November 12, 2020

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

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

Re: 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; File No. S7-13-20)

Dear Ms. Countryman:

We congratulate the Commission for addressing the issue of finders ("Finders") in the proposed exemptive order referenced above (the "Proposed Order"). The signatories to this comment letter have been deeply involved in the "Finders" issue for many years. Our views on the regulation of Finders have been developed through many discussions among ourselves and other attorneys who have focused on the Finder issue, as well as our discussions with federal and state regulators and elected officials. Our views have also been developed through many cumulative years of experience with businesses seeking capital and with Finders. At this time of severe economic distress in the United States, any step that the Commission takes to renew our economy and get our businesses open and profitable, especially for those entrepreneurs most in need of access to capital, is deserving of support. While one of the Commission's missions is to protect investors, an equally important mission is to facilitate capital formation. These two critical missions should work hand in hand; they do not represent opposing values and this should not be reduced to a binary choice.

Each of the signatories to this comment letter is signing in his or her individual capacity and not as member of any organization or firm with which such signatory is associated. Each of the signatories has indicated substantial agreement with the comments contained herein.

Our specific comments on certain of the questions raised in Release No. 34-90112 (the "Release") are set forth below. Item numbers correspond to the item numbers in the Release.

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?***

Federal and state guidance regarding Finders is in great need of clarification and uniformity. SEC No-Action Letters on the subject are inconsistent even when dealing with similar fact patterns. Federal court decisions, such as *SEC v. Kramer (Kramer"),*[1] are inconsistent with many of the SEC's No-Action Letters, and the opinions in *Kramer* and *SEC v. Mapp*[2] note the non-binding nature of No-Action Letters. Additionally, state regulation of Finders varies, in some jurisdictions, widely. This patchwork of regulation, case law and guidance can lead to confusion on the part of issuers and Finders. Furthermore, it does not address the conundrum that so many Finders either firmly believe that broker-dealer registration requirements do not apply to them or rely on the notion that "everyone does it." A simple internet search for Finders indeed results in a very substantial number of hits for persons or entities that are not registered as broker-dealers but are eager to connect issuers and potential investors for a fee.

As the Release correctly observes, the Commission itself has not broadly addressed whether and under what circumstances a person may "find" or solicit investors on behalf of an issuer without registering as a broker-dealer.[3] The Commission Staff has provided no-action relief to "finders" in some situations,[4] while denying relief to others on facts that seem very similar,[5] and even has changed positions on exactly the same facts.[6] In any event, no-action letters by their nature only express a view on whether the conduct described would be referred for enforcement consideration, and further only express the views of the Commission Staff, not the full Commission. As Chairman Clayton has emphasized, "all staff statements are nonbinding and create no enforceable legal rights or obligations of the Commission or other parties."[7] Further, only statements of the full Commission, not its staff, are entitled to judicial deference.[8] And as a result, certain federal courts have been reluctant to deem persons engaged in limited finder activity to be "engaged in the business" of effecting securities transactions on facts where the Commission staff might have come to a different result.[9] In short, there is substantial uncertainty

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1 SEC v. Kramer, 778 F. Supp. 2d (M.D. Fla. 2011) ("*Kramer*").
2 SEC v. Mapp, No. 4:16-CV-00246, 2017 BL 401498 (E.D. Tex. 2017) ("*Mapp*").
3 *See* Release at p. 14.
4 *See* Country Business, Inc. Staff No-Action Letter (Nov. 8, 2006); Paul Anka, SEC Staff No-Action Letter (July 24, 1991), Victoria Bancroft SEC Staff No-Action Letter (July 9, 1987); International Business Exchange Corporation Staff No-Action Letter (Dec. 12, 1986).
5 *See* Brumberg, Mackey & Wall, PLC Staff No-Action Letter (May 17, 2010); John Loofbourrow Associates, Inc. Staff No-Action Letter (June 29, 2006).
6 *See* Dominion Resources, Inc. Staff No-Action Letter (March 7, 2000); Dominion Resources, Inc. Staff No-Action Letter (August 22, 1985).
7 Chairman Jay Clayton, Statement Regarding SEC Staff Views (Sept. 13, 2018).
8 Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 468 U.S. 837 (1984).
9 *See, e.g., Kramer, supra*; and *Mapp, supra*.

under existing law as to whether and when Finders' activity rises to the level of "effecting transactions in securities for the account of others," thus triggering a requirement to register under Section 15(a) of the Exchange Act. This lack of clarity has the potential to threaten the success of the Commission's enforcement program against unscrupulous bad actors. The Commission should take this opportunity to clarify this longstanding area of legal uncertainty.

The pandemic has emphasized the need for clarity around Finders for entrepreneurs desperate for a way to raise capital who cannot get the attention of traditional investment banks or even lenders. It is indeed time for resolution and clarity.

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?*

We believe that there should be two tiers of Finders with respect to raising capital. Additional tiers would add complexity and risks likely create public confusion about which set of conditions governs a Finder's activities—not just among Finders but also among issuers and potential investors. Simplicity is important to avoid inadvertent non-compliance.

The first tier should be for Finders whose activity does not rise to the level of "engaging in the business" (*see* our comments on Item 9, below). We believe that there should be another tier for Finders who are, arguably, engaging in the business to a limited degree. We believe that it is appropriate that this second tier of Finders be subject to more oversight than in the current version of the Proposed Order, including at least notice to the SEC and relevant states of their proposed activities (see comments below on notice requirements).[10]

For the avoidance of doubt, the Proposed Order should expressly state that it does not supersede or revoke the SEC's staff's guidance in the M&A Brokers No-Action Letter. Indeed, we also believe that it would be desirable to codify the SEC's M&A Brokers No-Action Letter to give it full legal effect, judicial deference, permanence, and public clarity. See our comments on Item 30.

We note that a limited regulatory structure for Finders will enable the SEC and the states to collect data on the important use (and identify misuse) of Finder activity.

The Commission may wish to consider requiring a fingerprint check for this second tier of Finders, the results of which could be accessed by the states. This would

[10] That said, if a notice-filing requirement cannot be accomplished by order of the Commission, but instead would require formal rulemaking, then we believe the urgency of the current pandemic-created economic crisis requires the deferral of those exemption-related conditions that cannot be accomplished through the Commission's adoption of the Proposed Order.

assist in quickly weeding out “bad actors” who are prohibited from taking advantage of the Proposed Order.

At least two Commissioners have noted that Finders would not be subject to Regulation Best Interest. We believe that even if Finders were registered broker-dealers, Reg BI would not apply to their limited activities as outlined in the Proposed Order: (i) Finders are prohibited under the Proposed Order from making a recommendation, and (ii) they do not place orders or open accounts. See our comments on Item 12. However, we do believe that the term “recommendation”, at least as that term is used in the context of Finder activity, should be explained and clarified in and with respect to the Proposed Order. The Proposed Order would prohibit a Tier II Finder from “providing advice as to the valuation or advisability of the investment.” Some, including regulators, may interpret the mere introduction of the parties as a recommendation or endorsing the “advisability of the investment”, while others believe that investors will interpret introductions as an implicit recommendation or endorsement of the advisability of the investment by a Finder.

For example, a Finder must necessarily have a pre-existing relationship with a prospect in order to avoid general solicitation. Yet, that very pre-existing relationship could be viewed as imputing a “recommendation” simply by making the introduction. Those commonly occurring effects of a Finder’s having a pre-existing relationship should be expressly addressed, lest a Finder inadvertently fail this condition and, thereby, potentially cause the issuer’s private offering exemption to fail, and thus inadvertently creating grounds for an investor to assert rescission rights.

“Advisability” is a vague standard. Finders, as well as issuers, need to know precisely what is permitted and prohibited so they may be highly confident that they are complying with the requirements for exemption and do not need to engage securities counsel to explain them. See our comments on Item 5 below.

We do believe that it would be appropriate for Finders to be required to disclose to prospective investors their primary conflict of interest - the fact that they will receive transaction-based compensation if a sale is consummated, and the manner in which such compensation is calculated. We believe that a reasonable investor would want to be in a position to understand the Finder’s potential economic gain and the amount of capital raising proceeds the issuer will have to pay out.

3. *Should the definition of Finder be limited to natural persons?*

We strongly believe that the definition of Finder should not be limited to natural persons. For example, to mitigate potential personal liability (notwithstanding personal liability under antifraud prohibitions), business-related activities are typically conducted through wholly owned limited liability companies or corporations—very few sole proprietorships exist today. Moreover, we envision that various types of

non-profit economic development agencies, and community- and membership-based organizations could effectively serve in the role of a Finder, especially in the underserved areas and with underserved segments of those communities,

We note that no rationale has been stated in the Release for this limitation. Attorneys and other advisors frequently counsel their clients not to do business in their personal capacities but through an entity. Such a limitation to natural persons excludes a large segment of Finder activities that would facilitate capital formation and to limit the exemption to natural persons would substantially impede it with no regulatory purpose achieved. Under an Exemptive Order modified to remove the natural person limitation, regulators would still be free to impose liability on agents of the Finder entity for certain acts, including, importantly, fraud. It might be helpful for any revisions to this Proposed Exemptive Order to make that point even clearer.

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

We believe that the exemption should be limited to US persons, whether natural or artificial. It is important that US regulators should easily be able to assert jurisdiction over Finders who commit fraud or other offenses. We believe such a limitation will be very important to state regulators who review Finder activity by making it easier for a state to bring an enforcement action.

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?***

We are concerned, with respect to the permissible scope of activities, notably about how to distinguish whether a Tier II Finder who arranges, attends, and in the natural course participates in a meeting between a prospective investor and an issuer avoids implicitly making a recommendation, particularly in light of having a pre-existing relationship, as noted above.

At the very least, the Proposed Order should contain very clear and simple language on which Finders can rely to avoid making a "recommendation." Interpretations of the term "recommendation" range from traditional "touting" to merely bringing an opportunity to someone's attention or introducing the issuer to a potential investor. For example, we note that in the *Kramer* case, in which Mr. Kramer was found not to be required to register as a broker, Mr. Kramer had shared his opinion with several investors that the issuer was a good investment.

The difficulty of defining the term "recommendation" in the context of Finders could be resolved by the Commission either (i) explicitly stating what does and does not constitute a recommendation by a Finder; or (ii) relaxing its prohibition against a

Finder making a recommendation. If the Commission adopts our suggestion that Finders be required to disclose their compensation to potential investors, that may lead the Commission to being more comfortable with the notion of a recommendation being permissible. See our comments on Item 2 above. We note that Finders would still be prohibited from making fraudulent statements to potential investors.

The SEC should consider permitting Tier II Finders to participate in structuring the offering. We expect that Tier II Finders will be knowledgeable about what sorts of structures their network is comfortable with and issuers may look to experienced Tier II Finders to guide them in this regard.

We also believe that the Proposed Order should not limit itself to Finder activities for private companies. The reality is that Finders today are active in private placements for public companies, particularly smaller ones struggling to raise capital. The availability of public information on such companies provides an additional level of investor protection.

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.***

   While believing that the "accredited investor" qualification is an appropriate basis for the Proposed Order's exemptive relief, particularly as that definition has recently been expanded, we also encourage the Commission to consider, either now or at a future time, a path for Finders to identify members of their communities who are not accredited investors who may on a limited basis wish to invest in local entrepreneurs, much as they can accomplish under Reg CF, Crowdfunding, perhaps by cross-referencing those qualifications and limitations.

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?***

   We believe that it would be helpful for the Commission to consider a more nuanced and clarified definition of general solicitation for purposes of the Proposed Order. For example, the general solicitation prohibition is necessary for consistency with many of the available private offering exemptions available to an issuer. However, not all offering exemptions and exclusions prohibit it. For example, the intrastate offering exemption commonly available for small offerings is not dependent upon the

absence of general solicitation. In those offerings, a more general solicitation—even if localized—could otherwise be permissible.

Moreover, the general solicitation prohibition thereby presupposes a pre-existing relationship between a Finder and a prospective investor. The very existence of such a relationship may—indeed often—imputes a level of interpersonal trust and confidence between them. As explained above, this relationship imbues an introduction, meeting, or discussion with that trust and confidence, and is readily interpreted by the investor as a recommendation, advice, or the advisability of making the investment presented.

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

We do not believe such a threshold is necessary or appropriate with respect to accredited investors. For others not meeting that threshold, a size limitation such as contained in Reg CF, Crowdfunding, would be appropriate. For regulatory simplicity and avoidance of public confusion, we recommend utilizing Reg CF's limitations for investors who do not meet the accredited investor threshold.

We believe the success of the Proposed Order's fully achieving its stated objectives of facilitating capital formation in underserved communities and with underserved constituent groups would be substantially handicapped if an alternative lower qualification threshold is not available, but subject to investment limitations, such as those provided in Reg CF.

9. ***Have we appropriately limited the number of offerings a Tier I Finder can participate in on an annual basis? This term would be interpreted consistent with the meaning in Rule 902(k)(1)(i) of Regulation S. [See Harmonization Proposal at footnote 70.]***

We believe that Tier I activities do not fall within the parameters set forth in Section 3(a)(4) of the Exchange Act of "being engaged in the business of effecting transactions in securities for the account of others." However, if the Commission believes that such Tier I Finder activities are covered, we believe that the "once every 12 months" limitation, although consistent with the language in Reg S and Rule 3a4-1, is too limiting. Persons with superior networking skills are needed to boost entrepreneurship, especially during the current economic crisis. Although many Finders, such as the Finders in the *Kramer* and *Mapp* cases, engage very infrequently in such activity, it is also true that many Finders are excellent networkers and it can be expected that a happy issuer may refer the Finder to her friends who are seeking capital for their own businesses. We believe that limiting Tier 1 Finders to 10 or perhaps 15 unaffiliated issuers' unrelated offerings in a rolling

12-month period is far more useful and would enable the Finder to bring to the proposed investor many more opportunities for the investor to choose from.

Does the proposed limitation pass a cost benefit analysis? We believe that the present cost to entrepreneurs is great, without any corresponding benefit either to entrepreneurs or to investors. Given the severely limited role that a Tier I Finder must adhere to, we do not believe that such a limit is necessary. If, as we suggest, a notice filing for all Finders, including Tier I Finders, is adopted, regulators would have the information to enable them to test whether stricter limits are needed.

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?***

We strongly believe that the no contact limitation is unworkable because it does not take into account how Finders—relying upon pre-existing relationships—necessarily operate to locate sources of capital for issuers and thus limits the role of Finders to an unacceptable degree.

Tier I Finders codifies the Paul Anka No-Action Letter. However, the Staff has been bemusedly critical of this No-Action Letter; Paul Anka was not allowed to meet with any prospective investor, and no sales ever resulted. If the introduced person asks the issuer where the issuer got his name, must the issuer say, “I can’t tell you?” If the Issuer does tell, or the introduced person figures it out and approaches the Finder, is the exemption rendered unavailable?

In an era of robocalls and unwanted emails, we have all learned to block or simply not respond to calls from unknown numbers and to ignore and not open but merely delete emails from persons we do not know for fear of infecting a computer with malware. Thus, the reluctance of potential investors to acknowledge and respond to communications, oral or written, from unknown persons could render a Finder’s efforts fruitless, thereby abrogating one of the underpinnings of the Proposed Order (helping entrepreneurs locate needed capital).

Were the proposed Order modified to permit a Finder to tell a prospective investor that the prospective investor could expect a call from Ms. X about an investment opportunity (not described more particularly), and to give the prospective investor the number she will be calling from or email she will be writing from, without more, such communication would merely open the door for a call or email from the issuer. We do not believe that such bare bones information increases risk to the investor.

Additionally, if the Commission were to adopt our suggestion that the Finder be required to make compensation disclosure, that would necessitate additional communication. If the SEC determines to require Tier I as well as Tier II Finders to

make a notice filing with both the SEC and the relevant states, regulators could more easily examine the activities of these Finders prior to learning about a failed investment.

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?*

As noted above, we believe that requiring the Tier I Finder not to have any contact with the potential investors about the issuer is unrealistic. We urge the Commission to revise this condition to (i) permit the Tier I Finder to explain to the prospective investor that she provided the investor's name to "X issuer", and a representative of "X issuer" may contact the prospective investor; and (ii) require the Finder to disclose her compensation for the referral.

As stated above, the meaning of the term "recommendation" in the context of Finders must be stated with precision for Tier I Finders. We urge the Commission to clarify in the Proposed Order that mere introductions do not constitute recommendations and to set forth with specificity what acts do and do not constitute a recommendation.

With respect to Tier II Finders, we believe that a more pragmatic resolution would be to permit them to make recommendations, in light of the lack of clarity about the definition of the term "recommendation. It is inevitable that an investor will deem that a Finder has made a recommendation and in fact ask the Finder about his or her opinion. It is unavoidable that a Tier II Finder will end up discussing the advisability of an investment opportunity and barring such a discussion would deny most Finders the availability of the exemption.

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?*

We believe, based upon our experience, that in many cases Finders engage in finding investors both for primary offerings, as well as sales by founding and other shareholders, and often in connection with the same transaction, just as is the case with many registered public offerings. Bearing in mind that a seller must rely upon a resale offering exemption such as Section 4(a)(7) of the Securities Act of 1933, as amended (Securities Act) or custom and practice under the so-called "Section (4)(a)(1½)", a Finder's exemption for resales could be similarly conditioned.

We believe that persons and firms engaged in matching persons with options and warrants with direct and/or indirect purchasers of the options, warrants, or some derivative or contractual right based upon those options or warrants, should not be exempt from registration. These options and warrants are most often encumbered by complex rights of first refusal and other limitations on their transfer or sale, requiring negotiation with an issuer and a great deal of risk disclosure to the potential purchaser. A number of sophisticated, registered broker-dealers engage in this business and actively seek out sellers and we believe this market need is being met by experienced and competent professionals.

Moreover, for those investors holding crowdfunded investments, a Tier II Finder may be a cost-effective choice available to liquidate those investments.

For these reasons, were the Proposed Order modified to permit certain secondary as well as primary offerings, limited as described above, we believe it would be more synchronous with how such transactions play out in our collective experience and would afford needed protection to investors.

17*. Is more clarity or specificity required with respect to the specific written disclosures that are a condition of the proposed exemption for Tier II Finders? Should we provide more guidance about any of the specific written disclosures?*

The Commission may wish to consider whether investor protection would be enhanced if Tier II Finders were required to deliver to prospective investors a use of proceeds statement prepared by the issuer. See our comments above regarding disclosure to prospective investors of the details of the Finder's compensation. Of course, this would require communication between the Finder (including a Tier I Finder) and the prospective investor.

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?*

We believe that written disclosures regarding the Finder's compensation and issuer's use of proceeds should be required, but even if the Commission determines that they may be delivered orally, prospective investors should be required to supply, and Finders required to maintain for a required period, written acknowledgement that the investors received the disclosures.

In addition, a Finder's disclosure document could be required to include descriptions and links to FINRA BrokerCheck and Investment Adviser Public Disclosure (IAPD) websites, as well as the SEC's Investor.gov website.

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 e-mail, that could serve to validate that investors received the required disclosure?***

Yes; see our comments on Item 18 above.

21. ***Should Tier I Finders be subject to a disclosure and acknowledgment requirement?***

Assuming that a Tier I Finder is permitted to have limited contact with prospective investors, yes. See our comments on Items 2, 12, 17, 18 and 20.

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?***

We believe that a simple notice requirement is desirable for several reasons: (i) it heightens the likelihood that the Finder and the issuer will be aware of the limitations on the Finder role; (ii) it enhances the ability of regulators to identify Finders in the event something goes wrong with an offering; and (iii) it should provide a level of comfort to state regulators, who would be receiving more information than they currently get, and in advance of a problem, and thus the states would be in a better position to review the Finder's activities in their state.

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

We believe that the Commission should consider requiring that Finder fees be reasonable under the circumstances, without specifying a particular level. We encourage the Commission to seek input from FINRA and state regulators on how to determine whether fees would be considered reasonable consonant with the best interests of both issuers and investors. We believe the fee should be negotiated between the Finder and the issuer. We strongly recommend that the compensation be disclosed to prospective investors so that they can be clear about the stake of the Finder and the percentage of proceeds available to the issuer, but would leave the amount to be negotiated between the Finder and the issuer in light of their respective needs, skills, experience, risks, and other pertinent circumstances.

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

We believe any form of compensation should be acceptable. Compensation in the form of an interest in or position with the issuer is not objectionable. Many small issuers are cash-poor and would need all of the new investment for their business purposes. Also, co-investment by Finders may tend to make them more sensitive to the situation of other (prospective) investors. However, we believe that whatever the compensation is, it should be disclosed to prospective investors.

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?***

We believe that the range of activities permitted for M&A Brokers under the M&A Brokers No-Action Letter is appropriate for Finders. We commend the Staff's graphic presentation of this information in its chart format, which can be used as a discussion framework by an issuer and its counsel with each Finder, and can be readily used by a prospective investor to understand the differences.

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?***

We believe that the Proposed Order should be clarified, as it relates to solicitation for private fund sponsors, to state that the limitation on the number of "issuers" for which Tier II Finders can solicit should be interpreted to mean the number of fund sponsors and not the number of funds.

We also believe that it would be desirable to codify the M&A Brokers No-Action Letter. The principles expressed in the M&A Brokers No-Action Letter should exist side by side with the Proposed Order. This would resolve one problem with that No-Action Letter that currently limits the M&A Broker from being fully effective. M&A Brokers may be selling, for example, 50 percent of a company in a transaction in which one purchaser wishes to purchase 40 percent and another wishes to purchase 10 percent and the M&A Brokers No-Action Letter would prohibit the participation of the 10% investor. This issue would be resolved if the M&A Broker could also rely on the Proposed Order and avail herself of definitive relief with respect to the second purchaser. Also see our comment on Item 32 below.

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?***

We encourage the SEC to instruct the staff of Trading & Markets to address the list of "scenarios" certain of the undersigned transmitted to T&M staff, in particular,

those scenarios that are designed to establish guidelines on whether providing technology services and other ancillary services constitute "effecting" transactions in securities.

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

For the avoidance of doubt, the SEC should withdraw those No-Action Letters containing denials of requested no-action relief that are inconsistent with the philosophy of the Proposed Order (*e.g.*, the denial of no-action relief to a law firm that wanted to solicit its clients on behalf of another client).[11]

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?***

No, particularly with respect to investment advisers, transaction-based compensation would be a cost-effective alternative for one-time purchases of an illiquid investment, rather than incurring on-going AUM-based advisory fees for it.

If the person's other job (*e.g.*, investment adviser) is one that permits the receipt of transaction-based compensation, we would not object to extending the Proposed Order to such individuals. Among other things, they are already in a regulated business where their employers are responsible for overseeing their outside business activities.

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

We believe that it would, but that both goals could be enhanced by consideration of the suggested modifications contained herein.

39. ***Would the proposed exemption have a competitive impact on registered brokers?***

We believe that the role of Finders would not have a deleterious effect on registered brokers. First, registered brokers may sell away if both their firms permit and there is compliance with FINRA Rule 3280, Private Securities Transactions; and their activities as Finders would be supervised by their firms in any case. Second, for decades entrepreneurs have complained that they cannot get brokerage firms interested in helping them raise capital. There is nothing in the Proposed Order that would prevent a registered broker-dealer from changing its business model to include the types of transactions typically engaged in by Finders or even from

[11] *See* Brumberg, Mackey & Wall, PLC Staff No-Action Letter (May 17, 2010).

accessing their skills and contacts by reaching out to Finders to employ them in a registered capacity.

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?***

Full broker-dealer registration requirements and the consequent panoply of FINRA membership requirements would be devastating to most Finders. The net capital rule, with its attendant requirements of a FINOP, FOCUS Reports, and an expensive PCAOB annual audit, are unnecessary burdens. The SEC should craft rules for regulation of Tier II Finders that are consistent with actual, reasonable, and legitimate regulatory concerns. This would involve rulemaking which, unlike the Proposed Order, would be accompanied by a cost/benefit analysis.

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

Yes, as it relates to the "scenarios" and clarification of what constitutes "effecting" securities transactions.

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?***

Such coordination is, we believe, critical as it relates to consultation with state regulators. State regulators need to hear from the SEC why this kind of special treatment for Finders increases transparency, thereby enhancing the states' ability to monitor and prosecute potentially harmful activity. We also believe that FINRA can add valuable insight into appropriate oversight of Finders. Bringing Finders "under the tent" would promote capital formation. It would increase, not reduce, revenues based on fees the state regulators could impose on Finders operating in their state. It would promote uniformity and reduce the cost of raising capital that now results from a myriad of different local regulations. We reiterate the call in the ABA Task Force Report that the SEC "spearhead" this kind of collaborative approach. It may not lead to complete harmony or uniformity but if a significant number of states can be brought on board, that would be a major achievement to the credit of all.

Finally, the Commission should modify the Proposed Order to clarify that states are free to adopt a similar regulatory scheme for Finders, provided that, other than the filing fees, it is no more burdensome than the requirements in the Proposed Order. States would also retain their anti-fraud enforcement authority. States would thus be enabled to exercise their enforcement authority to protect their citizens and residents from the very commencement of the Finder's activities would be enabled to get

fraudsters off the street before they can damage investors and thus the faith in capital raising.

Very truly yours,

Linda Lerner
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