

Public Statement

Open Meeting on Proposed Finders Exemption – Providing Regulatory Clarity to Benefit Small Businesses



Chairman Jay Clayton

Oct. 7, 2020

Good morning. This is an open meeting of the U.S. Securities and Exchange Commission, under the Government in the Sunshine Act.

Today, the Commission will consider a recommendation from the Division of Trading and Markets that responds to many years of requests for regulatory clarity in the private placement market. Specifically, the staff recommends that the Commission issue a proposed conditional exemptive order that would permit natural persons to engage in certain limited activities involving accredited investors without registering as brokers under the Exchange Act. Persons engaged in this type of activity are often referred to as “finders.”

Our markets and our economy rely on, and significantly benefit from, a robust pipeline of new small businesses, which create jobs, contribute to innovation and promote economic health more generally. These smaller companies primarily use the exempt offering rules to access capital needed to create jobs and scale their businesses. For many smaller businesses, the private placement market is their only viable alternative to raise growth capital.

As I have often remarked, our markets are far different today than in decades past. Then, our private capital markets were a minor component of our economy for both companies and investors. Today, in terms of the amount of capital raised, investment opportunities, returns and other key metrics, for medium-sized and even larger companies, our private capital markets often are seen as more attractive for companies and professional investors than our public markets. There, we need to dig a bit deeper. The private capital markets are different for smaller businesses. In particular, as I mentioned, for many of these businesses the private markets may be their only source of growth capital. Further, smaller businesses and their investors frequently encounter challenges connecting with each other in the private market, particularly in regions that lack established robust capital-raising networks. In these areas, “finders” can play an important and discrete role in bridging the gap between small businesses that need capital and investors who are interested in supporting emerging enterprises.

A long-standing issue in the area of small business capital formation and broker regulation is the regulatory status of finders. Over the past decades, there have been many, repeated calls for the Commission to provide clarity in this area.^[1] The repeated calls for action arise from concerns in two areas. First, issuers that want to comply with the rules may struggle to know in what circumstances they can engage a finder that is not registered as a broker-dealer. Second, as a result of this uncertainty, individuals potentially could be engaging in brokerage activity, or

alternatively, not serving the market because of the regulatory uncertainty associated with playing even a limited role in a capital raise. The current patchwork of staff guidance and no-action letters in this area has not provided needed clarity, and the time for Commission action is overdue.

I commend the staff for their thoughtful approach to this issue. The staff's 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. Significantly, this proposed exemption would be available only for solicitation of investors that are accredited investors, or that the finder has a reasonable belief are accredited investors. The proposing release includes a request for comment on all aspects of the exemption, including whether offering size should be capped. We encourage small businesses, accredited investors and other market participants to engage with us during the comment period. I am certain the staff's work going forward will benefit from this engagement. The proposed exemption is not intended to affect a finder's obligation to comply with all other applicable laws, including the antifraud provisions of the Securities Act and the Exchange Act, as well as any applicable state laws.

The staff's recommendation recognizes that one size does not fit all, particularly for small businesses, and benefits from years of engagement and consideration by the Commission and staff, as well as prior recommendations of our advisory committees and small business forums, and public comment. For example, the SEC Government-Business Forum on Small Business Capital Formation has repeatedly and for many years included recommendations in its final reports related to the activities of finders.^[2] I look forward to public comment on the proposal to establish a clear framework.

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I want to thank the staff for their work on today's proposed exemptive order. In particular, I would like to acknowledge members of the staff that contributed to this effort:

- From the Division of Trading and Markets: Brett Redfearn, Emily Westerberg Russell, Joanne Rutkowski, Tim White, Geeta Dhingra, and Darren Vieira.
- From the Division of Corporation Finance: Jennifer Zepralka and Charles Guidry.
- From the Division of Enforcement: Charlotte Buford and Margaret Cain.
- From the Office of Compliance Inspections and Examinations: Carrie O'Brien and Christine Sibille.
- From the Office of the General Counsel: Meridith Mitchell, Robert Teply, Sean Bennett, Bryant Morris, and Evan Jacobson.
- From the Division of Investment Management: Melissa Gainor and Melissa Harke.

I also would like to thank Martha Miller, Jenny Riegel, Julie Davis, Colin Caleb and Jessica McKinney, and all the staff in the Office of the Advocate for Small Business Capital Formation, for their tireless outreach that resulted in feedback that has significantly informed the recommendations in today's proposed exemptive relief. Here, I bring your attention to an overview chart prepared by our Office of the Advocate for Small Business Capital Formation that provides a comparison of some of the terms and conditions of the proposed order.

And now, I'd like to turn it over to Brett Redfearn, our Director of Trading and Markets, for the staff's presentation of their recommendation.

[1] See, e.g., Report and Recommendations of the American Bar Association Business Law Section Task Force on Private Placement Broker-Dealers ("ABA Task Force") (June 2005), *available at* <https://www.sec.gov/info/smallbus/2009gbforum/abareport062005.pdf>; SEC Advisory Committee on Small and Emerging Companies ("ACSEC") Recommendations Regarding the Regulation of Finders and Other Intermediaries in Small Business Capital Formation Transactions (Sept. 2015), *available at* <https://www.sec.gov/info/smallbus/acsec/acsec-recommendations-regulation-of-finders.pdf>; ACSEC

Recommendation Regarding Finders, Private Placement Brokers, and Investment Platforms Not Registered as Broker-Dealers, Advisory Committee on Small and Emerging Companies (May 2017) (May 2017 ACSEC Recommendation), *available at* <https://www.sec.gov/info/smallbus/acsec/acsec-recommendation-051517-finders.pdf>; U.S. Department of Treasury, A Financial System that Creates Economic Opportunities: Capital Markets (Oct. 2017), *available at* <https://home.treasury.gov/system/files/136/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf>; SEC Small Business Capital Formation Advisory Committee Recommendations regarding the Capital Formation Proposal (May 28, 2020), *available at* <https://www.sec.gov/spotlight/sbcfac/capital-formation-proposal-recommendation-2020-05-08.pdf>; SEC Government-Business Forum on Small Business Capital Formation Final Reports, *available at* https://www.sec.gov/files/2020-oasb-forum-report-final_0.pdf and <https://www.sec.gov/info/smallbus/sbforumreps.htm>.

[2] See SEC Government-Business Forum on Small Business Capital Formation Final Reports, *available at* https://www.sec.gov/files/2020-oasb-forum-report-final_0.pdf and <https://www.sec.gov/info/smallbus/sbforumreps.htm>.