November 12, 2020

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

Re: Proposed Exemptive Order for Certain Activities of Finders [File Number S7–13–20]

Dear Ms. Countryman:

I am pleased to provide these comments regarding the proposed exemptive order for certain activities of finders.[1]

Introductory Comments

After two decades of procrastination and neglect by the Commission and its staff, the proposed exemptive order is a very welcome and highly constructive improvement over the existing situation.[2] It will certainly help a great number of entrepreneurs in middle America and those from less affluent backgrounds to raise needed capital. It will help democratize access to capital. It will substantially clarify the rules governing finders that the Commission staff muddied two decades ago by withdrawing long-standing guidance and providing no substitute rules. The proposed exemptive order is, however, markedly too narrow regarding the proposed Tier I finders category and should be improved.

A Note on the Economics of Finders and Relevant Economic Data

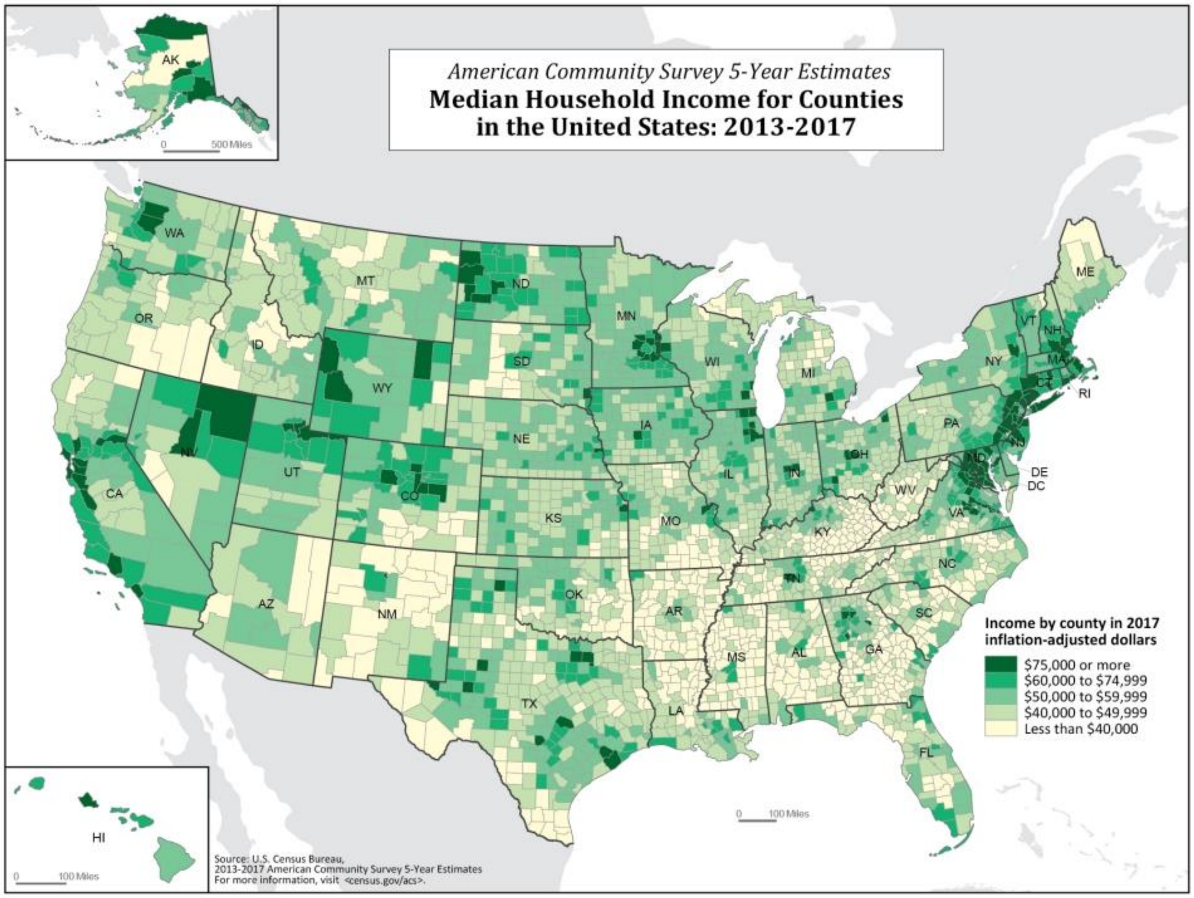
Geographical Differences

The analysis in the proposed exemptive order discusses the importance of finders to small issuers at some length. This is true and important. It ignores, however, the large differential effect that the Commission's current stance has on finders in middle America compared to affluent large cities. In large metropolitan areas like New York, Washington, or San Francisco, there are many accredited investors and most entrepreneurs in those cities will know many accredited investors. There are also large informal networks of such investors. In the Midwest, South and Rocky Mountain West (with the exception of a few large cities) and in less developed rural areas throughout the country, accredited investors are few and far between. Most entrepreneurs in

[1] "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," Notice of Proposed Exemptive Order; Request for Comments, *Federal Register*, Vol. 85, No. 198, October 13, 2020, pp. 64542-64551 (Release No. 34-90112) https://www.govinfo.gov/content/pkg/FR-2020-10-13/pdf/2020-22565.pdf (hereinafter "Proposed Exemptive Order").
[2] David R. Burton, "Let Entrepreneurs Raise Capital Using Finders and Private Placement Brokers," Heritage Foundation Backgrounder No. 3328, July 10, 2018 https://www.heritage.org/sites/default/files/2018-07/BG3328.pdf.

these regions will only know a few accredited investors and informal investor networks do not exist or are very small. Finders represent an opportunity to enable entrepreneurs in these regions to find accredited investors from outside of their communities.

The map below illustrates this problem by mapping median household income. The differences between the high income areas designated by dark green and low income areas designated by yellow are differences of approximately 100 percent – a factor of two. High incomes are very geographically concentrated on the coasts and a few other large cities.



I conjecture that if the percentage of the population that qualified as an accredited investor were mapped by county, the differences would be even more dramatic. Even many of the places marked dark green on this map (median household income >$75,000) will have a vanishingly small percentage of the population that have incomes high enough to qualify as accredited ($200,000 single, $300,000 joint). The Division of Economic and Risk Analysis (DERA) could perform a public service by obtaining data from the Census Bureau (the American Community Survey and other data) or the Internal Revenue Service Statistics of Income public use file and mapping accredited investor data by state and county. Because, however, in many small or rural counties there are so few accredited investors, some county data may be masked. Thus, DERA may have to use core-based statistical areas[3] or metropolitan statistical areas to generate the map instead of county data.[4]

Broker-Dealers, Finders, Competition and Barriers to Entry

Large broker-dealers are simply unwilling to deal with small, start-up entrepreneurs seeking small amounts of capital. The profit potential is too small to make the effort worth their while. Thus, most small entrepreneurs seek assistance from small broker-dealers or finders. The problem is that the relentless, ever-increasing regulatory burden on small broker-dealers by the Commission, the Financial Industry Regulatory Authority and the Treasury Department Financial Crimes Enforcement Network is killing off small broker-dealers.[5] Regulatory costs do not increase linearly with size, so large regulatory costs make it increasingly difficult for small broker-dealers to operate profitably. Small firms either merge with larger firms or close their doors. Large regulatory costs protect large broker-dealers from competition and contribute to the steadily increasing concentration in the financial service industry.[6] High regulatory costs constitute a government erected barrier to entry and are anti-competitive. Some large investment bank CEOs are quote frank about this. For example, Goldman Sachs CEO Lloyd Blankfein said:

> More intense regulatory and technology requirements have raised the barriers to entry higher than at any other time in modern history. This is an expensive business to be in, if you don't have the market share in scale. Consider the

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[3] One or more adjacent counties or county equivalents that have at least one urban core area of at least 10,000 population. There are nearly 1,000 CBSAs.

[4] One or more adjacent counties or county equivalents that have at least one urban core area of at least 50,000 population, plus adjacent territory that has a high degree of social and economic integration with the core as measured by commuting ties. There are nearly 400 MSAs.

[5] For a discussion of the differential impact of regulation on small firms, see, for example, David R. Burton, "The Corporate Transparency Act and the ILLICIT CASH Act," Heritage Foundation Backgrounder No. 3449, November 7, 2019 https://www.heritage.org/sites/default/files/2019-11/BG3449_0.pdf (discussing beneficial ownership reporting); David R. Burton, "Beneficial Ownership Reporting Regime Targets Small Businesses and Religious Congregations," Heritage Foundation Backgrounder No. 3289, March 5, 2018 https://www.heritage.org/sites/default/files/2018-05/BG3289.pdf; David R. Burton, "Improving Entrepreneurs' Access to Capital: Vital for Economic Growth," Heritage Foundation Backgrounder No. 3182, February 14, 2017 https://www.heritage.org/sites/default/files/2017-02/BG3182.pdf (discussing a wide variety of barriers to entrepreneurial capital formation); David R. Burton, "Securities Disclosure Reform," Heritage Foundation Backgrounder No. 3178, February 13, 2017 https://www.heritage.org/sites/default/files/2017-02/BG3178.pdf (discussing Regulation S-K and exempt offering disclosure); David R. Burton and Norbert J. Michel, "Financial Privacy in a Free Society," Heritage Foundation Backgrounder No. 3157, September 23, 2016 http://thf-reports.s3.amazonaws.com/2016/BG3157.pdf (discussing AML laws); David R. Burton, "Reforming FINRA," Heritage Foundation Backgrounder No. 3181, February 1, 2017, pp. 10-11 https://www.heritage.org/sites/default/files/2017-02/BG3181.pdf (briefly discussing small broker-dealers); David R. Burton and Norbert J. Michel, "Financial Institutions: Necessary for Prosperity," Heritage Foundation Backgrounder No. 3108, April 14, 2016 http://thf-reports.s3.amazonaws.com/2016/BG3108.pdf (discussing increasing concentration in financial services); and David R. Burton, "Reducing the Burden on Small Public Companies Would Promote Innovation, Job Creation, and Economic Growth," Heritage Foundation Backgrounder No. 2924, June 20, 2014 https://thf_media.s3.amazonaws.com/2014/pdf/BG2924.pdf (discussing smaller reporting companies and Regulation S-K).

[6] A similar phenomenon is occurring in banking. The four largest banks account for well over 2/5ths of all deposits.

> numerous business exits that have been announced by our peers as they reassessed their competitive positioning and relative returns.[7]

The Commission has been very slow to acknowledge the unpleasant reality that the Commission, FINRA and other financial regulators are, wittingly or not, active agents in the decline of small broker-dealers and community banks. The mindset that caused the staff to attempt to shut down the use of finders by entrepreneurs two decades ago is but one example. The Table below demonstrates what is happening.

Number of Broker-Dealers and Registered Representatives[8]

	2005	2019	2005-2019 Decline (%)
Broker-Dealers	5,106	3,517	-31%
Registered Representatives	653,721	624,674	-4%

Source: FINRA

The number of broker dealers has declined by 31 percent over the last decade and a half. Most of the broker-dealers that have disappeared were small broker-dealers – the kind that would have helped small entrepreneurs raise capital. The number of registered representatives has, however, remained relatively stable. They are now working for larger firms in a more concentrated financial services industry.

By clarifying the role of finders and delineating finders' and issuers' responsibilities, the proposed exemptive order will help over time to make up, to some degree, for the steady decline in the number of small broker-dealers due to the regulatory burden imposed by the Commission, FINRA and other agencies.

Moreover, finders are often a lower cost means of identifying potential than broker-dealers. Broker-dealers are typically less than enthusiastic about finders because they do not welcome the competition.

Transactions Costs

The current SEC stance makes the market less efficient by increasing transaction costs considerably — and has a disproportionately adverse effect on small firms trying to raise small amounts of capital.

Entrepreneurs from Lower and Middle Socio-Economic Groups

Lastly, the proposed exemptive order will disproportionately help entrepreneurs from lower and middle socio-economic groups because these entrepreneurs know markedly fewer highly affluent

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[7] "Regulation Is Good for Goldman," The *Wall Street Journal*, February 11, 2015 https://www.wsj.com/articles/regulation-is-good-for-goldman-1423700859.

[8] Statistics, Member Firm Statistical Review 2005 – 2019 and Statistics, Registered Representatives Statistical Review 2005 – 2019, FINRA https://www.finra.org/media-center/statistics#firms.

accredited investors even if they happen to live in jurisdictions with high incomes and a higher percentage of accredited investors in the population. Enabling them to more effectively use finders will enable them to find and raise capital from accredited investors. It will help democratize access to capital. DERA or perhaps the Office of the Advocate for Small Business Capital Formation could help quantify this effect by collecting and publishing survey data from entrepreneurs both now and after an exemptive order is put in place.

General Discussion

A "finder" is a person who is paid to assist small businesses to find capital from time to time by making introductions to investors — either as an ancillary activity to some other business (e.g., the practice of law, public accounting, insurance brokerage, etc.); as a Main Street business colleague or acquaintance;[9] or as a friend or family member of the business owner. They are sometimes called private placement brokers,[10] although this term is probably best used to describe people that are in the business of making introductions between investors and businesses. They are typically paid a small percentage of the amount of capital that they helped the business owner to raise. Finders play an important role in introducing entrepreneurs to potential investors, thus helping them to raise the capital necessary to launch or grow their businesses.[11] For regulatory purposes, neither finders nor private placement brokers should be treated the same as Wall Street investment banks (e.g., a large registered broker-dealers).

Section 15 of the Securities Exchange Act makes it unlawful for a broker or a dealer to effect a securities transaction without being registered with the Securities and Exchange Commission (SEC).[12] Although the definition of broker and dealer goes on for an absurd 2,300 words, the core of the broker–dealer concept is to be "engaged in the business" of "effecting transactions in securities for the account of others."[13]

The current SEC position on who should be required to register as a broker–dealer is overbroad and significantly exceeds the scope of the statutory registration requirement. The SEC's Guide to Broker–Dealer Registration illustrates this point.[14] The Guide suggests that those "finding investors," "making referrals," "finding buyers and sellers of businesses," or participating "in important parts of a securities transaction" "may need to register" as brokers. This is

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[9] By 'Main Street business,' I mean a privately held, non-financial business.

[10] Particularly by those familiar with the work and proposals of the American Bar Association Task Force on Private Placement Broker-Dealers. See American Bar Association, "Report and Recommendations of the Task Force on Private Placement Broker–Dealers," June 20, 2005, http://www.sec.gov/info/smallbus/2009gbforum/abareport062005.pdf.

[11] See, for example, Gregory C. Yadley, "Notable by their Absence: Finders and Other Financial Intermediaries in Small Business Capital Formation," presentation to the Advisory Committee on Small and Emerging Businesses, U.S. Securities and Exchange Commission, June 3, 2015, http://www.sec.gov/info/smallbus/acsec/finders-and-other-financial-intermediaries-yadley.pdf; *Capital Markets, A Financial System That Creates Economic Opportunities*, U.S. Department of the Treasury, October 2017, pp. 43-44 https://www.treasury.gov/press-center/press-releases/documents/a-financial-system-capital-markets-final-final.pdf; David R. Burton, "Let Entrepreneurs Raise Capital Using Finders and Private Placement Brokers," *op. cit*.

[12] Securities Exchange Act of 1934, 15 U.S. Code § 78o.

[13] Securities Exchange Act, § 4(a)(4) defines "broker" and § 4(a)(5) defines "dealer.

[14] See "Who is a Broker?" in the *Guide to Broker–Dealer Registration*, Division of Trading and Markets, U.S. Securities and Exchange Commission, April 2008, http://www.sec.gov/divisions/marketreg/bdguide.htm#II.

significantly beyond the scope of the statutory definition of a broker, to wit, "any person engaged in the business of effecting transactions in securities for the account of others."[15]

The current SEC criteria are so broad that just about anybody involved in the transaction would, in principle, be required to register as a broker–dealer. The issuer's accountant and attorney, after all, play an "important part" in a securities transaction. Presumably, so too might a finder or business broker. But the "important part" standard has no basis in the statute. Merely "making referrals" or "finding investors" is not what Congress had in mind when it enacted the Securities Exchange Act—and it is not in keeping with the plain meaning of the text of the statute. Making introductions or referral and finding investors does not constitute "effecting securities transactions for the account of others." It is also the case (contrary to what the SEC staff has claimed) that the current SEC position is a relatively recent innovation, dating, most notably, from the withdrawal of the 1985 *Dominion Resources* no action letter in 2000.[16] For the previous six-and-a half decades, the SEC position was substantially different than the position it has adopted in this century. The inconsistency of the current SEC position with both the underlying statute and previous SEC practice combined with the lack of clear regulatory standards have introduced significant regulatory uncertainty into the analysis of whether registration is required and what activities unregistered persons may engage in. It has also led to problems for issuers that used finders early in their lifecycle.

For years, the SEC staff appeared to believe that structuring compensation so that it is transaction-based will almost always result in the necessity of registration in the absence of some other specific statutory exemption (for example, those for banks in section 3 of the Securities Exchange Act). This is both an incorrect reading of the law[17] and bad public policy. There is absolutely no mention in the statutory definition of a broker or a dealer of the type of compensation involved. The primary focus of the law is whether the person is "engaged in the business" of "effecting transactions in securities" for the account of others.[18] Ergo, the focus on transaction-based compensation is an unwarranted regulatory creation of the SEC.

SEC staff analysis appears to center on concerns about "conflict of interest."[19] But in the context of small businesses trying to raise capital, success-based compensation usually creates a

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[15] Securities Exchange Act, § 3(a)(4).

[16] See, for example, the American Bar Association, "Report and Recommendations of the Task Force on Private Placement Broker–Dealers," for a discussion of previous SEC practice. See also, e.g., John Polanin, Jr., "The 'Finder's' Exception from Federal Broker–Dealer Registration," *Catholic University Law Review*, Vol. 40, No. 4 (Summer 1991), pp. 787–827, http://scholarship.law.edu/cgi/viewcontent.cgi?article=1758&context=lawreview.

[17] Some courts have agreed. See, for example, *SEC v. Kramer*, 778 F. Supp. 2d 1320 (M.D. Fla., 2011). Others have found that people claiming to be finders are actually unregistered broker–dealers. See, for example, *SEC v. Crawford*, 861 F.3d 760 (8th Cir., 2017). Given the uncertain state of the law, the deference accorded to agencies by courts and the varying factual situations, this is unsurprising.

[18] Securities Exchange Act, § 3(a)(4). See also Jeffrey D. Chadwick, "Finders Sleepers: Why Recent State Regulation of Financial Intermediaries Should Rouse the Federal Government from Its Slumber," *Richmond Journal of Law and the Public Interest*, Vol. 12, No. 1 (November, 2008), http://www.williamsmullen.com/sites/default/files/wm-url-files/Chadwick%20-%20Finders%20Sleepers.pdf.

[19] David W. Blass, "A Few Observations in the Private Fund Space," presentation before the Trading and Markets Subcommittee, American Bar Association, April 5, 2013, https://www.sec.gov/news/speech/2013-spch040513dwghtm. ("The SEC and SEC staff have long viewed receipt of transaction-based compensation is a hallmark of being a broker. This makes sense to me as the broker regulatory structure is built, at least in large part,

commonality of interest between the finder or private placement broker and his or her principal rather than a conflict of interest. With success fee compensation, the finder has the same interest as the small business principal — finding capital. With other forms of compensation, the finder or private placement broker simply has an interest in getting paid (whether or not he or she actually performed a service of value to the paying business).

Real estate brokers, commodities brokers, or insurance brokers raise substantially the same issue. As long as it is made clear for whom the broker works (i.e., it is not a case of dual agency),[20] these industries and their regulators do not regard transaction-based compensation as giving rise to a conflict of interest or as otherwise suspect. A finder representing a seller does not have a fiduciary duty to the buyer. They have a duty of fair and honest dealing, as does the issuer, imposed by other provisions in the securities laws[21] and, for that matter, the common law and a host of state statutes. But that constraint creates no conflict of interest.

As a matter of public policy, success-based compensation is generally preferable to other forms of compensation in the context of small firms. Allowing small business owners to pay a finder's fee or private placement brokerage fee to someone who actually did what he said he would do and brought capital to a business is one thing; forcing business owners into having to pay finders whether or not they were successful is another. If the aim of regulation is to prevent misrepresentation, fraud, and false dealing, it is preferable to pay people for actually doing what they promise rather than forcing business owners into the quandary of guessing whether the person will deliver. Moreover, capital-starved small businesses are not generally in a position to pay high-priced consultants who do not deliver. If, in contrast, the capital is raised, then the small business will have the means to pay.

The effort to channel these activities into either registered broker–dealers (with their attendant large fees) or consultants, who bill on some basis other than actual success, benefits large issuers and broker–dealers but harms small businesses seeking to grow. Wall Street is tolerant of large regulatory costs because it creates a major barrier to entry and forces those seeking capital to engage heavily regulated Wall Street firms.

Finders can reduce the cost of raising capital and increase the likelihood of raising needed capital, particularly for entrepreneurs who have a limited number of pre-existing relationships with affluent accredited investors. Under Regulation D, accredited investors must have an income of $200,000 annually ($300,000 joint) or a residence-exclusive net worth of $1 million or more.[22] As the American Bar Association (ABA) Task Force on Private Placement Broker–Dealers has noted, "The activities of PPBDs (private placement broker–dealers) is of critical importance to the efforts of a vast number of small businesses, and without their assistance it is unlikely that a great percentage of such businesses would ever be successful in raising early

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around managing the conflict of interest arising from a broker acting as a securities salesman, as compared to an investment adviser which traditionally acts as a fiduciary and which should not have that same type of conflict of interest.")

[20] Dual agency is when a broker represents both parties to a transaction and, often, accepts compensation from both parties. In this case, there is a clear conflict of interest because the broker is representing opposite parties in the same transaction.

[21] Most notably, § 10 of the Securities Exchange Act.

[22] 17 Code of Federal Regulations § 230.501(a).

stage funding."[23] Finders are of particular importance to entrepreneurs who live in cities or states where relatively few people are affluent enough to qualify as accredited investors. The SEC's regulatory position impedes small firms' ability to access needed capital both by restricting the availability of finders and by causing potential problems when successful small firms later seek venture capital or public financing and encounter counsel raising questions about their prior use of finders.[24]

The current SEC stance makes the market less efficient by increasing transaction costs considerably — and has a disproportionately adverse effect on small firms trying to raise small amounts of capital. A business owner should be able to compensate people for helping him or her to find and raise capital. He should be able to offer, for example, a 2 percent finders' fee to those that help him identify investors.

In the real world, people respond to incentives, and being able to offer a financial reward will make people more willing to take the time and effort necessary to help small business owners find the capital that they need.

<u>**Response to Requests for Comment**</u>

Request for Comment 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?

Response 1. Generally, yes. However, as noted above, the proposing release does not address the large differential geographical impact. In large parts of this country accredited investors are rare whereas in large coastal cities they are a substantial portion of the population. It does not address the fact that people from lower and middle socio-economic groups will know relatively few accredited investors because their social and business networks include few such people and that finders can help address this problem.

Request for Comment 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?

Response 2. No. The definition of Tier I finder is much too restrictive. This group should be thought of as ancillary, intermittent, "Main Street" finders who are not in business of being a finder. They will not typically be schooled in the nuances of securities laws and are not in the business of being a finder, so the limited requirements are appropriate. But limiting them to one transaction annually and prohibiting them from having ***any*** contact with an investor makes the category virtually useless. It basically means that Tier I finders will be limited to providing issuers with a contact list with which to make cold calls and then if the issuer makes one sale, the effort would have to stop. It is not clear, by the way, what the issuer would have to do if a second

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[23] See the American Bar Association, "Report and Recommendations of the Task Force on Private Placement Broker–Dealers," *op. cit*.

[24] Many counsel or venture capital firms will demand that the issuer buy back or offer to rescind transactions involving a finder's due to the SEC's creation of regulatory uncertainty.

investor sought to invest. Would the issuer be required to turn the potential investor away or be required to simply not pay the finder? And what is the point of either such rule? It protects no one and impedes entrepreneurial capital formation.

At the very least, the Tier I finders should be limited to one issuer not one transaction in any 12 month period. And the finders must at least be able to speak to investors to the extent of making an introduction to the issuer.

The Tier I category should be broader. It should allow finders to assist more than one issuer and engage in multiple transactions. In response 24, I give the examples found in recent legislation of different criteria that could be used. The rules discussed there may be too liberal for some, but they are easily scalable. The idea is to capture the level of activity that a business person, attorney, accountant, insurance agent or similar person might be expected to engage in as a sideline to their business or practice by making introductions for an issuer to business acquaintances or clients.

Tier II should be thought of as people who are effectively in the business of being a finder.

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

Response 3. No. There is no good reason to do so. A finder should be able to enter into agreements and accept payment via a firm which may be an LLC or corporation established for that purpose but more likely would be an existing business of the finder.

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

Response 4. No and Yes. There is no good reason to limit finders to natural persons. A finder should be able to enter into agreements and accept payment via a firm which may be an LLC or corporation established for that purpose but more likely would be an existing business of the finder. I have no problem, however, limiting the exemption to natural persons resident in the U.S. or firms chartered in or domiciled in the U.S. and with their primary office in the U.S. This would make it easier to ensure compliance with the requirements of the exemption.

Request for Comment 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?

Response 5. Generally, yes with respect to Tier II and no with respect to Tier I. See response 2.

Request for Comment 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.

Response 6. Limiting the investors to accredited investors is not unreasonable but suboptimal. Some exempt offerings are open to non-accredited investors. If Congress or the Commission has made the policy judgment that non-accredited investors may invest in the offering, it is manifestly unclear what policy rational exists for preventing the issuer from using finders to find non-accredited investors. Imposing investment limitations is simply wrong. It adds complexity and administrative cost for no good reason. The issuer is already subject to such limits. Imposing an additional layer of limitations is unwarranted. Moreover, investor specific limitations are a type of creeping federal merit review where the Commission would be substituting its investment judgement for that of the investor.

Request for Comment 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?

Response 7. In general, I think a prohibition on general solicitation is reasonable given the current structure of the law. Given the recent adoption of 17 CFR §230.148 (Exemption from General Solicitation or General Advertising), consideration should be given to explicitly stating that finders can participate in such meetings and that referring people met at those meetings to an issuer would not constitute general solicitation or be otherwise prohibited.

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

Response 8. No. Introducing another layer of limitations would be bureaucratic and complex and achieve no discernable policy goal. The offering limitations are sufficient.

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

Response 9. Definitely Not. See response 2.

Request for Comment 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?

Response 10. Definitely Not. See response 2. This provision makes Tier I virtually useless. At the very least, Tier I finders should be permitted to make introductions.

Request for Comment 11. Should we define “capital raising transaction” for purposes of Tier 1? If so, how?

Response 11. It is probably not necessary. A reasonable definition would be simply: “A ‘capital raising transaction’ is a transaction resulting in the sale of securities.” An offering should not be defined as a ‘capital raising transaction.’

Request for Comment 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?

Response 12. Generally, yes with respect to Tier II and no with respect to Tier I. See responses 2 and 7 especially.

Request for Comment 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?

Response 13. Finders should be able to solicit investors for any exempt offering.

Request for Comment 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?

Response 14. I doubt, in practice, there will be much finder activity in the public markets and there may be some merit in having finder activity limited to exempt markets and leaving non-exempt company activity to broker-dealers.

Request for Comment 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?

Response 15. Yes, the scope of the proposed exemption should be expanded to secondary offerings. Improving the efficiency and liquidity of exempt secondary markets will improve investor returns and to the extent finders can improve the situation, they should be permitted to do so.

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

Response 16. Generally, no.

Request for Comment 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?

Response 17. The guidance appears to be reasonable as written.

Request for Comment 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?

Response 18. Written disclosure are fine. They dramatically reduce evidentiary issues about whether the disclosures were provided should a dispute arise.

Request for Comment 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 98 for solicitations of investors in private funds, if adopted?

Response 19. I have no comment at this time.

Request for Comment 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 email, that could serve to validate that investors received the required disclosure?

Response 20. Any proof of actual receipt should suffice including a counter signature on a paper or electronic document, a certified mail receipt, a private courier tracking delivery notice, a read email receipt or other electronic verification of receipt.

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

Response 21. No.

Request for Comment 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?

Response 22. No. The issuer should not become an insurer of the finder's actions. Justice requires that the individual or firm that committed a violation should be liable for sanctions arising from the violation. If issuers must become insurers of finders, they will become less likely to use them. Moreover, we should not entirely absolve investors of the obligation to actually read the issuer's disclosure documents. Lastly, this would introduce a whole host of issues that will give rise to expensive litigation.

Request for Comment 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?

Response 23. No. This adds needless bureaucracy to the process and is particularly inappropriate for Tier I finders (if properly reconfigured – see above). It is also entirely unclear what the Commission would do with this information or what purpose it would serve.

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

Response 24. Generally, no. If the finder is not engaged in effecting securities transactions for the account of others and the offerings are lawful, then there is no sound rationale for such a limitation. There may be, however, a rationale for limiting Tier I finders compensation to some figure since, in principle, if properly reconfigured, Tier I finders would generally be meant to be ancillary or intermittent finders who are not in the business of being a finder. If there is a lot of money on the line, they would be able to afford compliance with the Tier II rules and be more likely to seek advice of counsel regarding the situation.

Rep. Budd introduced the Unlocking Capital for Small Businesses Act of 2019[25] that would have established an analog to Tier I finders with the following criteria:

> (A) receives transaction-based compensation of equal to or less than $500,000 in any calendar year;
> (B) receives transaction-based compensation in connection with transactions that result in a single issuer selling securities valued at equal to or less than $15 million in any calendar year;
> (C) receives transaction-based compensation in connection with transactions that result in any combination of issuers selling securities valued at equal to or less than $30 million in any calendar year; or
> (D) receives transaction-based compensation in connection with fewer than 16 transactions that are not part of the same offering or are otherwise unrelated in any calendar year."

Assuming a two percent finder's fee, criterion (B) would correspond to compensation of $300,000 and criterion (B) would correspond to compensation of $600,000.

Request for Comment 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?

Response 25. How finders are compensated should be left to private negotiations between the issuer and the finder. There is no justification for the SEC to be prescriptive. And, as discussed above, the staff hostility to transaction-based compensation has no basis in the statutory definition of broker-dealer and creates rather than eliminates conflicts of interest.

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

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[25] H.R.3768, 116th Congress.

Response 26. Yes. How finders are compensated should be left to private negotiations between the issuer and the finder. There is no justification for the SEC to be prescriptive.

Request for Comment 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?

Response 27. The limitations for Tier II are fine. As discussed above, the limitations on Tier I are too restrictive.

Request for Comment 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?

Response 28. I have no comment at this time.

Request for Comment 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?

Response 29. The exemptive order as written seems sufficient.

Request for Comment 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?

Response 30. Codifying the M&A broker letter would be constructive. It would be more durable and more likely to be found and complied with by non-specialist small business counsel who often will not go beyond statutes and regulations because their clients cannot afford to pay them to spend large amounts of time rummaging through poorly indexed guidance documents.

Request for Comment 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?

Response 31. I have no comment at this time.

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

Response 32. I may provide a supplemental comment on this issue.

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

Response 33. The provisions seem reasonable.

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

Response 34. Yes. Being a broker-dealer or associated with a broker-dealer would seem to be inconsistent with being governed by the rules governing a finder.

Request for Comment 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?

Response 35. I would think not. It would seem to me that once the employment or contractual connection is severed that becoming a finder should not be prohibited.

Request for Comment 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?

Response 36. I have no comment at this time.

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

Response 37. I have no comment at this time.

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

Response 38. Yes. Allowing finders to make introductions poses minimal risks. The issuer is still subject to the same requirements and all anti-fraud provisions still apply to the finder. Moreover, as written, the exemptive order limits finder activities to finding accredited investors.

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

Response 39. Yes. Finders will to some extent compete with broker-dealers in finding potential investors for entrepreneurs. This is a good thing. It will reduce transactions costs and afford entrepreneurs more options to raise capital. Artificial regulatory barriers to entry reduce social welfare.

Request for Comment 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?

Response 40. They are not broker-dealers since they are not effecting securities transactions for the account of others and they should not be required to register as broker-dealers. Requiring registration would effectively outlaw finders to the detriment of entrepreneurs and the economy more generally. The adverse effect would be most pronounced in small towns and rural America and for those in large cities who do not have affluent social networks.

Even small broker-dealers incur hundreds of thousands of dollars in compliance costs. And Tier I brokers are limited to one transaction. The idea that one transaction annually could justify that level of expenditure on compliance costs is preposterous.

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

Response 41. See the discussion above regarding Tier I finders.

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

Response 42. I have no comment at this time.

Request for Comment 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?

Response 43. The exemptive order should make it clear that finders do not need to become members of the Financial Industry Regulatory Authority or any other self-regulatory organization (i.e. a national securities association). The Commission should work with FINRA to ensure its rules are consistent with the exemptive order.

The Commission should require that state broker-dealer regulations are consistent with the exemptive order (see below).

Request for Comment 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.

Response 44. Yes. See the discussion above under the heading "A Note on the Economics of Finders and Relevant Economic Data."

Request for Comment 45. Other than the possible obligation of a Finder to register as a broker-dealer, the proposed exemption is not intended to affect the rights of the Commission or any other party to enforce compliance with applicable law, or the available remedies for violations of the law. This includes, in the case of the Commission, the ability to impose a broker-dealer registration bar on a person for misconduct that would warrant a bar. Are there any other considerations in this regard that the Commission should take into account as it considers the exemptive relief?

Response 45. State laws and self-regulatory organizations. See below.

Self-Regulatory Organizations

The exemptive order should make it clear that finders do not need to become members of the Financial Industry Regulatory Authority or any other self-regulatory organization (i.e. a national securities association).

State Regulation of Finders

The exemptive order should preempt state blue sky laws governing finders by providing that "No State or political subdivision thereof may enforce any law, rule, regulation, or other administrative action that imposes greater registration, audit, financial recordkeeping, or reporting requirements on a finder than those that are required under this order." This is in keeping with the national character of the regulation of broker-dealers and, for that matter, Rule 506 offerings which will be the majority of the offerings made.

Sincerely,

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