



November 12, 2020

**VIA EMAIL:** rule-comments@sec.gov

Vanessa Countryman  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549

**Re: 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 (Release No. 34-90112)**

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> submits this letter to the Securities and Exchange Commission (the “SEC” or “Commission”) in response to the request for comments by the SEC with respect to its proposal to grant exemptive relief (the “Proposed Exemptive Order”) to permit natural persons to engage in certain activities on behalf of issuers without registering as brokers under Section 15(a) of the Securities Exchange Act of 1934 (the “Exchange Act”).<sup>2</sup>

SIFMA and its members appreciate the opportunity to provide comments on the Proposed Exemptive Order. We support the Commission’s goal of facilitating capital formation for small businesses and its effort to provide clarity in this area. However, the Proposed Exemptive Order raises several questions and, we believe, may not be the appropriate approach to achieve the Commission’s objectives. To ensure the appropriate balance of the Commission’s goals of

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<sup>1</sup> SIFMA is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s nearly one million employees, we advocate for legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed income markets, and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. With offices in New York and Washington, D.C., SIFMA is the U.S. regional member of the Global Financial Markets Association (GFMA).

<sup>2</sup> See *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*, 85 Fed. Reg. 64542 (Oct. 13, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-10-13/pdf/2020-22565.pdf>.

investor protection, robust capital formation, and fair, orderly and efficient capital markets, we believe that meaningful consideration of a framework for finders requires sound economic analysis, with due regard to available data and existing available models, as well as coordination among regulators.

## **I. Background**

On October 7, 2020, the SEC voted to propose a conditional exemption from the broker registration requirement under Section 15 of the Exchange Act for natural person “finders” who assist issuers with raising capital in private transactions from accredited investors.<sup>3</sup> Although the industry and SEC staff have long recognized the existence of finders who seek to operate without registering as brokers under Section 15 of the Exchange Act, this proposal marks the first time that the SEC has recognized an explicit finder exemption from broker registration.

The Proposed Exemptive Order provides for two classes of finders: Tier I Finders and Tier II Finders. Persons whose activities meet the relevant conditions under either tier would be exempt from the requirement to register as a broker under the Exchange Act, while permitted to engage in certain activities traditionally associated with brokers and to receive transaction-based compensation in connection with such activities. The Proposed Exemptive Order is designed to “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.”<sup>4</sup>

The Proposed Exemptive Order “is intended to be narrowly tailored to address the capital formation needs of entrepreneurs and certain smaller issuers while preserving investor protections.”<sup>5</sup> The SEC seeks to address the long-standing issue of the regulatory status of finders who play a “discrete role in bridging the gap between small businesses” and investors.<sup>6</sup>

## **II. Comments**

### **1. SIFMA Appreciates the Commission’s Efforts to Address this Issue, on Which Clarity Is Lacking**

SIFMA and its members appreciate the SEC’s efforts to clarify the regulatory status of finders engaged in activity commonly associated with brokers. Our courts have recognized that the distinction between a broker (who must register and comply with the requirements of the Exchange Act, state laws, and self-regulatory organization rules) and a finder “remains largely

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 64544.

<sup>5</sup> Chairman Jay Clayton, *Open Meeting on Proposed Finders Exemption – Providing Regulatory Clarity to Benefit Small Businesses* (Oct. 7, 2020), <https://www.sec.gov/news/public-statement/clayton-proposed-finders-exemption-2020-10-07>.

<sup>6</sup> Proposed Exemptive Order, 85 Fed. Reg. at 64543.

unexplored, and both the case law and the Commission’s informal, ‘no-action’ letter advice is highly dependent upon the facts of a particular arrangement.”<sup>7</sup> The fact-specific nature of the analysis has at times resulted in inconsistent outcomes, thus creating uncertainty as to the activity that requires registration as a broker under Section 15(a) of the Exchange Act.<sup>8</sup> Industry groups have long called for greater clarity,<sup>9</sup> and Commissioners have noted the need for action by the SEC.<sup>10</sup>

## **2. However, the Proposed Exemptive Order May Not Provide an Appropriate Framework for Finder Activity**

The Proposed Exemptive Order would permit a natural person to engage in certain defined activities on behalf of an issuer without registration as a broker under authority granted to the SEC pursuant to Sections 15(a)(2) and 36(a)(1) of the Exchange Act.<sup>11</sup> Thus, Commission action must be “consistent with” (under Section 15(a)(2)) or “necessary or appropriate in” (under Section 36(a)(1)) the “public interest,” as well as consistent with the protection of investors (both sections). Some of the concerns raised by the Proposed Exemptive Order call into question whether the proposed framework meets these standards.

In considering whether the proposed Commission action is necessary or appropriate, SIFMA believes that the SEC should consider available alternatives, including for example

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<sup>7</sup> *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1337 (M.D. Fla. 2011) (emphasis added).

<sup>8</sup> *See, e.g., SEC v. River North Equity LLC*, 415 F. Supp. 3d 853, 857, 860 (N.D. Ill. 2019) (denying motion to dismiss because the SEC pleaded a plausible case that a defendant acted as an unregistered broker because he was “heavily involved in the ... transactions at key points, and received transaction-based compensation for his work,” and noting that “there is no binding authority construing ... ‘broker’ under Section 15(a)”; *Kramer*, 778 F. Supp. 2d at 1339 (finding that defendant acted as facilitator rather than broker because his conduct “consisted of nothing more than bringing together the parties to a transaction” and there was no evidence of the defendant possessing “authority over the accounts of others”); *SEC v. Mapp*, 240 F. Supp. 3d 569, 591-92 (E.D. Tex. 2017) (finding that defendant acted as a “finder, as opposed to a broker, as he was ‘merely facilitating securities transactions rather than performing the functions of a broker,’” did not possess “authority over the accounts of others” (citing *Kramer*), and did not perform functions of a broker identified in prior cases).

<sup>9</sup> *See, e.g., American Bar Association Committee on Small Business, Business Law Section, Report and Recommendations of the Task Force on Private Placement Broker-Dealers* (June 20, 2005), <https://www.sec.gov/info/smallbus/2009gbforum/abareport062005.pdf>.

<sup>10</sup> *See, e.g., Commissioner Hester M. Peirce, Statement at Open Meeting on Proposed Exemptive Order for Certain Activities of Finders* (Oct. 7, 2020), <https://www.sec.gov/news/public-statement/peirce-finders-2020-10-07> (stating that, “[u]ntil now, an ad hoc approach—one based on gut-feeling and guideposts gleaned from no-action letters and enforcement actions—is the approach we have been forcing small businesses and finders to take because we have not provided a framework”).

<sup>11</sup> Section 15(a)(2) of the Exchange Act authorizes the SEC to act by rule or order to conditionally or unconditionally exempt from the registration requirements of Section 15(a)(1) any broker or class of brokers, as it deems consistent with the public interest and the protection of investors. 15 U.S.C. § 78o(a)(2). Section 36(a)(1) of the Exchange Act authorizes the SEC to act by rule, regulation, or order to exempt, either conditionally or unconditionally, any person, or any class or classes of persons, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors. 15 U.S.C. § 78mm(a)(1).

existing regulatory frameworks for capital acquisition brokers and funding portals. Effective April 14, 2017, the Financial Industry Regulatory Authority, Inc. (“FINRA”) created a category of persons – capital acquisition brokers (“CABs”) – that are permitted to comply with a streamlined set of regulatory requirements if they engage only in a limited range of activities, including: (1) advising companies and private equity funds on capital raising and corporate restructuring, and (2) acting as placement agents for sales of unregistered securities to institutional investors under limited conditions.<sup>12</sup> In 2015, the SEC implemented a separate registration and regulatory framework in light of the limited nature of the activities and businesses of funding portals acting as intermediaries to facilitate crowdfunding transactions.<sup>13</sup> The SEC should examine the merits of these regimes as alternatives, including whether amendments to the same could facilitate capital formation for small businesses and entrepreneurs while protecting investors.

With regard to whether the proposed Commission action is in the “public interest” and mindful of investor protection, SIFMA notes concerns raised by members that should be considered by the Commission, including (1) the competitive impact on smaller brokers (which are small businesses in their own right); (2) the lack of a framework under the Proposed Exemptive Order to monitor individuals using the relief and the Commission’s inability to assess their compliance with the conditions of the Proposed Exemptive Order and bad actor provisions given the absence of notice, registration, examination, and recordkeeping requirements; (3) the departure from important investor protections available with the participation of a registered broker in a transaction; and (4) myriad anti-fraud concerns (including the lack of an audit trail due to the fact that finders would not be subject to any recordkeeping requirements and viability of potential anti-fraud claims if Tier II Finders may not conduct due diligence).

Additionally, in evaluating proposed exemptions, the Commission should consider the potential effects on the reputation of the U.S. capital markets for integrity and reliability. The Proposed Exemptive Order would authorize finders to engage as a business in soliciting investors and investments, without the SEC having any ability or mechanism to confirm or verify any of the information the finders are communicating to prospective investors regarding the issuers on behalf of which they are soliciting investments. Authorizing this type of uninformed solicitation risks creating a market perception that people soliciting investments lack knowledge and information about the securities and issuers for which they are soliciting, and that such solicitations are unreliable. Creating such a perception would undermine decades of efforts by the Commission to bolster public confidence in financial markets and market participants by requiring persons soliciting investments to develop a reliable basis for the representations made to prospective investors and would threaten the reputation of financial markets for integrity and reliability.

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<sup>12</sup> See generally CAB Overview & Rules, <https://www.finra.org/registration-exams-ce/capital-acquisition-brokers>.

<sup>13</sup> *Crowdfunding*, 80 Fed. Reg. 71387 (Nov. 16, 2015), <https://www.federalregister.gov/documents/2015/11/16/2015-28220/crowdfunding>.

### **3. The Scope of the Proposed Framework Is Not Tailored to the Goal of Promoting Small Business Capital Formation**

The Commission states that the proposed relief in the Proposed Exemptive Order “is intended to be narrowly-tailored . . . to address the capital formation needs of certain smaller issuers while preserving appropriate investor protections.”<sup>14</sup> However, the Proposed Exemptive Order does not include any limit on offering size, as one transaction or in the aggregate. In addition, the Proposed Exemptive Order does not define “smaller issuer” or limit the size of the issuer that could engage a finder. SIFMA notes that there are several non-reporting companies that do not fit the commonly understood definition of “small,” and SIFMA members are concerned that, despite the stated rationale, the Proposed Exemptive Order does not appear to be narrowly tailored.

### **4. The SEC Should Coordinate with State Authorities and FINRA**

The Proposed Exemptive Order requests comment regarding whether the SEC should coordinate with other regulators to provide clarity and consistency regarding the types of activities in which finders and other limited purpose brokers may engage. We believe that it is imperative for the SEC to do so.<sup>15</sup> In the conduct of their business, SIFMA members generally must consider compliance with the oversight of several regulators, including the SEC. Through the North American Securities Administrators Association, Inc., state securities administrators have spoken against “any action that could limit state regulatory oversight of ‘finders’ and ‘private placement brokers.’”<sup>16</sup> Similarly, as noted above, since at least 2017 FINRA has offered a tailored regulatory regime for persons engaged in finder activities, essentially advising companies and private equity funds on capital raising and corporate restructuring and acting as placement agents for sales of unregistered securities to institutional investors under limited conditions.<sup>17</sup> In creating a regulatory framework for finder activities, SIFMA encourages the SEC to work with the various state government bodies that regulate and oversee financial markets and companies and FINRA.

### **5. The SEC Should Perform an Economic Analysis, Including Analysis of Alternatives**

The SEC should engage in a reasoned determination of the potential costs and benefits of the proposed regulatory framework for finders. As published, the Proposed Exemptive Order does not provide economic analysis sufficient to meaningfully address the merits of the framework or to discuss reasonable alternatives.

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<sup>14</sup> Proposed Exemptive Order, 85 Fed. Reg. at 64546.

<sup>15</sup> *Cf. American Bankers Association v. SEC*, 804 F.2d 739, 755 (D.C. Cir. 1986) (the “SEC cannot use its definitional authority to expand its own jurisdiction and to invade the jurisdiction” of others).

<sup>16</sup> See *NASAA Legislative Agenda for the 116<sup>th</sup> Congress*, at p. 5, <https://www.nasaa.org/wp-content/uploads/2019/06/NASAA-Legislative-Agenda-for-116th-Congress-1.pdf>.

<sup>17</sup> See FINRA Regulatory Notice 16-37 (Oct. 2016), <https://www.finra.org/rules-guidance/notices/16-37>.

While the Proposed Exemptive Relief is not a rulemaking, we believe action on the regulatory treatment of finders would benefit from economic analysis consistent with longstanding guidance from the SEC's Division of Economic and Risk Analysis and the SEC's Office of the General Counsel in the rulemaking context.<sup>18</sup> In particular, the SEC's action, and the ability of the public to provide meaningful comments, would benefit from an analysis: (1) identifying the need for the action and explaining how the proposed framework would meet that need; (2) articulating the appropriate economic baseline against which to measure the proposed framework's likely economic impact (in terms of potential benefits and costs, including effects on investor protection, efficiency, competition, and capital formation in the market(s) the rule would affect); (3) identifying and evaluating reasonable alternatives to the proposed approach; and (4) assessing the potential economic impact of the proposed framework and reasonable alternatives, in light of quantitative and qualitative costs and benefits of each.<sup>19</sup>

Further, the Commission should consider the availability of alternatives to accomplish its stated goal, including amendments to those alternatives. SIFMA has noted two examples above, FINRA's CAB rules and the rules applicable to funding portals. In adopting the funding portal rules, the SEC noted that its approach "will provide for a meaningful addition to the existing capital formation options for smaller companies while maintaining important investor protections."<sup>20</sup> In considering a framework for finders, the SEC should examine the merits of all available alternatives, including potential amendments to the same that could accomplish the Commission's stated goals of facilitating capital formation for small businesses and entrepreneurs while protecting investors.

## **6. Meaningful Consideration of a Framework Requires a Robust Rulemaking Process**

SIFMA believes that Commission action to establish a framework for finders must involve a robust formal rulemaking process. The Proposed Exemptive Order by design implements a framework for an entire industry (not a firm-specific or transaction-specific exemption); therefore, it is *de facto* a rule and it should be considered through the rulemaking process. As noted above, action by exemptive order is not well suited for due consideration of the establishment of a new framework for finders. In considering SEC action under its exemptive authority, the U.S. Court of Appeals for the D.C. Circuit has vacated such agency action where it finds that the SEC

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<sup>18</sup> See *Current Guidance on Economic Analysis in SEC Rulemakings* (Mar. 16, 2012), [http://www.sec.gov/divisions/riskfin/rsfi\\_guidance\\_econ\\_analy\\_secrulemaking.pdf](http://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf) (stating "the Commission considers potential costs and benefits as a matter of good regulatory practice whenever it adopts rules"). While not a rule, we believe Commission action that creates a regulatory framework for a class of persons is sufficiently similar to warrant cost-benefit analysis.

<sup>19</sup> *Id.* at 1-2 (detailing the referenced factors).

<sup>20</sup> Crowdfunding, 80 Fed. Reg. at 71391.

exceeded its authority under the Administrative Procedure Act.<sup>21</sup> Formal rulemaking procedures “enable[ ] the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those who are regulated.”<sup>22</sup> As Chairman Clayton has noted, “the SEC has developed robust processes for obtaining public input and is committed to performing rigorous economic analyses of our rules, at both the proposing and adopting stages. These efforts are critical to identifying the benefits and costs of regulatory actions, including situations where a rule’s effects may not be consistent with expectations.”<sup>23</sup> We agree.

### III. Conclusion

SIFMA and its members appreciate the opportunity to comment on the Proposed Exemptive Order. We appreciate the Commission’s efforts to promote capital formation by seeking to implement a framework that addresses this area and hope that our feedback is helpful in developing an improved regulatory framework.

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If you have any questions or would like additional information, please do not hesitate to contact me at [REDACTED].

Very truly yours,



Kenneth E. Bentsen, Jr.  
President and CEO

cc: Marlon Paz, Esq.  
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SIFMA

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<sup>21</sup> See *Fin. Planning Ass’n v. SEC*, 482 F.3d 481, 492 (D.C. Cir. 2007).

<sup>22</sup> *Batterton v. Marshall*, 648 F.2d 694, 704 (D.C. Cir. 1980).

<sup>23</sup> See Chairman Jay Clayton, *Remarks at the Economic Club of New York* (July 12, 2017), <https://www.sec.gov/news/speech/remarks-economic-club-new-york>. See also Hester Peirce, *Backdoor and Backroom Regulation*, *The Hill* (Nov. 10, 2014), <https://thehill.com/blogs/pundits-blog/finance/223472-backdoor-and-backroom-regulation> (stating that, “[a]s hard as the rule-making process is, its component parts are fundamental to an agency’s effectiveness and the public’s ability to hold the agency accountable”).