

November 12, 2020

**Via Electronic Submission: rule-comments@sec.gov**

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

**Re: File Number S7-13-20**

Dear Ms. Countryman:

We appreciate the opportunity to submit comments to the Securities and Exchange Commission (the “Commission” or the “SEC”) on its Notice of Proposed Exemptive Order Granting Conditional Exemption from the Broker Registration Requirements of section 15(a) of the Securities Exchange Act of 1934 for Certain Activities of Finders, Exchange Act Release No. 90,112, 85 Fed. Reg. 64,542 (Oct. 13, 2020), File No. S7-13-20 (the “Proposed Order”). We thank the Commission for its thoughtful approach to facilitating capital formation, for its commitment to providing clarity regarding the regulatory status of so-called “finders” and to define permissible activities in which finders can engage without being deemed as engaging in activities that require broker registration.

We write to make recommendations regarding the definition of Finders<sup>1</sup> and the limitation that it apply only to natural persons. In particular, the Commission should provide additional clarification on the application of the Proposed Order to natural person employees of an issuer, or any of its affiliates or subsidiaries, that engage in finder activities within the scope of their employment (“Employee Tier II Finder”). Addressing the issue of Employee Tier II Finders would provide clarity with respect to the ability of all Finders to engage in certain activities without being required to register as a broker.

**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?**

To the extent an Employee Tier II Finder is eligible for the safe harbor contemplated by the Proposed Order, the Commission should address the special considerations applicable to an

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<sup>1</sup> As defined in the Proposed Order

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Employee Tier II Finder and ensure that they can effectively operate within the safe harbor. Investors, even sophisticated, accredited investors, may infer that an Employee Tier II Finder, by virtue of his or her close relationship to an issuer is offering advice as to the valuation or financial advisability of an investment even if there is no such intent. Therefore, the Commission should consider additions to the Proposed Order that would provide Employee Tier II Finders assurance that they come within the safe harbor when engaged in certain finder activities available to other Tier II Finders. This should include an addition to the Proposed Order that (i) discussions between an Employee Tier II Finder and an accredited investor, on their own, are not considered advice as to the financial advisability of the investment, and (ii) mere comments by an Employee Tier II Finder to an investor on the issuer's valuation methodology is not considered advice as to the valuation of the investment.

Further, in situations involving smaller issuers with fewer employees, an Employee Tier II Finder often has the following roles at the issuer: (i) assisting with structuring the transaction or negotiating the terms of the offering, (ii) having the power to bind the issuer, (iii) participating in the preparation of sales materials, and/or (iv) having knowledge of the business and the affairs of the issuer that would typically exceed information obtained in standard "due diligence" activities. Notwithstanding the foregoing, Employee Tier II Finders should come within the safe harbor contemplated in the Proposed Order. Smaller issuers, including those run by traditionally underrepresented founders, may greatly benefit from services provided by Employee Tier II Finders, and clarity on the application of the safe harbor for an issuer's own employees would facilitate the mission of capital formation at the heart of the Proposed Order.

The Commission already applies an exemption from the Solicitation Rule for employees of an adviser under the Adviser's Act because no potential investor would believe that an employee was an independent actor and because employees are separately subject to supervision and control of their employer that has independent duties in connection with a solicitation. 17 C.F.R. § 275.206(4)-3(a)(2)(ii). For similar reasons, as issuers can only act through their employees, the Commission should consider clarification that allows Employee Tier II Finders to solicit investors without fear that they will run afoul of SEC regulations requiring registration.

Acknowledging the status of Employee Tier II Finders would not in any way implicate the Commission's concern that exempting finders from registration could result in more fraudulent activity in the markets. Issuers are already subject to liability for their offerings and they are responsible for supervising their employees. Employee Tier II Finders, by the nature of their employment, are subject to many Commission regulations (including anti-fraud regulations under Section 17(a)) to which other Tier II Finders would not be. A Proposed Rule that allowed Tier II Finders but left unclear the status of employees of issuers, would appear inconsistent with the stated purpose of the Proposed Order to increase capital formation for smaller issuers.

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This proposal would also facilitate the Commission's goal of supporting issuers owned by women and other diverse entrepreneurs. Diverse founders are more likely to employ and utilize diverse Employee Tier II Finders who would benefit from the transaction-based compensation allowance that the Proposed Order contemplates. Use of Employee Tier II Finders facilitates diversity and inclusion for both issuers and finders.

These proposed clarifications facilitate the SEC's stated justification of assisting small businesses to raise capital and to provide regulatory clarity to investors, issuers, and the finders that assist them. The Commission's proposals for Tier II Finders add clarity in certain instances while leaving Employee Tier II Finders associated with issuers unsure of their ability to engage in certain activities. Addressing the above concerns would solve this problem while preserving investor protections.

**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?**

The Commission should address special considerations regarding the Proposed Order's disclosure requirements when an issuer opts to use Employee Tier II Finders to solicit potential investors. In these circumstances, instead of requiring each Employee Tier II Finder to provide individualized disclosures, issuers and investors would be best served by allowing the issuer to prepare a general disclosure statement to all prospective investors detailing transaction-based compensation for each of the issuer's employees receiving such. This would greatly streamline the disclosure process for the issuer and would provide greater clarity for an investor who could have all transaction-based disclosures in a single document.

The Commission could also consider streamlining the use of Employee Tier II Finders by amending the Proposed Order to clarify that an employment agreement would satisfy the requirement that a Finder enter into a written agreement with the issuer that includes a description of the services provided and associated compensation. In general, preexisting employment agreements already explicitly define employee's roles and issuers utilizing Employee Tier II Finders can structure their employment agreements to conform to the exemption.

## CONCLUSION

Smaller issuers, early stage businesses, and those located in places that lack established, robust capital raising networks rely on finders to assist with capital formation. They often particularly rely on their own employees to assist with locating potential investors. The above-suggested changes would facilitate the use of Employee Tier II Finders and would allow smaller

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issuer to potentially hire and retain more qualified employees, including women and other diverse employees, if the issuers are able to pay transaction-based compensation.

Thank you for your consideration of our comments. If you have any questions, please contact the undersigned at [REDACTED], [REDACTED], or [REDACTED]. We would genuinely appreciate an opportunity to discuss further with you.

Sincerely,

/s/ Henry Bregstein

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