

## SEC Proposes Exemption for Certain Finders Assisting with Capital Raising

By: Wesley G. Nissen and Michael B. Gray

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SEC Chairman Jay Clayton recently noted that: “Many small businesses face difficulties raising the capital they need to grow and thrive . . . [and] finders may play an important role in facilitating capital formation for small issuers. There has been significant uncertainty for years, however, about finders’ regulatory status, leading to many calls for Commission action.”

Accordingly, the SEC recently voted to propose a new limited, conditional exemption from broker registration requirements for “finders” who assist issuers with raising capital in private markets from accredited investors. If adopted, the proposed exemption would permit natural persons to engage in certain limited activities involving accredited investors without registering with the SEC as brokers. The proposed exemption seeks to assist small businesses to raise capital and to provide regulatory clarity to investors, issuers, and the finders who assist them.

The proposal would create two classes of finders, Tier I Finders and Tier II Finders, that would be subject to conditions tailored to the scope of their respective activities. The proposed exemption would establish clear lanes for both registered broker activity and limited activity by finders that would be exempt from registration.

Tier I and Tier II Finders would both be permitted to accept transaction-based compensation under the terms of the proposed exemption.

### Tier I Finders

A Tier I Finder would be limited to providing contact information of potential investors in connection with only a single capital raising transaction by a single issuer in a 12-month period. A Tier I Finder could not have any contact with a potential investor about the issuer.

### Tier II Finders

A Tier II Finder could solicit investors on behalf of an issuer, but the solicitation-related activities would be limited to: (i) identifying, screening, and contacting potential investors; (ii) distributing issuer offering materials to investors; (iii) discussing issuer information included in any offering materials, provided that the Tier II Finder does not provide advice as to the valuation or advisability of the investment; and (iv) arranging or participating in meetings with the issuer and investor.

### Conditions for Both Tier I and Tier II Finders

Both Tier I and Tier II Finders would be subject to certain conditions. The proposed exemption for Tier I and Tier II Finders would be available only where:

- the issuer is not required to file reports under Section 13 or Section 15(d) of the Exchange Act;
- the issuer is seeking to conduct the securities offering in reliance on an applicable exemption from registration under the Securities Act;

- the Finder does not engage in general solicitation;
- the potential investor is an “accredited investor” as defined in Rule 501 of Regulation D or the Finder has a reasonable belief that the potential investor is an “accredited investor”;
- the Finder provides services pursuant to a written agreement with the issuer that includes a description of the services provided and associated compensation;
- the Finder is not an associated person of a broker-dealer; and
- the Finder is not subject to statutory disqualification, as that term is defined in Section 3(a)(39) of the Exchange Act, at the time of his or her participation.

A Finder could not rely on this proposed exemption to engage in broker activity beyond the scope of the proposed exemption. Among other things, a Finder could not rely on this proposed exemption to facilitate a registered offering, a resale of securities, or the sale of securities to investors that are not accredited investors or that the Finder does not have a reasonable belief are accredited investors.

Further, a Finder could not (i) be involved in structuring the transaction or negotiating the terms of the offering; (ii) handle customer funds or securities or bind the issuer or investor; (iii) participate in the preparation of any sales materials; (iv) perform any independent analysis of the sale; (v) engage in any “due diligence” activities; (vi) assist or provide financing for such purchases; or (vii) provide advice as to the valuation or financial advisability of the investment.

#### **Additional Conditions for Tier II Finders**

Because Tier II Finders could participate in a wider range of activity and have the potential to engage in more offerings with issuers and investors, the Commission has proposed additional, heightened requirements. A Tier II Finder wishing to rely on the proposed exemption would need to satisfy certain disclosure requirements and other conditions. These disclosure requirements, which include a requirement that the Tier II Finder provide appropriate disclosures of the Tier II Finder’s role and compensation, must be made prior to or at the time of the solicitation. Further, the Tier II Finder must obtain from the investor, prior to or at the time of any investment in the issuer’s securities, a dated written acknowledgment of receipt of the required disclosures.

#### **What’s Next?**

There will be a 30-day comment period for the proposed exemption following publication in the *Federal Register*. If you’d like to submit a comment letter on the proposal, or for assistance with regard to transactional or regulatory matters pertaining to capital raising, please contact Wesley Nissen, Michael Gray or your Neal Gerber Eisenberg attorney.



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