. If the exemption does not preempt state laws, then as a practical matter, the exemption will have limited impact.

Responses to Requests for Comments

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?

The Release proposes that both Tier I Finders and Tier II Finders be subject to a common set of threshold requirements limiting the availability of the exemption. A Tier II Finder wishing to rely on the proposed exemption would, in addition, need to provide certain written disclosures to the proposed investor.

The Committee believes that, in light of the significant limitations proposed on a Tier I Finder, a majority of Finders would prefer to comply with the additional disclosure requirement for Tier II Finders rather than be limited by the Tier I Finder limitations. Thus, the Committee believes that the two tiers would unnecessarily complicate the exemption and risk inadvertent violation of the exemption. Accordingly, the Committee is of the view that there should only be one tier of Finders consistent with the Tier II Finder proposal. We refer also to our response to question 10 below.

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

The Release defines Finders for purposes of the exemption as "natural persons" engaging "in certain limited activities on behalf of issuers." The Release further states that "In areas that lack robust venture capital ("VC") and angel investor networks, 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." The Release goes on to acknowledge the "long-standing issue" of the "gray market," in which finders operate.

The Committee agrees that these finders provide a valuable service in bridging this gap, and that the “gray market” in which they operate does not allow for adequate protection of investors or finders. We further agree that the proposed exemption provides a much-needed avenue for these finders to exit the “gray market.” Yet, by limiting the definition of Finder to natural persons, the exemption could exclude many of the finders currently operating in the “gray market” and disincentivize finders from (i) seeking to grow their business, thus limiting their capacity to assume their role in bridging the gap, or (ii) complying with the requirements of the proposed exemption, which would keep them in the “gray market.”

In addition, we believe the concerns addressed in limiting the exemption to natural persons can be addressed through alternative means. Accordingly, the Committee believes that the definition should not be limited to “natural persons.”

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?

The Release proposes to limit the activities of Tier I Finders 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 the Tier I Finder does not have any contact with the potential investors about the issuer.”

The Committee believes the proposed restriction on Tier I Finders from having any contact with potential investors is unworkable. As a practical matter, if a Tier I Finder provides the contact information of a potential investor to an issuer, the Finder should be allowed, at a minimum, to notify the potential investor that his or her information has been disclosed to the issuer and to provide the reason for such disclosure.

More generally, the Committee believes Tier I Finders should be permitted to provide contact information in both directions—*i.e.*, to provide the contact information of potential investors to an issuer, and the contact information of an issuer to potential investors. This would acknowledge the reality of customary introduction practices and allow either party to contact the other to discuss a potential transaction, and would not unduly broaden the role of Tier I Finders.

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 acknowledgement, for example, a read receipt for e-mail, that could serve to validate that investors received the required disclosure?

The Committee believes that the requirement to receive an acknowledgement of receipt of the required disclosure from the investor will limit a Tier II Funder’s ability to make introductions to an issuer, and thereby will limit the issuer’s ability to raise capital. In our experience as practitioners representing issuers, e-mail communications that appear to be purely administrative in nature are routinely ignored or overlooked by parties. Because time is often of the essence when early stage issuers are raising capital, the Committee believes that requiring Tier II Finders to receive an acknowledgement of receipt is likely to create delays or obstacles to funding.

Accordingly, the Committee believes that a read receipt for e-mail or other technological method to confirm that a written message was delivered should suffice as evidence of receipt.

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?

The Release states that the Commission’s mission “includes facilitating capital formation” for “the small businesses that are active participants in our private markets.” It goes on to state 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 Release also acknowledges, in footnote 46, that “Finders are customarily paid transaction-based compensation.” One of the primary reasons for this is that the businesses the exemption seeks to benefit (small businesses raising smaller amounts of capital) are unable to pay transaction fees that are disproportionately high in relation to the amount raised, while Finders are unwilling to provide their services for fees that are disproportionately low. The Committee therefore believes that limiting the ability to receive transaction-based compensation would discourage use of the exemption.

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?

The Release prohibits Tier II Finders from providing “advice as to the valuation or advisability of the investment.” Yet, Tier II Finders would be permitted to identify, screen and contact potential investors and discuss with them an issuer’s information in any offering materials. As a practical matter, if the Tier II FINDER is permitted to discuss information about the issuer, the FINDER should be permitted to discuss the strengths and weaknesses of the issuer and the merits and risks of the investment without going so far as to making a recommendation as to the advisability of the investment. Any concern that this activity might rise to the level of making a recommendation in the context of a securities offering (a role typically reserved to registered broker-dealers) would be mitigated by the other protections the Release has built into the proposed finder regime, including the requirement that Tier II Finders provide potential investors with, among other things, (i) a description of the relationship between the Tier II FINDER and the issuer, (ii) a statement that the Tier II FINDER will be compensated and a description of the compensation arrangement and (iii) an affirmative statement that the Tier II FINDER is acting as an agent of the issuer, is not associated with a broker-dealer and is not undertaking a role to act in the investor’s best interest.

As to Tier I Finders, we refer to our response to question 10, above.

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?

The Release would permit a Tier II Finder to arrange or participate in meetings with the issuer and investor, but then limits the nature of the discussions a Tier II Finder may have with potential investors. It would be helpful if the Commission were to provide guidance on acceptable parameters for discussions between Tier II Finders and potential investors and among Tier II Finders, the issuer and potential investors. Given that one of the goals of the Release is to promote small business capital formation, it is important to recognize that small issuers seeking to raise capital for the first time could benefit from the knowledge and sophistication that a Tier II Finder might bring to meetings arranged between the issuer and investor.

One way to balance investor protection concerns with the goal of capital raising would be to limit the Tier II Finder's role in the discussion to information addressed in the issuer's offering materials, including the strengths and weaknesses of the issuer, the merits (and risks) of the investment and the terms of the securities being offered. The Release seems to indicate that this type of activity would be permissible. The Committee would recommend the SEC go a step further and permit a Tier II Finder to go outside the four corners of the issuer's offering materials to assist the issuer in negotiating alternative terms to reach a deal acceptable to the potential investor. As a practical matter, small issuers are often looking to finders to be able to provide this type of service and not merely to serve as a conduit for identifying and screening potential investors or restating the information in the offering materials. While Tier II Finders could have the leeway to engage in negotiation between and among the issuer and potential investors, they could be prohibited from advising on the valuation or advisability of the investment.

32. If the proposed exemption is adopted, which staff letters, if any, should or should not be withdrawn, and why? This Committee believes the staff letter of Brumberg, Mackey & Wall, P.L.C (2008) should be withdrawn because it is contrary to the proposed exemption.

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. This Committee was involved in drafting and revising the California legislative bill adopted in 2015 (and codified at Cal. Corp. Code Section 25206.1) that provides a finders' exemption from California's broker-dealer certification requirements. The California exemption also allows for transaction-based compensation and imposes limitations on both the eligibility and activities of finders seeking to avail themselves of the exemption. As noted above, we believe the ability to receive transaction-based compensation is an essential component of the exemption. In our view, however, several of the requirements under the California exemption as finally codified, such as limiting the exemption to natural persons, the inclusion of a filing requirement and fee, and the limitation on the scope of the exemption to intrastate offerings, have had the effect of disincentivizing reliance on the exemption, despite the ability to receive transaction-based compensation. We believe these requirements impose a burden on the finder which is disproportionate to the limited activities in which a finder may engage. We therefore urge the Commission to take into account our

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experience with the California finder's exemption when considering comments that support limiting the burden on finders.

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We hope the foregoing is useful to the Commission and Staff in considering changes to Commission rules regarding broker registration. Please do not hesitate to contact either of the undersigned if you have any questions on the matters raised herein.

Very truly yours,

/s/ Rachelle H. Cohen
Co-Chair, Corporations Committee

/s/ Emily J. Yukich
Co-Chair, Corporations Committee

Drafting Committee: Rachelle H. Cohen, Darren L. Nunn, Julie A. Ryan, Shannon Treviño, and Emily J. Yukich

California Lawyers Association Business Law Section Corporations Committee Members:

As of the date of this letter, the Corporations Committee is composed of the members shown below, not all of whom necessarily endorse each and every recommendation and view expressed in this letter. Taken as a whole, however, this letter reflects a consensus of the members of the Corporations Committee.

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