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SEC Considering a Proposed Exemptive Order for Finders

On October 7, 2020, the Securities and Exchange Commission (the "SEC") voted to propose a new, limited, conditional exemption from broker registration requirements for "finders" who help issuers raise capital in private markets from accredited investors. (See https://www.sec.gov/news/press-release/2020-248).

Under Section 15(a)(1) of the Securities Exchange Act of 1934, finders and solicitors of investors are required to register as broker-dealers. Historically, the SEC has acknowledged that finders may be exempt from broker registration under certain very limited conditions, and the SEC staff from time to time has issued "no action" letters to such effect. However, to date the SEC has never provided general exemptions for finders. Because the broker-dealer registration requirements are onerous, the proposed rule is welcome news for would-be finders.

Among other things, the proposed exemption:

(a) applies only to offerings exempt from registration under the Securities Act of 1933, and made by non-reporting issuers;
(b) is limited to solicitations of accredited investors or investors who the finder has a reasonable belief are accredited investors;
(c) requires a written agreement between the issuer and the finder; and
(d) contemplates two tiers of finders (Tier I and Tier II), such that a finder who participates more frequently, or to a greater degree, in offering-related activities would have to comply with a greater number of requirements.

Tier I is an exemption for "one-off" participation as a finder in an offering, while Tier II is a broader exemption for finders with more significant finder activities. Tier I finders are limited to acting as finders for a single issuer in a single capital raising in any 12 month period, and may provide the issuer with the contact information of potential investor, but may not communicate with those potential investors about the issuer or offering.

Tier II finders may solicit investors on behalf of multiple issuers, 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 between an issuer and investor.

We note that the exemption would not be available to any finder who makes recommendations to investors regarding the investment, participates in the structuring, financing or negotiation of the investment, or helps prepare sales materials, or who has engaged in certain disqualifying conduct. This may limit unregistered finders from engaging in professional finders activities.

We further note that even if the proposed SEC finders' exemption is adopted, it would not preempt state 'blue sky' laws, which would have to be reviewed and assessed for the availability of a corresponding exemption and/or compliance on a state-by-state basis.

We highlight that the finders' exemption is only a proposal for the time being. We will continue to track the status of the proposal, and will provide further information when available.

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