November 12, 2020

<u>Via Electronic Submission</u>

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Attention: Ms. Vanessa A. Countryman, Secretary

Re: Comment to Notice ("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 (File Number S7-13-20)

Ladies and Gentlemen:

I appreciate the opportunity to comment in support of the above proposed exemptive relief. By way of background, I am a retired investment management and private funds attorney, who, for the last 19 years served as a partner in the Investment Management Group at the Dechert LLP Law Firm. I have represented hundreds of investment advisers, both before the Commission on a wide variety of issues and otherwise, including many that were challenged by the issue of broker-dealer registration for their business development employees. This letter is specifically intended to support the application of the proposed exemptive relief to the activities of employees of private fund advisers, without requiring registration as a broker under Section 15 of the Securities Exchange Act of 1934 (the "'34 Act")(see the Notice, Section IV. Request for Comments, questions 36 and 37). However, I also believe that the proposed relief would be highly beneficial to small businesses generally and help them to grow in a responsible way. Many of these small businesses are experiencing and will continue to experience extreme economic hardship as a result of the Covid-19 pandemic, so any support for the capital formation process would be a welcome boost at a time when it is sorely needed. The Commission acknowledges in Section I of the Notice that helping to facilitate capital formation is one of its primary roles.

While the Notice suggests that the proposed exemptive relief was prompted by the desire to support the capital raising needs of small and emerging companies, the need for exemptive relief is equally compelling when considering the capital raising needs of the private fund industry, including hedge funds, credit funds, real estate funds, private equity and venture capital funds. I note that many of the investments made by private funds are an important source of capital for small and emerging companies.

The Notice discusses the challenges faced by small and emerging companies in raising capital, but there does not appear to be anything in the proposed relief which would preclude private fund advisers from relying upon it. I believe that, in general, the conditions that would be attached to Tier 2 Finders are workable when applied to the activities of finders seeking to raise capital for private funds.

Reliance on the Issuer Exemption

Exchange Act Rule 3a4-1, the so-called "issuer exemption", provides a nonexclusive safe harbor under which associated persons of certain issuers can participate in the sale of an issuer's securities in certain limited circumstances without being considered a broker. However, as noted in 2013 by David W. Blass, Former Chief Counsel in the Commission's Division of Trading and Markets in a speech entitled "A Few Observations in the Private Fund Space", private fund advisers have difficulties relying on the issuer exemption because it can be tough to satisfy one of the three conditions necessary to rely on that rule – effectively, a) limiting the offering and sale of the issuer's securities to certain specified types of financial institutions, or b) having business development employees perform substantial duties for the issuer other than securities transactions and limiting participation in any securities offering to once every 12 months, or c) limiting activities to delivering written communication by means that do not involve oral solicitation. Importantly, the safe harbor also prohibits the payment of compensation in the form of commissions or other transaction-based compensation to employees.

Like the current initiative, the issuer exemption has its roots in the Commission's desire to facilitate the ability of small businesses to raise capital by enabling employees of an issuer (such as, for example, the company's CEO and CFO) to engage in capital raising activities on a periodic basis, as the company requires additional capital. Hence the conditions to be satisfied in order to rely upon the safe harbor (i.e., one offering for a single issuer every 12 months, performing substantial other duties for the issuer and not receiving a commission or transaction based compensation for the capital raising efforts) make sense in the context of a small business' capital needs.

However, it is generally not possible for advisers to private funds to satisfy these requirements, particularly if they have a dedicated sales team. As a matter of industry practice, many advisers seek to model their structure in a manner which is generally consistent with the safe harbor by using a compensation structure which provides for the payment of a salary and bonuses to employees engaged in marketing activities and having those employees involved in a broader Investor Relations role by supporting and servicing existing customer relationships. However, this creates regulatory uncertainty and risk for the adviser since it does not neatly fit within the safe harbor and is ultimately subject to a facts and circumstances test.

The proposed relief would provide a much cleaner approach for investment advisory firms that would otherwise be forced to continue to attempt to pigeonhole the activities of business development employees to fit neatly within the requirement of the issuer exemption. In fact, the primary focus of business development employees in any firm is and should be to raise capital and, it is respectfully submitted, the attempt to quantify the percentage of their time spent on other activities is a fiction and somewhat of a useless exercise.

Relationship of the Proposal to the Cash Solicitation Rule

Last year at this time the Commission published proposed changes to Rule 206(4)-3 under the Investment Advisers Act (the "Cash Solicitation Rule"). This proposed overhaul of the Cash Solicitation Rule would change certain of the requirements related to the nature of the disclosure to be provided to investors and the mechanics for delivering the information, as well as more fulsome provisions related to the potential disqualification of solicitors based upon regulatory or other similar events involving the solicitor.

Importantly, the proposal would explicitly make the Cash Solicitation Rule applicable to the activities of solicitors in raising capital for private funds. The proposal recognized that the use of solicitors, both third party and in-house employees, was an important means by which advisers raise capital for the private funds they advise.

Similar to the Notice, the disclosure obligations imposed on advisers and solicitors under the Cash Solicitation Rule focus on the need to disclose the nature of the compensation that would be received by the solicitor, as well as the conflicts associated with such compensation. The disclosure obligation would vary somewhat depending upon whether the solicitor is an employee of the adviser or adviser affiliate, or associated with a third party.

However, because the Cash Solicitation Rule is a rule adopted under the Investment Advisers Act (the "Advisers Act"), it does not create an exemption from the potential registration obligation of a solicitor as a broker-dealer under section 15(a)-1 of the '34 Act. Whether registration would be required is a matter of facts and circumstances based on the scope of the activities of the solicitor.

As the SEC observed in the Notice (see footnote 26), a solicitor for a private fund adviser (whether an employee or a third party) would be treated as an associated person of the investment adviser and would be subject to supervision and oversight by the adviser.

As the SEC made clear in the its recent adoption of the Best Interest Rule, and the related Fiduciary Interpretation, advisers are fiduciaries to their clients, a higher standard than the best interest standard applied to broker-dealers. As associated persons of the adviser, employees who act as solicitors would be subject to that higher standard in their capital raising activities. This includes an affirmative duty to disclose any material conflicts applicable to their role as a solicitor.

Moreover, employees are also subject to Rule 206(4)-8 of the Advisers Act, which imposes an affirmative obligation in dealing with prospective investors not to provide information which is false or misleading.

This regime offers a high level of protection to investors, yet it does not address the potentially overlapping application of the '34 Act to the activities of solicitors. Imposing the potential obligation to register as a broker-dealer in these circumstances creates confusion and uncertainty on the regulatory obligations of advisers. And if the adviser registers as a broker, it imposes significant expense and, at times, inconsistent and burdensome compliance obligations, while providing little or no additional protection to investors.

For these reasons, I respectfully request that the Commission determine that the Tier 2 exemption should be available to the capital raising activities of the employees of a private fund adviser. Since their marketing activities are largely directed to institutional investors, the exemption should have no limits on either the size of the investment that may be made by any one investor (question 6) or the maximum size of the offering (question 8).

If the Commission is considering imposing such limits, I would suggest creating a Tier 3 category for employees of advisers who are raising capital for private funds in compliance with the Cash Solicitation Rule. Doing so would be entirely consistent with and complementary to the changes proposed to the Cash Solicitation Rule.

Investor Protection

Private funds continue to become an increasingly large part of the financial marketplace and the advisers to such funds are subject to Commission oversight as registered investment advisers, and to a panoply of other related rules and reporting requirements, all of which further the Commission's mission regarding investor protection. Registered investment advisers are required to have robust compliance programs, which include the oversight, supervision and training of employees who conduct business development activities on behalf of the firm. Commission inspection of these compliance programs should help address and assuage any concerns that business development employees are acting to the detriment of investors. In addition, the many investor protection features built into the proposed rule should provide additional measures of investor protection, including (if not especially) the requirement that Tier II Finders provide certain disclosures to a prospective investor regarding the capacity in which the finder is acting, and obtain a written acknowledgement from the potential investor of the same. I note, parenthetically, that if the Commission moves forward with the proposed changes to the Cash Solicitation Rule, the changes to the disclosure obligations of advisers and solicitors under that Rule should be consistent with the corresponding obligations under the Finder's exemptive relief. Finally, investors in private funds are not permitted to invest without first confirming in writing via a Subscription Agreement their qualifications as an "accredited investor" and, often depending on the fund, the more stringent "qualified purchaser" accreditation standard under the federal securities laws, in addition to providing other representations regarding their investment knowledge and sophistication. This requirement serves as an important safeguard regarding investors' level of investment sophistication and their suitability for private investments of various types.

Costs of BD Registration

The costs of broker-dealer registration, in terms of both time and money, are significant. This is especially true for smaller advisers or for smaller businesses with already inadequate resources. The costs of an annual financial audit and of maintaining a separate email domain, among other costs, are also significant. It is respectfully submitted that these resources would be better spent and yield more quantifiable benefits for both the investment advisory firm and investors, if they were instead directed to the compliance effort for the SEC-mandated compliance program as a whole.

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Thank you for the opportunity to comment. I appreciate the efforts of the Commission to address this long-standing issue. If you have any questions regarding the above letter or would like more information, please do not hesitate to contact me.

Respectfully submitted,

George J. Mazin, Esq.
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