Public Statement

Statement at Open Meeting Considering a Proposed Exemptive Order for Finders

Commissioner Elad L. Roisman

Oct. 7, 2020

As it is commonly understood, the term "finder" refers to someone who helps small businesses seeking to raise capital by identifying and, in some cases, soliciting potential investors. The status of "finders" has been a long-standing grey area in our broker-dealer regulatory regime. Throughout my tenure as an SEC Commissioner, I have discussed the need for the SEC to provide clarity in this area.[1] Today, the Commission considers whether to take a step in this direction and publish for comment a proposed exemption from broker-dealer registration for finders. I am pleased to support this recommendation.

Small businesses have the ability to raise capital through offerings conducted in reliance on exemptions from registration under the Securities Act of 1933. In such offerings, finders can serve an important role in bridging the gap between businesses and investors. This is particularly the case for small businesses or entrepreneurs that may lack robust networks for raising capital. However, the Commission has never broadly addressed whether and under what circumstances a person may "find" potential investors on behalf of an issuer without being required to register as a broker, or whether such activity even implicates the Commission's regulatory regime for brokers.

For almost fifty years, finders have approached the staff regarding whether a particular activity or business model would require broker registration. While staff no-action letters, as well as court decisions, have recognized the distinct role played by finders and provided some guidance regarding what activities would require broker registration, [2] market participants have long requested that the Commission itself take on this issue.

For example, in 2005, the ABA Task Force on Private Placement Broker-Dealers recommended that the SEC work with FINRA and state regulators to establish a simplified system that would allow persons to solicit investors for small issuers, subject to a reduced, but appropriate, level of regulation.[3] Two SEC advisory committees, the former Advisory Committee on Small and Emerging Companies and the current Small Business Capital Formation Advisory Committee, have issued recommendations for the Commission to clarify the regulatory framework for finders.[4] It also is worth noting, for at least the last fifteen years, the SEC Government-Business Forum on Small Business Capital Formation has made recommendations related to finders, including that the Commission define the scope of permissible activities that would not require broker registration.[5] And in October 2017, the U.S. Treasury Report on Capital Markets also recommended that regulators delineate the obligations that apply to finders so that they could operate with more certainty.[6]

The lack of clarity regarding the status of finders has had detrimental effects for issuers and investors. An issuer may be reticent to utilize the services of a finder absent certainty that its offering is not being facilitated by an unregistered broker. But without finders, interested investors may never learn of the issuer that is offering an investment opportunity. There has been a lot of discussion recently about how certain small businesses and entrepreneurs historically have been underserved by venture capital funding or angel investors, either due to their geographic location or founder demographics.[7] Yet I think we can all agree that these businesses and entrepreneurs are no less deserving of growth opportunities than those that may have connections to well-established funding networks.

The proposed exemption would, if adopted, provide clear rules of the road to issuers, investors, and finders. It recognizes the important role played by intermediaries with respect to both capital formation and investor protection by proposing a non-exclusive safe harbor from broker registration for finders who engage in a limited set of activities.[8] Among other things, the proposed exemption would be limited to exempt offerings made by non-reporting issuers. Furthermore, a finder operating pursuant to the proposed exemption would *only* be able to solicit accredited investors or investors that the finder has a reasonable belief are accredited investors, ensuring that the potential investors have a sufficient level of financial sophistication. The proposed exemption also imposes a tiered set of requirements on finders, such that a finder who participates more frequently, or to a greater degree, in offering-related activities would need to comply with a greater number of requirements. Importantly, under the proposed exemption, a finder would not be able to provide advice regarding the valuation or advisability of the investment without registering as a broker. In other words, the proposed exemption recognizes that intermediaries that make recommendations to investors regarding securities transactions are not eligible to take advantage of this proposed exemption from broker registration.

I believe the proposed exemption recognizes potential investor protection concerns and represents a sensible framework to clarify the regulatory approach to finders. It aims to strike a careful balance between benefits and obligations as it confines the scope of permissible activities to those that pose limited risks, while making sure that investors receive full and fair disclosure about the finder and his or her relationship with the issuer. The proposed exemption does not limit the enforceability of the antifraud provisions of the federal securities laws. Nor does the proposed exemption limit the ability of the Commission to go after bad actors, be they finders or registered brokers.

Finally, the proposed exemption is indeed just that, a proposal. While I believe it is a reasonable approach, I am interested in continuing to learn from those market participants who would use or be implicated by the exemption, including finders, issuers, and accredited investors. Informed feedback can help uncover nuances we may have missed or operational issues we may not yet completely understand. I encourage interested market participants to submit comments in response to our questions, and I look forward to receiving their feedback on the proposed exemption. After all the years of uncertainty it is important that we hear from them to make sure the exemption would provide the clarity they have long sought.

Thank you to Chairman Clayton for your leadership on this issue and to the staff in the Division of Trading and Markets for your thoughtful work. Thank you also to the Division of Corporation Finance, the Division of Enforcement, the Division of Investment Management, the Office of the General Counsel, the Office of Compliance Inspections and Examinations, and the Office of the Advocate for Small Business Capital Formation for your many contributions to these efforts.

---

[1] *See* Commissioner Elad L. Roisman, Remarks at SEC Speaks: Encouraging Smaller Entrants to Our Capital Markets (Apr. 18, 2019) *available at* https://www.sec.gov/news/speech/speech-roisman-040819; *see also* Remarks at the SIFMA Equity Market Structure Conference: The Dynamics of our Markets and the Changing Structure on which they are Built (Sept. 19, 2019) *available at* https://www.sec.gov/news/speech/roisman-remarks-sifma-equity-market-structure-conference-091919.

[2] *See*, *e.g.*, Paul Anka, SEC No-Action Letter (Jul. 24, 1991); SEC v. Mapp, 2017 U.S. Dist. LEXIS 29267 (E.D. Tex. Mar. 2, 2017) (finding that the defendant acted as a "finder, as opposed to a broker, as he was "merely facilitating securities transactions rather than performing the functions of a broker"); and SEC v. Offill, Civil Action

No. 3:07-CV-1643-D (N.D. Tex. Jan. 26, 2012) (stating that a finder "bring[s] the parties together with no involvement on [his] part in negotiating the price or any of the other terms of the transaction.'").

[3] *See* Report and Recommendations of the American Bar Association Business Law Section Task Force on Private Placement Broker-Dealers (June 2005), *available at* https://www.sec.gov/info/smallbus/2009gbforum/abareport062005.pdf.

[4] *See, e.g.,* 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; Recommendation Regarding Finders, Private Placement Brokers, and Investment Platforms Not Registered as Broker-Dealers (May 2017) *available at* https://www.sec.gov/info/smallbus/acsec/acsec-recommendation-051517-finders.pdf; and Recommendations regarding the Capital Formation Proposal (May 2020), *available at* https://www.sec.gov/spotlight/sbcfac/capital-formation-proposal-recommendation-2020-05-08.pdf.

[5] *See, e.g.,* 24th Annual SEC Government-Business Forum on Small Business Capital Formation, Final Report (Nov. 2005) *available at* https://www.sec.gov/info/smallbus/gbfor24.pdf; and 39th Annual SEC Government-Business Forum on Small Business Capital Formation, Final Report (Sept. 2020) *available at* https://www.sec.gov/files/2020-oasb-forum-report-final_0.pdf.

[6] *See* U.S. Treasury, "A Financial System That Creates Economic Opportunities: Capital Markets" (Oct. 2017), at 44, *available at* https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf.

[7] *See, e.g.,* Office of the Advocate for Small Business Capital Formation, Annual Report for Fiscal Year 2019, at 27, 31, and 36, *available at* https://www.sec.gov/files/2019_OASB_Annual%20Report.pdf. *See also* Presentation at Feb. 4, 2020 Small Business Capital Formation Advisory Committee meeting by James Gelfer, Senior Strategist, Lead Venture Analyst, PitchBook, *available at* https://www.sec.gov/spotlight/sbcfac/2020-02-04-presentation-pitchbook-venture-climate.pdf at 13 (showing that 22.8% of VC deals and 14.2% of VC dollars in 2019 involved companies with at least one female founder and 6.8% of VC deals and 2.7% of VC dollars in 2019 involved companies with all female founders.; Banerji, Devika & Reimer, Torsten, *Startup Founders and Their LinkedIn Connections: Are Well-Connected Entrepreneurs More Successful?* 90 Computers in Hum. Behavior 46 (2019) (finding that social connectedness of founders was the best predictor of funds raised); Redd, Tammi C. and Wu, Sibin, "Gender Differences in Acquiring Business Support from Online Social Networks" (2020), *available at* https://doi.org/10.28934/jwee20.12 pp22-36 (highlighting gender differences between social networks and the process of creating network ties for men and women); Looze, Jessica and Desai, Sameeksha, "Challenges Along the Entrepreneurial Journey: Considerations for Entrepreneurship Supporters" (2020) *available at* https://ssrn.com/abstract=3637048 (noting that aspiring entrepreneurs reported acquiring funds to start or grow the business as one of the key challenges, followed by networks and connections).

[8] The proposed exemption would not affect a finder's obligation to continue to comply with all other applicable laws, including the antifraud provisions of the Securities Act and the Exchange Act, such as the obligations under Section 10(b) and Rule 10b-5 under the Exchange Act as well as state laws.