November 13, 2020

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

Dear Ms Countryman,

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, 85 FR 64542 (October 13, 2020) ("*Finders Proposal*")

We are pleased to provide the Commission and the Staff with its comments on the *Finders Proposal* and commend their efforts.

In our view, if there is one area where regulatory review and action is overdue, it is brokerage. This includes issues such as what is a broker, what is a finder and when might an investment adviser be a broker. It includes what should be the exceptions or exemptions from being a broker or finder and what form they should take. This includes both U.S. and non-U.S. firms.

We believe that, aside from some small improvements, the law as regards the definition of the term "broker" in Exchange Act Section 3(a)(4)(A) and the registration requirements in Exchange Act Section 15(a)(1), given a broad meaning by the U.S. Congress, have withstood the test of time and remain relevant.

We believe that market developments, advances in technology and trading and the impact of globalization require a review and update of the administrative application of who is or is not a broker and should register or be excepted or exempt, not just a proposal for finders. Regulation has not kept pace with market developments. Certain of the no-action letters, rules and interpretations date from the 1970s, 1980s and 1990s. Also, the current U.S. regulatory regime is inconsistent with the laws and regulatory requirements of other nations. We believe that a concept release on the subject of what is brokerage would be appropriate, leading to action to amend or rescind existing rules, adopt as necessary new rules, revise exceptions and exemptions, withdraw no-action letters and revise or rescind interpretations.

We believe that the criteria to define a broker and a finder should be clear, consistent with respect to trading and selling the securities of a private fund and not reliant on the receipt of transaction-based compensation, a factor that often is circumvented.

Finders

According to the courts and the Staff, and in court cases and enforcement actions, what makes a person a finder is based on what activities it performs and its compensation. The *Paul Anka* no-action letter[1] and other finder's letters are important. The statements regarding solicitation in the context of offers for sale of the securities of private funds that appear in several Commission releases are relevant, as are the factors that are cited in no-action letters on whether a person is or is not a broker. Also relevant are two 2013 enforcement actions[2] involving a finder, and we ask why no mention was made of these in the *Finders Proposal*.

Our experience leads us to observe that there are three stages of activity in the offer and sale of the securities of a private fund.

1. "Identification", which is identifying prospects (researching prospects, assembling contact lists and sending these to others for solicitation), with no attempt to solicit or induce a transaction and with no finder's fee or transaction-based compensation.
2. "Solicitation", which includes Identification and post-Identification contact and interaction leading to and involving inducement leading to an investment decision (giving private placement offering materials, slide decks and holding or arranging meetings), and which includes transaction-based compensation in the form of a success fee and possibly a trailer fee.
3. "Subscription", which is the completion and submission of the subscription agreement, payment, confirmation of sale and issuance of indicia of beneficial ownership in securities.

A person that engages only in Stage 1 Identification, if there is no attempt to solicit or induce or attempt to induce the sale of securities and no transaction-based compensation, should result in that person not being deemed to be a broker under Section 3(a)(4)(A). Identification, considering what is comprised in this activity, would not rise to the level of participation "on a regular basis in securities transactions at key points in the chain of distribution".[3] Here, if such a person is not a broker then an exemption it would not be necessary to exempt that person from registration as a broker under Exchange Act Section 15(a)(1). The premise is that if a person is not a broker it does not have a registration requirement under this Section, but that if it is a broker then, unless an exemption or exception is available, it must register.

Stage 2 Solicitation, is consistent with Commission and Staff pronouncements and the law on brokerage, involves inducement and regular participation in securities transactions at key points and is consistent with the concept of solicitation as noted in the *Finders Proposal.*[4] We believe that a finder engaged solely in Solicitation or *both* Identification and Solicitation is a broker under Section 3(a)(4)(A) and that it is appropriate to fashion exemptive relief from registration as a broker under Exchange Act Section 15(a)(2), but under a rule, not an order.

We view a Tier I finder as engaging only in Identification and a Tier II finder as being involved with Solicitation or both Identification and Solicitation.

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[1] *Paul Anka*, Staff no-action letter (July 24, 2991).

[2] *In the Matter of William M. Stephens*, Admin Proc 3015233 (March 8, 2013), http://www.sec.gov/litigation/admin/2013/34-69090.pdf; and *In the Matter of Ranieri Partners LLC and Donald W. Phillips*, Admin Proc 3-15234 (March 8, 2013), http://www.sec.gov/litigation/admin/2013/34-69091.pdf.

[3] *Finders Proposal*, 85 FR at 64545 and materials in accompanying footnote 33.

[4] *Finders Proposal*, 85 FR at 64545 and materials in accompanying footnotes 41 to 44.

We believe that any action taken should be in two temporary rules, not an order.

- Rule 3a4-2T: a finder is not a broker under Section 3(a)(4)(A). This temporary rule should involve Identification activity only and not the other two activities, be open to all persons and not just natural persons, be for an issuer of any size and not have a "one in 12 month" restriction.
- Rule 15a-7T: a finder is a broker under Section 3(a)(4)(A) but is exempt from registration under Section 15(a)(2). This temporary rule includes a finder that is engaged in only Solicitation or both Identification *and* Solicitation.

Putting these in place as temporary rules will permit time for consultation before these rules are made permanent, changed, expire or continue in a temporary state.

We agree that a finder cannot be a person associated with a broker-dealer. We believe that a finder cannot be an associated person of an issuer. Rule 3a4-1 should not be available for a finder. Although not part of this consultation, we believe that section (c)(iv) of Rule 3a4-1, the definition of "associated person of an issuer", should be amended to read (new language in *italics*): "(iv) An investment adviser registered under the Investment Advisers Act of 1940 to an investment company registered under the Investment Company Act of 1940, *an investment company as defined in section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-3(a)) or any company that would be an investment company under section 3(a) of that Act but for the exclusion provided from that definition by either section 3(c)(1) or section 3(c)(7) of that Act (15 U.S.C. 80a-3(c)(1) or (7)),* which is the issuer." We also believe that a new section (c)(v) should be added to Rule 3a4-1 to read (new language in *italics*): "*(v) An investment adviser that is exempt from the requirement to register under section 203 of the Investment Company Act of 1940 to any company that would be an investment company under section 3(a) of that Act but for the exclusion provided from that definition by either section 3(c)(1) or section 3(c)(7) of that Act (15 U.S.C. 80a-3(c)(1) or (7)),* which is the issuer." We suggest a consultation on ending or revising the once every 12-month restriction.

Rule 15a-6 is for a non-U.S. person engaged in certain activities with designated persons. Under this rule, a person is a broker (or a dealer) and is exempt from registration under Section 15(a)(1). As an Introduction finder is not a broker or a person associated with an issuer of securities, Rule 15a-6 should not be available for a finder. Considering Rule 15a-6 in the current regulatory environment and giving effect to market developments, we request that the Commission propose amendments to this rule. These would include the following: re-propose amendments to this rule similar to those proposed in 2008[5]; expand the scope of the unsolicited transaction exemption to permit a non-U.S. firm that is registered with the SEC as an investment adviser to accept *bona fide* unsolicited orders from a U.S. person client to buy or sell securities, subject to conditions including, *inter alia*, record keeping and disclosure in an examination; replace the definition of "major U.S. institutional investor" with the definition of "qualified institutional buyer" ("QIB") and eliminate the definition of "U.S. institutional investor"; revise the rule's inducements and research exemptions to provide that they do not apply to research, inducements or transactions with a QIB but that they do to an "accredited investor"; and rescind or codify, as the case may be, the no-action letters issued under this rule.

[5] "Exemption of Certain Foreign Brokers or Dealers", Exchange Act Release 58047, 73 FR 39182 (July 8, 2008), https://www.sec.gov/rules/proposed/2008/34-58047fr.pdf.

Specific comments

Our replies are based on the questions in the *Finders Proposal* and reflect our views, noted above.

1. There are legal, regulatory and commercial uncertainties in the proposal, noted above. Legal uncertainty would be created if the exemptions are adopted as proposed. A finder engaged only in Identification is not a broker and should not by a conditional exemption under an order have the law changed so that it would be treated as one but exempt from registration. A finder should be any person, not just a natural person. A finder should be able to engage in identification of investor activity for issuers of all sizes, not just small firms in need of capital.
2. Per activity, yes. We believe that a Tier I finder be able to engage only in Identification and a Tier II Finder could engage in both Identification and Solicitation.
3. No – any person must be able to be a finder but not a person associated with an issuer.
4. A non-U.S. person that uses the means of interstate commerce to engage in Identification with a U.S. person (as defined in Regulation S), could be a finder. A U.S.-based finder could find a non-U.S. prospect, so this should be included. No rule should make a distinction between the U.S. and non-U.S. markets and market participants, particularly where a person uses the means of interstate commerce.
5. Generally, yes – if the Identification and Solicitation activities noted above are used and both are not included in the definition of broker.
6. A finder in the scope of Rule 3a4-2T that is not a broker or a finder in the scope of Rule 15a-7T that is a broker but that is exempt from registration should be free to engage in their activities with any type of investor, with no dollar limit. Using a dollar limit starts to link the Securities Act private placement exemptions to the activities of a finder, which currently and without further consultation is not workable. How would the proposal work for an investor that is a non-accredited investor natural person or a person that is not a natural person but that is not an accredited investor? There continue to be differences in the several definitions used in the federal securities laws; we provided the Chairman's Office with a chart (to be updated due to the recent amendments to the definition of QIB and accredited investor) and we recommend that the Commission consult to streamline these several, inconsistent definitions.
7. Yes. It is recommended that private placements under Regulation D Rule 506(c), quasi-public offerings under Regulation A and all registered offerings be carved out.
8. This should be open to all private placements of companies and private funds, with no size threshold.
9. There should not be a limit. This limit would be open to abuse, with a finder simultaneously engaged in multiple "one in a 12-month period" offerings for different issuers. (Likewise, this same provision in Rule 3a4-1 is outmoded and needs to be revised or removed.)
10. Yes. A true Tier I finder engaged in Identification must have contact with potential investors only to obtain key details – name, status (defined terms in the federal securities laws, taxpaying or tax-exempt, etc.), type of investment sought, verification of identity and contact details.
11. A finder should be able to find only for a primary offering.
12. Each type of finder should have their conditions: Tier I only for Introduction and Tier II for Introduction and Solicitation, essentially as proposed. We believe that any written materials to be given to a prospect reflect the disclosure requirements in Advisers Act Rule 206(4)-3.
13. This should apply to any private placement of a security that is exempt from registration under a Securities Act exemption or for the securities of a fund that is not an investment company under the Section (3)(a)(1) or 3(a)(7) exemptions in the Investment Company Act of 1940.
14. Please see our reply to Question 13.
15. Only primary offerings.
16. No. This would cover offerings for securities as defined in the federal securities laws.

17. We believe that the disclosure materials to be provided under Advisers Act Rule 206(4)-3 are a model, but clarity must be made with respect to the disclosure of compensation and expenses.
18. No, and please see our answer in reply to Question 17.
19. Yes. Disclosures should be modeled on those used in Advisers Act Rule 206(4)-3 but prepared, compliance cleared and published by the issuer of the securities. Also, the issuer should exercise oversight control over the finder and be liable for any material misstatements or omissions in such materials. We would proscribe oral disclosures. If disclosures in materials for the securities for a private fund were materially deficient and were prepared or cleared by an issuer, liability should lie under Advisers Act Rule 206(4)-8.
20. Yes, for both finder and issuer, and maintained as a required record. A read receipt does not confirm reading and understanding. The acknowledgment requirement should match that for a Code of Ethics under Advisers Act Rule 204A-1(a)(5).
21. Yes, as for a Tier II finder under proposed Rule 15a-7T.
22. Yes. A finder must be held liable for a material act or omission that violates the anti-fraud provisions of the federal securities laws. Likewise, there could be aiding and abetting or substantial assistance liability.
23. No. this is unduly burdensome. No filing and no notice. But there should be relevant record retention requirements and the power for the Commission or the Staff to examine them.
24. Fees must be proportionate and scalable, agreed with the issuer and be disclosed to all persons involved. Fees should not include the securities of the issuer, options or SARs on securities or undisclosed incentives. There should not be retrocessions.
25. A finder would receive a fee, not based on transaction-based compensation or a trailer fee. It would be preferable for compensation to be agreed with the issuer in writing and disclosed to all. See our answer to Question 24.
26. No.
27. A finder should comply with the activities noted above – only Identification for Tier I and both Identification and Solicitation for Tier II. In a rule and not under an order.
28. No. finder activity and private placement activity should not be linked at this time, without further review and consultation on specific proposals.
29. No.
30. These are unrelated to finder activities. What is contemplated by this should go into a separate rule or rules.
31. There should be a form of broker registration for a private placement firm that does not wish to be exempt, that engages in Identification and Solicitation activities, that does not hold accounts and that does not receive or process investor funds. Today, a private placement broker holds the General Securities Representative license of a natural person who serves as a finder, but this practice poses risks via, *inter alia*, failure to supervise.
32. *Paul Anka* and other finder's no-action letters.
33. Yes, and if any of the "bad actor" provisions in Rule 506(d) are relevant, these should apply.
34. Yes.
35. Yes.
36. Rule 3a4-1 should be amended to include a person associated with an investment adviser to a private fund. Alternatively, the Staff should issue no-action relief under Rule 3a4-1.
37. A finder rule(s), not a conditional exemption, should not include a person associated with an issuer. A finder should not be a person associated with the issuer; it is more akin to a solicitor under Advisers Act Rule 206(4)-3.
38. It must be made clear that the Securities Act, Exchange Act and Advisers Act anti-fraud provisions would apply. Nothing can or could limit the reach of the anti-fraud provisions of state securities laws or breach of contract, or provisions of state law.
39. No.

40. A proposed Tier I finder engages only in Identification, which we believe is not an activity that could or should fall under the definition of a broker.
41. Adopt the proposed two temporary rules, consult on their effectiveness, issue a consultation release on brokerage and do not act under an order.
42. Please note our suggestions. We recommend issuing a concept release on brokerage, review comments and make further proposals. We outlined our thoughts in a Briefing Memorandum, which we provided to the Chairman's Office and which we incorporate into these comments.
43. Non-U.S. regulators and FINRA. IOSCO.

Conclusion

We commend the Commission and the Staff for their efforts.

Who and what is a broker or a finder requires clear definitions and conditions in a rule, not an order. Certainty is needed to regulate the markets, ensure investor protection, conduct examinations, issue deficiency letters and take enforcement action when required. A person other than a natural person may be a finder – we ask whether redistricting this solely to a natural person might discriminate against a person that is not a natural person and if this proposal is adopted how the Staff and the Commission would propose to deal with a person other than a natural person as a finder. We believe that there should not be a link to an exemption for the offer or sale of the securities in a private placement. There are possibilities of confusion between Securities Act private placement exemptions, activities under Rule 3a4-1 and this proposal – and this is not the time to attempt to achieve clarity on one hand and create uncertainty on the other hand.

The avenue to treat a firm that is engaged solely in Identification but not Solicitation is a temporary rule under the definition of broker in Exchange Act Section 3(a)(4)(A), providing that such a firm is a finder but not a broker.

The way to treat a firm that is engaged in Solicitation or *both* Identification and Solicitation is to treat them as a broker but exempt them from registration under Exchange Act Section 15(a)(2) in a rule.

We believe, as we noted above, that the Commission should issue a concept release on the area and activities of brokerage. We recommend a re-proposal and a more thorough consultation. We suggest that the Commission (1) expand Rule 3a4-1 to include SEC registered investment advisers and Private Fund Advisers within the definition of an associated person of an issuer of securities, (2) propose Rules 3a4-2T and 15a-7T or, if it does not wish to do so, re-propose these as rules with an expanded comment period.

We are happy to meet with the Commissioners or the Staff to discuss our comments.

For and on behalf of CompliGlobe Ltd.,

Mark Berman
Founder and CEO