



November 12, 2020

Submitted via email to:
rule-comments@sec.gov

Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: SEC's request for public comments on Release No. 34-90112; 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, and specifically the codification of the
SEC Division of Trading and Markets M&A Brokers No-action Letter

Dear Ms. Countryman:

This letter is submitted to the Securities and Exchange Commission (*SEC* or *Commission*) by and on behalf of the Business Intermediaries Education Foundation, the Alliance of Merger & Acquisition Advisors, the International Business Brokers Association, and the M&A Source. Together, we are the leading national associations of merger and acquisition (*M&A*) advisors and intermediaries (*M&A Brokers*). This letter is in response to the SEC's request for public comments with respect to its proposed exemptive relief (*Proposed Exemption*) to permit natural persons to engage in certain limited securities-related activities on behalf of issuers without such persons being required to register as a broker under Section 15(a) of the Securities Exchange Act of 1934 and related rules (*Exchange Act*).¹

The members of our national and related state and regional organizations work closely with small business owners—sellers and buyers—in facilitating a wide range of business sales, purchases, mergers, and other combinations (*M&A Transactions*) involving their privately owned companies. As such, we are strong small business advocates, believing that privately held businesses are the very cornerstone of the U.S. economy, in both jobs creation and business innovation. We wholeheartedly commend the Commission for initiating the Proposed Exemption and are fully supportive of its stated goals and objectives, as well as its approach to achieving them. For more than 15 years, our members have been active participants in the annual SEC Government-Business Forum on Small Business Capital Formation. Collectively, we have contributed ideas to, and we are fully supportive of, those forums' recurring recommendations to be realized through the Commission's Proposed Exemption.

¹ See SEC Release No. 34-90112 (Oct. 28, 2020) available at <https://www.sec.gov/rules/exorders/2020/34-90112.pdf> (*Proposing Release*).

While the Commission will surely receive a wide range of public comments, we strongly encourage the Commission not to let the “perfect” proposal stand in the way of adopting this “good” proposal. The Proposed Exemption is a critically important first step forward. The Proposed Exemption will strongly contribute to our economy’s recovery from the COVID-19 pandemic. Hundreds of thousands of small businesses have been forced by state governments to close or severely restrict the scope of their operations, causing unprecedented financial and job losses—and the pandemic is not yet over. Moreover, as baby boomers continue to retire at an accelerating rate, existing jobs will only be preserved through the successful transition of those businesses to new owners.

Our specific focus with respect to the Proposed Exemption is the SEC’s request for public comment about the Commission codifying and adopting the no-action position taken by the SEC Division of Trading and Markets in four separate M&A Brokers No-action Letters over the last 34 years. All these policy statements, under different administrations provided similar exemptive relief.² The underlying public policy considerations and related recommendations are summarized in the 2005 Report of the ABA Task Force on Private Placement Broker-Dealers.³ The no-action letters issued over the course of more than 35 years evidence thousands of hours of thoughtful consideration of how to appropriately balance the dual statutory mandates of capital formation in its various forms and investor protection in the context of M&A Transactions involving privately owned businesses.

We believe the M&A Brokers No-action Letter strikes a reasonable, appropriate balance in harmonizing those important public policy objectives with respect to privately negotiated M&A Transactions, particularly those involving smaller businesses and underserved communities and their various constituents. This no-action letter includes relevant investor protections, while recognizing that privately negotiated M&A Transactions involving sellers and buyers actively running and acquiring those businesses rarely involve the issues and public policy concerns underpinning the protection of public markets and passive investors. Parties to these M&A Transactions commonly engage lawyers, accountants, tax advisors, commercial lenders, and other advisors to assist in structuring, negotiating, performing due diligence, and closing these transactions—typically, the larger the transaction, the more internal expertise and staffing is applied, as well as lawyers, accountants, and tax advisors. The parties and their legal counsel contractually protect their own rights, interests, and remedies; and rarely do they rely upon federal or state securities laws or turn to securities regulators for their protection or enforcement.

² See M&A Brokers, SEC Staff No-Action Letter (Jan. 31, 2014) available at <https://www.sec.gov/divisions/marketreg/mr-noaction/2014/ma-brokers-013114.pdf> (*M&A Brokers Letter*); see also Country Business, Inc. Staff No-Action Letter (Nov. 8, 2006); Victoria Bancroft, SEC Staff No-Action Letter (July 9, 1987); and International Business Exchange Corporation, Staff No-Action Letter (Dec. 12, 1986).

³ See Report and Recommendations of the American Bar Association Business Law Section Task Force on Private Placement Broker-Dealers (June 20, 2005), 60 *Business Lawyer* 959-1028 (2005), available at .

Moreover, as further evidence of the broad public policy support for this exemptive relief, following the SEC staff's lead, the North American Securities Administrators Association (NASAA) adopted an M&A Brokers Model Rule in 2015.⁴ NASAA's Model Rule incorporates various terms and provisions from the then pending federal legislation, as well as found in the staff's no-action letter. The Model Rule is intended to harmonize federal and state regulation of M&A Broker activities. The Model Rule incorporates key terms, definitions, and concepts from the M&A Brokers No-action Letter and then-pending federal legislation.⁵ Differences between the M&A Brokers No-action Letter, NASAA's M&A Brokers Model Rule, and the still pending federal legislation are largely due to the timing of their parallel stages and processes of development and political considerations with respect to the legislation (i.e., a transactional size cap on eligible qualifying private companies). To date, a total of 19 states have by statutory amendment, administrative rule, administrative order, or no-action letter adopted exemptive relief. Their state-level exemptive relief is based on NASAA's M&A Brokers Model Rule, incorporation of the M&A Brokers No-action Letter by reference, or a combination of those sources.⁶ Moreover, both NASAA and, among many others, the U.S. Chamber of Commerce have actively supported the pending federal legislation through letters of support and Congressional testimony.⁷

While the M&A Brokers No-action Letter is certainly helpful in clarifying federal regulation of M&A Brokers, it remains only a statement of the SEC staff's position with respect to enforcement. On numerous occasions Commissioners and SEC staff have reiterated that no-action letters, FAQs, and other staff guidance are not legally binding on the Commission and, indeed, are not legally binding on any person.⁸ A no-action position could be withdrawn by the

⁴ NASAA's Model M&A Brokers Rule is available at <https://www.nasaa.org/wp-content/uploads/2011/07/MA-Broker-Model-Rule-adopted-Sept-29-2015-corrected.pdf> (*M&A Brokers Model Rule*).

⁵ Presently, this legislation is embodied in H.R. 609 (116th Congress) available at <https://www.congress.gov/bill/116th-congress/house-bill/609>; prior iterations of this legislation have twice unanimously passed the U.S. House of Representatives, even while the U.S. Senate has not yet taken up consideration of the legislation.

⁶ See Alaska Securities Act, art. 2, § 45.56.320; Arkansas Securities Rules, ch. 3 Rule 301(f); Colorado Securities Division Rules, ch. 3, § 51-3.33; Florida Securities and Investor Protection Act, § 517.12; Georgia No-action letter, Noula Zaharis, Interim Director, Georgia Office of the Secretary of State, Securities Division, January 23, 2015; Illinois Admin. Code, tit. 14, subtit. A, ch. 1, pt. 130, Subpt. H, § 130.830; Iowa Admin. Code, ch. 50, Div. II, § 191-50.10 (502); Maryland, Admin. Order, Melanie Senter Lubin, Commissioner, Maryland Securities Division, 12-7-2017; Michigan Admin. Code, Securities, Part 1, R 451.4.2; Mississippi Rules of the Secretary of State, tit. 1, pt. 14, c. 5, r. 5.35; Montana Securities Department Rules, tit. 6, ch. 10, subch. 3, § 6.10.308; Oklahoma Securities Commission Rules, tit. 660, ch. 1, subch. 5, Pt. 3, § 660:11-5-26; Pennsylvania Department of Banking and Securities, No-action letter, Scott A. Lane Sr., Deputy Chief Counsel for Securities, January 25, 2016; South Carolina Securities Division, No-action letter, J. Louis Cote' III, November 12, 2014; South Dakota Securities Regulations, art. 20:08, ch. 20:08:03 § 20:08:03.18; Tennessee Securities Division, Policy Statement, 9-11-2017; Tex. Admin. Code, tit. 7, pt. VII, ch. 139, § 139.27; Utah Division of Securities, Interim Statement of Policy, February 28, 2014; and Vermont Department of Financial Regulation, Rule No. S-2016-01.

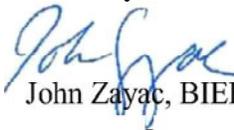
⁷ Congressional letters of support and testimony from NASAA and the U.S. Chamber of Commerce through multiple sessions of Congress are available upon request.

⁸ See, e.g., Chairman Clayton, *Statement Regarding SEC Staff Views*, Sept. 13, 2018, available at <https://www.sec.gov/news/public-statement/statement-clayton-091318>; and *Statement on Division of Trading and*

staff, potentially with little or no prior notice. Moreover, the public—even the business community—does not readily understand what is a “no action” letter or its legal effect, leading to marketplace confusion—often exploited by SEC-registered competitors as misperceived barriers to M&A brokerage competition. This creates an untenable foundation upon which we, as M&A Brokers, must predicate our professional services conducted through our own small businesses. For example, the staff’s published general explanation of a “no-action letter” (now moved to the Investor.gov website)⁹ leaves substantial ambiguity around the M&A Brokers No-action Letter’s application in M&A Transactions. In application the ambiguity leads to confusion, disputes, and legal expenses that would be mitigated, if not avoided, through a Commission-adopted exemptive order.

Accordingly, we strongly encourage the Commission to promptly codify and formally adopt the M&A Brokers No-action letter by exemptive order. As this exemptive relief has been “in the making” since at least 2005, with broad public policy support—including NASAA—we believe the SEC has compiled an exhaustive basis upon which to predicate this exemptive relief. Nonetheless, we would be pleased to discuss or answer any questions further at your convenience.

Sincerely,


John Zayac, BIEF President

Sincerely,


Chris Blees, AM&AA President

Sincerely,


Barry Berkowitz, IBBA Chair

Sincerely,

/s/ Robert McCormack
Robert McCormack, M&A Source Chair

c: Mr. J. Michael Ertel
Campaign for Clarity, Co-Chair
Transworld M&A Advisors, Managing Director

Mr. Shane B. Hansen, Partner
Warner Norcross + Judd LLP

Markets Staff Fee Guidance, June 12, 2019, available at <https://www.sec.gov/news/public-statement/statement-division-trading-and-markets-staff-fee-guidance>.

⁹ See, e.g., Fast Answers - No Action Letters, available at <https://www.investor.gov/introduction-investing/investing-basics/glossary/no-action-letters>.

OUR ORGANIZATIONS

Business Intermediaries Education Foundation (BIEF)

The Business Intermediaries Education Foundation is a non-profit organization founded with the mission of creating and enabling activities to uplift the profession through, but not limited to: (1) Information, (2) Awareness, (3) Research, (4) Outreach, (5) Analysis, (6) Exchange, (7) Understanding, (8) Cooperation, and (9) Education. The work of the BIEF is guided by a volunteer Board of Directors comprised of current and past chairs of the leading, international, business intermediary professional associations.

Specific objectives of the BIEF are: (1) Develop cooperation, education, and interchange among worldwide peers and with related professions; (2) Advise, educate, and persuade business buyers, sellers, and their advisors about the value and wisdom in employing a professional business broker or intermediary when selling, buying, or transferring ownership of a business; (3) Cause development and delivery of education and programs to enhance competencies and success throughout the business brokerage, mergers and acquisitions profession or its clientele; (4) Enable study and research into topics of value to the profession and its markets; (5) Establish perpetual self-funding to enable and sustain BEIF's vision and mission.

More information about BIEF is available on its website at:
<http://www.biefoundation.org>.

Alliance of Merger & Acquisition Advisors (AM&AA) and its Members

The Alliance of Merger & Acquisition Advisors (AM&AA or The Alliance) is an international professional association of M&A intermediaries and related professionals. The Alliance serves the educational and transactional support needs of middle market M&A professionals worldwide. The Alliance was formed in 1998 to connect M&A intermediaries, CPAs, attorneys, and other experienced corporate financial investors and advisors, and currently has more than 900 professionals that are among the most highly recognized leaders in the industry. The Alliance draws upon proven capital resources combined with a think-tank of transactional expertise to better serve the many business investment needs of middle market companies worldwide. Some members are registered broker-dealers and others are unregistered in reliance upon SEC no-action letters and a variety of state-level transactional exemptions.

Members serve corporate and institutional sellers and buyers of privately held businesses with a wide range of transaction values. These essential corporate financial advisory and transaction services include investment banking, business brokerage, accounting, finance, valuation, tax law, and due diligence.

More information about AM&AA is available on its website at:
<http://www.amaaonline.com>.

International Business Brokers Association (IBBA) and its Members

The International Business Brokers Association promotes members' professional development and interests to maximize public awareness of the business brokering profession. The IBBA supports entrepreneurship, and the concept that the investment risks of owning a business deserve a straightforward, professional and honest presentation to both seller and buyer. The IBBA's Standards and Code of Ethics impose obligations beyond those of ordinary commerce. We believe business brokers should be zealous in maintaining and improving ethical practices and sharing with their fellow business brokers a common responsibility for integrity and honor in their business transactions.

More information about IBBA is available on their website at: <http://www.ibba.org>.

M&A Source (MAS) and its Members

The M&A Source is organized and operated to promote members' professional development to better serve their clients' needs, and to maximize public awareness of services performed by intermediaries and ancillary advisors who facilitate solutions available for lower middle market merger and acquisition transactions.

The M&A Source was established in 1992 to address the challenges faced by merger and acquisition professionals. This international organization currently has more than 300 M&A dealmakers including intermediaries, investment bankers, attorneys, accountants, financial planners and others involved in the M&A process.

The goals of the M&A Source are: (1) To advance the members' deal making opportunities, (2) To advance the profession's practice standards by providing a wide array of programs, and (3) To advance each member's personal growth potential through a variety of forums whereby members exchange information and learn from one another.

In addition, there are specific professional duties outlined for M&A Source members. They include: (1) Represent clients in accomplishing the sale of all or part of their businesses, (2) Represent clients searching to acquire companies, divisions or product lines, (3) Advise clients on the current values, structures, strategies and methods for ownership transfers of middle market companies, (4) Facilitate the array of financing necessary to consummate the transaction, and (5) Preserve client confidentiality and transaction details.

More information about M&A Source is available on their website at: <http://www.masource.org>.

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