[5]NDAA § 6501(a)(1)(B) (to be codified at 15 U.S.C.A. § 78u(d)(3)(A)(ii)).

[6]NDAA § 6501(a)(3) (to be codified at 15 U.S.C.A. § 78u(d)(8)(A)(ii)).

[7]NDAA § 6501(a)(3) (to be codified at 15 U.S.C.A. § 78u(d)(8)(C)).

[8]The Securities Fraud and Investor Compensation Act, S. 799, 116th Cong. (2019); Investor Protection and Capital Markets Fairness Act, H.R. 4344, 116th Cong. (2019).

[9]NDAA § 6501(b).

[10]NDAA § 6501(a)(1)(B) (to be codified at 15 U.S.C.A. § 78u(d)(3)(A)(ii)).

[11]NDAA § 6501(a)(3) (to be codified at 15 U.S.C.A. § 78u(d)(8)(A)(ii)).

[12]NDAA § 6501(a)(3) (to be codified at 15 U.S.C.A. § 78u(d)(8)(A)(i)).

[13]NDAA § 6501(a)(3) (to be codified at 15 U.S.C.A. § 78u(d)(8)(B)). This addition is notable because before the amendment, such equitable remedies were not subject to any statute of limitations and the SEC could initiate civil injunctive proceedings for any historic violating conduct.

[14]NDAA § 6501(a)(3) (to be codified at 15 U.S.C.A. § 78u(d)(8)(C)) ("any time in which the person against which the action or claim, as applicable, is brought is outside the United States shall not count towards the accrual of that period.").

[15]H. Rept. 116-617, William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Conference Report to Accompany H.R. 6395, 116th Cong. (2020), https://www.congress.gov/congressional-report/116th-congress/house-report/617.

[16]NDAA §§ 6506 (Treasury study and strategy on trade-based money laundering), 6508 (Treasury and Justice study on the efforts of authoritarian regimes to exploit the financial system of the United States).

[17]Jay Clayton, Chairman, SEC, Keynote Remarks at the Mid-Atlantic Regional Conference (June 4, 2019), https://www.sec.gov/news/speech/clayton-keynote-mid-atlantic-regional-conference-2019.

[18]Jay Clayton, Chairman, SEC, Testimony on "Oversight of the Securities and Exchange Commission" (Nov. 17, 2020), https://www.sec.gov/news/testimony/clayton-sec-oversight-2020-11-17.

[19]NDAA § 6501(a)(3) (to be codified at 15 U.S.C.A. § 78u(d)(8)(A)(ii), § 78u(d)(8)(B)).

[20]*Liu*, 140 S. Ct. at 1946.

[21]NDAA § 6501(a)(1)(B) (to be codified at 15 U.S.C.A. § 78u(d)(3)(A)(ii)).

[22]NDAA § 6501(a)(1)(B) (to be codified at 15 U.S.C.A. § 78u(d)(3)(A)(ii)).

[23]15 U.S.C.A. § 78u(d)(5) (emphasis added).

[24]NDAA § 6501(a)(1)(B) (to be codified at 15 U.S.C.A. § 78u(d)(3)(A)(ii)).

SAFE HARBOR: THE SEC PROPOSES LIMITED RELIEF FOR SMALL BUSINESSES AND PERSONS INVOLVED IN PRIVATE CAPITAL TRANSACTIONS

By Eric Chartan and Andrew Adams

Eric Chartan is a counsel in the New York and Dallas offices of Bryan Cave Leighton Paisner LLP. Andrew Adams is an attorney in the firm's St. Louis office. Contact: eric.chartan@bclplaw.com or andrew.adams@bclplaw.com.

Small businesses that need to raise capital ("issuers") typically lack access to robust capital raising networks and often rely on "finders" for introductions to potential investors. The current federal and state regulatory landscape regarding compensating finders and determining whether finders are required to register as brokers is complex. Securities regulators know this and they will bring enforcement matters which can lead to significant sanctions including fines. In effect, the lack of regulatory clarity inhibits small businesses from engaging finders and cuts off meaningful access to the capital markets. Recognizing the importance of finders' role in facilitating capital formation for smaller issuers, in October 2020, the U.S. Securities and Exchange Commission (the "SEC") proposed a new, limited, conditional

exemption from broker registration requirements for finders (the "Proposed Exemption"). The proposals are still subject to further SEC review, but it would appear that change is afoot.

The Proposed Exemption

The Proposed Exemption would create a non-exclusive safe harbor from broker registration for finders, thereby allowing issuers to compensate these individuals with transaction-based compensation provided these finders engage in certain limited activities. To qualify, the finder must be a natural person and the following threshold requirements must be met:

1. The issuer is not required to file reports under Section 13 or Section 15(d) of the Exchange Act;

2. The issuer is seeking to conduct the securities offering in reliance on an applicable exemption from registration under the Securities Act of 1933 (the "Securities Act");

3. The Finder does not engage in general solicitations;

4. 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";

5. The Finder provides services pursuant to a written agreement with the issuer that includes a description of the services provided and associated compensation;

6. The Finder is not an associated person of a broker-dealer; and

7. 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.

Next, the finder's activity must fall into one of the following tiers:

Tier I Finders will be 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, provided that the Tier I Finder does not have any contact with the potential investors about the issuer.

Tier II Finders may engage in a wider range of solicitation-related activities on behalf of an issuer but these are 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 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. Tier II Finders would also be required to make certain disclosures in writing and to obtain a signed investor acknowledgement. These disclosures are akin to the written disclosures required by the Cash Solicitation Rule under the Investment Advisers Act of 1940.

Importantly, finders operating under either Tier will still be subject to other applicable laws such as the antifraud provisions of the Securities Act and the Exchange Act and state law. They must also evaluate whether their activity triggers the registration requirements for other regulated entities such as investment advisers or municipal advisors.

Challenges With the Proposed Exemption

The Proposed Exemption is a step in the right direction for issuers that want to follow the rules and it provides participants in these arrangements greater regulatory clarity than exists today. However, this exemptive relief does not lessen the responsibilities for issuers' legal and compliance professionals and it does not completely eliminate the regulatory uncertainty inherent in these arrangements. For example,

the Proposed Exemption applies to federal law, and there is no relief for pre-emption of state laws. Thus, as drafted, legal and compliance professionals will still have to navigate certain states' laws to determine whether they can compensate an unregistered finder.

Additionally, even though the Proposed Exemption does not create formal record keeping requirements, experienced legal or compliance professionals will strongly encourage issuers to develop compliance policies and procedures for finders' arrangements. After all, the securities regulators will not be precluded from enforcing compliance with other laws or seeking available remedies for violations of the law.

Lastly, the Proposed Exemption lacks support from two Commissioners on various public policy grounds and the result of the U.S. presidential election may impact its adoption or implementation.

Developments in 2021

Given that the Proposed Exemption is still under further SEC review, it is difficult to predict the rate at which we can expect to see changes implemented. It is still unclear whether the SEC will push forward under this administration or the next. A quick turnaround time will be well received so that the benefits to private company issuers, private fund advisers and/or managers and prospective finders can be felt sooner rather than later. However, the Proposed Exemption alone will not be enough to grant finders relief in various activities they undertake given that it is narrowly applicable. To that end, the silver lining of a delay at federal level could be that state laws will have the opportunity to come up to speed, which would be the most effective way of guaranteeing full regulatory clarity and safeguarding all capital markets participants.

Conclusion

The advantage of regulatory clarity here is somewhat offset by the burden of responsibilities that will still need to be shouldered by both legal and compliance professionals and also the issuers themselves. We support this step towards simplifying regulations that have previously inhibited small businesses from engaging finders and we hope that it will encourage more meaningful access to the capital markets. We look forward to any further developments that may resolve the challenges identified above.

THE SEC AND SARs

By Thomas O. Gorman

Thomas Gorman is a partner in the Washington, D.C. office of Dorsey & Whitney LLP. He also publishes SEC Actions (www.secactions.com), a blog that focuses on the Securities and Exchange Commission. This article is based on a blog post that he published on December 15, 2020. He is also a member of the Editorial Advisory Board of ***Wall Street Lawyer****. Contact: gorman.tom@dorsey.com.*

The Securities and Exchange Commission periodically has filed enforcement actions against broker-dealers for failing to file SARs—suspicious activity reports—typically centered on a failure to file reports regarding microcap issuers. Those actions are based on Exchange Act Section 17(a) and Rule 17a-8. SARs, on the other hand, trace to the Bank Secrecy Act and FinCEN.

The question of broker-dealer compliance with SARs and the Commission's authority under the Exchange Act Section and Rule typically cited by the agency was raised in an action recently decided by the Second Circuit Court of Appeals: *SEC v. Alpine Securities Corporation*.[1]

The Case

Alpine, a registered broker-dealer, was named as a defendant in an enforcement action by the Commission. The complaint alleged that the firm, which specializes in microcap securities, had failed over a period of time to properly file thousands of

