its total financial resources available by conducting stress testing of its total financial resources once each day using standard predetermined parameters and assumptions.[33]

As described in Section II.C., FICC proposes to use vendor-supplied data, including Historical Data and Security-Level Data, in MBSD's scenario development process and the risk measurement and aggregation process. Historical Data would identify stress risk exposures under broad and varied market conditions and provide FICC with an enhanced capability to design more transparent scenarios.[34] Security-Level Data would provide stable and robust data that would enable FICC to calculate stress profits and losses that is more accurate.[35] In addition, as described in Section II.D., FICC proposes to use a back-up calculation in the event the vendor fails to provide data to FICC.

The Commission believes that the proposal is consistent with Rule 17Ad–22(e)(4)(iii) because it should better enable FICC to assess its ability to maintain sufficient financial resources to cover a wide range of foreseeable stress scenarios that include the default of the member (including relevant affiliates) that would potentially cause FICC's largest aggregate credit exposure in extreme but plausible conditions.[36] Additionally, the Commission believes FICC's proposed stress testing methodology is consistent with Rule 17Ad–22(e)(4)(vi) because it should enable FICC to test the sufficiency of its minimum financial resources by conducting stress testing using standard predetermined parameters and assumptions.[37]

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and, in particular, with the requirements of Section 17A of the Act[38] and the rules and regulations promulgated thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act[39] that proposed rule change SR–FICC–2020–010, be, and it hereby is, *approved*.[40]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[41]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–22476 Filed 10–9–20; 8:45 am]

BILLING CODE 8011–01–P

[33] 17 CFR 240.17Ad–22(e)(4)(vi).

[34] *See* Notice, *supra* note 3 at 52389.

[35] *See id.*

[36] 17 CFR 240.17Ad–22(e)(4)(iii).

[37] 17 CFR 240.17Ad–22(e)(4)(vi).

[38] 15 U.S.C. 78q–1.

[39] 15 U.S.C. 78s(b)(2).

[40] In approving the proposed rule change, the Commission considered the proposals' impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[41] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90112; 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

AGENCY: Securities and Exchange Commission.

ACTION: Notice of proposed exemptive order; request for comment.

SUMMARY: Pursuant to Sections 15(a)(2) and 36(a)(1) of the Securities Exchange Act of 1934 (''Exchange Act''), the Securities and Exchange Commission (''SEC'' or ''Commission'') is proposing to grant exemptive relief to permit natural persons to engage in certain limited activities on behalf of issuers (''Finders''), without registering as brokers under Section 15 of the Exchange Act. The proposed exemption provides for two classes of Finders, Tier I Finders and Tier II Finders, with corresponding conditions as described below.

DATES: Comments should be received on or before November 12, 2020.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/exorders.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number S7–13–20 on the subject line.

Paper Comments

- Send paper comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–13–20. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/exorders.shtml*). Comments also are available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Emily Westerberg Russell, Chief Counsel; Joanne Rutkowski, Assistant Chief Counsel; Timothy White, Senior Special Counsel; Geeta Dhingra, Special Counsel; and Darren Vieira, Special Counsel, Office of Chief Counsel, Division of Trading and Markets, at (202) 551–5550, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–8549.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Commission's mission includes facilitating capital formation—not only for public companies, but also for the small businesses that are active participants in our private markets. Our dynamic markets and economy significantly benefit from a robust pipeline of new small businesses, which create the majority of net new jobs in the United States[1] and greatly contribute to innovation.[2] Small and emerging companies—from start-ups seeking their initial seed funding to businesses on a path to become a public reporting company—require capital to grow and scale.[3] One of the ways that

[1] *See* U.S. Small Business Administration Office of Advocacy, Frequently Asked Questions (Sept. 2019), *available at https://cdn.advocacy.sba.gov/wp-content/uploads/2019/09/24153946/Frequently-Asked-Questions-Small-Business-2019-1.pdf.*

[2] *See, e.g.,* Ufuk Akcigit and William R. Kerr, ''Growth through Heterogeneous Innovations,'' Journal of Political Economy 126:4 (Aug. 2018), *available at https://www.journals.uchicago.edu/doi/full/10.1086/697901* (demonstrating that the ''relative rate of major inventions is higher in small firms'' due to the ''outcome of innovation investment choices by firms'').

[3] *See* Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Release No. 33–10763 (Mar. 4, 2020) [85 FR 17956 (Mar. 31, 2020)] (''Harmonization Proposal'') (proposing amendments to facilitate capital formation and increase opportunities for investors by expanding

small businesses may seek to access critical capital needed to grow and scale is through offerings conducted in reliance on an exemption from registration under the Securities Act of 1933 (''Securities Act'').[4] The exempt market supports the capital needs of many small companies that contribute substantially to our economy.[5]

Small business investors play a critical role in fostering the growth and success of small companies.[6] For example, investors can provide expertise as well as financial capital to support the businesses' strategic growth.[7] Observers have noted, however, that small businesses frequently encounter challenges connecting with investors in the exempt market, particularly in regions that lack robust capital raising networks.[8] According to the 2017 Treasury Report, ''[f]or a small business seeking to raise capital, identifying and locating potential investors can be difficult. It becomes even more challenging if the amount sought (*e.g.,* less than $5 million) is below a level that would attract venture capital or a registered broker-dealer, but beyond the levels that can be provided by friends and family and personal financing. The number of registered broker-dealers has been falling, and few registered broker-dealers are willing to raise capital in small transactions.'' [9]

In areas that lack robust venture capital (''VC'') [10] and angel investor [11] networks, so-called ''finders,'' who may identify and in certain circumstances solicit potential investors, often 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.[12] Finders may also help bridge gaps between traditionally underrepresented founders, such as women and minorities [13] and VC and start-up capital.[14]

A long-standing issue in the area of broker regulation concerns the regulatory status of these persons who play a discrete role in bridging the gap between small businesses and investors. Concerns have been raised that ''identifying potential investors is one of the most difficult challenges for small businesses trying to raise capital . . . [yet] companies that want to play by the rules struggle to know in what circumstances they can engage a 'finder' or a platform that is not registered as a broker-dealer.'' [15] Observers have described a ''gray market,'' reflecting a ''major disconnect'' between the various laws and regulations applicable to securities brokerage activities, and the methods and practices by which capital is raised to fund early stage businesses in the United States.[16] As a result of this uncertainty, individuals potentially could be engaging in unregistered brokerage activity, or alternatively, not serving the market because of the regulatory uncertainty associated with playing even a limited role in a capital raise.[17]

Over the years, there have been many calls for Commission action in this area. In 2005, the ABA Task Force recommended that the Commission work with the Financial Industry Regulatory Authority (''FINRA,'' which was then the National Association of Securities Dealers) 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.[18] In

access to capital for entrepreneurs across the United States and noting that the significance of the exempt securities markets has increased over time both in terms of the absolute amounts raised and relative to the public registered markets).

[4] *See* Harmonization Proposal at 17957.

[5] *Id.*

[6] *Id.*

[7] *See* Final Report of the Securities and Exchange Commission Advisory Committee on Small and Emerging Companies (''ACSEC'') (Sept. 2017), *available at https://www.sec.gov/info/smallbus/acsec/acsec-final-report-2017-09.pdf.*

[8] *See id. See also* 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* (''2017 Treasury Report'').

A recent report shows that in 2019, 77% of venture capital funding in the United States was raised by companies in just three states, California, New York, and Massachusetts. *See PWC MoneyTree™ Report, Q4 2019, available at https://www.pwc.com/us/en/industries/technology/assets/pwc-moneytree-2019-q4-final.pdf.*

[9] 2017 Treasury Report at 43–44. *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* (''ABA Task Force Report'') (stating that small issuers are almost ''never interesting'' to professional capital and will seldom be able to attract fully licensed members to participate in offerings of less than $5 million); Gregory C. Yadley, ''Notable by Their Absence: Finders and Other Financial Intermediaries in Small Business Capital Formation,'' (June 2015), *available at https://www.sec.gov/info/smallbus/acsec/finders-and-other-financial-intermediaries-yadley.pdf* (''Funding of start-up and new companies is often sought in amounts of $100,000 or less, and rarely more than $5 million. Accordingly, these offerings are not of interest to many professional investors such as venture capital or private equity funds.'').

[10] Venture capital funds generally invest capital directly in portfolio companies for the purpose of funding the expansion and development of the companies' business, with the goal of eventually either selling the companies or taking them public. *See* Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, Release No. IA–3222 (Jun. 22, 2011) [76 FR 39646 (Jul. 6, 2011)] (''VC Fund Adviser Release''). Many advisers to VC funds provide managerial assistance to the funds' portfolio companies. *See* VC Fund Adviser Release at 39661.

[11] ''Angel investors'' are generally high net worth individuals who provide financial backing for early-stage businesses. They typically invest their own funds directly in a business located in close proximity, often using convertible debt. *See* Office of the Advocate for Small Business Capital Formation, Annual Report for Fiscal Year 2019, *available at https://www.sec.gov/files/2019_OASB_Annual%20Report.pdf* (''OASB Report'') at 18.

[12] *See id.* at 44–45. *See also* comments of Gregory Yadley, Partner, Shumaker, Loop & Kendrick, LLC, at the Meeting of the Small Business Capital Formation Advisory Committee meeting (May 8, 2020), *available at https://www.sec.gov/info/smallbus/acsec/sbcfac-transcript-050820.pdf,* transcript at 112–113 (''Particularly these days, where companies are going to become even more desperate for money and we are loosening up so many ways for people to be able to raise money, there is still a disconnect between issuers who need a little bit of money and accredited investors who are willing to invest. . . .'').

[13] *See* Transcript of the 39th Annual SEC Government-Business Forum on Small Business Capital Formation *available at https://www.sec.gov/file/06182020-small-business-forum-transcript.pdf.*

[14] *See* OASB Report at 26 and 30. *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 percent 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).

[15] Recommendation Regarding Finders, Private Placement Brokers, and Investment Platforms Not Registered as Broker-Dealers, ACSEC (May 15, 2017), *available at https://www.sec.gov/info/smallbus/acsec/acsec-recommendation-051517-finders.pdf* (''ACSEC Recommendation 2017'').

[16] *See* ABA Task Force Report.

[17] *See id.* (''This vast and pervasive 'gray market' of brokerage activity creates continuing problems for the unlicensed brokers, the businesses which rely upon them for funding, attorneys and other professionals advising both the brokers and businesses, and, last but not least, the federal and state regulators who are charged with the obligation to enforce laws and regulations that are out of step with current business practices.'').

[18] *See id.* at 2 (stating that, among other things, the proposed solution should modify the amount

Continued

recent years, the U.S. Department of the Treasury recommended that the SEC, FINRA, and the states propose a new regulatory structure for finders and other intermediaries in capital-forming transactions;[19] the former SEC Advisory Committee on Small and Emerging Companies (the ''ACSEC'')[20] recommended that the Commission address questions regarding whether and under what circumstances small issuers can engage a finder or other intermediary that is not a registered broker-dealer, highlighting the importance of finders for small business capital formation;[21] and the current SEC Small Business Capital Formation Advisory Committee (the ''SBCFAC'') recommended that the Commission adopt a clear framework for unregistered finders in light of their role as intermediaries in fostering capital formation for smaller businesses.[22]

The status of these intermediaries has also been a concern for participants in the SEC Government-Business Forum on Small Business Capital Formation (''Small Business Forum''). The Small Business Forum has repeatedly recommended that the Commission address the status of finders, including recommendations that finders should be exempt from the requirement to register as broker-dealers, and that the Commission should define permissible activities in which finders can engage without being deemed as engaging in activities that require broker registration.[23] In August 2019, the Small Business Forum's Small, Emerging Businesses breakout group and the Mature and Later Stage Private Companies breakout group both made recommendations related to finders, indicating a broad market perception that additional clarity and possibly relief may be needed in this area.[24] Further, at the Small Business Forum in June 2020, participants made a recommendation related to finders.[25]

Against this background, and given the role of intermediaries with respect to capital formation and investor protection, especially for smaller issuers, the Commission believes it is important to address the regulatory status of persons who engage in certain limited securities-related activities on behalf of issuers. The Commission preliminarily believes that this exemption would provide clarity to investors and issuers, and establish clear lanes for both registered broker activity and limited activity by finders that would be exempt from registration.[26]

II. Broker Regulatory Framework

Because of the broker's role as an intermediary between customers and the securities markets, broker-dealers are required to register with the Commission unless they can rely on an exception or exemption.[27] Registered broker-dealers are subject to comprehensive regulation under the Exchange Act and under the rules of each self-regulatory organization (''SRO'') of which the broker-dealer is a member, including a number of obligations that attach when a broker-dealer makes recommendations to a customer, as well as general and specific requirements aimed at addressing certain conflicts of interest.[28]

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and scope of regulations that apply such that they would be in proper balance with the scope of activities to be pursued by those who will be subject to regulations, and diminish the number of unlawful securities brokers to a level that will make feasible effective enforcement actions against continuing unlawful activity).

[19] *See* 2017 Treasury Report at 44.

[20] The ACSEC was formed in 2011 to provide the Commission with advice on its rules, regulations and policies with regard to protecting investors; maintaining fair, orderly and efficient markets; and facilitating capital formation in relation to smaller public companies. The ACSEC's term expired at the end of 2017 and it was replaced by the SEC's new Small Business Capital Formation Advisory Committee. *See https://www.sec.gov/page/small-business-capital-formation-advisory-committee.*

[21] *See, e.g.,* ACSEC Recommendations Regarding the Regulation of Finders and Other Intermediaries in Small Business Capital Formation Transactions (Sept. 23, 2015), *available at https://www.sec.gov/info/smallbus/acsec/acsec-recommendations-regulation-of-finders.pdf* (requesting the Commission address the regulatory issues surrounding finders and other private placement intermediaries as referenced in the ABA Task Force Report and stating that a failure to address the issue impedes capital formation for smaller companies); ACSEC Recommendation 2017 (referencing the ABA Task Force Report).

[22] *See,* SBCFAC 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. See also* Transcript of SBCFAC at 59–61 for discussion of finders (May 6, 2019), *available at https://www.sec.gov/info/smallbus/acsec/sbcfac-transcript-050619.pdf;* Transcript of SBCFAC at 18, 112 for discussion of finders (Feb. 4, 2020), *available at https://www.sec.gov/info/smallbus/acsec/sbcfac-transcript-020420.pdf;* Transcript of SBCFAC at 112–117 for discussion of finders (May 8, 2020), *available at https://www.sec.gov/info/smallbus/acsec/sbcfac-transcript-050820.pdf* (encouraging the Commission to adopt a clear framework for unregistered finders).

[23] *See, e.g.,* 37th Annual Government-Business Forum on Small Business Capital Formation, Final Report (Dec. 12, 2018); 36th Annual SEC Government-Business Forum on Small Business Capital Formation, Final Report (Nov. 30, 2017); 35th Annual SEC Government-Business Forum on Small Business Capital Formation, Final Report (Nov. 17, 2016); 34th Annual SEC Government-Business Forum on Small Business Capital Formation, Final Report (Nov. 19, 2015); 33rd Annual SEC Government-Business Forum on Small Business Capital Formation, Final Report (Nov. 20, 2014); 32nd Annual SEC Government-Business Forum on Small Business Capital Formation, Final Report (Nov. 21, 2013); 31st Annual SEC Government-Business Forum on Small Business Capital Formation, Final Report (Nov. 15, 2012); 30th Annual SEC Government-Business Forum on Small Business Capital Formation, Final Report (Nov. 17, 2011); 29th Annual Small Business Forum, Final Report (Nov. 18, 2010); 28th Annual SEC Government-Business Forum on Small Business Capital Formation, Final Report (Nov. 19, 2009); 27th Annual Small Business Forum, Final Report (Nov. 20. 2008); 26th Annual SEC Government-Business Forum on Small Business Capital Formation, Final Report (Sept. 24, 2007); 25th Annual SEC Government-Business Forum on Small Business Capital Formation, Final Report (2006); and 24th Annual SEC Government-Business Forum on Small Business Capital Formation, Final Report (Sept. 19, 2005). Copies of these and other Annual Government-Business Forum on Small Business Capital Formation Final Reports making recommendations relating to finders are available at *https://www.sec.gov/info/smallbus/sbforumreps.htm.*

[24] *See* Report on 38th Annual Government-Business Forum on Small Business Capital Formation (Aug. 14, 2019), *available at https://www.sec.gov/files/small-business-forum-report-2019.pdf.*

The Mature and Later Stage Private Companies breakout group also recommended that the *M&A Broker* Letter be codified. *See M&A Brokers,* SEC Staff No-Action Letter (Jan. 31, 2014) (''*M&A Broker* Letter''). In the *M&A Broker* Letter, the staff agreed not to recommend enforcement action under Section 15(a) of the Exchange Act for persons facilitating securities transactions in connection with the transfer of ownership of a controlling interest in a privately-held operating company under certain facts and circumstances. This proposed exemptive order is limited to the regulatory status of individuals who identify and solicit potential investors for an issuer as discussed above, and does not address the *M&A Broker* Letter or the associated recommendation to codify the staff position in the *M&A Broker* Letter.

[25] *See* Report on 39th Annual Government-Business Forum on Small Business Capital Formation (June 18, 2020), *available at https://www.sec.gov/files/2020-oasb-forum-report-final_0.pdf.* The Small Business Forum recommended that the Commission provide an exemption from broker-dealer registration for finders facilitating secondary transactions. *Id.* While the scope of this proposed exemptive order is limited to finders participating in primary offerings, the Commission is requesting comment on whether we should expand the scope to include secondary offerings.

[26] The conditions of this proposed exemptive order for Finders differ from the requirements for solicitors under the Commission's proposed amendments to Rule 206(4)–3 under the Investment Advisers Act of 1940 (''Advisers Act''). *See* Investment Adviser Advertisements; Compensation for Solicitations, Release No. IA–5407 (Nov. 4, 2019), [84 FR 67518 (Dec. 20, 2019)] (''Cash Solicitation Rule Proposed Amendments'').

These differences reflect the particular facts and circumstances surrounding the proposed permitted activities for Finders and solicitors, and the characteristics of the applicable regulatory regimes, notably that a solicitor would solicit for an investment adviser and would be subject to oversight by such investment adviser, while a Finder would solicit for an issuer and therefore would not be subject to such oversight. *See* Cash Solicitation Rule Proposed Amendments at 67580.

[27] *See, e.g.,* Registration Requirements for Foreign Broker-Dealers, Exchange Act Release No. 27017 (Jul. 11, 1989), [54 FR 30013 (Jul. 18, 1989)] (''15a–6 Adopting Release'') at 30014–15.

[28] *See, e.g.,* Regulation Best Interest, Exchange Act Release No. 86031 (Jun. 5, 2019), [84 FR 33318 (Jul.

Section 3(a)(4) of the Exchange Act generally defines a ''broker'' as ''any person engaged in the business of effecting transactions in securities for the account of others.'' [29] Section 15(a)(1) of the Exchange Act, in turn, generally makes it unlawful for any broker to use the mails or any other means of interstate commerce to ''effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security'' unless that broker is registered with the Commission in accordance with Section 15(b) of the Exchange Act.[30] As a result, absent an available exception or exemption,[31] a person engaged in the business of effecting transactions in securities for the account of others is a broker required to register under Section 15(a) of the Exchange Act.

The question of whether a person is a broker within the meaning of Section 3(a)(4) turns on the facts and circumstances of the matter. Because the Exchange Act does not define what it means to be ''engaged in the business'' or ''effecting transactions,'' courts and the Commission have looked to an array of factors in determining whether a person is a broker within the meaning of the statute.[32] Often, a key consideration in these determinations is whether the person participates on a regular basis in securities transactions at key points in the chain of distribution.[33] Over the years, the courts and the Commission have identified certain activities as indicators of broker status, including: (1) Actively soliciting or recruiting investors; [34] (2) participating in negotiations between the issuer and the investor; [35] (3) advising investors as to the merits of an investment or opining on its merits; [36] (4) handling customer funds and securities; [37] (5) having a history of selling securities of other issuers; [38] and (6) receiving commissions, transaction-based compensation or payment other than a salary for selling the investments.[39] This is not an exhaustive list of the relevant factors, and no one factor is dispositive.[40]

A person who identifies and solicits potential investors for an issuer or other party could be viewed as engaging in activity that indicates broker status.[41] The courts and the Commission generally have viewed solicitation as any affirmative effort intended to induce a securities transaction, including, but not limited to, telephone calls, mailings, advertising (online or in print), and conducting investment seminars.[42] Solicitation includes efforts to induce a single securities transaction as well as efforts to develop an ongoing securities-business relationship.[43] Although it is not required to establish broker status and is not in itself determinative of broker status, the receipt of transaction-based compensation in connection with securities activities, such as solicitation of potential investors, has been considered by courts as a factor indicating that registration as a broker may be required.[44]

While some courts have discussed the issue of finders, their interpretations have varied, and address the facts and circumstances of the specific matter.[45] The Commission has not previously recognized a ''finders'' exemption or exception, nor has the Commission broadly addressed whether and under what circumstances a person may ''find'' or solicit potential investors on behalf of an issuer without being required to register as a broker, or even whether such activity implicates the Commission's regulatory regime for brokers.[46] Instead, the Commission

12, 2019)] (''Regulation Best Interest Adopting Release'').

[29] Section 3(a)(4)(A) of the Exchange Act, 15 U.S.C. 78c(a)(4)(A).

[30] Section 15(a) of the Exchange Act, 15 U.S.C. 78*o*(a). Although Section 15(a) applies to both brokers and dealers, this proposed exemption would apply only to activities that historically have been associated with brokers—that is, effecting securities transactions for the account of others.

[31] *See, e.g.,* Exemptions to Facilitate Intrastate and Regional Securities Offerings, Release No. 33–10238 (Oct. 26, 2016) [81 FR 83494 (Nov. 21, 2016)] at 83510 (providing guidance on the exemption from registration for broker-dealers whose business is exclusively intrastate and who do not use any facility of a national securities exchange).

[32] *See, e.g.,* 15a–6 Adopting Release (noting that the definition in the Exchange Act of the term ''broker'' and the registration requirements under Section 15(a) of the Exchange Act ''were drawn broadly by Congress to encompass a wide range of activities involving investors and the securities markets'').

[33] *See SEC* v. *Bravata,* 2009 WL 2245649 (E.D. Mich. 2009), quoting *SEC* v. *Martino. See also Mass. Fin. Servs., Inc. v. SIPC,* 411 F. Supp. 411, 415 (D. Mass. 1976), *aff'd,* 545 F.2d 754 (1st Cir. 1976), *cert. denied,* 431 U.S. 904 (1977).

[34] *See SEC* v. *Hansen,* 1984 U.S. Dist. LEXIS 17835, at *26 (S.D.N.Y. April 6, 1984).

[35] *Id.*

[36] *Id.*

[37] *See SEC* v. *M&A West, Inc.,* 2005 WL 1514101, at *9 (N.D. Cal. June 20, 2005); *SEC* v. *Margolin,* 1992 WL 279735, at *5 (S.D.N.Y. 1992); *SEC* v. *Benger,* 697 F. Supp. 2d 932, 944 (N.D. Ill. 2010).

[38] *See, e.g., SEC* v. *Hansen,* 1984 U.S. Dist. LEXIS 17835, at *26 (S.D.N.Y. April 6, 1984).

[39] *Id.*

[40] *See SEC* v. *Benger,* 697 F. Supp. 2d 932, 945.

[41] *See, e.g.,* Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Section 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934, Exchange Act Rel. No. 44291, 66 FR 27760, 27772–73 at n.124 (May 18, 2001) (''Solicitation is one of the most relevant factors in determining whether a person is effecting transactions.''), *cited in Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants,* Exchange Act Rel. No. 75611 (Aug. 5, 2015), 80 FR 48964, 48976 (Aug. 14, 2015) (''The Commission has previously interpreted the term 'effecting transactions' in the context of securities transactions to include a number of activities, ranging from identifying potential purchasers to settlement and confirmation of a transaction.'').

[42] *See, e.g., SEC* v. *Century Inv. Transfer Corp., et al.,* No. 71–cv–3384, 1971 WL 297, at *5 (S.D.N.Y. Oct. 5, 1971) (Century ''engaged in the brokerage business by soliciting customers through ads in the Wall Street Journal, and engaging in sales activities designed to bring about mergers between private corporations and publically held shells controlled by'' a co-defendant); *SEC* v. *Hansen,* 1984 U.S. Dist. LEXIS 17835, at *26 (S.D.N.Y. Apr. 6, 1984) (defendant engaged in unregistered broker activity when he ''sold or attempted to sell interest in the five [securities] by use of the mails, the telephone, advertisements in publications distributed nationally and by other intestate means of communication''); *SEC* v. *National Executive Planners, Ltd.,* et al., 503 F. Supp. 1066, 1072–73 (M.D.N.C. 1980) (defendant engaged in unregistered broker activity by using the mails and telephone to ''solicit[] clients actively'' in the offer and sale of securities); *SEC* v. *Earthly Mineral Solutions, Inc.,* No. 2:07–cv–1057, 2011 WL 1103349, at *2 (D. Nev. Mar. 23, 2011) (defendant engaged in unregistered broker activity when, among other things, he ''conducted general solicitations through newspaper advertisements''); *SEC* v. *Deyon,* 977 F. Supp. 510, 518 (D. Maine 1997) (defendants engaged in unregistered broker activity when they ''solicited investors by phone and in person,'' ''distributed documents and . . . prepared and distributed sales circulars'').

[43] *See* 15a–6 Adopting Release at 30018.

[44] *See, e.g., SEC* v. *Helms,* No. 13–cv–01036, 2015 WL 5010298, at *17 (W.D. Tex. Aug. 21, 2015) (''In determining whether a person 'effected transactions [for purposes of the Exchange Act registration requirements],' courts consider several factors, such as whether the person: (1) Solicited investors to purchase securities, (2) was involved in negotiations between the issuer and the investor, and (3) received transaction-related compensation.'') (citing cases initiated by the Commission).

[45] *See, e.g., SEC* v. *Collyard,* 154 F. Supp. 3d 781, No. 11–CV–3656 (JNE/JJK), 2015 WL 8483258 at *5 (D. Minn. Dec. 9, 2015) (rejecting the argument that the defendant acted as a ''finder'' not subject to registration under Section 15(a)); *SEC* v. *Bio Defense Corp., et al.,* No. 1:12–cv–11669–DPW (D. Mass. Sept. 6, 2019) (concluding that the defendants acted as unregistered brokers in violation of Section 15(a) because the directness of their involvement in the securities sales was ''certainly broader than that of a mere finder who has no broker/dealer experience and simply brings parties together''); *SEC* v. *Kramer,* 778 F.Supp.2d 1320 (M.D. Fla. 2011) (concluding that registration under Section 15(a) was not required where the defendant acted like a ''finder'' and not a broker where he introduced friends and family as prospective investors to an issuer and received transaction-based compensation); *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''). *See also SEC* v. *Offill,* Civil Action No. 3:07–CV–1643–D (N.D. Tex. Jan. 26, 2012) (''If an individual is a ''finder'' rather than a broker or dealer, he is not required to register under the Exchange Act. 'The distinction drawn between the broker and the finder or middleman is that the latter bring[s] the parties together with no involvement on [his] part in negotiating the price or any of the other terms of the transaction.' '').

[46] Exchange Act Rule 3a4–1 provides a conditional exemption from broker status when

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understands that market participants have looked to staff no-action letters discussing circumstances under which persons act as ''finders'' without registering as a broker-dealer.[47]

In particular, in connection with private placements, the Commission understands that market participants may look to the *Paul Anka* staff no-action letter with respect to broker registration under Section 15(a) of the Exchange Act.[48] In the *Paul Anka* Letter, the staff stated that it would not recommend enforcement action to the Commission under Section 15(a) of the Exchange Act against an individual who, without registering with the Commission as a broker-dealer: (1) Entered into an agreement with an issuer to provide to the issuer a list of names and telephone numbers of potential investors he reasonably believed to be accredited investors and with whom he had a pre-existing business or personal relationship, (2) had no further contact with potential investors concerning the issuer, and (3) received a finder's fee for doing so.[49]

As noted above, Commission staff has responded over the years to other requests for staff statements in relation to broker status issues, similar to those in the *Paul Anka* Letter. Differences in the facts and circumstances can lead to different results. In some matters, the staff provided the no-action statement that was requested.[50] A number of the no-action letters in this area, for example, involve persons seeking to facilitate the sale of a business or a controlling interest therein, a fact pattern different from that presented in the *Paul Anka* Letter.[51] But in certain other matters, the staff has declined to provide such statements.[52]

III. Proposed Exemption for Finders

The Commission acknowledges that so-called ''finders'' may play an important role in facilitating capital formation, particularly for smaller issuers. At the same time, the absence of a regulated intermediary may raise investor protection concerns. The Commission preliminarily believes that there are situations where the need to impose the broker registration requirement may be mitigated by other factors.[53] Accordingly, the Commission is proposing to grant exemptive relief pursuant to Sections 15(a)(2)[54] and 36(a)(1)[55] of the Exchange Act to permit a natural person to engage in certain defined activities on behalf of an issuer (a ''Finder'') without registration as a broker, subject to the conditions described below.[56] The proposed exemption would provide a non-exclusive safe harbor from broker registration. The safe harbor is intended to provide clarity with respect to the ability of a Finder to engage in certain activities without being required to register as a broker under Section 15(a).[57] Accordingly, no presumption shall arise that a person has violated Section 15(a) of the Exchange Act if such person is not within the terms of the proposed exemption; rather—consistent with how questions under Section 15(a) have been evaluated—it would depend on the facts and circumstances of the situation.

Specifically, the Commission is proposing to exempt two classes of Finders, Tier I Finders and Tier II Finders, as described below, based on the types of activities in which they are permitted to engage, and with conditions tailored to the scope of their activities. The Commission's proposed relief is intended to be narrowly-tailored and seeks to address the capital formation needs of certain smaller issuers while preserving appropriate investor protections.

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

''associated persons'' of an issuer engage in certain limited activities on behalf of the issuer. However, the ability to rely on the rule is subject to a number of conditions, including that the associated person does not receive compensation that is based either directly or indirectly on transactions in securities. The associated person must also perform, or be intended primarily to perform at the end of the offering, substantial duties for or on behalf of the issuer otherwise than in connection with transactions in securities. Exchange Act Rule 3a4–1; *see Persons Deemed Not to Be Brokers,* Exchange Act Release No. 22172, 1985 WL 634795 (June 27, 1985) (''Rule 3a4–1 Adopting Release''). Finders are customarily paid transaction-based compensation and few finders perform substantial duties for the issuer after the offering. Thus, finders have generally not been eligible to rely on the Rule 3a4–1 exemption.

[47] Staff no-action letters, like all staff guidance, have no legal force or effect: they do not alter or amend applicable law, and they create no new or additional obligations for any person.

[48] *See Paul Anka,* SEC Staff No-Action Letter (July 24, 1991) (''*Paul Anka* Letter''). If the exemption is adopted, the *Paul Anka* Letter and other staff positions relating to the application of Section 15(a) of the Exchange Act in private offerings, including but not limited to the letters discussed in footnotes 50 and 52 *infra,* may be moot, superseded, or otherwise inconsistent with the exemption. As discussed below, the Commission is requesting comment on which letters, if any, should or should not be withdrawn, and why.

[49] *Id.* The facts of the *Paul Anka* Letter are very narrow. The staff in its response noted that the individual would not: (i) Solicit the prospective investors or have any contact with them regarding the proposed investment; (ii) participate in any advertisement, endorsement, or general solicitation; (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; (vii) provide advice as to the valuation or financial advisability of the investment; or (viii) handle any funds or securities in connection with the investment.

The staff's response also noted that the individual had not previously engaged in any private or public offering of securities (other than buying and selling securities for his own account through a broker-dealer), had not acted as a broker or finder for other private placements of securities, and did not intend to participate in any distribution of securities after the completion of the proposed private placement, so that the *Paul Anka* Letter only addressed an individual's first participation in a securities offering and not participation in any subsequent offerings by that individual.

[50] *See, e.g., Garrett/Kushell/Assocs.* SEC Staff No-Action Letter (Aug. 8, 1980, Pub. Avail. Sept.7, 1980); *May-Pac Management Co.* SEC Staff No-Action Letter (Oct. 23, 1973, Pub. Avail. Dec. 20, 1973); *Victoria Bancroft* SEC Staff No-Action Letter (July 9, 1987); *Russell R. Miller & Co., Inc.* SEC Staff No-Action Letter (July 14, 1977); *Corporate Forum, Inc.* SEC Staff No-Action Letter (Dec. 10, 1972).

[51] *M&A Broker* Letter; *Country Business, Inc.* Staff No-Action Letter (Nov. 8, 2006); *International Business Exchange Corporation* Staff No-Action Letter (Dec. 12, 1986).

[52] *See, e.g., Brumberg, Mackey & Wall, PLC* Staff No-Action Letter (May 17, 2010) (denial of no-action for a person who would pre-screen investors for eligibility to purchase certain privately-placed securities and pre-sell securities to those investors); *John Loofbourrow Associates, Inc.* Staff No-Action Letter (June 29, 2006) (denial of no-action for a person who would receive a commission for introducing an investment banking client to a registered broker-dealer).

[53] *See* Rule 3a4–1 Adopting Release (''Exemptions from registration have traditionally been narrowly drawn in order to promote both investor protection and the integrity of the brokerage community. At the same time, however, the Commission recognizes that there are situations where imposition of the registration requirement would be inappropriate.'').

[54] Section 15(a)(2) of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt from the registration requirements of Section 15(a)(1) any broker or class of brokers, by rule or order, as it deems consistent with the public interest and the protection of investors.

[55] Section 36(a)(1) of the Exchange Act authorizes the Commission, by rule, regulation, or order, to exempt, either conditionally or unconditionally, any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

[56] Nothing in the proposed exemption excuses compliance with all other applicable laws, including the antifraud provisions of the Securities Act and the Exchange Act and state law.

[57] As discussed above, whether a person is acting as a ''broker'' and in particular, whether he or she is ''engaged in the business'' of effecting securities transactions for the account of others will depend on the facts and circumstances of the particular matter. Accordingly, engaging in some of the limited activities falling within the terms of the proposed exemption should not be considered per se to require registration as a broker-dealer in the absence of the exemption.

applicable exemption from registration under the Securities Act; [58]

- 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 [59] 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.

Limiting the proposed exemption to activities on behalf of issuers that are not required to report under the Exchange Act and in connection with offers and sales of securities made in reliance on an applicable exemption from registration under the Securities Act is intended to address concerns that have been raised over the years regarding the perceived inability of smaller companies to engage the services of a broker-dealer to assist with opportunities to raise capital in exempt offerings.[60] Smaller companies, particularly smaller private companies, may be more likely to rely on the exemptions from registration, given the initial and ongoing costs associated with conducting a registered offering and becoming an Exchange Act reporting company.[61]

Although relatively smaller issuers that are required to report under the Exchange Act may also encounter difficulty raising capital in exempt offerings as compared to larger Exchange Act reporting issuers, we have proposed limiting this relief to non-Exchange Act reporting issuers because we believe these non-reporting issuers may be the types of companies most likely to experience difficulty obtaining the assistance of a broker-dealer, and are therefore most likely to need the assistance of a Finder when seeking to raise capital in such offerings.[62]

The proposed exemption would also require that a Finder not engage in general solicitation of potential investors, and that the potential investors be ''accredited investors'' or investors that the Finder has a reasonable belief [63] are ''accredited investors,'' as defined in Rule 501 of Regulation D.[64] These proposed requirements are intended to provide investor protection by limiting the scope of potential investors with whom Finders are permitted to engage on behalf of an issuer.[65] The accredited investor requirement is intended to ensure that Finders solicit only potential investors who have a sufficient level of financial sophistication to participate in investment opportunities that do not have the additional protections provided by registration under the Securities Act.[66] Accredited investors currently provide the vast majority of early-stage capital to small businesses through exempt offerings,[67] where they often invest directly without the engagement of an intermediary. We believe the targeted approach we are proposing would address the capital raising needs of smaller issuers while maintaining appropriate investor protections.

The requirement that a Finder enter into a written agreement [68] with the issuer that includes a description of the services provided and associated compensation is intended to explicitly define the role of the Finder consistent with the terms of the proposed exemption and, in turn, establish accountability between the parties.[69]

Next, a Finder cannot be an associated person of a broker-dealer as defined under Section 3(a)(18) of the Exchange Act.[70] The Commission believes this

[58] An issuer's failure to comply with the conditions of an exemption from registration under the Securities Act for an offering would not, in itself, affect the ability of a Finder to rely on the proposed exemptive order provided the Finder can establish that he or she did not know and, in the exercise of reasonable care, could not have known, that the issuer had failed to comply with the conditions of an exemption. However, a Finder that, through its activities on behalf of an issuer, causes an issuer's offering to be ineligible for an exemption from registration, would not be able to rely on the proposed exemption.

This proposed exemptive order is not intended to exempt an issuer from its requirements under each offering exemption from registration under the Securities Act.

[59] *See* footnote 68 and accompanying text.

[60] *See, e.g.,* ACSEC Recommendation 2017 at 10 (stating that ''identifying potential investors is one of the most difficult challenges for small businesses trying to raise capital'').

[61] *See* Harmonization Proposal at 17957.

[62] *See* 2017 Treasury Report at 43–44.

[63] The Commission recently reiterated that the steps necessary to establish a reasonable belief as to investor status will depend on the facts and circumstances of the contemplated offering and each potential issuer. *See* Solicitations of Interest Prior to a Registered Public Offering, Release No. 33–10699 (Sept. 25, 2019) [84 FR 53011 (Oct. 4, 2019)] at 53018. Finders can look to the methods that other market participants currently use to establish a reasonable belief regarding an accredited investor's status in other contexts.

[64] 17 CFR 230.501(a). The definition of accredited investor provides that natural persons and entities that come within, or that the issuer reasonably believes come within, any of the enumerated categories at the time of the sale of the securities are accredited investors.

On August 26, 2020, the Commission adopted changes to the accredited investor definition to add new categories of qualifying natural persons and entities. *Amending the ''Accredited Investor'' Definition,* Release Nos. 33–10824; 34–89669 (Aug. 26, 2020) (''Accredited Investor Adopting Release'').

[65] As the Commission previously indicated, ''[w]hether there has been a general solicitation is a fact-specific determination.'' *See* Harmonization Proposal at footnote 70. One way, though not the exclusive way, to demonstrate the absence of general solicitation is by establishing the existence of a pre-existing substantive relationship. *Id.* at 17966.

The Commission has stated that it generally viewed a pre-existing relationship as ''one that the issuer has formed with an offeree prior to the commencement of the securities offering or, alternatively, that was established through another person (for example a registered broker-dealer or investment adviser) prior to that person's participation in the offering.'' *Id.* The Commission has stated that a substantive relationship is ''one in which the issuer (or a person acting on its behalf, such as a registered broker-dealer or investment adviser) has sufficient information to evaluate, and does, in fact, evaluate, an offeree's financial circumstances and sophistication, in determining his or her status as an accredited or sophisticated investor.'' *Id.*

[66] *Regulation D Revisions; Exemption for Certain Employee Benefit Plans,* Release No. 33–6683 (Jan. 16, 1987), [52 FR 3015 (Jan. 30, 1987)]. *See also* Accredited Investor Adopting Release.

As the Commission recently stated in the Accredited Investor Adopting Release, the accredited investor standard is similar to, but distinct from, other regulatory standards in Commission rules that are used to identify persons who are not in need of certain investor protection features of the federal securities laws. *See* Accredited Investor Adopting Release at footnote 8. Each of these other regulatory standards serves a different regulatory purpose. Accordingly, an accredited investor will not necessarily meet these other standards, and these other regulatory standards are not designed to capture the same investor characteristics as the accredited investor standard. *See id.*

The Commission, in adopting Rule 3a4–1, noted that ''the fact that the Commission has concluded that, under limited circumstances, investors do not need the protections afforded by registration under the 1933 Act does not dictate a conclusion that a broad exemption from broker-dealer is appropriate.'' The Commission is not predicating the proposed exemption solely on the status of the potential investor. Rather, as it did with Rule 3a4–1, the Commission is considering, among other various approaches, whether there are a set of conditions that considered together would be appropriate in a narrow set of circumstances.

[67] From 2009 to 2019, Rule 506(b) offerings to only accredited investors provided between 93–97% of total capital raised using Rule 506(b), the most commonly used offering exemption. *See* Accredited Investor Adopting Release at 97.

[68] The Finder could employ electronic media and communications to satisfy the written agreement requirement.

[69] *See* footnote 26 and accompanying text.

[70] Section 3(a)(18) of the Exchange Act defines associated person of a broker or dealer as: ''any partner, officer, director or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer, or any employee of such broker or dealer, except that any person associated with a broker or dealer whose functions are solely clerical or ministerial shall not be included in the meaning of such term

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condition is appropriate because of the potential for investor confusion and abusive sales tactics when the Finder is also associated with a broker-dealer.[71] Therefore, the relief provided by the proposed exemption should not be necessary or available to such persons. This condition is intended to ensure that regulated persons do not attempt to circumvent applicable rules and regulations to which they are already subject, including their required standard of conduct when providing recommendations.[72]

Finally, a Finder cannot rely on the exemption during a time he or she is subject to statutory disqualification, as that term is defined in Section 3(a)(39) of the Exchange Act.[73] The Commission preliminarily believes that any person subject to the provisions described in Section 3(a)(39) should not be able to rely on this exemption as we believe there is potential for abusive practices where persons who are subject to a statutory disqualification participate in securities transactions without the assurance of adequate supervision or regulatory oversight.[74]

Tier I Finders. For purposes of the proposed exemption, a ''Tier I Finder'' is defined as a Finder who meets the above conditions [75] and whose activity is limited to providing contact information of potential investors in connection with only one capital raising transaction by a single issuer within a 12-month period,[76] provided the Tier I Finder does not have any contact with the potential investors about the issuer. The contact information may include, among other things, name, telephone number, email address, and social media information. The Commission preliminarily believes limiting the exemption to this activity will appropriately narrow the role of the Tier I Finder to preclude the participation in continuous or multiple sales of securities by persons that are not subject to broker-dealer registration or to the heightened requirements of Tier II Finders. A Tier I Finder that complies with all of the conditions of the exemption may receive transaction-based compensation for the limited services described above without being required to register as a broker under Section 15(a) of the Exchange Act.[77]

Tier II Finders. The Commission is also proposing an exemption that would permit a Finder, where certain conditions are met, to engage in additional solicitation-related activities beyond those permitted for Tier I Finders. For purposes of the proposed exemption, a ''Tier II Finder'' is defined as a Finder who meets the above conditions,[78] and who engages in solicitation-related activities on behalf of an issuer, that are limited to: (i) Identifying, screening, and contacting potential investors; [79] (ii) distributing issuer offering materials to investors; (iii) discussing issuer information included in any offering materials,[80] provided that the Tier II Finder does not provide advice as to the valuation or advisability of the investment; [81] and (iv) arranging or participating in meetings with the issuer and investor.[82] As discussed above, the Commission generally views solicitation as any affirmative effort to induce or attempt to induce a securities transaction [83] and broadly views these activities of Tier II Finders to constitute solicitation. The identification of these activities is not an exhaustive listing of activities that may constitute solicitation. Rather, these are the limited solicitation-related activities permissible under the proposed exemption.[84] The Commission preliminarily believes that limiting the proposed exemption to these specified activities associated with solicitation, along with the additional conditions discussed below, will appropriately narrow the role of the Tier II Finder to support the proposed exemption.[85]

A Tier II Finder wishing to rely on the proposed exemption would need to satisfy certain disclosure requirements and other conditions: [86]

First, the Tier II Finder would need to provide a potential investor, prior to or at the time of the solicitation, disclosures that include:

(1) the name of the Tier II Finder;

(2) the name of the issuer;

(3) the description of the relationship between the Tier II Finder and the issuer, including any affiliation;

(4) a statement that the Tier II Finder will be compensated for his or her

for purposes of section 15(b) of this title (other than paragraph 6 thereof).''

[71] *See* Rule 3a4–1 Adopting Release at *3.

[72] The Commission recognizes the importance of the protections provided by the standard of conduct applicable to broker-dealers when providing recommendations to retail investors. *See* Regulation Best Interest Adopting Release at Section I.

[73] Section 3(a)(39).

[74] *See* Rule 3a4–1 Adopting Release at *3 (''The Commission believes that there is added potential for abusive practices in the sale of an issuer's securities in circumstances where persons who are subject to a statutory disqualification participate without assurance of adequate supervision or regulatory oversight.'').

[75] As discussed above, the proposed exemption would only be available where: (i) The issuer is not required to file reports under Section 13 or Section 15(d) of the Exchange Act; (ii) the issuer conducts the offering in reliance on an applicable exemption from registration under the Securities Act; (iii) the Finder does not engage in general solicitation; (iv) the potential investor is an accredited investor or the Finder has a reasonable belief that the potential investor is an accredited investor; (v) the Finder provides services pursuant to a written agreement with the issuer that includes a description of the services provided and associated compensation; (vi) the Finder is not an associated person of a broker or dealer; and (vii) the Finder is not subject to statutory disqualification.

[76] The Commission notes that requirement is similar to the limitation included in Rule 3a4–1 for sales activities by associated persons of an issuer. *See* Rule 3a4–1(a)(4)(ii)(C) (stating that as a condition of the rule, subject to limited exceptions, the associated person of an issuer cannot participate in selling and offering of securities for any issuer more than once every 12 months).

[77] As noted above, no presumption shall arise that a person has violated Section 15(a) of the Exchange Act if such person is not within the terms of the proposed Tier I Finders exemption. Whether a person is acting as a ''broker'' and, in particular, whether he or she is ''engaged in the business'' of effecting securities transactions for the account of others will depend on the facts and circumstances of the particular matter. A person who falls within the definition of broker must register with the Commission pursuant to Section 15(a) of the Exchange Act, absent an applicable exemption or exclusion. The proposed exemption is intended to provide a safe harbor from the broker registration requirement to market participants for the limited activities described herein.

[78] *See supra* footnote 75 and accompanying text.

[79] *See SEC* v. *Hansen,* 1984 U.S. Dist. LEXIS 17835, at *26 (S.D.N.Y. April 6, 1984) (setting forth actively soliciting or recruiting investors as commonly cited indicia of broker activity).

[80] *See SEC* v. *Offill,* 2012 WL 246061 (N.D. Tex. Jan. 26, 2012) (stating that a ''finder'' will be performing the functions of a broker-dealer, triggering registration requirements, if activities include, among other things, discussion of details of securities transactions).

[81] *See infra* p. 28 (discussing activities that Finders are not permitted to engage in pursuant to the proposed exemption).

[82] A Tier II Finder is not subject to the Tier I Finder's limitation of participation in only one capital raising transaction by a single issuer in a 12-month period.

[83] *See supra* p. 13 (stating that solicitation includes efforts to induce a single securities transaction as well as efforts to develop an ongoing securities-business relationship).

[84] *See supra* footnote 77.

[85] As noted above, no presumption shall arise that a person has violated Section 15(a) of the Exchange Act if such person is not within the terms of the proposed Tier II Finders exemption. Whether someone is acting as a ''broker'' and in particular, whether he or she is ''engaged in the business'' of effecting securities transactions for the account of others, will depend on the facts and circumstances of the particular matter. A person who falls within the definition of broker must register with the Commission pursuant to Section 15(a) of the Exchange Act, absent an applicable exemption or exclusion. The proposed exemption is intended to provide a safe harbor from the broker registration requirement to market participants for the limited activities described herein.

[86] The disclosure requirements and conditions applicable to Tier II Finders differ from the requirements applicable to solicitors under the Cash Solicitation Rule Proposed Amendments. As discussed above, the Commission preliminarily believes these more specific disclosure requirements, including the required acknowledgment, for Tier II Finders are appropriate to address the differences in regulatory structures. *See* footnote 26 and accompanying text.

solicitation activities by the issuer and a description of the terms of such compensation arrangement;

(5) any material conflicts of interest resulting from the arrangement or relationship between the Tier II Finder and the issuer; and

(6) an affirmative statement that the Tier II Finder is acting as an agent of the issuer, is not acting as an associated person of a broker-dealer, and is not undertaking a role to act in the investor's best interest.[87]

The Commission is proposing to allow a Tier II Finder to provide such disclosure orally, provided that the oral disclosure is supplemented by written disclosure and satisfies all of the disclosure requirements listed above no later than the time of any related investment in the issuer's securities.

The Commission preliminarily believes that this disclosure would direct an investor's attention to important information, such as the fact that the Tier II Finder is paid by the issuer and any associated material conflicts of interest, in order to facilitate the investor's ability to evaluate the role of the Tier II Finder. In addition, the Commission believes the disclosure should be made ''prior to or at the time of the solicitation'' so that investors have this important information early enough in the process to give the investor adequate time to consider the information in order to make informed investment decisions.[88] While the Commission is requiring that the disclosures be written, we believe this can be satisfied either through paper or electronic means.[89] For purposes of this proposed exemption, we believe that delivery of the disclosure would be evidenced by the acknowledgment required below.

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 Tier II Finder's required disclosures. While the Commission is requiring that the acknowledgment be written, we believe this can be satisfied either through paper or electronic means, similar to the disclosure condition discussed above.[90] The Commission believes this acknowledgment is important as it helps ensure that the investor received the required disclosures.

Because Tier II Finders may participate in a wider range of activity and have the potential to engage in more offerings with issuers and investors, the Commission believes that heightened requirements are appropriate. A Tier II Finder that complies with all of the conditions of the proposed exemption may receive transaction-based compensation for services provided in connection with the activities described above without being required to register as a broker under Section 15(a) of the Exchange Act.

The Commission preliminarily believes that the proposed exemption is narrowly drawn to permit a limited set of activities, subject to conditions intended to address investor protection concerns, including the requirement that any potential investors solicited under this proposed exemption be accredited investors or investors the Finder has a reasonable belief are accredited investors. In addition, Tier II Finders, who will interact with potential investors, must provide those investors with appropriate disclosures of the Tier II Finder's role and compensation.[91]

Because a Finder would engage in a limited scope of securities-related activities with a limited set of investors, would be subject to conditions commensurate with the level of activity, and would not handle customer funds or securities or have the power to bind the issuer or the investor, the Commission preliminarily believes that the investor protection concerns that otherwise would be addressed by registration as a broker and the related requirements in the limited circumstances contemplated by the exemption should be addressed by the conditions of the proposed exemption for each tier of Finders. In particular, the disclosure requirement for Tier II Finders should help to increase investor awareness of the scope of the Finder's relationship with the issuer and potential conflicts of interest, and as a result help to facilitate an informed investment decision.

Consistent with the narrow scope of activities contemplated by the proposed exemption, as noted above, a Finder could not be involved in structuring the transaction or negotiating the terms of the offering.[92] A Finder also could not handle customer funds or securities or bind the issuer or investor; participate in the preparation of any sales materials; perform any independent analysis of the sale; engage in any ''due diligence'' activities; assist or provide financing for such purchases; or provide advice as to the valuation or financial advisability of the investment.

The proposed exemption would apply only with respect to the defined activities for each tier of Finder and is limited to activities solely in connection with primary offerings. A Finder could not rely on this proposed exemption to engage in broker activity beyond the scope of the proposed exemption, such as 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. The Commission preliminarily believes these are important safeguards that operate as a constraint on the conduct of Finders.

If a Finder fails to comply with any of the relevant conditions (for example, the Finder engages in general solicitation of potential investors), the Finder could not rely on the proposed exemption. The inability to rely on the proposed exemption means that the Finder may need to consider whether it is required to register with the Commission as a broker under Section 15(a) of the Exchange Act.[93]

There are two important principles embodied in our regulatory framework that are not affected by this exemption. Significantly, this 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, and state law. In

[87] A Tier I Finder or Tier II Finder that complies with the requirements of the proposed exemption would not be subject to broker-dealer sales practice rules, including Regulation Best Interest.

[88] *See* Regulation Best Interest Adopting Release at Section II.C.1.

[89] The Finder could employ electronic media and communications to satisfy the requirement.

[90] *Id.*

[91] *See supra* pp. 25–26 (describing required disclosures to the investors) and *infra* 29 (describing the Commission's antifraud protections). The Commission is seeking comment on questions related to potential investor protection concerns associated with this proposed exemption.

Because Tier I Finders would only be providing the investor's contact information to the issuer and would not have any contact with potential investors about the securities offering, we preliminarily do not believe that a similar disclosure requirement for Tier I Finders is necessary or appropriate.

[92] To assist Finders in applying this standard, we propose to use terms already familiar to market participants. To that end, for the purposes of the proposed exemption, ''terms of the offering'' would be interpreted as the amount of securities offered, the nature of the securities, the price of the securities and the closing date of the offering period. This interpretation would be consistent with the Instruction to Rule 204 of Regulation Crowdfunding. *See* Rule 204 of Regulation Crowdfunding.

[93] As noted above, the proposed exemption would provide a non-exclusive safe harbor from broker registration, and no presumption shall arise that a person has violated Section 15(a) of the Exchange Act if such person is not within the terms of the proposed exemption but rather the need for registration would depend on the facts and circumstances of the situation.

addition, this exemption is not intended to affect the rights of the Commission or any other party to enforce compliance with other applicable law, or the available remedies for violations of the law. Further, regardless of whether or not a Finder complies with this exemption, it may need to consider whether it is acting as another regulated entity, such as an investment adviser or a municipal advisor. An exemption from the obligation to register as a broker-dealer does not insulate a person from the registration requirements of the Advisers Act if such person is acting as an investment adviser.

Thus, the Commission preliminarily believes that the proposed exemption would be consistent with the public interest and protection of investors, and would also provide issuers with greater access to investment capital and investors with access to investment opportunities. Specifically, the proposed conditions for both Tier I Finders and Tier II Finders should sufficiently restrict the scope of the proposed exemption such that permitting limited activities associated with solicitation in this narrow context would not implicate the need for regulation of these activities under the broker regulatory framework. At the same time, the proposed exemption would permit Finders to play an important role in facilitating capital formation for small businesses, consistent with many of the various recommendations put forth through the years.[94]

Accordingly, for the reasons discussed above, the Commission preliminary believes that the proposed conditional exemption would be consistent with the public interest and the protection of investors and would be necessary or appropriate in the public interest.

IV. Request for Comments

The Commission is seeking comment on all aspects of the proposed exemption. In particular, the Commission requests comment on the following questions as well as the potential costs and benefits of the proposed exemption. When responding to the request for comment, please explain your reasoning.

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?

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?

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

4. Should the definition of Finder be limited to a natural person resident in the U.S.?[95]

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?

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.

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?[96]

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

9. Have we appropriately limited the number of offerings a Tier I Finder can participate in on an annual basis?

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?

11. Should we define ''capital raising transaction'' for purposes of Tier 1? If so, how?

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?

13. Should Finders be able to ''find'' or solicit investors only for exempt offerings, as proposed? Should Finders be able to ''find'' or solicit investors only for offerings under certain exemptions from registration? If so, which ones?

14. Should Finders be able to ''find'' or solicit for all non-Exchange Act reporting companies or should they be able to solicit for a narrower or wider range of companies?

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?

16. Should the proposed exemption include limitations on the types of securities for which a Finder can ''find'' or solicit 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?

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?

19. Should we adopt comparable disclosure requirements with disclosures required under the proposed changes to Rule 206(4)–3 under the Advisers Act[97] for solicitations of investors in private funds, if adopted? Should the disclosures required by Tier II Finders be deemed to satisfy the disclosure requirements under the proposed changes to Rule 206(4)–3 under the Advisers Act[98] for solicitations of investors in private funds, if adopted?

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 email, that could serve to validate that investors received the required disclosure?

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

[94] *See* Section I.

[95] This term would be interpreted consistent with the meaning in Rule 902(k)(1)(i) of Regulation S.

[96] *See* Harmonization Proposal at footnote 70.

[97] *See* Cash Solicitation Rule Proposed Amendments. The Cash Solicitation Proposed Amendments require that the solicitor disclosure state: (A) The name of the investment adviser; (B) the name of the solicitor; (C) a description of the investment adviser's relationship with the solicitor; (D) the terms of any compensation arrangement, including a description of the compensation provided or to be provided to the solicitor; (E) any potential material conflicts of interest on the part of the solicitor resulting from the investment adviser's relationship with the solicitor and/or the compensation arrangement; and (F) the amount of any additional cost to the client or private fund investor as a result of solicitation.

[98] *Id.*

22. Should Tier II Finders be required to enter into a written agreement with the issuer where the issuer, without affecting the Finder's obligations, also assumes liability with respect to investors for the Finder's misstatements in the course of his or her engagement by the issuer?

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?

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

25. Should we impose limitations on the form of compensation Finders can receive? Should Finders be prohibited in certain circumstances from receiving transaction-based compensation, and instead be required to receive compensation that is not tied to the success of the transaction (that is a fixed fee or other arrangement)? If so, under what circumstances and how should Finders then be compensated?

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

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?

28. Should we provide guidance on how a Finder can establish that he or she did not know and, in the exercise of reasonable care, could not have known, that the issuer had failed to comply with the conditions of an exemption?

29. Should we provide further guidance on the solicitation-related activities in which Tier II Finders can engage on behalf of an issuer, for example, guidance surrounding a Tier II Finder's discussion of issuer information and arrangement and participation in meetings with issuers and investors?

30. Should we provide guidance regarding activities of private fund advisers, M&A Brokers as defined in the *M&A Broker* Letter,[99] 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? [100]

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?

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

33. Have we appropriately defined the disqualification condition for Finders?

34. Have we appropriately limited the proposed exemption to individuals who are not associated persons of a broker-dealer?

35. Should the proposed exemption include a limitation such that it would not be available to individuals who were associated persons of a broker-dealer within the previous 12 months?

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?

37. Should the proposed exemption be limited to individuals who are not associated persons of an issuer? Why or why not?

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

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

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?

41. Should we instead take an alternative approach for either class of Finders?

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

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?

44. Are there any other sources of data or information that could assist the Commission in analyzing the consequences of the proposed exemption? We request that commenters provide any relevant data or information.

45. Other than the possible obligation of a Finder to register as a broker-dealer, the proposed exemption is not intended to affect the rights of the Commission or any other party to enforce compliance with applicable law, or the available remedies for violations of the law. This includes, in the case of the Commission, the ability to impose a broker-dealer registration bar on a person for misconduct that would warrant a bar. Are there any other considerations in this regard that the Commission should take into account as it considers the exemptive relief?

By the Commission.

Dated: October 7, 2020.

Vanessa A. Countryman,

Secretary.

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[99] An M&A Broker is defined as a person engaged in the business of effecting securities transactions solely in connection with the transfer of ownership and control of a privately-held company through the purchase, sale, exchange, issuance, repurchase, or redemption of, or a business combination involving, securities or assets of the company, to a buyer that will actively operate the company or the business conducted with the assets of the company. *See M&A Broker* Letter.

[100] *See supra* footnote 24 and accompanying text.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90099; File No. SR–LCH SA–2020–005]

Self-Regulatory Organizations; LCH SA; Notice of Filing of Proposed Rule Change Relating to the Clearing of Options on Index Credit Default Swaps in Respect of North American Indices (More Specifically, CDX.NA.IG and CDX.NA.HY)

October 6, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 24, 2020, Banque Centrale de Compensation, which conducts business under the name LCH SA (''LCH SA''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change described in Items I, II, and III below, which Items have been prepared primarily by LCH SA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

Banque Centrale de Compensation, which conducts business under the name LCH SA (''LCH SA''), is proposing to amend its rules to permit the clearing of options on index credit default swaps in respect of North American indices (more specifically, CDX.NA.IG and CDX.NA.HY) (''CDX Swaptions'') (the ''Proposed Rule Change'').

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.