CRACKING THE PROBLEM OF FINDERS—AN EMPIRICAL AND COMPUTATIONAL ANALYSIS

Seth Chertok[*]

I. INTRODUCTION

A. *Finders Definition, Classification, and Significance*

In 2005, more than ten years into our "World Wide Web" era, an American Bar Association ("ABA") Task Force described "finders" in a securities market setting as follows:

> Financial intermediaries come from a variety of sources. They include CPAs and to a lesser extent lawyers, M&A specialists, business brokers, local "monied people" (the country club set), consultants (who take a variety of forms), insurance agents and real estate brokers, registered representatives illegally selling away from their firms, individuals who have substantial investor networks or the people that work for such individuals, individuals hired by entities seeking capital, angel networks,[1] retired executives and community leaders. They also include unregistered individuals or entities who hold themselves out as finders or investment bankers and do this for a living by providing business plans, private placement memoranda, and who may remain thereafter as paid consultants.[2]

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[*] Seth Chertok, Assistant Professor of Law at Peking University School of Transnational Law and former Visiting Assistant Professor at Penn State Law School. Prior to becoming a law academic, Professor Chertok worked as a securities regulation attorney in private equity at Morrison & Foerster in San Francisco, where he developed substantial experience with finders in diverse corporate and securities, and private equity, practice areas, and won the Lefever Prize at the University of Pennsylvania Law School for the best paper in law and economics. Professor Chertok would like to thank Yuqing Liu for her help with the computational aspects of the data analysis, and the *Wake Forest Law Review* for their dedication and diligence in the editing process.

1. "Angel investors invest in early stage or start-up companies in exchange for an equity ownership interest." Richard Harroch, *20 Things All Entrepreneurs Should Know about Angel Investors*, FORBES (Feb. 5, 2015), http://www.forbes.com/sites/allbusiness/2015/02/05/20-things-all-entrepreneurs-should-know-about-angel-investors/#6611ba68483a. There are a variety of ways to find angel investors, including through "angel investor networks ([finder] groups that aggregate individual investors)." *Id.*

2. Task Force on Private Placement Broker-Dealers, ABA Section of Business Law, *Report and Recommendations of the Task Force on Private Placement Broker-Dealers*, 60 BUS. LAW. 959, 970 (2005) [hereinafter *ABA Report*].

More abstractly put, "finder," in its legal context—"[a]n intermediary who contracts *to find, introduce, and bring together parties* to a [securities] business opportunity, leaving ultimate negotiations and consummation of business transaction to the principals"[3]—reminds us in layman's parlance of a "matchmaker," which has been availing incalculable singles through the ages and thriving in the market of "love" (i.e., pairing up bachelors' and bachelorettes' day-to-day existences).

Economically and socially, finders and their far-reaching roles are of paramount importance for society. Inside the web of our mega-economic infrastructure, finders operate over such an extensive range of contexts and subcontexts that they essentially permeate all forms of securities transactions in our economy. A practitioner can easily encounter finders by working for a lucrative, sophisticated private equity firm with a keen interest in expanding its clientele, or by representing small business clients seeking more capital for growth. Still, these are just a few instances out of numerous diverse contexts in which the finder's phenomenon occurs.

In the issuer context, a finder is often a small business issuer's only way to acquire the capital needed to expand its business, and "without their [finders'] assistance it is unlikely that a great percentage of such businesses would ever be successful in raising early stage funding."[4] "Small business capital formation is key to creating jobs in America. Small businesses create many more new jobs than large public companies who have no need for [finders]."[5] In fact, "[s]mall businesses account for the creation of two-thirds of all new jobs, and are [also] the incubators of innovation."[6] Finders also help small businesses deal with larger, highly regulated broker-dealers, since small businesses often are not in a position to deal with more sophisticated parties." "Fully licensed broker-dealers are similarly not inclined to assist in micro and small offerings. The risks involved in undertaking a small transaction are often similar to those of a large one, without a commensurate upside."[7]

Besides assisting small business, as a boon to capital formation, finders can also bring together buyers and sellers in other high-profile contexts, such as, without limitation, private equity and mergers and acquisitions ("M&A"). Incentivizing M&A as a social goal could potentially be just as valuable as helping small business, a point

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3. *Finder*, WEST'S ENCYCLOPEDIA OF AMERICAN LAW (2d ed. 2008) (emphasis added).

4. *ABA Report*, *supra* note 2, at 960.

5. *Id.*

6. GREGORY C. YADLEY, U.S. SECURITIES AND EXCHANGE COMMISSION ADVISORY COMMITTEE ON SMALL AND EMERGING BUSINESSES, NOTABLE BY THEIR ABSENCE: FINDERS AND OTHER FINANCIAL INTERMEDIARIES IN SMALL BUSINESS CAPITAL FORMATION 1 (June 3, 2015), https://www.sec.gov/info/smallbus/acsec/finders-and-other-financial-intermediaries-yadley.pdf.

7. *Id.* at 3.

much less well known. "Transactions in corporate control [such as M&A] often produce gains for the corporation."[8]

B. *The Push-Pull Seesaw of Regulation and Compliance*

Since the main bodies of the federal securities laws were enacted between 1933 and 1940, there has been a palpable trend over the past several decades of increasing complexity and accretion of securities laws as a whole.[9] The law of finders, situated within broker-dealer securities regulation, is no exception. The strength of regulation gives rise to an opposing force in a finder's compliance tactics, who naturally seeks to sidestep regulations. Since their debut on the historical stage of securities transactions, finders have hardly changed their stance on the roles they play, which in their minds is to find and introduce potential buyers and sellers of securities without affecting transactions, as would a broker-dealer. Therefore, they have always defended their legal freedom to be exempted from the very onerous and extensive regime of broker-dealer registration and regulation.

Not only is broker-regulation itself a byzantine regime for those who must register, but also the process of seeking exemptions from that regime is quite difficult and perplexing. To this end, a tradition of seeking no-action relief from the Securities and Exchange Commission ("SEC") concerning the finder's exemption on a case-by-case basis has been tacitly formed among the regulated entities. The no-action letters often vary widely based on fine differences in factual representations, thereby confusing regulated entities.

C. *A Framework for Finder Regulation*

1. *An Overview of Broker-Dealer Regulation*

Section 15(a)(1) of the Securities Exchange Act of 1934 ("Exchange Act") provides that broker-dealers must generally register under the Exchange Act.[10] A "broker" is defined in section 3(a)(4)(A)

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8. Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 698 (1982) (discussing the benefits of transactions in corporate control).

9. *See infra* Subpart IV.A.3 (discussing the trend of regulatory accretion and complexity in securities regulation).

10. 15 U.S.C. § 78o(a)(1) (2012) ("It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.").

of the Exchange Act as "any person engaged in the business of effecting transactions in securities for the account of others," subject to certain exceptions.[11] A "dealer" is defined by Section 3(a)(5)(A) of the Exchange Act as "any person engaged in the business of buying and selling securities . . . for such person's own account through a broker or otherwise," also subject to certain exceptions.[12]

Following the trying time of the Great Depression, knelled by the ominous "Black Tuesday" of October 29, 1929, the whole of America, along with the world, felt the threat of massive losses to investors.[13] Action was needed to protect the public and restore confidence in the securities markets. The lofty goal of the Exchange Act was to provide important safeguards to investors by ensuring that "all Registered Broker-Dealers and their associated persons satisfy professional standards, have adequate capital, treat their customers fairly, and provide adequate disclosures to investors."[14] In short, this aspect of the Exchange Act boiled down to the categorical concept of "investor protection."[15]

Of course, the Exchange Act, like all forms of securities regulation, is also driven by the twin goal of "capital raising/formation."[16] The fruitful effects of the enacted main bodies of the federal securities laws have been captured by the heartening observation made by a Senate Report in April 1973:

> Under the wise and far-sighted system of federal regulation established by Congress in the 1930s, [securities] markets have flourished. They have provided a means for millions of Americans to share in the profits of our free enterprise system,

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11. *See id.* § 78c(a)(4)(A)–(B).

12. *See id.* § 78c(a)(5)(A)–(B).

13. *See* Edwin F. Gay, *The Great Depression*, 10 FOREIGN AFF. 529, 529, 531 (1932) (detailing the state of national and international economic affairs as a result of the American Depression); Eugene N. White, *The Stock Market Boom and Crash of 1929 Revisited*, 4 J. ECON. PERSP. 67, 68 (1990) (describing how vertical price drops on "Black Tuesday, October 29" led to the Great Depression).

14. Robert L.D. Colby et al., *What is a Broker-Dealer?*, *in* BROKER-DEALER REGULATION § 2-6 (2010), http://www.davispolk.com/sites/default/files/files/Publication/ccc2422e-8266-4acf-9e4c-3236a64aaf8f/Preview/PublicationAttachment/172ca422-8d7d-4b84-9880-354bd4f98e1a/WhatisaBroker-Dealer.pdf.

15. The SEC on its website notes: "The mission of the U.S. Securities and Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation." *What We Do*, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/about/whatwedo.shtml (last visited Nov. 29, 2016).

16. *See id.*

and have facilitated the raising of capital by new and growing businesses.[17]

Since the promulgation of the 1930s securities rules, the Division of Trading and Markets at the SEC has broadly taken the position that finders may be required to register as brokers under the Exchange Act, depending on a number of factors, but has not fully explained such factors.[18]

For finders, such a registration requirement has two key effects in practice. First, "[r]egistration with the SEC subjects the broker-dealer to a number of substantial requirements under the Exchange Act"[19] and "registration also subjects broker-dealers to the regulatory authority of the Commission."[20] Second, registered broker-dealers must become members of the Financial Industry Regulatory Authority ("FINRA") (formerly known as the National Association of Securities Dealers, Inc. ("NASD")), and thus become subject to FINRA oversight, which is "the primary private-sector regulator of the U.S. securities industry."[21] Colby suggests that this broker-dealer regulation scheme is quite onerous for those who must register.[22]

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17. SENATE COMM. ON BANKING, HOUS. AND URBAN AFFAIRS, SECURITIES INDUSTRY STUDY REPORT OF THE SUBCOMMITTEE ON SECURITIES, S. DOC. NO., 93-13 (1973) [hereinafter SENATE REPORT].

18. *See* U.S. Securities and Exchange Commission, Division of Trading and Markets, *Guide to Broker-Dealer Registration*, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/divisions/marketreg/bdguide.htm (noting that "a 'yes' to any of [certain] questions indicates that you may need to register as a broker") (last visited Nov. 29, 2016).

19. John L. Orcutt, *Improving the Efficiency of the Angel Finance Market: A Proposal to Expand the Intermediary Role of Finders in the Private Capital Raising Setting*, 37 ARIZ. ST. L.J. 861, 901 (2005) (noting that such requirements include "[c]ompliance with basic standards of competency and training," "[e]xtensive and detailed record keeping requirements," "[s]ubstantial financial reporting requirements," and "[n]et worth and capital requirements").

20. John Polanin, Jr., *The "Finder's" Exception from Federal Broker-Dealer Registration*, 40 CATH. U. L. REV. 787, 792 (1991).

21. Orcutt, *supra* note 19, at 901–02.

22. "The Exchange Act, rules of the SEC thereunder, and the rules of self-regulatory organizations (SROs) prescribe an extensive scheme of regulation for broker-dealers." Colby et al., *supra* note 14, § 2:1.1; *id.* at § 2.1.2. ("The compliance requirements include: meeting certain standards of operational capability and standards of training, experience, competence, and other qualifications established by the SEC; becoming a member of a self-regulatory organization; being subject to investigations, inspections, and disciplinary actions by the SEC; complying with minimum net capital requirements, customer protection rules, specific recordkeeping, financial compliance, and financial reporting requirements. Registered Broker-Dealers are also subject to the general anti-fraud and anti-manipulation provisions of the federal securities laws and implementing rules, as well as specific antifraud requirements. Registered Broker-Dealers must also establish, maintain, and enforce policies and procedures reasonably designed to prevent insider trading, and comply with rules limiting extensions of securities-related credit to customers under certain circumstances. Registered Broker-Dealers are also subject to anti-money

Regulation of finders entails not only an initial but also a significant ongoing compliance burden and expense.[23] And Colby notes:

> There are a number of potential adverse consequences of doing business illegally as an unregistered broker-dealer, including:
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> (i) cease-and-desist orders from the SEC or relevant state regulator or court injunctions;
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> (ii) civil penalties including fines and disgorgement;
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> (iii) criminal liabilities;
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> (iv) potential rescission rights of investors under federal or state law; and
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> (v) reputational harm.[24]

Further, "[i]n addition to the federal regulatory system, broker-dealers are subject to state securities laws, known as the 'Blue Sky Laws.'"[25] "State jurisdiction is concurrent with SEC and FINRA," and "[l]aws of more than one state may apply to activities of the broker-dealer and its associated persons."[26] However, Colby notes that "the National Securities Market Improvement Act of 1996 (NSMIA) . . . preempted certain aspects of state regulation of broker-dealer operations."[27]

2. An Overview of Advisers Act Regulation

An "investment adviser" is defined by the Investment Advisers Act of 1940 ("Advisers Act") as "any person who, for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities," subject to certain exceptions.[28] Finders' activities may "amount to providing investment advice, which would require the finder to register as an investment adviser" under the Advisers Act.[29] Section 203(b)(3) of the Advisers Act provides that, subject to certain exceptions, "it shall be unlawful for any investment advisers, unless registered under this section, to make use of the mails or any

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laundering regulations and many other requirements and obligations under the securities laws, rules, and regulations thereunder.").

23. *See id.*

24. *Id.* § 2:1.5.

25. *Id.* § 2:1.4.

26. G. Philip Rutledge, State Regulation of Broker-Dealers and Agents, Presentation at the PLI Fundamentals of Broker-Dealer Regulation Conference (June 24, 2015).

27. Colby et al., *supra* note 14, § 2:1.4.

28. 15 U.S.C. § 80b-2(a)(11) (2012).

29. Orcutt, *supra* note 19, at 902.

means or instrumentality of interstate commerce in connection with his or its business as an investment adviser."[30]

This issue is lurking in the background any time a finder goes beyond mere matchmaking and seeks to provide "investment advice" to a third party, which, for example, might happen if a finder gives recommendations to a purchaser or valuation advice to a seller. But it is worth noting that many finders, particularly if they are true finders and not actually broker-dealers, do not provide "investment advice." Thus, the compliance encumbrance for finders is far more likely triggered by the onus of the Exchange Act than that of the Advisers Act. The former is the central focus of this Study.

3. The Finder's Perspective on Securities Regulation

As an opposition to the force of regulation, given that finders are potentially subject to both Exchange Act[31] and Advisers Act[32] regulations, not to mention applicable state law, finders often seek to sidestep regulation—ideally in a legitimate way. For finders, legitimately bypassing the Advisers Act is simple: avoid being an "investment adviser" within the meaning of the Advisers Act. The term "investment adviser" has very broad but clear standards, typically allowing for presumably legitimate tactics to keep "investment advice" at bay.[33]

The Exchange Act issue is much more complicated. Finders are almost invariably not "dealers" under the Exchange Act because finders, essentially as a type of matchmaker, do not engage in the business of buying and selling securities for their own account. The real issue is whether a finder will be considered a "broker" within the meaning of the Exchange Act, which involves a quite murky and obtuse analysis.

4. The SEC Staff No-Action Letter System for the Finder's Exemption

As mentioned earlier, even though regulators might regard finders as "brokers" in certain cases, finders would generally maintain that they are not "brokers," since they are not "effecting" transactions for others.[34] "Rather, the finder argues that his activities are limited to identifying potential purchasers or sellers of securities and that the negotiation and execution of the actual

30. 15 U.S.C. § 80b-3(a).

31. *See id.* § 78c(a)(4)(A) (regulating broker-dealers under the federal securities laws).

32. *See id.* § 80b-2(a)(11) (regulating investment advisers under the federal securities laws).

33. *See id.*

34. *See supra* note 11 and accompanying text.

transaction is left to others."[35] This is essentially an argument for invoking something known to practitioners as the finder's exemption.[36] There is no finder's exemption, however, in the Exchange Act or SEC rules—this exemption is instead based on SEC no-action letters.[37]

One might observe that courts are not necessarily obligated to follow the SEC staff's views,[38] but the SEC staff's views are presumably the best measure of safety, and those who transgress the SEC staff's views are clearly playing with fire, with both enforcement and litigation risks. For example, there are quite a few exemplary cases that find factual questions in the finder's issue.[39] The SEC and courts have determined that a person "effects transactions in securities" if that person participates in transactions at key points in the chain of distribution.[40] Participation can include, among other activities:

(i) assisting an issuer to structure prospective securities transactions;

(ii) helping an issuer to identify potential purchasers of securities;

(iii) screening potential participants in a transaction for credit-worthiness;

(iv) soliciting securities transactions (including advertising);

(v) negotiating between the issuer and the investor;

(vi) making valuations as to the merits of an investment or giving advice;

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35. David A. Lipton, *A Primer on Broker-Dealer Registration*, 36 CATH. U. L. REV. 899, 927 (1987).

36. "Associated persons" of an "issuer" can potentially also receive a finder's exemption by relying upon Rule 3a4-1 under the Exchange Act, which provides "a nonexclusive safe harbor from the broker-dealer registration provisions of the [Exchange] Act for certain associated persons of issuers." Persons Deemed Not To Be Brokers, 50 Fed. Reg. 27940, 27941 (July 9, 1985); *see also* Orcutt, *supra* note 19, at 920 (explaining in more detail how Rule 3a4-1 functions).

37. Colby et al., *supra* note 14, at 18 § 2:2.7[A].

38. *See, e.g.*, SEC v. Kramer, 778 F. Supp. 2d 1320, 1326 (M.D. Fla. 2011) (rejecting an SEC enforcement action on the finders issue).

39. *See, e.g.*, Found. Ventures, LLC v. F2G Ltd., 2010 U.S. Dist. LEXIS 81293, at *9 (S.D.N.Y. Aug. 11, 2010); Apex Glob. Partners, Inc. v. Kaye/Bassman Int'l Corp., No. 3:09-cv-637-M, 2009 U.S. Dist. LEXIS 77679, at *11–13 (N.D. Tex. Aug. 31, 2009); Salamon v. Teleplus Enters., Inc., No. 05-2058, 2008 U.S. Dist. LEXIS 43112, at *27 (D.N.J. June 6, 2008).

40. Colby et al., *supra* note 14, at § 2:2.2.

(vii) taking, routing or matching orders, or facilitating the execution of a securities transaction;

(viii) handling customer funds and securities; and

(ix) preparing and sending transaction confirmations (other than on behalf of a broker-dealer that executes the trades).[41]

These factors are not all of equal importance, however:

> Evaluating the merits of investments and issuing confirmations are relatively weak factors. In contrast, helping an issuer identify potential purchasers, and handling customer funds and securities are moderate factors. In addition, structuring issuances, soliciting transactions negotiating with investors and taking and executing orders are strong indicators of broker activity. Each of these factors is substantially heightened when combined with transaction-based compensation.[42]

Further, transaction-based compensation ("TBC") concerns compensation based directly or indirectly on the size, value, or completion of other securities transactions: "The receipt of transaction-based compensation often indicates that a person is engaged in the business of effecting transactions in securities. As a policy consideration, transaction-related compensation can induce high pressure sales tactics and other problems of investor protection often associated with unregulated and unsupervised brokerage activities."[43] The SEC has in the past noted as follows:

> Persons who receive transaction-based compensation generally have to register as broker-dealers under the Exchange Act because, among other reasons, registration helps to ensure that persons with a "salesman's stake" in a securities transaction operate in a manner consistent with customer protection standards governing broker-dealers and their associated persons, such as sales practice rules.[44]

But what is the finder's perspective? Finders might bring up a couple of arguments in favor of TBC. Without TBC, it is hard for a finder to make enough money on the finding activity. As the California proposal has noted, "percentage-based compensation is often the only type of compensation that an issuer can afford to pay

41. *Id.*
42. *Id.*
43. *Id.* § 2:2.6.
44. *Id.* § 2:2.6 (citing 1st Glob., Inc., SEC No-Action Letter, 2001 WL 499080 (May 7, 2001)).

to a finder."[45] In addition, finder TBC conflicts might be somewhat mitigated by reputational concerns and by analogy to the scholarship on investment banks (which are in theory concerned about their reputational capital) should a fairness opinion be erroneous.[46] But Professor Reinier Kraakman and his colleagues observe that reputational capital can be "illusory."[47]

Nonetheless, I witnessed firsthand how perhaps overly cautious attorneys view TBC today as a necessary verboten in all circumstances without further analysis, absent broker-dealer registration, though the computational analysis of this Study reveals that in certain cases TBC might be consistent with the finder's exemption per the SEC staff.[48] Thus, one cannot simply hold the view that TBC is always a verboten, as quite a few ethical but overly cautious practitioners are apt to do.

D. The Key Points and Significance of the Current Study

This Study is the first of its kind to group nearly every single available finder's no-action letter by the finder's contexts and subcontexts, and provide a computational as well as empirical analysis of what activities are permitted and prohibited within each main- and subcategory. Further, this Study undergoes this evaluation without speaking in too many generalities, as all similar studies have done, which reflects the fine nuances of the SEC staff. The primary goals of this Study are to:

> (1) extrapolate characteristics of the modern-day finder's activities that cross the line into those of a "broker" in the eyes of the SEC staff, and correlate such characteristics with the environmental frame of the Digital Age (while these characteristics are known to society generally, the level and extent of precision in this Study are unprecedented);

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45. Business Law Section, Corporations Committee, The State Bar of California, Proposal to Enact a Safe Harbor for "Finders" in Connection with Securities Transactions (proposed May 1, 2012), http://www.calbar.ca.gov/portals/0/documents/legislation/proposals/BLS-2013-03-finders-ADA.pdf [hereinafter CA Proposal].

46. *See* Gerard Hertig, Reinier Kraakman & Edward Rock, *Issuers and Investor Protection*, *in* THE ANATOMY OF CORPORATE LAW, (2d ed. 2009), § 8.2.5.2 (noting that the investment bank "provides an assessment of the offer to which the shareholders must receive, the accuracy of which has reputational consequences for the bank") [hereinafter Kraakman].

47. *Id.* at § 9.3.3 (noting that "reputational capital is an illusive commodity").

48. *See infra* Subpart II.B (showing how in certain cases, the SEC staff does not object if finders receive TBC, without broker-dealer registration).

(2) attempt to unveil the underlying mechanisms of finders' changing roles as well as the SEC's changing views on finders' roles over time; and

(3) based on this Study's nuanced extrapolations, strive to put SEC, FINRA, and state regulators in a better position to create a finder's exemption safe harbor, as the regulators have done in certain other key amorphous securities areas such as "private placement exemptions" under section 4(2) of the Securities Act of 1933.[49]

A secondary goal of this Study is to provide compliance education in a highly obscure but very important area in securities law that is likely hungered for by practitioners. Thus, this Study seeks to bridge the gap between regulators and regulated entities. In particular, this Study could be used to educate not only attorneys serving finder clients, but could also educate state regulators about the views of the SEC to create more consistency and predictability with regard to the concurrent jurisdiction of the SEC, FINRA, and state regulators. Joseph Borg, one of the most famous state law regulators who is currently the Director of the Alabama Securities Commission, has noted: "Everyone forgets sometimes that regulators are learning this along with the practitioners. There's no time delay that we get it in advance. We don't know what's going on with the SEC . . . We also have to learn . . . ."[50] Last but not least, the empirical and historical methodology of this Study could be applied in other contexts to serve the larger scope of our society as a whole.

II. HISTORICAL ANALYSIS OF SEC FINDERS' NO-ACTION LETTERS

A. *Contextual Factors of Finders Analysis*

1. *Summary of Finders' Operating Contextual Factors*

An empirical and computational analysis of the finder's exemption requires formulating two axes. First, one needs to understand the different contexts and subcontexts in which finders operate in society, since the SEC clearly evidences different judgment in different contexts. Then, one must formulate specific criteria that kick finders across the line into broker-dealer territory. The criteria can be applied across all contexts, but the formula to encapsulate the minds and conclusions of the SEC are clearly different in different contexts.

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49. *See* 15 U.S.C. § 77d(a)(2) (2012). The major safe harbor for section 4(2) is Rule 506 under Regulation D. *See* 17 C.F.R. § 230.506 (2015).

50. Joseph Borg, PLI Panel on Crowdfunding and Online Direct Lending (Peer-to-Peer) 2015: Legal Issues for Equity Crowdfunding Platforms (Sept. 22, 2015).

John Polanin was the first scholar to propose that SEC views differ depending on the contexts and subcontexts. In an earlier descriptive study, Polanin thankfully identified "three general classes of finders," which include:

> (i) finders for registered broker-dealers, including licensed professionals, other non-brokerage businesses, depository institutions, and common-interest groups; (ii) finders for issuers, including persons who promote the sale of a new issue of securities, financial advisers who provide consulting services regarding the issuance of securities, persons who facilitate merger and acquisition activities, so-called "business brokers," and persons who match investors with entrepreneurs seeking financing; and (iii) finders for investors, including listing services and trading systems.[51]

Under each of these three contexts, finders operate in an incredibly large number of subcontexts, as discussed in this Study's empirical and computational analysis.[52] As society evolves from manual to automatic and from analog to digital, there is much greater potential for finders to operate in still newer and more complex subcontexts.

Society is much indebted to Polanin's efforts. However, Polanin's study has several limitations. First, Polanin tended to speak about generalized conclusions in each particular context, without analyzing the subtleties and nuances of SEC staff's views. Second, Polanin did not exhaustively analyze all broker-dealer no-action letters. Third, Polanin wrote his article in 1991, just at the beginning of the new Digital Age and before the crowdfunding era. In this new era, people raise money contributions from massive amounts of investors over the Internet, and many websites have begun to establish themselves analytically as finders, thanks to the utilities of expanding information, which allow them to bring together securities buyers and sellers on a broad platform as never before. Fourth, Polanin's article, as with other relevant articles in the field, was unable to unfold the full historical evolution of SEC staff's views on the finder's exemption and hypothesize what exactly was driving the views of the SEC staff. Finally, Polanin did not propose any solutions going forward for society. Polanin's study, therefore, should be regarded as a good start for the law of finders, but there is clearly more work to be done in this area.

In terms of identifying criteria of finders, as opposed to contexts in which they operate, the first study to identify such factors was undertaken by David Lipton in 1987:

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51. Polanin, *supra* note 20, at 789–90.
52. *See infra* Subpart II.B.

> (1) Whether the finder was involved in negotiations for the sale of the securities. Finders involved in negotiations would more likely be required to register as a broker-dealer than finders not involved in negotiations.
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> (2) Whether the finder discussed details of the nature of the securities sold or whether he made any recommendations. Discussions of details and making recommendations increase the likelihood that registration would be required.
>
> (3) Whether the finder was compensated on a commission basis linked to sales. Sales volume linked commissions would increase the likelihood that registration would be required.
>
> (4) Whether the finder previously was involved in sales of securities. Previous involvement increases the likelihood that registration would be required.[53]

Since the Lipton study, Robert Colby, the Chief Legal Officer of FINRA, has articulated a more comprehensive view of such factors.[54] Based on the prior literature, and more importantly nearly the entire set of the SEC's no-action letters for finders, this Study proposes the following factors.

Table I. Contextual Factors of Finder's Activities (Current & Past Studies)

	Factors
1	Transactional based compensation [55]
2	Negotiations
3	Advice to seller—consulting, structuring, analysis, screening investors, etc.
4	Active marketing to buyer—recommending, valuations, advice, solicitations, advertisings, etc.
5	Limited marketing to buyer—passing along information, very generalized discussions, etc.

53. Lipton, *supra* note 35, at 927–28.

54. *See* Colby et al., *supra* note 14, at § 2:2.2.

55. One general note on TBC is that it appears that if a finder employee shares TBC with his or her employer, the employer by virtue of receiving such TBC should likely register as a broker-dealer, with the assumption that the employer could direct or influence the finders. *See* Herbruck, Alder & Co., SEC No-Action Letter, 2002 SEC No-Act. LEXIS 499 (May 3, 2002); 1st Glob., Inc., SEC No-Action Letter, 2001 SEC No-Act. LEXIS 557 (May 7, 2001).

6	Effecting securities transactions—handling funds or securities, facilitating executing securities transactions, etc.
7	Finder functioning as either a registered broker-dealer or registered investment adviser[56]
8	Prior involvement in sales of securities
9	Prior discipline for securities violations[57]
10	Broker-dealer permitted on finder premises
11	Finder quoting market prices
12	Special representations made by finder to secure no-action relief

To examine the temporal change of the finder's no-action letter reliefs in greater detail, this Study breaks the 126 relevant cases over 44 years into 3 classes of finders that have been generally identified in the pre-existing literature.[58] Given that "the [SEC] staff typically does not provide a rationale for its position,"[59] this Study makes tentative hypotheses of the reasoning behind the SEC staff's gestures, either favorable or unfavorable for specific contexts and subcontexts and before and after the Digital Age. This Study also offers a comprehensive compliance guide to the regulated entities and substantive evidence for regulators to refine their legal tools in the new age and achieve the optimal balance between legal effectiveness and efficiency. It is my hope that this Study will shine light on one of the gray areas of securities law, where misunderstandings between regulators and regulated entities has led to a number of problems.[60] Such a temporal analysis, which traces out the timeline of the regulators' postural shifts toward the finder's exemption and the evolution of our social conditions, will provide historical perspectives on the causal relationship between the epochal, societal environment and the evolution of the law.

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56. The SEC appears potentially more lenient on finders who also are broker-dealer registered representatives, or registered investment advisers, likely because these finders are already subject to regulatory oversight. However, the opposing force should be observed. "There is no general exemption for investment advisers from federal broker-dealer registration." *See* Colby et al., *supra* note 14, § 2:2.7[K].

57. "A history of abusive securities practices would appear to override compliance with guidelines that are normally satisfactory in demonstrating a lack of need to register." Lipton, *supra* note 35, at 931.

58. *See* Polanin, *supra* note 20, at 789–90.

59. Lipton, *supra* note 35, at 942.

60. *See infra* Subpart IV.A.

2. Computational Method

This Study systematically analyzes nearly all SEC staff no-action letters (n = 126) along all the key axes identified in Table I. For every no-action letter, each of the twelve contextual factors is examined and checked once it is identified. The "Contextual Factor Score" computed in all four figures of this Study is the total number of all the contextual factors identified for a given finder's case. The Contextual Factor Score serves as a grading tool for the leniency of the SEC staff's views on the finder's exemption—the greater the score, the wider the permissible range of finders' exempted operating contexts. A positive sign ("+") was assigned to scores of "granted" cases and a negative sign ("–") was assigned to scores of "denied" cases. The total ("n") of granted and denied cases, as well as their averaged Contextual Factor Scores, were computed for various temporal epochs of interest and compared between different epochs. Such computational analysis attempts to set forth the full historical evolution of the SEC staff's views.

B. Empirical and Computational Analyses

1. Finders Acting On Behalf of Broker-Dealers

a. Temporal Distribution of SEC Staff "Grant/Denial" Cases

The first category of finders this Study analyzes is finders acting on behalf of broker-dealers. A wide variety of businesses can step into the finder's role when acting on behalf of a broker-dealer. Banks can also engage in such a role, but these no-action letters have been omitted from the data since the finder's exemption in the banking context "has since been codified into federal securities laws by [the Gramm-Leach-Bliley Act ("GLBA")]."[61]

The current Study examined twenty-nine no-action letters issued to finders for broker-dealers from 1982 to 2013. A temporal distribution of the SEC staff's "grant/denial" cases is shown in Figure 1. Throughout the period from 1982 to 2013, the SEC staff appears more lenient when the finder is either a "registered representative" or associated with a "registered investment adviser" (though Colby notes that, in his view, there is no definitive break for these kinds of

61. *ABA Report*, *supra* note 2, at 986–87. "Among other things, the GLBA amended sections 3(a)(4) and 3(a)(5) of the Exchange Act by replacing the blanket exemption for banks from broker-dealer registration requirements with specific exemptions for designated traditional bank securities activities." Colby et al., *supra* note 14, § 2:7.4[A]. The finder's exemption in the banking context can now be located in section 3(a)(4)(B)(i) of the Exchange Act. 15 U.S.C § 78c(a)(4)(B)(i) (2012). Then, "[o]n September 24, 2007, the SEC and the Board of Governors of the Federal Reserve System jointly adopted Regulation R, which among other things, provides interpretive guidance for the exemptions provided for banks listed in section 3(a)(4)." Colby et al., *supra* note 14, § 2:7.4[B][2].

status),[62] therefore finders in the registered versus unregistered contexts were plotted with closed and open circles, respectively. The Contextual Factor Score[63] was plotted as a function of time, ranging from 1982 to 2013, in Figure 1.a. Overlapping data points were shifted slightly along the x- or y-axis for visual purposes, although computations were conducted with exact data values. Unlike the pooled data of three classes of finders, the SEC staff's views on finders for broker-dealers appear to have one epochal shift around the 1990s. The data show that from 1982 to 1989, there were in total 14 granted and 0 denied cases (+/- ratio: inf.), and then from 1990 to 2013, there were in total 11 granted and 4 denied cases (+/- ratio: 2.75). The averaged Contextual Factor Score for no-action relief granted cases from 1982 to 1989 ($n = 14$) is 3.57, whereas the score for the granted cases from 1990 to 2013 ($n = 11$) is 2.91. Statistically, the twenty-first century epoch showed a significantly higher proportion of cases denied than the 1980s epoch (Fig. 1.b, $P < 0.1$, Fisher exact test).

62. *See* Colby et al., *supra* note 14, § 2:2.7[E][2].
63. *See infra* Table I and II.A.1–2 (discussing "Computational Method").

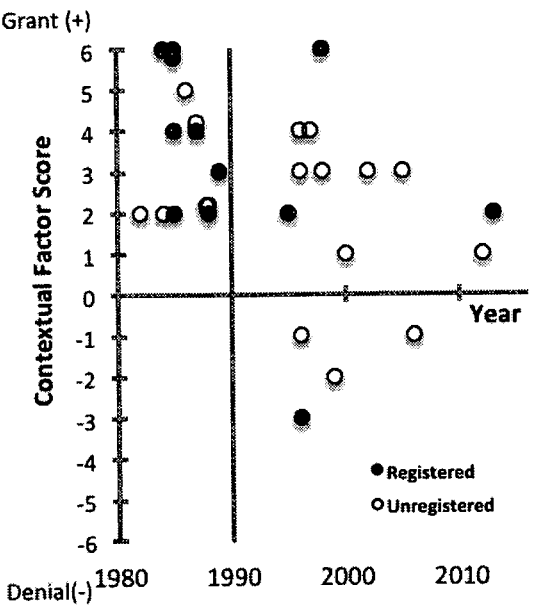
Figure 1

Finders' (for broker-dealers) no-action letter reliefs (n = 29) distribution over 32 years (1982–2013).

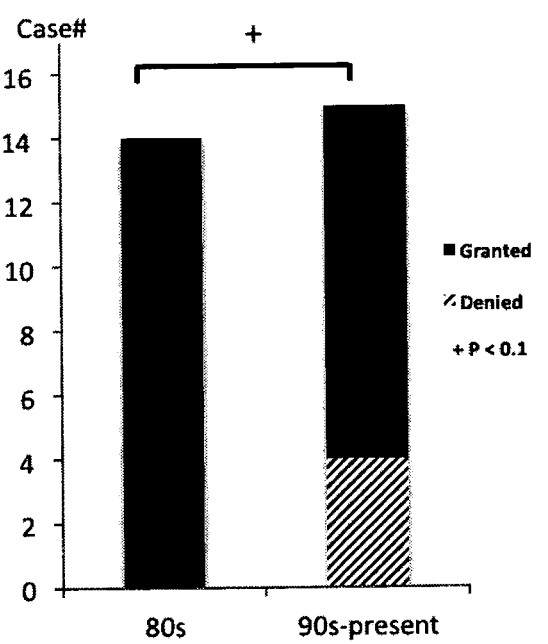
(a) Contextual Factor Score (total number of the contextual factors identified) as a function of time. Overlapping data points were shifted slightly for visual purposes.

(b) Granted and denied no-action letter counts from two epochs.

a



b



b. Case-by-Case Summary of Historical SEC Staff No-Action Letters

The complete raw dataset is listed in Table II, which provides a snapshot of "trees in the forest" for the SEC staff's views, as reflected by historical no-action letters, grouped into eleven types of businesses engaged by finders for broker-dealers:

Table II. Eleven types of finders for broker-dealers no-action relief summary across thirty-two years (1982 to 2013)

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
Consultants[64]	*Caplin*[65]	1982	Granted	X		X									
	Financial Charters[66]	1984													
Service organizations and affinity groups[67]	*Security Pacific*[68]	1935	Granted	X		X	X			X					X[70]
	Merrill Lynch[69]	1987													
Certified Public Accountants ("CPAs")[71]	*Redmond*[72]	1985	Granted	X						X					X[75]
	Freytag[73]	1988													
	1st Global[74]	2001													

64. This refers to broker-dealers who seek to market brokerage services through consultants who act as finders on behalf of such broker-dealers.

65. Caplin & Drysdale, SEC No-Action Letter, 1982 SEC No-Act. LEXIS 2291 (Apr. 8, 1982).

66. Fin. Charters & Acquisitions Inc. and Hirshen & Assoc., SEC No-Action Letter, 1984 SEC No-Act. LEXIS 2821 (Nov. 25, 1984).

67. This refers to either services organizations, such as realtor organizations, or affinity groups acting as finders on behalf of broker-dealers.

68. Sec. Pac. Brokers, Inc., SEC No-Action Letter, 1985 SEC No-Act. LEXIS 2700 (July 21, 1985).

69. Merrill Lynch, Piece, Fenner & Smith, Inc., SEC No-Action Letter, 1987 SEC No-Act. LEXIS 2509 (July 9, 1987).

70. Special key representation: The finder had to make appropriate disclosures and keep appropriate records.

71. This refers to broker-dealers who seek to use CPAs as finders.

72. Redmond Assocs. & John Kendall Redmond, SEC No-Action Letter, 1985 SEC No-Act. LEXIS 1589 (Jan. 12, 1985).

73. Freytag, LaForce, Teofan & Falik, SEC No-Action Letter, 1988 SEC No-Act. LEXIS 1346 (Jan. 4, 1988).

74. 1st Glob., Inc., SEC No-Action Letter, 2001 WL 499080 (May 7, 2001).

75. Special key representation: Registered representatives agreed to comply with all federal and state rules, subject to appropriate broker-dealer supervision. In 1st Global, the SEC staff noted that certified public accountants ("CPA") who were registered representations should not be subject to a formal or informal agreement requiring them to turn securities commissions over to an unregistered CPA firm, and no unregistered person should be eligible to receive commissions directly or indirectly.

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
	Flexible Financial [76]	1996	Denied[77]				X								
	John R. Wirthlin [78]	1999	Denied	X			X								
Insurance / real estate agents[79]	*M Financial* [80]	1988	Granted [81]	X			X								X [82]

76. Flexible Fin. Mktg., Inc., SEC No-Action Letter, 1996 SEC No-Act. LEXIS 819 (Sept. 13, 1996).

77. *Id.* (stating that the reason for the denial here was that a CPA firm could not enter in a finder's arrangement "without impairing its independence. An audit firm's provision of securities or investment advisory services raises concerns with respect to the independence of the firm if the firm recommends investments in or the sale of securities issued by audit clients of the firm. Such services also raise independence concerns if the recipient of such advice is an audit client or is a major shareholder, officer, director, or key managerial employee of an audit client."); *ABA Report*, *supra* note 2, at 967 ("[t]he SEC recently addressed the unregistered broker-dealer issue in its revisions to the rules on accountant's independence under Section 201 of the Sarbanes-Oxley Act of 2002. Rule 10A-2 under the Exchange Act now states generally that a certified public accounting firm is prohibited from acting as a promoter or underwriter, or making investment decisions on behalf of an audit client, among other things. The amendment expanded the scope of the prohibition to address situations where a CPA firm acts as an unregistered broker-dealer. In the commentary, the SEC notes that selling—directly or indirectly—an audit client's securities presents a threat to independence, regardless of whether the broker-dealer affiliated with the CPA firm was registered as such or not.").

78. John R. Wirthlin, SEC No-Action Letter, 1999 SEC No-Act. LEXIS 83 (Jan. 19, 1999).

79. This refers to insurance or real estate professionals or agencies who act as finders on behalf of broker-dealers.

80. M Fin., SEC No-Action Letter, 1988 SEC No-Act. LEXIS 786 (June 14, 1988).

81. This letter was revoked, but only because M Financial and its affiliates "had changed their business plan such that their operations were no longer entirely consistent with the representations they made in their original requests for relief." Sec. Indus. & Fin. Mkts. Ass'n, SEC No-Action Letter, 2013 WL 1771299 (Apr. 23, 2013) [hereinafter Sec. Indus. & Fin. Mkts. Ass'n, SEC No-Action Letter].

82. Special key representation: The finder had to make appropriate disclosures.

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
	Colonial Equities[83]	1988	Granted			X[84]							X		X[85]
	First of America[86] *Securities Industry*[87]	1995 2013	Granted	X						X					X[88]
Financial planners[89]	*Asset Manage ment Group*[90]	1989	Granted	X			X			X					X[91]
Health insurers[92]	*BSC Financial Corp.*[93]	1996	Denied	X			X			X					

83. Colonial Equities Corp., SEC No-Action Letter, 1988 SEC No-Act. LEXIS 862 (June 28, 1988) [hereinafter Colonial Equities Corp., SEC No-Action Letter].

84. It should be noted that the SEC staff frequently denies no-action relief when the finder engages in pre-screening investors, but might have permitted it in *Colonial Equities*, since the finder would not receive TBC there. *See e.g.*, Brumberg, Makey & Wall, PLC, SEC No-Action Letter, 2010 WL 9487577 (May 17, 2010) [hereinafter Brumberg, Makey & Wall, PLC, SEC No-Action Letter]; Colonial Equities Corp., SEC No-Action Letter, *supra* note 83.

85. Special key representations: (1) Finder had to make appropriate disclosures; (2) finder had to agree to comply with brokerage and investment adviser laws; (3) Broker-dealer had substantial record keeping, compliance, and supervision obligations.

86. First of Am. Brokerage Serv., Inc., SEC No-Action Letter, 1995 WL 1940656 (Sept. 28, 1995).

87. Sec. Indus. & Fin. Mkts. Ass'n, SEC No-Action Letter, *supra* note 81.

88. Special key representation: Broker-dealer and insurance agency each had to make heavy securities compliance representations.

89. This refers to situations where financial planner act as finders on behalf of broker-dealers.

90. Asset Mgmt. Grp., SEC No-Action Letter, 1989 SEC No-Act. LEXIS 1016 (Sept. 20, 1989).

91. Special key representation: Finder had to make appropriate disclosures.

92. This refers to situations where health insurers tried to market securities to doctors and others who provide health care services to persons insured by such health insurers.

93. BSC Fin. Corp., SEC No-Action Letter, 1996 SEC No-Act. LEXIS 814 (Oct. 3, 1996).

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
Store front information centers[94]	*Original Financial*[95]	1987	Granted					X	X				X	X	
	Plummer[96]	1996													
	Vedder, Price[97]	1997													
Non-profits[98]	*National School*[99]	1984	Granted[103]	X		X	X	X		X			X[104]		X[105]
	Security Pacific[100]	1985													
	Ewing Capital[101]	1985													
	Attkisson[102]	1998													

94. This refers to finders who are open centers in shopping malls advertising various types of financial products and services. Sometimes, these centers have communications links to the customer service and order entry departments of broker-dealers.

95. Original Fin. Info. Ctrs. of Am., Inc., SEC No-Action Letter, 1987 SEC No-Act. LEXIS 2503 (Aug. 31, 1987) [hereinafter Original Fin. Info. Ctrs. of Am., Inc., SEC No-Action Letter].

96. Plummer & Plummer, SEC No-Action Letter, 1996 SEC No-Act. LEXIS 813 (Sept. 27, 1996) [hereinafter Plummer & Plummer, SEC No-Action Letter].

97. Vedder, Price, Kaufman & Kammholz, SEC No-Action Letter, 1997 SEC No-Act. LEXIS 740 (May 21, 1997) [Vedder, Price, Kaufman & Kammholz, SEC No-Action Letter].

98. This refers to situations where non-profit organizations act as finders on behalf of broker-dealers. Such non-profit organizations might include school board associations targeting school district members, as well as trade, professional, and charitable associations targeting their members and associated persons.

99. Nat'l Sch. Bds. Ass'n, SEC No-Action Letter, 1984 SEC No-Act. LEXIS 1797 (Feb. 18, 1984).

100. Sec. Pac. Brokers, Inc., SEC No-Action Letter, 1985 SEC No-Act. LEXIS 1961 (Mar. 5, 1985).

101. Ewing Capital, SEC No-Action Letter, 1985 SEC No-Act. LEXIS 1597 (Jan. 22, 1985).

102. Attkisson, Carter & Akers, SEC No-Action Letter, 1998 SEC No-Act. LEXIS 674 (June 23, 1998).

103. In the non-profit context, the finders had numerous hallmark broker-dealer activities, yet the SEC staff nonetheless granted no-action relief. The SEC staff appears particularly lenient in this context.

104. Under limited circumstances.

105. Special key representation: Finder had to make appropriate disclosures, keep appropriate records, and comply with laws.

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
Broker-to-broker order delivery and messaging systems[108]	*Broker-to-Broker Network*[107]	2000	Granted			X									X[109]
	S3 Matching[108]	2012													
Online services[110]	*Charles Schwab*[111]	1996	Granted					X	X					X	X[113]
	Evare[112]	1998													

106. This refers to a finder using an order delivery and messaging system for use by broker-dealers to communicate with each other and their respective settlement agents.

107. Broker-to-Broker Networks, Inc., SEC No-Action Letter, 2000 SEC No-Act. LEXIS 1034 (Dec. 1, 2000).

108. S3 Matching Techs. LP, SEC No-Action Letter, 2012 WL 2948910 (July 19, 2012).

109. Special key representations: (1) Finder had no proprietary relationship with broker-dealer; (2) only registered broker-dealer would have access to the system;(3) database gave originating brokers information regarding fulfilling brokers, and vice versa; (4) the finder was not permitted to facilitate the sharing or splitting of commissions by participating broker-dealers, nor would it acquire, store, or report information with respect to such activity; (5) the system would not route orders among broker-dealers based on any system priorities, or otherwise automate order flow among broker-dealers; (6) the system also would not automate trading desk activities, such as pricing, position, risk management, or trading analysis; and (7) the system would not bring together orders for securities of multiple buyers and sellers, and would not use established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders would agree to the terms of a trade.

110. This refers to situations where finders are online services, which make broker-dealer services (and sometimes transactions) available to subscribers of the online services.

111. Charles Schwab & Co., SEC No-Action Letter, 1996 SEC No-Act. LEXIS 976 (Nov. 27, 1996).

112. Evare, LLC, SEC No-Action Letter, 1998 SEC No-Act. LEXIS 1131 (Nov. 30, 1998).

113. Special key representations: (1) The broker-dealer should generally have full responsibility for the operation of the website and for the finder's compliance with applicable securities laws; (2) finder had to make appropriate disclosures; (3) in *Swiss American Securities*, the SEC staff noted that no-action relief would no longer apply if the finder participated in marketing the services or in negotiating the agreements between the broker-dealer and the foreign financial institutions; the finder was a party to the contracts between the broker-dealer and the foreign financial institutions; the finder exercised discretion over the websites; the finder's name or brand name appeared anywhere on those websites; or the broker-dealer failed to exercise control over the finder's development and maintenance of the websites. Swiss Am. Secs., Inc., SEC No Action Letter, *infra* note 114. Some of the additional heavy representations required in *Swiss American* could well be surplus in other situations.

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
	Swiss American[114]	2002													
	Global Tec Solutions[115]	2005													
Mortgage banks[116]	*Loofbourrow*[117]	2006	Denied[118]	X											

c. Observable Trends

In general, there have been only a few cases denied by the SEC among the finders for broker-dealers seeking exemption, typically when finders didn't have affiliations with registered entities. Nevertheless, the data in this Study show a clear tightening of the SEC staff's rein on finders for broker-dealers starting in the 1990s. In the 1980s epoch, all fourteen no-action letters in this class were granted with relatively high Contextual Factor Scores and no cases denied at all. However, starting from the 1990s and continuing into the twenty-first century, four out of eleven cases were denied, yielding greater than one in three odds of failure. This finding means that, despite a finder's connection to a regulated broker-dealer entity, the SEC staff could now require registration and regulation in certain cases, as Colby pointed out.[119]

On the other hand, one can also observe that finders can get protection by developing stronger connections with regulated entities. The SEC staff's views have been clearly in favor of permissibility for finders who are either "registered representatives" themselves or associated with "registered investment advisers." Out of the twelve "registered" cases over the three decades, only one was denied, and four of twelve such cases had the highest Contextual Factor Scores

114. Swiss Am. Secs., Inc., Streetline, Inc., SEC No-Action Letter, 2002 SEC No-Act. LEXIS 597 (June 4, 2002) [hereinafter Swiss Am. Secs., Inc., SEC No Action Letter].

115. GlobalTec Sols., LLP, SEC No-Action Letter, 2005 SEC No-Act. LEXIS 868 (Dec. 28, 2005).

116. This refers to mortgage banks acting as finders to refer to the broker-dealer potential investment banking clients.

117. John W. Loofbourrow Assocs., Inc., SEC No-Action Letter, 2006 SEC No-Act. LEXIS 523 (June 29, 2006).

118. The Loofbourrow no-action letter provides some evidence that, at least in the broker-dealer context, the SEC staff by 2006 viewed the finder receiving TBC even by itself as a verboten. But one could argue that the position is limited to the mortgage banking finder or investment banking context, or at least limited outside the non-profit context.

119. *See* Colby et al. *supra* note 14, § 2.2.7[A].

possible (six), meaning that the permissible range for their operating contexts has been very wide.

A finer look into the dataset (see Table II) shows that three out of the four denied cases received TBC. However, similar circumstances with TBC in the 1980s were all given the green light for exemption from broker-dealer registration, including consultants, realtors, CPAs, and financial planners. All of this signals that the SEC's views on the thorny TBC issue are tightening. But, one cannot say that TBC in this broker-dealer context is always a verboten as some are apt to do.

2. *Finders Acting On Behalf of Issuers*

a. Temporal Distribution of SEC Staff "Grant/Denial" Cases

The second major class of finders "engages in activities designed to assist issuers seeking financing by referring potential investors directly to those issuers."[120] In addition to some others, "these finders include persons who promote the sale of a new issue of securities, financial advisers who provide consulting services regarding the issuance of securities, persons who facilitate merger and acquisition activities, so called 'business brokers,' and persons who match investors with entrepreneurs seeking financing."[121]

This portion of the Study examines eighty-three no-action letters issued between 1971 to 2014. A temporal distribution of the SEC staff's "grant/denial" cases is shown in Figure 2. As in Figure 1, finders in the registered versus unregistered contexts were plotted with different symbols and, in Figure 2, closed and open squares, respectively, although there have been very few cases (n = 4) where finders for issuers were "registered representatives" or associated with "registered investment advisers." The Contextual Factor Score[122] was plotted as a function of time, ranging from 1971 to 2014 (Figure 2.a). Overlapping data points were shifted slightly along the x- or y-axis for visual purposes, although computations were conducted with exact data values. For this class of issuer-finders, the data suggest a dramatic softening of the SEC staff's views around 1980 and then hardening again starting around 2000. More specifically, from 1971 to 1979, there were in total 14 granted and 11 denied cases (+/- ratio: 1.27); from 1980 to 1999, there were in total 37 granted and 4 denied cases (+/- ratio: 9.25); and from 2000 to 2014, there were in total 7 granted and 11 denied cases (+/- ratio: 0.64). The averaged Contextual Factor Score for granted no-action reliefs from 1971 to 1979 (n = 14) is 2; from 1980 to 1999 (n = 37) the average is 2.62; and from 2000 to 2014 (n = 7) the average is 2.86. The

120. Polanin, *supra* note 20 at 813.

121. *Id.*

122. *See supra* Table I and Subpart II.A.1–2 (discussing "Computational Method").

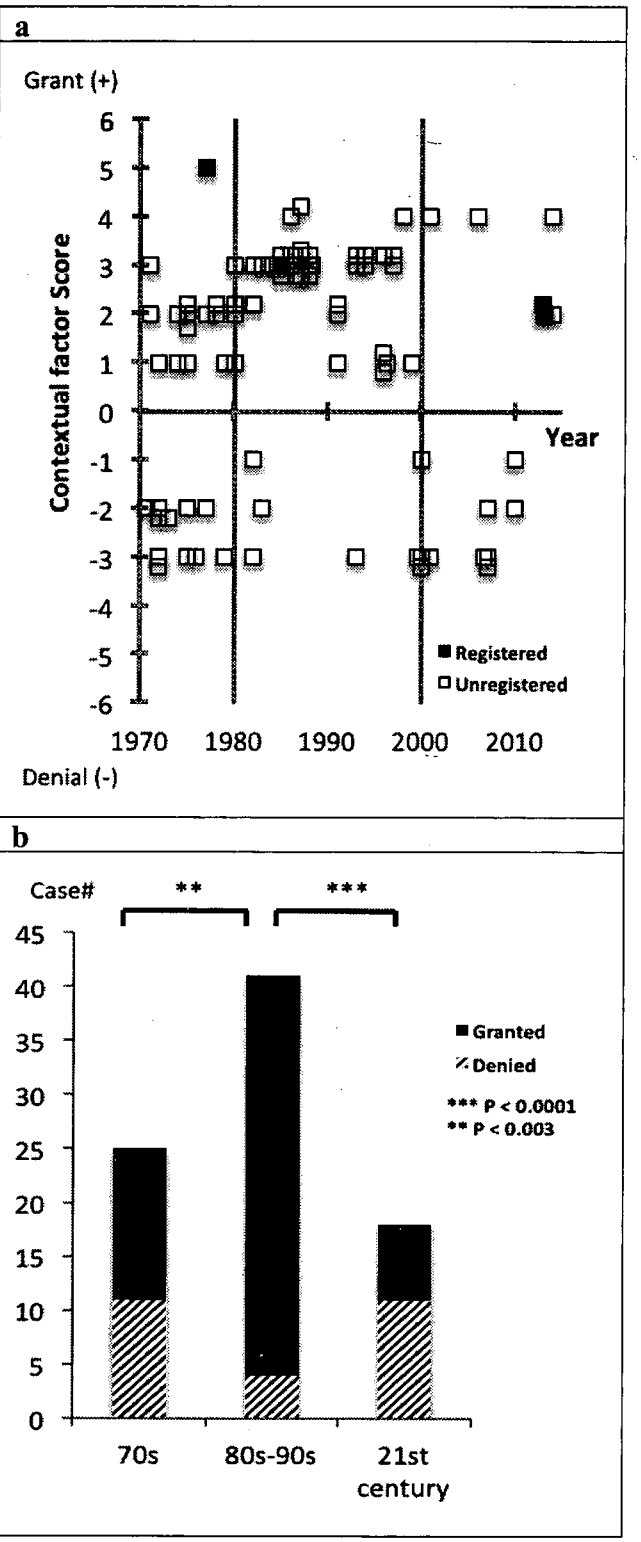
Contextual Factor Scores for the denied cases from 1971 to 1979 (n = 11) averaged -2.45; from 1980 to 1999 (n = 4) -2.25; and from 2000 to 2014 (n = 11) -2.45. Statistically, the 1980s–90s epoch showed a significantly lower proportion of denied cases than the 1970s epoch (Fig. 2.b left, $P < 0.003$, Fisher exact test), and the twenty-first century epoch showed a significantly higher proportion of denied cases than the 1980s–90s epoch (Fig. 3.b right, $P < 0.0001$, Fisher exact test).

Figure 2

Finders' (for issuers) no-action letter reliefs (n = 83) distribution over 44 years (1971–2014).

(a) Contextual Factor Score (total number of the contextual factors identified) as a function of time. Overlapping data points were shifted slightly for visual purposes.

(b) Granted and denied no-action letter counts from three epochs.



b. Case-by-Case Summary of Historical SEC Staff No-Action Letters

The complete raw dataset is listed in Table III, which provides a snapshot of "trees in the forest" for the SEC staff's views, as reflected by historical no-action letters, grouped into 18 types of businesses engaged by finders for issuers:

Table III. Eighteen types of finders for issuers no-action relief summary across forty-four years (1971 to 2014)

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
Finders acting on behalf of clients seeking to lend money [123]	*Black, Samuel*[124]	1977	Granted	X				X							
	Swanke [125]	1980													
	Hallmark Capital[126]	2007	Denied	X			X								
Investment advisers [127]	*Funders Club*[128]	2013	Granted			X				X [129]					X [130]

123. This refers to situations where finders act on behalf of clients seeking to lend money, who are then matched up with companies that want to borrow.

124. Samuel Black, SEC No-Action Letter, 1977 SEC No-Act. LEXIS 104 (Jan. 20, 1977).

125. Charles H. Swanke, SEC No-Action Letter, 1980 SEC No-Act. LEXIS 3376 (June 5, 1980).

126. Hallmark Capital Corp., SEC No-Action Letter, 2007 SEC No-Act. LEXIS 509 (June 11, 2007) [hereinafter Hallmark Capital Corp., SEC No-Action Letter].

127. This refers to a situation where an investment finder posted information about start-up companies on its website, which would be available online to its investor clients.

128. FundersClub, Inc., SEC No-Action Letter, 2013 SEC No-Act. LEXIS 271 (Mar. 26, 2013).

129. Exempt investment adviser.

130. Special key representations: (1) In *FundersClub*, neither the finder nor any principal, employee, board member, controlling shareholder, or other persons associated with the finder could be subject to a statutory disqualification under section 3(a)(39) of the Exchange Act; (2) finder had to make appropriate disclosures about compensation.

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
Financial Planner Finders [131]	*Biscotti*[132]	1985	Granted	X			X			X					X [133]
IPO Finders [134]	*Mona/ Kauai*[135]	1974	Granted [140]	X											X [141]
	Taco Bell[136]	1975													
	John DiMeno [137]	1979													
	MFA Security [138]	1980													
	Paul Anka[139]	1991													

131. This refers to situations where financial planners proposed to act as finders on behalf of issuers. The financial planners were accountants who proposed to establish a new corporation that would conduct a separate line of business. The separate line of business would perform financial planning services, which would be a registered investment adviser.

132. Biscotti & Co., Certified Pub. Acct., P.C., SEC No-Action Letter, 1985 SEC No-Act. LEXIS 2924 (Nov. 29, 1985).

133. Special key representation: Any TBC was 100% rebated to customers, since the AICPA prevented accountants from receiving TBC.

134. This refers to situations where finders act on behalf of issuers in marketing IPOs, also known as "new issues."

135. Mona/Kauai Corp., SEC No-Action Letter, 1974 SEC No-Act. LEXIS 63 (Aug. 10, 1974).

136. Taco Bell, SEC No-Action Letter, 1975 SEC No-Act. LEXIS 2628 (Dec. 20, 1975) [hereinafter Taco Bell, SEC No-Action Letter].

137. John DiMeno, SEC No-Action Letter, 1979 SEC No-Act. LEXIS 2791 (Apr. 1, 1979). It should be noted that initially, the SEC staff denied no-action relief, without the addition of a couple negative representations that the finder was not previously involved in private or public offerings of securities, and would not plan to engage in future distributions of securities after having completed the proposed private placement. *See* John DiMeno, SEC No-Action Letter, 1978 SEC No-Act. LEXIS 2188 (Oct. 11, 1978).

138. MFA Sec. Serv. Co., SEC No-Action Letter, 1980 SEC No-Act. LEXIS 2558 (Aug. 22, 1980) [hereinafter MFA Sec. Serv. Co., SEC No-Action Letter].

139. Paul Anka, SEC No-Action Letter, 1991 SEC No-Act. LEXIS 925 (July 24, 1991) [hereinafter Paul Anka, SEC No-Action Letter]. Paul Anka is an important no-action letter in that there is currently doubt as to its continued validity. *See infra* Part III.

140. As shown below, in more recent years, the SEC staff has been increasingly less likely to grant no-action relief in this context. *See infra* Subpart II.B.2.c.

141. Special key representation: The finder should make appropriate disclosures about TBC.

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
	General Stock Transfer Company[142]	1971	Denied				X							X	
	Leonard Trap[143]	1972	Denied	X			X								
	Louisiana Stud[144]	1977	Denied	X			X								
	Rodney B. Price[145]	1982	Denied			X	X					X			
	First Atlantic[146]	1982	Denied	X											X[147]
	Richard S. Appel[148]	1983	Denied	X			X								
	Hallmark Capital[149]	2007	Denied	X		X	X								X[150]
	Brumberg[151]	2010	Denied	X											X[152]

142. Gen. Stock Transfer Co., SEC No-Action Letter, 1971 SEC No-Act. LEXIS 3385 (Sept. 5, 1971).

143. Leonard Trapp & Assocs. Consultants, SEC No-Action Letter, 1972 SEC No-Act. LEXIS 3203 (Aug. 25, 1972).

144. Louisiana Stud, Ltd., SEC No-Action Letter, 1977 SEC No-Act. LEXIS 1757 (June 10, 1977).

145. Rodney B. Price & Sharod & Assocs., Inc., SEC No-Action Letter, 1982 SEC No-Act. LEXIS 2978 (Nov. 7, 1982).

146. First Atl. Inv. Corp., SEC No-Action Letter, 1982 SEC No-Act. LEXIS 3092 (Nov. 28, 1982).

147. The fatal weakness of this letter is that the finder did not represent that it would refrain from engaging in other broker-dealer hallmark activities.

148. Richard S. Appel, SEC No-Action Letter, 1983 SEC No-Act. LEXIS 2035 (Feb. 14, 1983).

149. Hallmark Capital Corp., SEC No-Action Letter, *supra* note 126.

150. The finder did not represent that it would refrain from engaging in other broker-dealer hallmark activities.

151. Brumberg, Mackey & Wall, P.L.C., SEC No-Action Letter, *supra* note 84.

152. The fatal weakness of this letter is that the finder did not represent that it would refrain from engaging in other broker-dealer hallmark activities.

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
Issuer officers, directors and GPs[153]	*Canam*[154]	1974	Granted [160]		X		X								
	Energy Fund[155]	1975													
	Taco Bell[156]	1975													
	MFA Security [157]	1980													
	Wilson & Sons[158]	1982													
	Paul Anka[159]	1991													
Consultant Finders [161]	*Stamp Collector* [162]	1971	Granted		X [166]	X									
	Club Panorama[163]	1975													
	Benjamin and Lang[164]	1978													
	A&M Financing[165]	1978													

153. This refers to situations where the issuer's officers, directors, and general partners s contact investors referred by finders.

154. Canam 1973 Energy Fund, SEC No-Action Letter, 1974 SEC No-Act. LEXIS 1583 (Jan. 21, 1974).

155. Energy Fund ("CANAM"), SEC No-Action Letter, 1975 SEC No-Act. LEXIS 1566 (Aug. 1, 1975).

156. Taco Bell, SEC No-Action Letter, *supra* note 136.

157. MFA Sec. Serv. Co., SEC No-Action Letter, *supra* note 138.

158. Wilson & Sons Energy, SEC No-Action Letter, 1982 SEC No-Act. LEXIS 2845 (Sept. 24, 1982).

159. Paul Anka, SEC No-Action Letter, *supra* note 139.

160. It should be noted that the issuer's officers can potentially also rely on section 3a4-1 of the Exchange Act for a broker-dealer exemption. *See supra* note 36.

161. The basic idea here is that finders, often financial advisers, provide consulting advice to issuers about securities offerings.

162. Stamp Collector Assocs., Inc., SEC No-Action Letter, 1971 SEC No-Act. LEXIS 4076 (Nov. 21, 1971).

163. Club Panorama, SEC No-Action Letter, 1975 SEC No-Act. LEXIS 440 (Feb. 27, 1975).

164. Benjamin & Lang, Inc., SEC No-Action Letter, 1978 SEC No-Act. LEXIS 2065 (Aug. 1, 1978).

165. A&M Fin., SEC No-Action Letter, 1978 SEC No-Act. LEXIS 2444 (Dec. 27, 1978).

166. But only to the extent it was acting as a consultant to the issue in negotiations with an issuer selected purchaser.

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
	Knight Group[167]	1991													
	Christian Bonds[168]	1971	Granted	X[170]	X	X									
	ELJA Group[169]	1984													
	Gunnar[171]	1975	Denied	X		X									
	R.T. Madden[172]	1976	Denied	X	X	X									
	Capital Directions[173]	1979	Denied	X	X	X									
	Davenport[174]	1993	Denied	X	X	X									
	Dominion Resources[175]	1985 / 2000[176]	Granted (then) Denied[177]	X	X	X									

167. The Knight Grp., SEC No-Action Letter, 1991 SEC No-Act. LEXIS 1303 (Nov. 13, 1991).

168. Christian Bonds, Inc., SEC No-Action Letter, 1971 SEC No-Act. LEXIS 2193 (Sept. 26, 1971).

169. ELJA Grp. – Evangelical Consultants, SEC No-Action Letter, 1984 SEC No-Act. LEXIS 2825 (Oct. 25, 1984).

170. Only in a church or non-profit context.

171. Gunnar/Burkhart/Armstrong & Assocs., SEC No-Action Letter, 1975 SEC No-Act. LEXIS 2617 (Nov. 28, 1975).

172. R.T. Madden & Co., SEC No-Action Letter, 1976 SEC No-Act. LEXIS 2240 (Oct. 17, 1976).

173. Capital Directions, Inc., SEC No-Action Letter, 1979 SEC No-Act. LEXIS 2051 (Jan. 4, 1979).

174. Davenport Mgmt., Inc., SEC No-Action Letter, 1993 SEC No-Act. LEXIS 624 (Apr. 13, 1993).

175. Dominion Res., Inc., SEC No-Action Letter, 1985 SEC No-Act. LEXIS 2511 (Aug. 22, 1985), *rescinded by* Dominion Res., Inc., SEC No-Action Letter, 2000 SEC No-Act. LEXIS 304 (Mar. 7, 2000) [hereinafter Dominion Res., Inc., SEC No-Action Letter].

176. This case data point was first granted then revoked, and thus was treated as two data points in our data set.

177. It is unclear whether the SEC staff's rescinding of *Dominion Resources* eliminates the no-action guidance in the no-action letters where the SEC staff granted no-action relief to finders that engaged in consulting activities. One article points out that "[w]hether the primary motivation for this withdrawal was the very active role of the finder or the transaction-based compensation is not entirely clear. It is possible that either factor alone may have motivated the SEC." Orcutt, *supra* note 19, at 908.

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
	Hallmark Capital[178]	2007	Denied	X		X	X								
Non-profit finders — associations[179]	*Construction Industry*[180]	1980	Granted	X		X	X								X[185]
	Tri-State[181]	1982													
	Florida Affirmative Investment[182]	1983													
	Delaware Investment[183]	1986													
	Dana Investment[184]	1994													
Non-profit finders - other[186]	*Social Finance*[187]	2014	Granted			X	X								X[188]

178. Hallmark Capital Corp., SEC No-Action Letter, *supra* note 126.

179. The finders in this context were generally non-profit, unincorporated associations or corporations with members who were construction industry pension trusts (and possibly welfare trusts), or hospital associations with hospital members. In one letter, a non-profit sought to assist various non-profit social service providers in obtaining funding for their operations through the offer and sale of SIB securities.

180. Constr. Indus. Real Estate Dev. Fin. Found. of S. Cal., SEC No-Action Letter, 1980 SEC No-Act. LEXIS 4016 (Nov. 1, 1980).

181. Tri-State Inv. Found., SEC No-Action Letter, 1982 SEC No-Act. LEXIS 2844 (Sept. 6, 1982).

182. Florida Affirmative Inv. Roundtable, SEC No-Action Letter, 1983 SEC No-Act. LEXIS 2722 (Aug. 21, 1983).

183. Delaware Inv. Found., SEC No-Action Letter, 1986 SEC No-Act. LEXIS 3069 (Dec. 6, 1986).

184. Dana Inv. Advisers, Inc., SEC No-Action Letter, 1994 SEC No-Act. LEXIS 871(Oct. 12, 1994).

185. Special key representation: All literature describing the issuer had to disclose the terms of the agreement between the finder and the issuer.

186. This refers to a situation where a non-profit sought to assist various non-profit social service providers in obtaining funding for their operations through the offer and sale of SIB securities.

187. Social Fin., Inc., SEC No-Action Letter, 2014 WL 5907528 (Nov. 13, 2014).

188. Special key representation: An independent evaluator or validator must measure and report the outcomes of the social program to the special purpose vehicle and the government.

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
Storefront information centers [189]	*Original Financial* [190]	1987	Granted					X					X[193]	X	
	Plummer [191]	1996													
	Vedder, Price[192]	1997													
M&A Finders [194]	*Capital Forum*[195]	1972	Granted			X									
	Roland Berger[196]	2013		X [197]		X									X [198]
	Jack Northrup [199]	1972	Denied	X		X	X								

189. Storefront information centers were also discussed above in the issuer context. Such finders can also act on behalf of issuers, and fall within the same no-action letters as in the broker-dealer context.

190. Original Fin. Info. Ctrs. of Am., Inc., SEC No-Action Letter, *supra* note 95.

191. Plummer & Plummer, SEC No-Action Letter, *supra* note 96.

192. Vedder, Price, Kaufman & Kammholz, SEC No-Action Letter, *supra* note 97.

193. Under limited circumstances.

194. This refers to situations where finders propose to act as consultants for M&A. "[F]inders may be deemed to effect securities transactions [and could thereby need broker-dealer registration] if the mergers or acquisitions are accomplished through the issuance, transfer, or exchange of securities." Polanin, *supra* note 20, at 816.

195. Corp. Forum, Inc., SEC No-Action Letter, 1972 SEC No-Act. LEXIS 4320 (Dec. 10, 1972).

196. Roland Berger Strategy Consultants, SEC No-Action Letter, 2013 SEC No-Act. LEXIS 385 (May 28, 2013) [hereinafter Roland Berger, SEC No-Action Letter].

197. The finder provided consultancy services to non-U.S. clients, which is probably key, given that the finder engaged in consultancy services, plus TBC.

198. Special key representation: In *Roland Berger Strategy Consultants*, the finder acted on behalf of non-U.S. clients, and was required to comply with the antifraud provisions of the U.S. securities laws. *See* Roland Berger, SEC No-Action Letter, *supra* note 196.

199. Jack Northrup Assocs., SEC No-Action Letter, 1972 SEC No-Act. LEXIS 1487 (Feb. 9, 1972).

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
	Fulham[200]	1972	Denied	X	X										
	May-Pac[201]	1973	Denied	X	X										
	Bantuveris[202]	1975	Denied	X	X				X						
	Hallmark[203]	2007	Denied	X		X	X								
	Nemzoff[204]	2010	Denied[205]	X		X									

200. Fulham & Co., SEC No-Action Letter, 1972 SEC No-Act. LEXIS 4488 (Dec. 20, 1972).

201. May-Pac Mgmt. Corp., SEC No-Action Letter, 1973 SEC No-Act. LEXIS 1117 (Dec. 20, 1973).

202. Mike Bantuveris, SEC No-Action Letter, 1975 SEC No-Act. LEXIS 2158 (Oct. 23, 1975).

203. Hallmark Capital Corp., SEC No-Action Letter, *supra* note 126.

204. Nemzoff & Co., LLC, SEC No-Action Letter, 2010 SEC No-Act. LEXIS 579 (Nov. 30, 2010).

205. Consulting for non-profit organizations did not stop the no-action letter denial here.

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
Business Broker Finders [206]	*Miller*[207]	1977	Granted [208]	X	X	X [209]	X			X					X [210]

206. Business brokers are finders who assist their clients in buying and selling businesses. When a finder acts as a business broker, there is a high risk that the finder will be involved in a securities transaction. One article notes that in *Landreth Timber*, the Supreme Court "held that the sale of a business effected by transferring ownership of 100% of a company's stock constituted a securities transaction with all the protections of the securities laws." *ABA Report*, *supra* note 2, at 995 (discussing Landreth Timber Co. v. Landreth, 471 U.S. 681, 697 (1985)). Nonetheless, the SEC staff clearly exhibits a lot of sympathy for unregistered business brokers in this context, a fact noted by Joanne Rutkowski. *See* Joanne Rutkowski, PLI Panel on Fundamentals of Broker-Dealer Regulation 2015 (June 24, 2015).

207. Miller & Co., SEC No-Action Letter, 1977 SEC No-Act. LEXIS 2059 (Aug. 15, 1977).

208. In almost all cases involving business brokers, the SEC staff has generally granted no-action relief. The theoretical underpinning of this result is likely that in privately negotiated M&A transactions, buyer had adequate incentives for due diligence in non-public transactions, so a registered broker-dealer intermediary is not needed.

209. Valuation advice was allowed in *Miller*, but more recently the SEC staff permitted the finder merely to value the assets of the business as a going concern without valuing securities; finder can assist seller with preparation of financial statements under limited circumstances; finder could provide a list of potential lenders or make uncompensated introductions to lenders, under certain conditions.

210. Special key representations: (1) Businesses represented by finder must be going concerns and not shell organizations; (2) the buyer must control and actively operate the company or the business conducted with the assets, after completion of the M&A transaction; (3) M&A transactions cannot involve public offerings; (4) disclosure and consent from all parties was required; (5) in several no-action letters, the SEC staff appeared to condition no-action relief on the fact that the finder represented that transactions effected by means of securities would convey all of a business's equity securities to a single purchaser or group of purchasers formed without the assistance of the finder; and (6) In *M&A Broker*, the business broker had to represent that (1) it has not been barred from association with a broker-dealer by the SEC, any state or any self-regulatory organization, and (2) it has not been suspended from association with a broker-dealer.

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
	International Business Exchange [211]	1986	Granted	X	X	X	X [215]								X [216]
	Victoria Bancroft [212]	1987													
	Country Business [213]	2006													
	M&A Brokers [214]	2014													
Trading information systems [217] —for profit non-website context [218]	*USF Mortgage* [219]	1972	Denied	X	X		X								

211. Int'l Bus. Exch. Corp., SEC No-Action Letter, 1986 SEC No-Act. LEXIS 3065 (Dec. 12, 1986).

212. Victoria Bancroft, SEC No-Action Letter, 1987 SEC No-Act. LEXIS 2517 (Aug. 9, 1987).

213. Country Bus., Inc., SEC No-Action Letter, 2006 SEC No-Act. LEXIS 669 (Nov. 8, 2006).

214. M&A Brokers, SEC No-Action Letter, 2014 WL 356983 (Jan. 31, 2014).

215. Advertising permitted in asset sales, rather than securities sales, but finder can potentially still describe offering in securities sales, particularly if finder does not seek TBC.

216. *See supra* note 210 for special key representations.

217. Trading information systems are generally any type of information system that makes information available about buyers and sellers of securities. Initially, trading information systems were not website based. In the Digital Age, trading information systems have become website based, and at times even offer trading services. One article notes that "[q]uestions may also be raised in regard to trading information systems as to whether the system constitutes an 'exchange,' as defined by section 3(a)(1) of the 1934 Act, a 'securities information processor' or an 'exclusive processor' as defined by section 3(a)(22), or an 'investment adviser' under section 202(a)(11) of the Investment Adviser's Act of 1940. Satisfying any of these definitions would invoke additional registration concerns." Lipton, *supra* note 35, at 933. Trading systems occur in several contexts. This Study breaks down each context one by one.

218. This refers to situations where a for-profit corporation seeks to provide non-website based computer matchmaking services.

219. USF Mortg. Exch., SEC No-Action Letter, 1972 SEC No-Act. LEXIS 785 (Feb. 21, 1972).

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
Trading information systems —non-profit website context [220]	*Venture Capital*[221]	1985	Granted [226]			X [227]	X	X [228]							X [229]
	University of Arkansas [222]	1986													
	Heartland Venture [223]	1987													
	Wyoming Small Business [224]	1987													
	VCN of Texas[225]	1987													

220. This refers to situations where a not-for-profit corporation seeks to provide non-website based computer matchmaking services for matching potential venture capital investors with entrepreneur issuers. Such finders have been sponsored by local chambers of commerce, subdivisions within universities, state and local instrumentalities, and private non-profit corporations.

221. Venture Capital Res., SEC No-Action Letter, 1985 SEC No-Act. LEXIS 2765 (Nov. 25, 1985).

222. Univ. of Ark., SEC No-Action Letter, 1986 SEC No-Act. LEXIS 3061 (Oct. 6, 1986).

223. Heartland Venture Capital Network, Inc., SEC No-Action Letter, 1987 SEC No-Act. LEXIS 2213 (June 7, 1987).

224. Wyoming Small Bus. Dev. Ctr., SEC No-Action Letter, 1987 SEC No-Act. LEXIS 2319 (May 13, 1987).

225. VCN of Tex., SEC No-Action Letter, 1987 SEC No-Act. LEXIS 2225 (June 18, 1987).

226. The SEC staff has consistently granted no-action relief in this category. *See* Polanin, *supra* note 20, at 822 ("Any benefits to be gained by requiring these matching services to register as broker-dealers are outweighed by the increasing role that the services play in generating investment capital for small businesses. The services are providing information and not acting as an instrumentality through which securities are purchased or sold. The financial responsibility concerns militating in favor of the broker-dealer registration are not present, because these services are not holding the funds or securities of their users.").

227. Pre-screened investors, suitability, etc., subject to appropriate disclosures.

228. Limited advertisements not referencing particular securities, subject to appropriate disclosures.

229. Special key representations: (1) In several no-action letters, the finder's founders, incorporators, officers, directors and employees, and the entities over which they exercise control, directly or indirectly, weren't permitted to participate as entrepreneurs or investors in the computer matchmaking program; (2) in *Angel Capital Electronic Network*, the party seeking no-action relief achieved a carve-out on the foregoing representation if participation was in compliance with the federal securities laws and disclosed to users of the network; and (3) in several no-action letters, the finder would operate the computer matchmaking program only on a cost recovery basis.

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
	Venture Capital Network of N.Y.[230]	1988													
	Venture Match of N.J.[231]	1988													
	Kansas Venture Capital[232]	1988													
	Mid-Atlantic[233]	1993													
	Angel Capital Electronic Network[234]	1996													

230. Bd. of Dirs. of Venture Capital Network of N.Y., Inc., SEC No-Action Letter, 1988 SEC No-Act. LEXIS 388 (Feb. 13, 1988).

231. Venture Match of N.J., SEC No-Action Letter, 1988 SEC No-Act. LEXIS 727 (June 11, 1988).

232. Kan. Venture Capital Network, SEC No-Action Letter, 1988 SEC No-Act. LEXIS 1061 (Aug. 8, 1988).

233. Mid-Atlantic Inv. Network, SEC No-Action Letter, 1993 SEC No-Act. LEXIS 712 (May 18, 1993).

234. Angel Capital Electronic Network, SEC No-Action Letter (Oct. 25, 1996).

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
Websites without trading — matching buyers and sellers of finders own securities[235]	*Real Goods*[236]	1996	Granted				X								X[240]
	PerfectData[237]	1996													
	Flamemaaster[238]	1996													
	Portland Brewing[239]	1999													

235. This refers to situations where a finder proposed to operate a passive online "bulletin board" providing information to prospective sellers and buyers of the finder's own common stock.

236. Real Goods Trading Corp., SEC No-Action Letter, 1996 SEC No-Act. LEXIS 566 (June 24, 1996).

237. PerfectData Corp., SEC No-Action Letter, 1996 SEC No-Act. LEXIS 700 (Aug. 5, 1996).

238. The Flamemaster Corp., SEC No-Action Letter, 1996 SEC No-Act. LEXIS 972 (Oct. 29, 1996).

239. Portland Brewing Co., SEC No-Action Letter, 1999 SEC No-Act. LEXIS 979 (Dec. 14, 1999).

240. Special key representations: (1) In most no-action letters, the finder has represented that it was registered under the Exchange Act, or if it should so cease, it would make publicly available the information required by the Exchange Act; (2) in multiple no-action letters, the finder was not permitted to hold itself out or the system as being a broker, a dealer, or an exchange; (3) in multiple no-action letters, no transactions would be effected by the system itself, and the finder would have no role in effecting transactions between participants; (4) in multiple no-action letters, although the finder would have no transaction records, it would retain records of the quotations listed for not less than three years and make them available to the staff of the SEC and any regulated market on which the shares are listed on reasonable request thereof; and (5) in multiple no-action letters, it was important for the finder to be mindful of and comply with securities laws.

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
Websites without trading — matching buyers with other issues[241]	*Quick America*[242]	1993	Granted				X		X					X	X[245]
	Venture Listing[243]	1994													
	Internet Capital[244]	1997													
Websites without trading — matching buyers with other issues[246]	*OilOre.com*[247]	2000	Denied	X		X	X								
	Oil-N-Gas[248]	2000	Denied	X		X	X								
	Progressive Technology[249]	2000	Denied	X											
	MiniAuction[250]	2001	Denied			X	X		X						

241. This refers to situations where a finder proposed to operate a passive online "bulletin board" providing information to buyers about the securities of unaffiliated issuers.

242. Quick Am. Corp., SEC No-Action Letter, 1993 SEC No-Act. LEXIS 821 (June 28, 1993).

243. Venture Listing Servs., Inc., SEC No-Action Letter, 1994 SEC No-Act. LEXIS 597 (June 15, 1994).

244. Internet Capital Corp., SEC No-Action Letter, 1997 SEC No-Act. LEXIS 1061 (Dec. 18, 1997).

245. Special key representations: (1) In *Venture Listing Services*, affiliated parties of the finder, including founders, incorporators, officers, directors and employees, as well as the entities over which the finder exercised control, would not place, offer, or list any investment opportunities through the system; (2) in *Internet Capital Corp.*, neither the finder nor its directors, officers, or employees would have an interest in any issuer to be listed or any agent of such issuer; and (3) *Internet Capital* added substantial heavy key representations, including that the finder was required to comply with all securities laws—see letter for more details.

246. This refers to situations where a finder proposed to operate a passive online "bulletin board" providing information to buyers about the securities of unaffiliated issuers.

247. OilOre.com, SEC No-Action Letter, 2000 SEC No-Act. LEXIS 609 (Apr. 21, 2000).

248. Oil-n-Gas, Inc., SEC No-Action Letter, 2000 SEC No-Act. LEXIS 758 (June 8, 2000).

249. Progressive Tech. Inc., SEC No-Action Letter, 2000 SEC No-Act. LEXIS 898 (Oct. 11, 2000).

250. MuniAuction, Inc., SEC No-Action Letter, 2000 WL 291007 (Mar. 13, 2000).

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
Websites with trading functions[261]	*Stock Power*[252] *Prescient Markets*[253]	1998 2001	Granted	X[254]		X	X[255]		X						X[256]
Investment adviser websites without trading — matching buyers with other issues[257]	*AngelList*[258]	2013	Granted				X			X					X[259]

c. Observable Trends

It is my general belief that the SEC staff tends to give a relatively gentle look at finders' issues in the issuer context, which implicates the policy of facilitating capital formations, which is one of the goals of the securities laws. The data show that this was particularly true

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251. Websites with trading functions raise issues beyond broker-dealer registration. "For example, the question would be the designation of the system as a securities exchange or an alternative trading system." NORMAN S. POSER & JAMES A. FANTO, BROKER-DEALER LAW AND REGULATION § 5.02 (4th ed. 2015). In one letter, a website would direct the investor to initiate a purchase transaction with the issuer's bank transfer agent, while in another a finder operated an internet based electronic execution platform for commercial paper securities transactions.

252. StockPower Inc., SEC No-Action Letter, 1998 SEC No-Act. LEXIS 718 (July 24, 1998).

253. Prescient Mkts., Inc., SEC No-Action Letter, 2001 SEC No-Act. LEXIS 464 (Apr. 2, 2001).

254. Finder affiliated broker-dealer could receive TBC, but not finder itself.

255. Advertisements about issuers, but one letter required a password protected website, subject to appropriate disclosures; finder could advertise its own website, provided it did not endorse any issuer or bank transfer agent.

256. Special key representations: (1) These no-action letters require intense representations about the nature of the contractual relationships among the finder, the brokers, and the investors; and (2) several other key extensive representations were required.

257. This refers to situations where a registered investment adviser finder proposed to operate a passive online "bulletin board" providing information to buyers about the securities of unaffiliated issuers.

258. AngelList LLC, AngelList Advisors LLC, SEC No-Action Letter, 2013 SEC No-Act. LEXIS 294 (Mar. 28, 2013).

259. Special key representation: Neither the finder nor any principal, employee, board member, controlling shareholder, or other persons associated with the finder could be disqualified from membership in a self-regulatory organization under section 3(a)(39) of the Exchange Act.

throughout the 1980s and 1990s, when the SEC staff appeared particularly open in the issuer context to finders receiving TBC in several issuer subcontexts: (a) non-profit finders, (b) business brokers (subject to heavy letter representations), and (c) the online context (subject to heavy letter representations). This seems to be the take-home message of a well-known SEC staff no-action letter called *Paul Anka*.[260]

Furthermore, in that era, the SEC staff appeared open to permitting finders to engage in multiple hallmark broker-dealer indicia, without registering, in quite a few contexts. In the context without TBC, the SEC staff allowed the finder's exemption with multiple indicia in even wider issuer subcontexts, including: (a) consultants, (b) storefront information centers, and (c) the online context (with less heavy representations than when the finder receives TBC).

However, the 1970s "denied" data (n = 11), which was mainly driven by Initial Public Offering ("IPO") finders (n = 3), consultant finders (n = 3), and M&A finders (n = 4), showed stringent regulations by the SEC staff. IPO finders and M&A finders (in the U.S. client context) were denied exemptions even after 2000. Therefore, the 1970s data should be viewed as a reflection of the SEC staff's strict regulations in specific subcontexts, rather than a general representation of the SEC staff's posture toward all finders for issuers.

Going into the third millennium, the wind seems to be changing once again. The data show that eleven of eighteen finders for issuers cases were denied between 2000 and 2014, including finders working for financial lenders, IPO finders, consultant finders, M&A finders, and websites that acted as finders. All eleven of these denied cases, except one, received TBC, which proved to be strictly verboten during the current era in this context.

3. Finders Acting On Behalf of Investors

a. Temporal Distribution of SEC Staff "Grant/Denial" Cases

Sometimes finders act to match up investors with other investors, rather than acting on behalf of a broker-dealer or an issuer. In general, the SEC staff is more reluctant to grant no-action relief to this class of finders, likely for the reason that their "intermediary function is perhaps at the core of broker-dealer activity,"[261] which is obviously required to be registered under the Exchange Act. After all, classic brokerage institutions like Schwab match up investors with other investors to trade securities. This being said, the SEC staff has in fact granted a series of no-action letters for mere listing services

260. *See* Paul Anka, SEC No-Action Letter, *supra* note 139.
261. Polanin, *supra* note 20, at 822.

under this category, and in one instance even for a trading service, given the right circumstances and sufficiently limited activities.

Due to the clear resemblance of finders acting for investors to actual broker-dealers, very few no-action letters have been submitted in this category. The current Study examined fourteen no-action letter reliefs issued to finders acting for investors from 1979 to 2001. A temporal distribution of the SEC staff's "grant/denial" cases is shown in Figure 3. No finders in this category operated in the "registered" context. The Contextual Factor Score was plotted as a function of time, ranging from 1979 to 2001 (Fig. 3). Overlapping data points were shifted slightly along the x- or y-axis for visual purposes, although computations were conducted with exact data values. Unlike the pooled data that combined all classes of finders, the SEC staff's view on this particular class of finders (for investors) appear to be consistently strict across time. Over the twenty-two-year period, there have been eight granted cases and six denied cases for finders in the investor context, yielding slightly greater than 1:1 odds of exemption. All granted cases except one had a Contextual Factor Score of 1, and 4 of 6 denied cases had a Contextual Factor Score of -2, with the fifth and sixth denied cases scoring -1 and -3, respectively. The data suggest a very narrow range of permissible contexts for this class of finders (for investors) to be exempted through the ages.

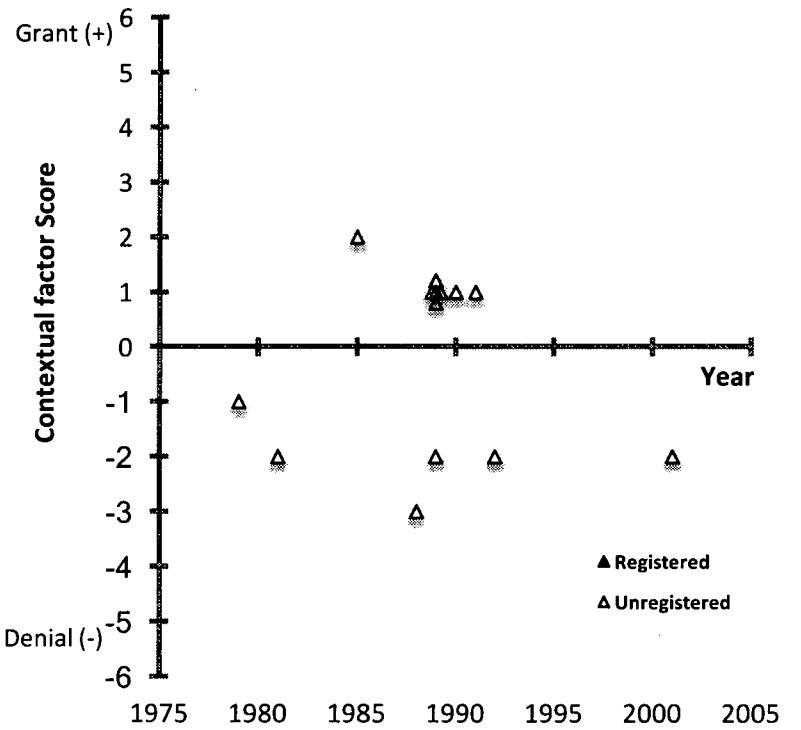


Figure 3 Finders (for investors) no-action reliefs (n = 14) distribution over 22 years (1979–2001). Contextual Factor Score (total number of the contextual factors identified) as a function of time. Overlapping data points were shifted slightly for visual purposes.

b. Case-by-Case Summary of Historical SEC Staff No-Action Letters

The complete raw dataset is listed in Table IV, which provides a snapshot of "trees in the forest" for the SEC staff's views, as reflected by historical no-action letters, grouped into six types of businesses engaged by finders for investors:

Table IV. Six types of finders for investors no-action relief summary across twenty-two years (1979 to 2001)

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
Bond exchanges[262]	*A.E. Grudin*[263]	1981	Denied	X			X								
Repurchase transactions[264]	*C&W Portfolio*[265]	1989	Denied	X	X										
Condominium transactions[266]	*Snowy Owl Inn*[267]	1992	Denied	X			X								
Listing services[268]—computer listing services and newsletters[269]	*Real Estate Financing*[270]	1989	Granted					X							X[272]
	Petroleum Information[271]	1989													

262. This refers to finders who attempt to match buyers and sellers of bonds.

263. A.E. Grudin, SEC No-Action Letter, 1981 SEC No-Act. LEXIS 4341 (Nov. 30, 1981).

264. This refers to finders who attempt to bring dealers together involving Treasury notes, bills, and bonds.

265. C&W Portfolio Mgmt., Inc., SEC No-Action Letter, 1989 SEC No-Act. LEXIS 1286 (July 20, 1989).

266. This refers to finders who attempt to match buyers and sellers of condominium securities.

267. The Snowy Owl Inn Condo. Unit Owners' Ass'n, SEC No-Action Letter, 1992 SEC No-Act. LEXIS 1215 (Nov. 17, 1992).

268. Polanin notes that "[t]he staff has been more lenient if persons seeking to match investors with each other are willing to limit their activities to providing information only, by essentially serving as a bulletin board." Polanin, *supra* note 20, at 823. Listing services that receive no-action relief are sometimes operated by third party finders, and other times operated by issuers themselves. *Id.* Polanin further notes that the SEC staff is possibly accommodating to listing services, since it helps facilitate securities transactions for entities that "do not have active secondary trading in their securities and therefore cannot interest a broker-dealer in making a market in the securities." *Id.* at 824.

269. This refers to finders who use newsletters and computer databases to match sellers and buyers of securities. Such finders have tried to offer limited partnerships, oil and gas properties, and commercial real estate financing.

270. Real Estate Fin. P'ship, SEC No-Action Letter, 1989 SEC No-Act. LEXIS 551 (Apr. 4, 1989).

271. Petroleum Info. Corp., SEC No-Action Letter, 1989 SEC No-Act. LEXIS 1236 (Nov. 18, 1989).

272. Special key representations: (1) The finders and their related parties generally should not participate in the database listing and subscription; and (2)

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
	Investex [273]	1990													
Listing services — purchaser/seller lists[274]	*Troy Capital* [275]	1989	Granted					X							
	CNB Corp.[276]	1989													
	Tri-State Livestock [277]	1989													
	Orincon Corp.[278]	1991													
Trading systems [279]	*National Partnership Exchange* [280]	1985	Granted [281]	X				X							X [282]

in *Petroleum Information*, the finder's related parties, would not have access to information contained in the system until it was released to all users.

273. Investex Inv. Exch., Inc., SEC No-Action Letter, 1990 SEC No-Act. LEXIS 609 (Apr. 9, 1990).

274. This refers to finders who maintain a list of purchasers or sellers who expressed an interest in securities transactions regarding the finder's own stock.

275. Troy Capital Servs., Inc., SEC No-Action Letter, 1989 SEC No-Act. LEXIS 672 (Apr. 28, 1989).

276. CNB Corp., SEC No-Action Letter, 1989 SEC No-Act. LEXIS 758 (June 9, 1989).

277. Tri-State Livestock Credit Corp., SEC No-Action Letter, 1989 SEC No-Act. LEXIS 1058 (Oct. 18, 1989).

278. Orincon Corp., SEC No-Action Letter, 1991 SEC No-Act. LEXIS 1359 (Dec. 11, 1991).

279. "A privately-operated trading system is yet another type of service bringing together buyers and sellers of securities. These systems go beyond merely providing information about indications of interest in buying or selling securities. Rather, they offer their users the capability of completing securities transactions through the systems." Polanin, *supra* note 20, at 824. For this type of finder, an electronic information system would enable subscribers to buy and sell units of publicly registered limited partnerships.

280. Nat'l P'ship Exch., Inc., SEC No-Action Letter, 1985 SEC No-Act. LEXIS 2500 (Sept. 1, 1985).

281. Although the SEC staff generally declines no-action relief in this context, the SEC staff granted no-action relief here, where an electronic information system would enable subscribers to buy and sell units of publicly registered limited partnerships, due to the fact that the SEC staff expressed a desire to allow "innovative systems for trading and settling limited partnership interests." *Id.*

282. Special key representations: (1) Heavy special representations were required; and (2) the SEC staff noted that its no-action position was subject to modification or revocation at any time the SEC would determine that such modification or revocation was consistent with the public interest or for the protection of investors.

Finder type	Major letters	Year	Granted or denied	1	2	3	4	5	6	7	8	9	10	11	12
	Sidney Schwartz[283]	1979	Denied[284]					X							
	National Royalty Exchange[285]	1988	Denied	X				X						X	
	BondGlobe[286]	2001	Denied					X	X						

c. Observable Trends

In the investor context, the SEC staff's views on regulations have remained consistently stringent throughout time, for the aforementioned reason that matching investors with other investors fits the classic role of a "broker." Despite the SEC staff's tight rein on this class of finders, exemptions from registration were granted in the past, especially around 1990, to finders for investors without TBC and in one instance *with* TBC, but certainly without affecting securities transactions and with the requirement of heavy special representations—subject to modification or revocation of the no-action relief at any time.

For finders acting on behalf of investors, my analysis echoes the general view that finders possibly could receive TBC if their broker-dealer "hallmark activities" are sufficiently, or in certain conditions, strictly limited.

C. *Tying it All Together*

A preliminary analysis of the historical evolution of the SEC's grant and denial of finder's exemption no-action letters requests reveals a significant shift in the SEC staff's philosophy for the finder's exemption, occurring first in the 1980s (more lenient), then in the

283. Sidney Schwartz, Esq., SEC No-Action Letter, 1979 SEC No-Act. LEXIS 2463 (Mar. 17, 1979). The finder proposed to operate an automated trading information system for mortgage securities.

284. One article notes that the reason for this kind of denial, even though no TBC was received and the finder's broker-dealer activities were in certain respects very circumscribed, is that "[t]he systems . . . mimic traditional broker-dealer activity so closely that the staff has been unable to give assurances that it would refrain from recommending enforcement action if the systems did not register as broker-dealers with the Commission." Polanin, *supra* note 20, at 824.

285. Nat'l Royalty Exch., SEC No-Action Letter, 1988 SEC No-Act. LEXIS 1722 (Dec. 21, 1988). The finder proposed to operate a central marketplace for holders of oil and gas royalties to purchase and sell such royalties. *Id.*

286. BondGlobe, Inc., SEC No-Action Letter, 2001 SEC No-Act. LEXIS 140 (Feb. 6, 2001).

1990s (less lenient), and finally an even greater shift around 2000 (much stricter). A temporal distribution of the SEC staff's grant/denial cases across three different classes of finders[287] is shown in Figure 4. The Contextual Factor Score[288] was plotted as a function of time, ranging from 1971 to 2014 (Fig. 4.a). Overlapping data points were shifted slightly along the x- or y-axis for visual purposes, although computations were conducted with exact data values. The data show that from 1971 to 1979, there were in total 14 granted and 12 denied cases (+/-ratio: 1.17; note: all data points except one in this epoch were cases of finders for issuers); from 1980 to 1989, there were in total 42 granted and 6 denied cases (+/- ratio: 7); from 1990 to 1999, there were in total 23 granted and 5 denied cases (+/- ratio: 4.6); and from 2000 to 2014, there were in total 12 granted and 13 denied cases (+/- ratio: 0.92). Statistically, the 1980s epoch showed a significantly lower proportion of denied cases than the 1970s epoch (Fig. 4.b, $P < 0.0035$, Fisher exact test), and the twenty-first century epoch showed a significantly higher proportion of denied cases than both the 1980s epoch (Fig. 4.b, $P < 0.00053$, Fisher exact test) and the 1990s epoch (Fig. 4.b, $P < 0.019$, Fisher exact test).

As shown in the data, the odds of a finder for issuers (matching investors with entrepreneurs seeking financing) getting the nod from the SEC when seeking exemption were significantly higher in the 1980s to 1990s than the 1970s (Fig. 4.a, square symbol), yet a finder in general is significantly less likely to be exempted in the twenty-first century than in the 1980s or 1990s. Pulling all of the observed trends together, two things seem apparent in most contexts. Obviously, TBC has become a very thorny issue for the SEC staff. And the incidence of SEC staff denials beginning sometime in the 1990s seems to be increasing. As this Study's computational analysis of finders' no-action letters shows, the finder's own position on registration exemption has been placed under greater scrutiny by the SEC staff, even though certain aspects of the finder's exemption remain well intact.

287. *See* Polanin, *supra* note 20, at 789–90.

288. *See supra* Table I and Subpart II.A.1–2 (discussing the "Computational Method").

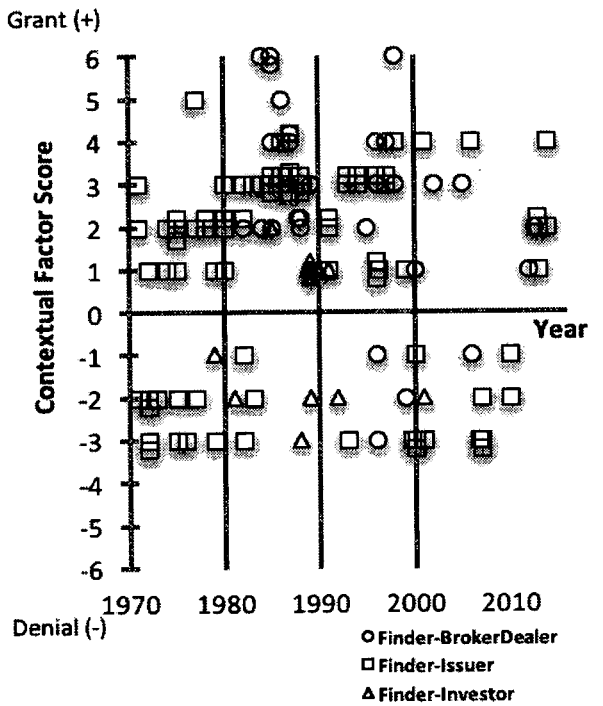
Figure 4

Finders' no-action letter reliefs (n = 126) distribution over 44 years (1971–2014).

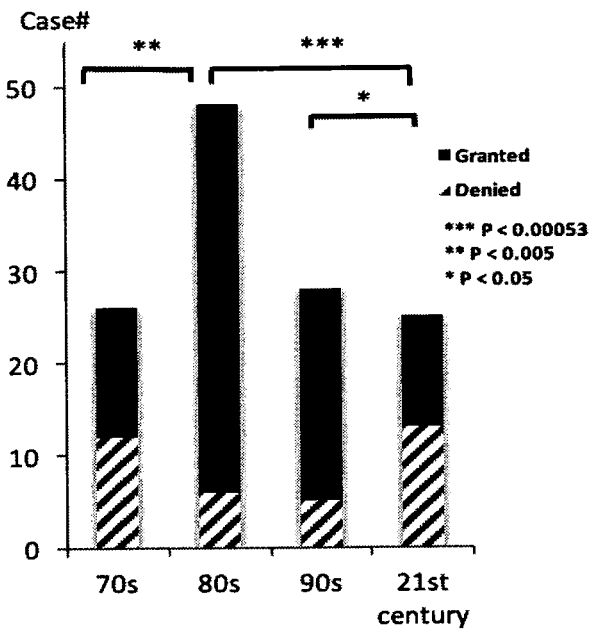
(a) Contextual Factor Score (total number of the contextual factors identified) as a function of time. Overlapping data points were shifted slightly for visual purposes.

(b) Granted and denied no-action letter counts from four epochs.

a



b



So what occasioned the changing winds over the regulatory "lawscape" of finders?

III. HYPOTHESIZED CONDITIONS DRIVING THE EVOLUTION OF SEC STAFF VIEWS ON FINDERS

From a narrow perspective, one can contemplate the TBC issue in a vacuum, without much historical analysis. The regulators have explained their views on this issue as follows. In a speech at the SEC's Government-Business Forum on Small Business Capital Formation held on November 20, 2008, a staff member of the SEC Division of Trading and Markets observed that:

> Ever since Paul Anka has come out, a lot of people in the private bar, a lot of people in the business industry, have felt that that has given some sort of coverage to allow for what is thought of as the traditional providing an introduction between investors and an issuer, and being able to receive compensation for that. The truth is, from the staff point of view, there is no progeny of Paul Anka, in fact, and the ways that we look at broker-dealer regulation today, I'm not even sure that we would issue the Paul Anka letter again. And so, [I] really don't think it's something that people out there doing transactions should be relying on. A lot of other letters that have come out where persons have asked to earn some form of transaction-based compensation and when you're talking about capital raising, there is not a lot of relief that is given.[289]

This statement seems congruous with this Study's analysis of SEC staff no-action letters. However, just as this Study's empirical analysis showed, the regulators have also indicated that *Paul Anka* is not necessarily always void. Nonetheless, at a recent CLE conference, Joanne Rutkowski—a Senior Special Counsel in the Office of Chief Counsel of the Division of Trading Markets, speaking in her own personal capacity—did not appear to suggest that TBC is always a verboten, and seemed to indicate that the *Paul Anka* no-action letter exists, notwithstanding the fact that the SEC staff tries to distance themselves from this letter at times.[290] But whether it exists or not, it is clear that the SEC staff's philosophy in this regard becomes more stringent over time. That circles us back to the

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289. Hugh H. Makens & Shane B. Hansen, Presentation on Regulation of Third Party Finders: The Illusion, the Needs, and the Prospects at the North American Securities Administrators Association's 92nd Annual Conference, Panel Three: Monitoring the Middlemen: Enhancing the Regulation of Third Party Finders (Sept.14, 2009), http://www.wnj.com/warnernorcrossjudd/media/files/upload/NASAA_2009_Fall_Conference-Regulation_of_Finders_(9-14-09).pdf.

290. Rutkowski, *supra* note 206. Rutkowski notes that her views are personal, and not necessarily the views of the regulators.

question of why. Robert Colby, also speaking in his own personal capacity at a recent PLI conference provided some clues here:

> When you see transaction related compensation, ever, for any intermediary, a bell should go off in your head this may be a broker-dealer . . . There are some letters that say if all you're doing . . . is handing over your contact list . . . and if any of them do anything, I want a small cut, then you might not be a broker-dealer . . . if it's extremely careful. But if a person is paid a lot . . . the SEC will never believe that the only thing that happened was just a hand over of contacts. What they're looking for is whether this finder is going out to her friends and relatives selling, trying to shape up the interest of the customer. Once you put selling and you put transaction related compensation together, and you do it more than once . . . then you've satisfied the requirements for being a registered broker-dealer.[291]

Rutkowski mentioned that, from the staff's perspective:

> [I]f you're getting paid when the deal closes, it's not human nature to say "here's the list go forth and be happy." Typically, there's some pre-screening of investors, you're probably pre-selling, saying this is a pretty good deal. And this takes you into core broker-dealer activity, the sales activity . . . There's actually a regulatory concern there . . . If you're a [registered] broker-dealer there's [FINRA] standards that are enforced. There's sales practice standards, just and equitable principles of trade, things that you have to do, principles of fair dealing, that you have recourse to arbitration under the FINRA scheme. So this actually does trigger some significant investor protections . . . This is an area that needs regulation.[292]

Colby and Rutkowski speak as though the SEC staff operated in a timeless vacuum, as if the state of their views have always been so. But in all likelihood these explanations are not complete, since this Study clearly shows that the SEC staff was more at peace with TBC in the 1980s, for example. The likely problem then is not TBC by itself, but TBC in light of the changing epochal social conditions. So what historical conditions might be driving the evolution of the SEC staff?

Home computers entered the U.S. market in 1977[293] and became a common household appendage in America during the 1980s.[294]

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291. Robert Colby, PLI Panel on Broker-Dealer Regulation 2015, Who is a Broker-Dealer? (June 24, 2015). Colby notes that his views are personal, and not necessarily the views of the regulators.

292. Rutkowski, *supra* note 206.

293. *See Home computer*, WIKIPEDIA, https://en.wikipedia.org/wiki/Home_computer (last visited Dec. 23, 2016).

294. *See id.*

Eventually, the rise of computers spawned the World Wide Web era beginning in 1991,[295] a virtual world where a plurality of us thrive by day and jive by night. Clearly, the views of the SEC staff began to shift right around 1991, which is also the date of the *Paul Anka* no-action letter.[296]

What happened to finders in a securities context, as the wheel of history trundled forward into the Information Age (a.k.a. the Digital Age) around the 1990s and gaining greater momentum by leaps and bounds as we enter the third millennium? What is the rationale behind the tightening rein of the SEC staff on the finders' broker-dealer registration requirements with the burgeoning Digital Age? Has the role of the finders changed over time? Is the platform they danced on a transformed terrain with the emerging Internet bowling down the "information superhighway," which takes us all for a long, long ride? Of course, as this Study showed during this pivotal epochal transformation, the attitudes of the SEC staff also began to shift and transform. Some evidence for this assertion can be found in the legislative history. A Senate Report utterance in 1973 vaguely touched on this question:

> Growth and success, however, have brought problems in their wake. Rapid unanticipated increases in the volume of trading found the industry unable to handle the operational aspects of the business it had solicited. A shift in public investment patterns, with a constantly increasing proportion of investment being made through institutions, rather than through direct purchases by individuals, has placed serious strains both on the operation of the markets and on the industry's compensation structure. And development of new technology and communication systems, while offering the promise of a more efficient, better coordinated marketplace, has produced conflict between groups within the industry, each striving to preserve or improve its economic position.[297]

One might also make the following observation about this epochal transformation. Before the first website was published on December 20, 1990,[298] and IP addresses overwhelmed street addresses, and when back-slapping and shoulder-rubbing were carried out in the flesh instead of via "avatars" in the cybernetic world of today, matchmaking used to be a reflection of the matchmaker's social network in a "fleshy" sense. All categories of finders as mentioned above—consultants, realtors, CPAs, and financial planners—far more likely brought their friends, colleagues, and

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295. *See World Wide Web*, WIKIPEDIA, https://en.wikipedia.org/wiki/World_Wide_Web (last visited Dec. 23, 2016).

296. *See* Paul Anka, SEC No-Action Letter, *supra* note 139.

297. SENATE REPORT, *supra* note 17, at 2.

298. *See World Wide Web*, WIKIPEDIA, https://en.wikipedia.org/wiki/World_Wide_Web (last visited Dec. 23, 2016).

acquaintances in *life* (not online) to broker-dealers in the old days than do their Digital Age counterparts, who might have thousands of "friends" on Facebook and tens of thousands of followers on Twitter. Finders would point out that, notwithstanding regulations, they always have their reputational capital at risk, which should soften any finder's conflicts. But unfair treatments and inadequate disclosures to the matched parties would have far graver repercussions for matchmakers reliant on their "fleshy" social networks—many nodes of which might have been able to recognize the "culprits" on the street—than for matchmakers so far removed from all parties interconnected by the mazy Internet.

Going into the twenty-first century crowdfunding era, an increasing number of finding activities were and will be conducted online. A greater possibility for fraud, without reputational concerns, triggered by the distancing nodes of the virtual world of the Internet, becomes a realistic concern for individuals of society and for lawmakers that act to protect the citizens' rights and curb any abuses of such rights. When finders activities are compensated by the ensuing transactions and facilitated by the information superhighways that have paved the way for the Digital Age, finders are more motivated than ever to straddle the line between finders and brokers for greater financial gain without any social or personal chagrin if any abuse is exercised with customer representations. By contrast, finders were unshielded by the virtuality of cybernetics prior to the Digital Age.

Another observation is that as virtuality extends unfamiliar and impersonal social networks, the financial stakes drastically go up when there is a salesman's stake, which in theory should exacerbate finders' conflicts. Getting a salesman's stake from a few friends would clearly create dramatically different incentives than getting a salesman's stake from an entire virtual network. Technology has therefore likely magnified the power and force of the TBC salesman's stake.

The probable views of the SEC staff might therefore be divined as follows. Integrity needs to be redefined when the world is redefined, with its actuality refitted into virtuality, reality into superreality, and flesh into avatar. Apart from the impact of technological progress, one might observe that some key historical events took place that could have inflamed the SEC's protective goals. In the early 2000s, society witnessed the collapse of Enron. Not surprisingly, "[m]any legal scholars mark the fall of Enron as a momentous event in our legal and economic history."[299] Professor Gregory Mitchell notes: "In perhaps the most influential analysis of Enron to date, Professor William Bratton reaches a . . . skeptical view

299. Gregory Mitchell, *Case Studies, Counterfactuals, and Causal Explanations*, 152 U. PA. L. REV 1517, 1526 (2004).

of self-regulation and the power of market forces to constrain corporate misdeeds . . . ."[300] One can imagine therefore that such a powerful event could shift the perspectives of the SEC staff in a more pro-regulatory, pro-investor protection direction. And in fact, in certain contexts, this Study shows a step up in SEC staff stringency immediately after the post-Enron era.[301]

Then, in the late 2000s, the world saw the Financial Crisis of 2008. "Following the financial crisis of 2008, stampeded by poor mortgage lending practices [that ultimately imposed systemic risks on society], the regulators across the country reached a heightened state of alert. This motivated Congress to enact the Dodd-Frank Act[302] in 2010, primarily to address systemic risk concerns . . . ."[303] Further, "[t]he financial crisis of 2008, [due to systemic risks], clearly had the potential to bring down the economy"[304] and "[t]hat prompted Congress to take [many] preventative measures against systemic risks [with the Dodd-Frank Act], as a prudent doctor is apt to prescribe preventative medicines against potential heart and kidney damage for a patient with a diagnosed liver disease."[305] Given that the financial crisis occurred less than a decade after Enron, one might suspect that the spirit of the SEC staff was reinforced again in a more pro-regulatory, pro-investor protection direction.

As actors are rooted in their stage, citizens are rooted in their social platform. Age after age, Renaissance, Enlightenment, Information (Digital), and Cybernetics, men and women were rebred by their ever-changing epistemic, aesthetic, social, economic, and existential culture that never ceases to adapt to each and every new age unique to our history. My historical analysis of finders' no-action letter reliefs over forty-four years shows the evolution of the regulator's mentality from decade to decade, until now. After a blissful period of passing the SEC staff's examinations with flying colors through the 1980s and in some contexts also the 1990s, finders generally entered a more uncertain period with greater scrutiny and stricter criteria for the exemption they were seeking, first in the 1990s, at the dawn of the world wide web, and then in the early 2000s, around the time of the Enron debacle. This Study posed the question "why" in the face of a transformed legal lawscape and sought answers from a metamorphosed social landscape over the changing times.

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300. *Id.* at 1529.

301. *See supra* Subpart II.B.2 (showing new trends in the early 2000s in the issuer context).

302. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

303. Seth Chertok, *The Rise of the Dodd-Frank Act: How Dodd-Frank Will Likely Impact Private Equity Real Estate*, 16 U. PA. J. BUS. L. 97, 102 (2013).

304. *Id.* at 103.

305. *Id.*

I formed the following hypotheses for the underlying social causes that drove the tightening rein of the SEC staff on three classes of the finder's exemption. First, considering finders for broker-dealers, TBC triggered far more likely denials of their exemption after the 1990s than before, likely due to a growing concern for fraud in the virtual Internet world, where the matchmakers' networks are far more intangible and thus untraceable than in the old world of "corporeality" and credibility. Second, finders for issuers enjoyed a favorable look of the SEC staff throughout the 1980s and 1990s due to their contributions to capital formations, but had almost two-thirds of their no-action letters denied for exemption going into the third millennium. Finders either receiving TBC or affecting the ensuing securities transactions likely aroused the concern of the regulators regarding their incentives to engage in abusive sales practices, which was made so much easier by the information super-highway to greater monetary gain and less traceable identities, and also so much more probable, after the fall of Enron. Third, finders who match investors with other investors, whose intermediary function at the core of broker-dealer activity almost always required registration and hence concerned far fewer no-action letters submitted than the other two categories, but, on the contrary, were granted exemptions in a few cases by the SEC staff, provided that no TBC was involved or the finder's broker-dealer "hallmark activities" were strictly limited (which essentially eliminated many factors that could possibly lead to investor misrepresentations and the compromised integrity of the brokerage community in the labyrinthine Digital Age).

My evolutionary analysis of such cause and effect attempted to unearth the roots of the aforementioned mismatch between the two separate sectors of our society, which I hope will further uncover the underlying causes for their divergent and convergent interests. The result of this historical Study aspires to (1) provide a systematic and comprehensive methodology for other temporal and/or causal analyses in wider contexts to display a bird's-eye view of our societal forest, with "trees" scattering to the four corners of our mega-infrastructure; and (2) offer instrumental solutions, beyond compliance education, as to how to remedy the missing link between securities regulation and compliance in American legal society.[306]

The characterizations of finders' activities and of the environmental conditions underlying their daily functions could help reveal the byzantine social causes for lawmaking and law-abiding, and propel our macrosociety to evolve more effectively and efficiently, with freedom that abounds in our skies and responsibility that saddles our earth.

306. *See infra* Subparts IV.A (problems) and IV.B (solutions).

IV. IMPLICATIONS

A. Problems with the Current Finder's Lawscape

The current finder's "lawscape" presents several categorical problems for securities regulation, each of which are discussed below.

1. A Look at Dual Perspectives in Regulation

One way of evaluating the success of a regulatory regime is to fairly consider the dual perspectives of regulators and regulated entities. In fact, Rutkowski, in her personal capacity, noted what this Study views as a social problem here: "as a regulator, we will cast the net wide, and say, of course, you should presumptively register."[307] She then went on to describe the practitioner's view by stating that "there may be no-action letters that cover this activity, you can interpret it this way . . . ."[308] All of this harkens the push-pull seesaw of regulation and compliance.[309]

Suppose that a finder is actually ethical, very prudent, and cautious. Such a finder could write to the SEC staff for no-action relief, but often ethical finders often will not want to write in for no-action relief.[310] And given that the finder's exemption is so confusing, ethical but cautious legal advisers representing finders poorly understand how the finder's broker-dealer exemption functions. In the tumult of our Digital Age that abounds with information of every description, finders and their attorneys have become increasingly uncertain about when their activities cross over into the registration-required broker-dealer activities.[311] This can lead to practical problems for practitioners:

> The current broker-dealer registration system, and especially the FINRA membership application process, is disproportionately complex for someone acting only as a 'finder.' The ongoing regulatory requirements – appropriate for a full-service broker-dealer, or one that engages in market making, over-the-counter trading for customers, proprietary trading, holding customer funds or securities, making margin loans, and the like – are similarly overwhelming for a finder or smaller intermediary.[312]

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307. Rutkowski, *supra* note 206.
308. *Id.*
309. *See supra* Subpart I.B.
310. *See infra* Subpart IV.A.2 (setting forth reasons why ethical finders often dislike seeking no-action relief).
311. Laura Anthony, *Finders- The Facts Related to Broker-Dealer Registration Requirements*, LEGAL & COMPLIANCE, LLC (Aug. 25, 2015), http://securities-law-blog.com/2015/08/25/finders-facts-related-broker-dealer-registration-requirements/.
312. YADLEY, *supra* note 6, at 3.

Apart from being confusing, the regulatory system is also very burdensome. In a recent PLI conference, Kiran Lingam, a partner at Nelson Mullins, appeared to point out that broker-dealer registration and regulation was difficult for start-ups, both in terms of actual costs and operational costs.[313] The major burdens of broker-dealer registration and regulation are (1) rule compliance, (2) training responsibilities, and (3) supervisory responsibilities.[314] This system of compliance and supervision is quite difficult, since registered firms must prevent and detect all kinds of legal violations.

Clearly, ethical and very cautious finders will not want to take risks of acting illegally, but they also might not want to register, which leaves their sole alternative option as over-complying by sharply and overly subscribing their finder's activities to ensure that there are no regulatory violations. First-hand observations have been made on how legal advisers representing finders often advise unregistered finders to circumscribe all broker-dealer activities, even when they should be legally permissible.

These hurdles effectively remove good finders from the finder's lawscape. As noted by Professor John Orcutt, "[t]his uncertainty, coupled with the substantial burden of complying with broker-dealer regulations, has severely hampered the development of a professional class of finders who could potentially help reduce the problems that plague the angel finance market."[315] Orcutt further suggests dead-weight losses stemming from the chilling effect on securities transactions and on the capital raising process.[316] Orcutt has captured the legal and economic repercussions of finder's regulatory obscurity in blunt words as such: "[T]he uncertainty that surrounds the current approach appears to [discourage] . . . more reputable actors that would be desirable, but hesitate to become involved in an activity that can be second-guessed as inappropriate."[317]

In this process, one might argue that the goal of investor protection is met, but this kind of regulation is clearly inefficient, meaning that it removes a lot of good guys from the activity in order

313. Kiran Lingam, PLI Panel on Crowdfunding and Online Direct Lending (Peer-to-Peer) 2015, Legal Issues for Equity Crowdfunding Platforms (Sept. 22, 2015).

314. *See, e.g.*, Clifford E. Kirsch & Ben Marzouk, Practical Considerations Regarding the Establishment and Maintenance of the Broker-Dealer Supervisory Framework, Fundamentals of Broker-Dealer Regulation 2015 Program (June 24, 2015).

315. Orcutt, *supra* note 19, at 866.

316. *See id.* at 867 ("If finders are empowered to act more freely in the private capital setting, it should be expected that early-stage rapid-growth start-ups will be the issuers most likely to engage them and that angels are likely to be the primary target of the finders as they seek investors. In this setting, finders could assume a meaningful intermediary role and should help to improve the efficiency of the private capital markets.").

317. *Id.* at 929.

to achieve its hypothetical effectiveness. That raises the question of how one could make finders regulation more efficient. A visual analogy might be how Steve Jobs redesigned the iPad 4 as the iPad Air, which could functionally do all the same tasks, but was lighter and more streamlined.[318] In any event, the inefficiency of the current finders regulation will clearly harm the securities regulation goals of facilitating capital raising.

Thus, in this first case, finder freedoms are over-regulated and overly sacrificed, while regulatory goals also fail in light of all the inefficiency and deterrence of the capital raising process. Obviously, this drives apart, rather than bridges, the dual perspectives of regulators and regulated entities. Now, one might also point how some ethical finders are very ignorant and confused, but not necessarily so prudent and cautious. Ignorance, when caused by a general state of confusion, undermines even the good-faith attempts of regulated entities to abide by the law.

The nature of these securities rules seems so amorphous among legal practitioners that they cannot be accurately interpreted without in-depth studies of the relationship between the rules and the commentaries in the releases, which demand an extraordinary amount of time and effort, such as the effort behind this Study, which is beyond the functional capacity of tasks-laden practitioners in our spinning digital world. Given the complexity of finders' securities regulations, many regulated entities are not aware of whether they are fully in compliance with the sea of rules. In fact, "[a] great number of the brokers, funded businesses, and even sometimes their attorneys, do not realize that [finders] are operating in violation of securities laws."[319] "Regretfully, it is also the experience and, therefore, belief of most members of the Task Force that a great number of the unlicensed brokers currently operating in the gray market are ethical and honest individuals."[320]

In spite of the efforts of so many good finders, all of this confusion stemming from the current finders regime produces much ignorance, which leads to many bad finders and illegalities. "It is widely recognized among business participants that many individuals and entities act as 'finders' in the State of California in connection with securities transactions even though they are not registered with the State as a 'broker-dealer' or an 'associated person thereof.'"[321]

In this process, the regulatory goal of investor protection is likely not met. This kind of regulation for confused good faith finders is actually even worse than the inefficiency observed for good finders.

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318. Andrew Williams, *iPad Air vs iPad 4: Which Should You Buy?*, TRUSTED REVIEWS (Mar. 18, 2014), http://www.trustedreviews.com/opinions/ipad-air-vs-ipad-4.

319. *ABA Report*, *supra* note 2, at 960.

320. *Id.* at 961.

321. CA Próposal, *supra* note 45.

Instead, for confused good faith finders, the regime, as a result of a lack of transparency and predictability, is entirely ineffective. This ineffectiveness means that it fails to catch or stop mistaken finders, which raises the question of how one could make finders regulation more effective beyond just the inefficiency question identified above for good finders. In any event, just like the inefficiency problem for good finders, this ineffectiveness drives apart the dual perspectives of regulators and regulated entities. One could also imagine how some finders are simply bad faith actors, who have no genuine desire to comply with the law. As has been noted:

> Unfortunately, in many other cases, persons acting as finders represent 'the dark side' of the securities business: purveyors of fraudulent shell corporations; front-end fee con artists; purported Regulation S specialists who send stock off-shore and wait to dump it back into the U.S. through unscrupulous brokerage firms or representatives who are receiving under-the-table payments for promoting stocks and micro-cap manipulators.[322]

A "common lament from . . . attorneys is that too often the client walks down the street and easily finds attorneys who are willing to advise the issuer that there is no problem . . . ."[323] Orcutt noted that "the uncertainty that surrounds the current approach appears to encourage questionable actors wishing to act as finders . . . ."[324] Colby noted in his personal capacity that:

> [T]here are numerically a lot of people out in the world doing things that probably technically require them to register as a broker-dealer, and they either don't know it, or they're ignoring it. So, I had someone call me and talk to me about the activities that he was engaged in, and said "are there any regulatory requirements here?" I said "yes well actually there are, I'm sorry to tell you this, but what you're doing would require you to register as a broker-dealer." He said "oh darn, the other five lawyers told me that too."[325]

Colby went on to discuss, "on the finder area, there are untold numbers of people out there operating as finders without registering, just taking their chances."[326] As with confused finders, having bad-faith finders obviously leads to lots of illegalities, which is clearly inimical to the interests of investor protection.[327].

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322. YADLEY, *supra* note 6, at 4.
323. *ABA Report*, *supra* note 2, at 973.
324. Orcutt, *supra* note 19, at 929.
325. Colby, *supra* note 291.
326. *Id.*
327. *See supra* note 15 and accompanying text.

In this process, the regulatory goal of investor protection is not met. And as with confused finders acting in good faith, this regime is entirely ineffective, meaning that it fails to catch or stop bad finders. To make matters worse, Colby admitted that it is difficult for the regulators to find and track down finders, unlike say issuers, and as a result, bad finders might never get caught.[328] And of course, Colby noted how the regulators often do not identify bad finders, unless something goes seriously wrong: "Usually life goes along well until someone you're engaged with in a deal or a client has something go wrong, and then they start examining the whole process . . . sometimes they determine that their agent was not properly regulated . . . . And when that happens a number of consequences can take place . . . ."[329]

That once again raises the question of how one could make finders regulation more effective beyond the inefficiency question identified above for good finders. In any event, just like with the problem of confused good faith finders, this ineffectiveness drives apart the dual perspectives of regulators and regulated entities. And all of the positive aspects of finders get deterred.[330]

2. The Headaches of the No-Action Letter System

Apart from the dual perspectives of regulators and regulated entities, the no-action letter system itself is not optimal for finders. Obviously, the regulators cannot regulate every single area, so keeping some regulation open through letters is a good idea, but not for an area so central and pervasive to the economy as finders.

For good and prudent finders, there are additional inefficiencies that arise purely from the letter system itself. Good finders must burn a lot of attorney time and regulator resources to forever reinvent the wheel under the no-action letter system. Given finders' indispensable roles for society, it seems a disappointing waste of social resources to bid regulators respond to no-action letters over and over, as if immured in an endless cycle of reinventing the wheel of law unsystematically and sporadically, while informational and technological progress has zoomed off far into the distance.

As this Study's empirical analysis shows, without the resources of a scholar, it is impossibly difficult for finders to piece together the letter lawscape, as this Study has done. An additional problem is that even if a few finders managed to piece together this lawscape, letters are not binding precedent or definitive law, but merely opinions of the SEC staff, and thus do not have perfect predictive value for future regulated entities, and as the Study's empirical analysis revealed, the

328. Colby, *supra* note 291.
329. *Id.*
330. *See supra* Subpart I.A.

winds of the staff can change sharply over time,[331] which creates a kind of regulatory tag between regulators and regulated entities. "[N]o-action letters are purely matters between the SEC staff and the party making the request, and because they are limited to the specific facts of the requesting letters, it is risky for other parties to draw general conclusions from these letters."[332]

One example to bear out the SEC staff's narrowing views on the finder's exemption is their relatively recent revocation of a key no-action letter, *Dominion Resources*.[333] A logical question that follows is, what is to stop the SEC staff from revoking other key no-action letters? Non-binding precedent as such, given its ambiguity, is obviously inconsistent with our legal values, such as consistency, predictability, and, hence, dependability, needed for guiding and operating our modern macro society of byzantine complexity. Worse still, non-binding precedents are often tied to highly idiosyncratic facts and therefore are difficult for regulated entities and their law firms to understand and meet the minds of the regulators.

Another problem, in light of the concurrent jurisdiction of states over broker-dealers, is that the states are not obligated for state law purposes to accept the views of the SEC staff. Borg, has noted: "States are going to make their own independent reviews, by giving weight and consideration to the SEC's no-action opinion."[334] David Freeman, Jr. of Arnold & Porter notes: "FINRA tends to follow SEC no-action letters and exemptions; states may or may not."[335]

Bad and less docile finders do not like to write letters. Letters are not only expensive for the client, but they put the client on the regulatory radar screen. Letters can also create bad precedent, which can be embarrassing in, and might even anger, the finder's business community. A better solution must be found than no-action letters.

3. The Larger Social Problems

Looking at the larger picture, the finder's problem reveals several higher-level social problems, such as efficiency and effectiveness problems in securities regulation, as described above in dual perspectives problems. To this day, there has not been a historical study on what is prompting such ineffectiveness and inefficiency in securities regulation, and on seeking a remedy for such a missing link between securities regulation and compliance in American legal society. This Study provides a case-in-point example of this much deeper social problem. The finder's problem also reflects higher-level problems of regulatory accretion and complexity.

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331. *See supra* Subpart II.B and II.C.
332. Orcutt, *supra* note 19, at 904.
333. *See* Dominion Res., Inc., SEC No-Action Letter, *supra* note 175.
334. Borg, *supra* note 50.
335. David Freeman, Jr., State & SRO Jurisdiction & Initiatives, Fundamentals of Broker-Dealer Regulation 2015 Program (June 24, 2015).

Over the past several decades, there has been a growing accretion of complexity in various areas of the securities laws. In the wake of the Second Industrial Revolution, with the boom of mechanization and the transformation of the labor market, followed by World War I and the Great Depression, a major worldwide economic downturn ensued. To restore the public confidence in the securities markets, in the years between 1933 and 1940, Congress enacted the main bodies of the federal securities laws, by which, with further amendments, the regulated entities abide today.[336] This Study's historical analysis of finders' no-action letters over forty-four years echoes a common-sense observation that times have changed and societal platforms have changed, and so has the law.

As of today, the machinery of American securities laws, with all its paraphernalia, has become so complex and numerous that ordinary "machinists," so to speak, run high risks of mis-operation. A great deal of non-compliance has risen and will continue to rise, which is an observation borne out by the scholarly literature,[337] and one which this Study evidences.

Over the last fifty years, scholars widely acknowledge that regulatory complexity has been on the rise due to the growth of government and the need to rein in regulated entities that continuously adapt to new regulation, dancing on the seesaw of the opposing interests of lawmakers and law-abiders; however, most of the scholarly literature has focused on environmental regulation.[338] Much like the ambiguities revolving around many other areas of the securities regulations, a gray area of the laws lies in the finder's broker-dealer exemption under the Exchange Act. The finder's problem might be solved through this Study, but solving the finder's issue will not solve the larger deeper social problem in securities regulation, which will persist.

4. Fitting the Finder's Problems into Society

I believe all of these problems are a reflection of sentiment in society that has been expressed in the past, but not explained thoroughly. As the ABA Task Force summed up humorously but disquietingly, "[m]ost surprising has been the large number of attorneys who have expressed interest in our project and concern over the frequency with which they encounter unregistered finders in their practices in private offering transactions."[339] It is safe to conclude the significance of the finder's issue in the pungent words of the same

336. *Researching the Federal Securities Laws Through the SEC Website*, U.S. SEC. & EXCHANGE COMMISSION, https://www.sec.gov/investor/pubs/securitieslaws.htm (last visited Dec. 23, 2016).

337. *See* J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757, 763 (2003).

338. *See id.* at 782.

339. *ABA Report*, *supra* note 2, at 970.

ABA report: "The highest ranked recommendation was to adopt the number one recommendation of the 2003 Forum—to resolve various issues related to the use of and payment of 'finders' in capital formation transactions."[340]

"On the heels of the Task Force Report, an SEC advisory committee in 2006 strongly endorsed the Task Force recommendation to seek better ways to oversee the largely-invisible world of private placement finders and at the same time to facilitate capital formation by small businesses."[341] Moreover, "Final Reports of the Small [Capital] Business Forum since 2006 have urged the Commission to follow the recommendations of its own Advisory Committee on Smaller Public Companies."[342] Interestingly enough, no definitive solution has yet been struck, despite virtually a decade passing.

B. In Search of Solutions

Solutions to the finder's lawscape problem should be addressed at the problems identified in Subpart IV.A. Hopefully, the solutions proposed in this Study will create the right kind of finders and correct the problem of the finder's lawscape. Of course, prior articles have already put forth proposals for reform. Any solution should build on these prior proposals, which have come in two principal forms—a limited registration and an exemption regime.

The ABA Report on the finder's exemption recommended as follows: "We believe that the SEC, NASD and State Administrators ("Regulators") should work to establish a simplified system for registration for [finders]. This system should recognize that [finders] will be permitted to engage in only very limited activities."[343] Orcutt, however, argued for a special registration regime for finders, allowing them to be exempt from both standard broker-dealer and investment-adviser registration and regulation.[344]

Given that neither solution ever came to fruition, it is evident that any practical solutions to the finder's issue will have to meet the minds of the SEC, which is where all the prior proposals have obviously failed. Clearly, if there can finally be a meeting of the minds with the regulators, then what do they stand to lose by formulating a finder's exemption?

As Wittgenstein urged, it is often helpful to build models by employing case studies: "[A] description of an activity, phenomenon, object, or event in a particular in ordinary life . . . comparing and contrasting of a range of cases."[345] This, in fact, is what this Study

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340. *Id.* at 1015.
341. YADLEY, *supra* note 6, at 5.
342. *Id.*
343. *ABA Report*, *supra* note 2, at 761.
344. *See* Orcutt, *supra* note 19, at 930–31.
345. RICHARD H. POPKIN, THE COLUMBIA HISTORY OF WESTERN PHILOSOPHY 637 (Richard F. Popkin et al. eds., 1998).

does with its historical analysis of finders' no-action letters, which could, in turn, enable the construction of both a compliance theory, and more importantly, a finders safe harbor exemption, which in theory would meet the SEC staff's lenses on very specific contexts and subcontexts of finders' activities, rather than based on generalities in the earlier descriptive studies.

Another observation is that what is driving the SEC staff's tighter reins over the years are concerns about fraud. As Orcutt noted, "[a]n overabundance of fraudulent activities in the angel market would likely cause a chilling effect on rapid-growth start-up investment, as it would worsen, rather than improve, the lemons problem that impacts rapid-growth start-ups."[346] Any solution that meets the minds of the regulators should therefore strike a tolerable rein. That is why this Study does not stop at only clearer finders exemption standards, but seeks tag-along pieces that will rein in fraud.[347]

One might also wonder why now is the time for all of this, and whether change is consistent with the will of the regulators. It should be noted that for issuers alone, the JOBS Act has expanded their ability to solicit in private placements.[348] But the JOBS Act has not done much to help finder intermediaries. It is significant that

> only 13% of Regulation D offerings between 2009 and 2012 reported using a financial intermediary, such as a broker-dealer or finder. There are several explanations as to why this is the case. However, for most start-up and early stage businesses, the primary reasons are the lack of interest from registered broker-dealers and the danger of using unregistered firms that might identify and solicit potential investors for these businesses.[349]

But if an exemption can be created to truly meet the minds of the regulators, then why is now not the time, in light of the positive aspects of finders?[350]

1. Compliance Education

In terms of the short-term perspective, compliance education, based on an assessment of the regulators' minds, would help to bring clarity to the good faith but perplexed finders, and would thus help narrow the chasm between regulators and regulated entities. This is a recognized phenomenon in regulatory scholarship. J.B. Ruhl and James Salzman have noted that "as a means of addressing legitimacy

346. *See* Orcutt, *supra* note 19, at 932.
347. *See infra* Subpart IV.B.3–6.
348. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 201(a), 126 Stat. 306, 313 (2012).
349. YADLEY, *supra* note 6, at 1.
350. *See supra* Subpart I.A.

concerns arising from mounting effort and information burdens, compliance assistance is well worth the investment."[351]

This Study sets forth a comprehensive analysis to cobble together the results of 126 finders' no-action letters across the span of forty-four years (1971–2014) and extracts factual representations for these reliefs individually as well as categorically. So far, this Study is the first of its kind to group nearly every single available no-action letter for finders by the finders' contexts and subcontexts, and provide a computational as well as empirical analysis of what activities are permitted and prohibited within each main- and subcategory, without speaking in too many generalities—as all the other studies essentially did—which would not reflect the fine nuances of the SEC staff.

2. *Clearer Standards*

From the long-term perspective, this Study urges less reliance on the no-action letter system, and in its place, a simplified finders regime. It is possible for the regulators to formulate clear, simple, predictable, and transparent finders standards that are superior to idiosyncratic no-action letters, about what is permissible and impermissible, what is a broker-dealer, and who is exempt. This Study now considers what is so good about these clearer standards. Recall how a considerable number of good, ethical (but cautious) finders are currently scared away from finders activities fearing all this perplexity, thereby creating over-compliance. Simplifying the finder's lawscape should make compliance easier, which should, in turn, help more good finders into the lawscape. That will produce several benefits for society.

First, having more good finders will obviously facilitate securities regulatory goals of capital raising.[352] It could also facilitate investor protection, as the proportion of bad finders shifts toward more good finders, which would nullify any post-Enron anxieties.[353] Good finders should also facilitate regulatory efficiency, as the good guys get put back into the system and, given the array of proposed solutions in this Study, without sacrificing effectiveness, such as producing more bad finders. And of course, all of this will promote the positive aspects of finders, which should narrow the chasm between the dual perspectives of regulators and regulated entities.

This Study just considered good but confused finders who are scared away from the finder's "lawcape." But recall also that there are those good but confused finders, who are not scared away but often are still unable to figure out the finders rules, thereby resulting in inadvertent illegalities, and this time unwanted under-compliance

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351. Ruhl & Salzman, *supra* note 337, at 831.

352. *See What We Do*, *supra* note 15.

353. *See supra* Part III (discussing the hypothesis that the SEC staff became very pro-investor in the immediate aftermath of Enron).

(rather than over-compliance), all of which might very well go undetected.[354] All of this is further evidence of the ineffectiveness of the current finders' regulatory lawscape, beyond mere inefficiencies, as in the case of good but confused finders who over-comply.

For those good but confused finders actually involved in the lawscape, bringing the clarity urged by this Study will mitigate their finders perplexities. This will also produce several benefits for society. Once the good but confused finders understand the law, they will voluntarily bring themselves into better compliance with the law, thereby resulting in fewer illegalities. Again, as this process happens, many of the bad apples should be converted into good ones, thereby achieving regulatory efficiency, as more good finders get involved in the system in the right way. Also, as non-compliant good finders come into compliance, one would expect fewer illegalities, thereby bolstering effectiveness. And of course, all of this will promote the positive aspects of finders, which should narrow the chasm between the dual perspectives of regulators and regulated entities.

One might also point out that in facilitating a better finder's lawscape, any post-financial crisis anxieties about systemic risks would also be put to rest.[355] Of course, virtuality in itself creates even more connections among nodes in society, which could obviously facilitate systemic risk dangers,[356] but all of that also comes with capital benefits. Moreover, any such dangers likely exist now, regardless of the position of the regulators. Having a suboptimal gray finders lawscape does not mitigate systemic risks. Therefore, society has nothing to lose, and everything to gain, from clearer standards and the other solutions advocated in this Study. But how can we achieve these clear standards?

This Study, with its first up-to-date systematic and comprehensive analyses of virtually every available finder's no-action letter relief over more than four decades, offers a detailed framework for the regulators to adjust the finder's safe harbor criteria as befits their views, with careful considerations to the opposing forces between investor protection on the one hand, and capital formation on the other. Thus, this Study hopefully will provide the framework to finally persuade the regulators how the finder's exemption problem can be solved, but without the opposite problem of too little regulation. Obviously, the SEC staff are very wise people, and it is arguably unreasonable (even if on the right track) to attempt to formulate a solution, like in prior proposals, without fully incorporating the probable perspectives of the SEC staff.

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354. *See supra* Subpart IV.A.

355. *See supra* Part III (explaining how the SEC staff possibly became more concerned about systemic risks after the Financial Crisis of 2008).

356. *See* Chertok, *supra* note 303, at 113–14 (explaining how connections matter for assessing systemic risks).

Extrapolating the data categorically based on historical periods, the SEC could cobble together exemptions, as follows, based on what appears to be: (1) the outer limits of broker-dealer activities that the SEC staff permitted, while still granting no-action relief on the finder's issue, and (2) the minimum sufficient for denying no-action relief, each as a general matter, and in special contexts. Below, this Study proposes how this kind of project could potentially be undertaken. Of course, such analysis is exemplary and preliminary, and one would expect that the regulators would need to make their own final tweaks.

a. Finders Acting on Behalf of Broker-Dealers

1980s and Before

	Registered Context[357]	**Unregistered Context**
Outer limits for granting no-action relief	*In general*: TBC + 2 indicia[358] *CPAs*: TBC + 0 indicia[359] *Non-profit context*: TBC + 4 indicia[360]	*In general*: TBC + 1 indicia[361] OR 2 indicia w/o TBC[362] *Storefront information centers*: 4 indicia w/o TBC[363]
Minimum sufficiency for denying no-action relief	Insufficient data	Insufficient data

357. This refers to a finder with an affiliation with either a registered broker-dealer, or registered investment adviser.

358. The relevant outer limits in this context appeared to take place in the service organizations and affinity groups context. See *supra* note 67 and accompanying text.

359. *See supra* note 71 and accompanying text.

360. *See supra* note 98 and accompanying text.

361. The relevant outer limits in this context appeared to take place in the consultants context. *See supra* note 64 and accompanying text.

362. The relevant outer limits in this context appeared to take place in the insurance / real estate agents context. *See supra* note 79 and accompanying text.

363. *See supra* note 94 and accompanying text.

1990s and Later (non-digital related)

	Registered Context[364]	Unregistered Context
Outer limits for granting no-action relief	*In general*: TBC + 0 indicia[365] *Non-profit context*: TBC + 4 indicia[366]	*In general*: No letters on point *Storefront information centers*: 4 indicia w/o TBC[367]
Minimum sufficiency for denying no-action relief	*In general*: TBC + 1 indicia[368]	*In general*: TBC + 0 indicia[369] *CPAs*: 1 indicia w/o TBC[370]

1990s and Later (digital related)

	Registered Context[371]	Unregistered Context
Outer limits for granting no-action relief	Insufficient data	*Broker-to-broker order delivery and messaging systems*: 1 indicia w/o TBC[372] (subject to heavy representations) *Online services*: 3 indicia w/o TBC[373] (subject to heavy representations)
Minimum sufficiency for denying no-action relief	Insufficient data	Insufficient data

364. This refers to a finder with an affiliation with either a registered broker-dealer, or registered investment adviser.

365. The relevant outer limits in this context appeared to take place in the insurance / real estate agents context. *See supra* note 79 and accompanying text.

366. *See supra* note 98 and accompanying text.

367. *See supra* note 94 and accompanying text.

368. The relevant minimum sufficiency for denial in this context appeared to take place in the health insurers context. *See supra* note 92 and accompanying text.

369. The relevant minimum sufficiency for denial in this context appeared to take place in the mortgage banks context. *See supra* note 116 and accompanying text.

370. *See supra* note 71 and accompanying text.

371. This refers to a finder with an affiliation with either a registered broker-dealer, or registered investment adviser.

372. *See supra* note 106 and accompanying text.

373. *See supra* note 110 and accompanying text.

b. Finders Acting on Behalf of Issuers

1980s and Before

	Registered Context[374]	**Unregistered Context**
Outer limits for granting no-action relief	*Business Brokers*: TBC + 3 indicia (with less heavy representations than in unregistered context)[375] *Financial planners*: TBC + 1 indicia[376]	*In general*: TBC + 1 indicia[377] OR 2 indicia w/o TBC[378] *IPOs*: TBC + 0 indicia[379] *Consultants in non-profit context*: TBC + 2 indicia[380] *M&A*: 1 indicia w/o TBC[381] *Non-profits*: TBC + 2 indicia[382] *Storefront information centers*: 3 indicia w/o TBC[383] *Business Brokers*: TBC + 3 indicia (with heavier representations than in registered context)[384] *Trading information*

374. This refers to a finder with an affiliation with either a registered broker-dealer, or registered investment adviser.

375. *See supra* note 206 and accompanying text.

376. *See supra* note 131 and accompanying text.

377. The relevant outer limits in this context appeared to take place in the finders acting on behalf of clients seeking to lend money context. *See supra* note 123 and accompanying text.

378. The relevant outer limits in this context appeared to take place in the issuer officers, directors and GPs, and consultant finders contexts. *See supra* note 153, 161 and accompanying text.

379. *See supra* note 134 and accompanying text. This is the lesson of *Paul Anka*, which possibly seems reversed in *Brumberg*. See also *supra* note 139 and accompanying text.

380. *See supra* note 168, 169 and accompanying text.

381. *See supra* note 194 and accompanying text.

382. *See supra* note 179 and accompanying text.

383. *See supra* note 189 and accompanying text.

384. *See supra* note 206 and accompanying text.

		systems (non-profits): 3 indicia w/o TBC (subject to heavy representations)[385]
Minimum sufficiency for denying no-action relief	Insufficient data	*IPOs*: TBC + 1 indicia[386] OR 2 indicia w/o TBC[387] *Consultants*: TBC + 1 indicia[388] *M&A*: TBC + 1 indicia[389]

1990s and later (non-digital related)

	Registered Context[390]	**Unregistered Context**
Outer limits for granting no-action relief	*Investment advisers*: One indicia[391]	*Consultants*: 2 indicia w/o TBC[392] *IPOs*: TBC + 0 indicia[393] *M&A*: TBC + 1 indicia (when acting on behalf of non-U.S. clients)[394] *Non-profits*: TBC + 2 indicia[395] *Storefront information centers*: 3 indicia w/o TBC[396] *Business Brokers*: TBC + 3 indicia

385. *See supra* note 220 and accompanying text.
386. *See supra* note 134 and accompanying text.
387. *See supra* note 134 and accompanying text.
388. *See supra* note 161 and accompanying text.
389. *See supra* note 194 and accompanying text.
390. This refers to a finder with an affiliation with either a registered broker-dealer, or registered investment adviser.
391. *See supra* note 127 and accompanying text.
392. *See supra* note 161 and accompanying text.
393. *See supra* note 134 and accompanying text.
394. *See supra* note 194 and accompanying text.
395. *See supra* note 179 and accompanying text.
396. *See supra* note 189 and accompanying text.

		(subject to heavy representations)[397]
Minimum sufficiency for denying no-action relief	Insufficient data	*In general*: TBC + 1 indicia[398] *IPOs*: TBC + 0 indicia[399] *Consultants*: TBC + 2 indicia[400] *M&A*: TBC + 1 indicia (outside of the non-U.S. client context)[401]

1990s and later (digital related)

	Registered Context[402]	**Unregistered Context**
Outer limits for granting no-action relief	Insufficient data	*Trading information systems (non-profit website context)*: 3 indicia w/o TBC[403] *Websites without trading (matching buyers and sellers of finders' own securities)*: 1 indicia[404] *Websites without trading (matching buyers with other issuers)*: 3 indicia (with heavy representations)[405] *Websites with trading functions*: TBC + 3

397. *See supra* note 206 and accompanying text.
398. The relevant minimum sufficiency for denial in this context appeared to take place in the finders acting on behalf of clients seek to lend money. *See supra* note 123 and accompanying text.
399. *See supra* note 134 and accompanying text.
400. *See supra* note 161 and accompanying text.
401. *See supra* note 194 and accompanying text.
402. This refers to a finder with an affiliation with either a registered broker-dealer, or registered investment adviser.
403. *See supra* note 220 and accompanying text.
404. *See supra* note 235 and accompanying text.
405. *See supra* note 241 and accompanying text.

		indicia (with heavy letter representations)[406]
Minimum sufficiency for denying no-action relief	Insufficient data	*Websites without trading (matching buyers with other issuers)*: TBC + 0 OR 3 indicia[407] (without heavy representations)

c. Finders Acting on Behalf of Investors

Today and before

	Registered Context[408]	**Unregistered Context**
Outer limits for granting no-action relief	Insufficient data	*Listing services*: 1 indicia w/o TBC[409] *Trading systems*: TBC + 1 indicia (subject to heavy letter representations)[410]
Minimum sufficiency for denying no-action relief	Insufficient data	*In general*: TBC + 1 indicia[411] *Trading* systems: 1 indicia w/o TBC (without heavy letter representations)[412]

3. Disclosure Requirements

For ethical but confused finders, compliance education, combined with clearer, more transparent standards, should solve the problems of the finder's lawscape. But for unethical finders operating in the dark, which is a term for potentially regulated entities operating outside the purview of the regulatory eye, presumably such finders

406. *See supra* note 251 and accompanying text.
407. *See supra* note 246 and accompanying text.
408. This refers to a finder with an affiliation with either a registered broker-dealer, or registered investment adviser.
409. *See supra* note 269, 274 and accompanying text.
410. *See supra* note 279 and accompanying text.
411. The relevant minimum sufficiency for denial in this context appeared to take place in the bond exchange, repurchase transactions and condominium transactions contexts. *See supra* note 262, 264, 266 and accompanying text.
412. *See supra* note 279 and accompanying text.

just do not care, even if they were to know the rules.[413] Once again, we are dealing with an ineffectiveness problem. So how can we solve this ineffectiveness problem? Clearly, any solutions involve getting "bad faith" finders to care about the law. The question becomes, then, what tactics might get them finally to care?

One approach that the regulators should likely consider is pairing simplified clear standards with mandatory disclosure. In analyzing securities disclosure requirements in the public company context under the Exchange Act, Professor Kraakman, et al., ran through three key inquiries: (1) what are the benefits of mandatory disclosure, (2) what are the triggers for such mandatory disclosure, and (3) what exactly should get mandatorily disclosed (scope of disclosure)?[414] By analogy, this same inquiry should apply to the finder's problem at hand.

Thus, the first question is why disclosure would be advantageous for the finder's lawscape. Disclosure, in theory, would force finders out of the dark and put finders on the regulatory radar screen, which would make it easier to detect those bad finders who commit fraud, currently often undetectable as noted by Colby.[415] Then, once these previously unknown bad-faith actors are known to regulators, one would expect that they will be considerably more hesitant to act illegally. Again, as this process happens, a lot of the bad apples should be converted into good ones, which will have similar benefits as just mentioned in the case of good faith but confused finders.[416] All of that should also resound with the SEC goals of investor protection in comparison with the current "vast and pervasive 'gray network,'"[417] all of which, just as with clearer standards, should alleviate post-Enron anxieties and hopefully meet the minds of the regulators. And of course, all of this will still promote the positive aspects of finders, which should narrow the chasm between the dual perspectives of regulators and regulated entities.

If mandatory disclosure is a good idea for finders, the next question is what the triggers should be for mandatory disclosure. The triggers for finders' mandatory disclosure should be very broad, in exchange for their regulatory free pass. Virtually all finders exhibiting any contextual factors,[418] or certainly two or three thereof (the exact number to be determined by the regulators), should be subject to some kind of mandatory disclosure.

However, theory is only theory. One might observe a problem that any mandatory disclosure regime possibly will not work for achieving society's desired ends, meaning that such a regime will not

413. *See* Colby et al., *supra* note 14, §§ 2:1.5, 2:2.7[A].
414. *See* Kraakman, *supra* note 46, §§ 9.2.1.3, 9.2.1.4.
415. Colby, *supra* note 291.
416. *See supra* Subpart IV.B.2.
417. *See ABA Report*, *supra* note 2, at 759.
418. *See supra* Table I.

move finders to seek the light. For example, if clearer standards do not motivate compliance, then why would disclosure requirements do so? If actors are dead set on their bad faith, how can anything motivate them to comply? The answer lies in a combination of sugar and stick motivational tactics, which, based on common sense observation, are the only available strategies for persuading those who do not want to do what one wants.

On the sugar side, as already discussed, those who disclose should be exempt from broker-dealer regulation.[419] Apart from getting an exemption, society can always work toward sweetening the disclosure requirements, which raises the issue of the scope of mandatory disclosure. The starting point of determining the scope is to look for inspiration to what regular broker-dealers are required to disclose when they register as such. Kirsch and Marzouk tell us that for such broker-dealers, there are effectively two centerpieces.[420] First, Form BD must be filed with the SEC.[421] Second, a new membership application must be filed with FINRA.[422]

Here, we might begin by remarking that just as disclosure has clear benefits, sometimes there can be too much of a good thing. Overly cumbersome disclosure might keep finders lurking in the dark and not coming forward to disclose their activities to the regulators. Thus, any scope of mandatory disclosure must be moderate, and such moderation is effectively a form of "sugar."

In order to moderate mandatory disclosure requirements, this Study supports the regulators' embrace of a finder's exemption disclosure document modeled largely on Form BD, once again, hopefully meeting the minds of the regulators, but without the need to file a membership application with FINRA, since exempt finders are not broker-dealers. Form BD contains sufficient information to put the finder on the regulators' radar screen. For example, under Form BD, the finder would have to disclose his identity, where he does business, and any "bad finder" problems.[423]

However, to facilitate this meeting of the minds, this Study recommends adapting Form BD disclosures to the exemption problem at hand. For example, the regulators should also ask finders in what context and subcontext they operate,[424] which contextual factors apply to them,[425] and what "extrapolation pattern" would be the basis

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419. *See supra* Subpart IV.B.2.

420. *See* Kirsch & Marzouk, *supra* note 314.

421. U.S. SEC. & EXCH. COMM'N, FORM BD: UNIFORM APPLICATION FOR BROKER-DEALER REGISTRATION, https://www.sec.gov/about/forms/formbd.pdf (last visited Dec. 23, 2016).

422. *See Filing Membership Applications*, FINRA, http://www.finra.org/industry/filing-membership-applications#NMA (last visited Dec. 23, 2016).

423. *See* U.S. SEC. & EXCH. COMM'N, FORM BD: UNIFORM APPLICATION FOR BROKER-DEALER REGISTRATION, *supra* note 421.

424. *See supra* Subpart II.B.

425. *See supra* Table I.

for their exemption.[426] The regulators might also desire that finders disclose their salesman's stake compensation arrangements. "A consistent theme in the SEC proceedings against unregistered broker-dealers has been the lack of disclosure of compensation paid to such individuals or entities."[427] On the stick side of disclosure requirements, apart from the normal penalties for doing business illegally as a finder,[428] any finder who refuses to disclose should be subject to a minimum of a daily monetary penalties imposed for failing to file the finder's version of Form BD (the exact amount to be determined by the regulators), similar to what is currently provided for failing to make filings under the Exchange Act.[429]

Suppose all of this ensures that finders come out of the dark in large numbers. A final question that remains is whether mandatory disclosure would then successfully constrain bad actors. The answer is probably yes, because once finders no longer linger in the dark, the forces of enforcement become much more significant and powerful, beyond merely soft enforcement mechanisms, such as reputational concern.[430] By analogy to the public company context, Professor Kraakman, et. al., suggest that mandatory disclosure facilitates enforcement in America, noting that "[t]he area of . . . mandatory disclosure in particular, provides numerous examples of . . . enforcement devices . . . namely, private, public, and gatekeeper enforcement."[431]

As far as public enforcement is concerned, once finders are on the regulatory radar screen, regulators will, when needed, bring enforcement actions, since America empirically has many enforcement proceedings compared to other countries. "Looking at public enforcement *staff* relative to population, the UK and the U.S. stand out: These two Anglo-Saxon jurisdictions devote at least three times the staff to public securities enforcement (adjusted for population) as any of our remaining four jurisdictions."[432] Such disclosure requirements should be sharply enforced by the regulators, because it is important in exchange for clearer, more transparent, and potentially lighter regulations for the regulators to know who is acting out in the marketplace.

In America, public regulatory enforcement sharpens private enforcement. "In the U.S., the shareholder class action is one of the

426. *See supra* Subpart IV.B.2.
427. *ABA Report*, *supra* note 2, at 972.
428. *See supra* note 24, accompanying text.
429. 15 U.S.C. § 78ff(b) (2012).
430. Kraakman, *supra* note 46, § 9.3.1 (noting that "[t]he law . . . provides for *informal* private enforcement of investor protections . . . by using mandatory disclosure itself to encourage the reputational sanctioning of publicly-traded firms that fail to reveal material information or deviate from 'best practices' . . . .").
431. *Id.* § 9.3.
432. *Id.* § 9.3.2.

most important mechanisms for enforcing mandatory disclosure requirements, notwithstanding recent legislative efforts to cabin it. Such actions are typically brought by a specialized 'plaintiff's law firm' in the wake of a SEC investigation . . . ."[433] Thus, the right kind of disclosure requirements should successfully first bring finders out of the dark, and then successfully constrain those finders once in the light.

4. Bad Finder Disqualification

If the regulators are worried about giving a regulatory free pass to bad faith actors, any mandatory disclosure requirements could be backed up by "bad finder disqualification." However, just as with disclosure, too strong of a bad-finder barrier would likely be counterproductive, as it might deter finders from coming out of the dark. "Moderation" is once again key.

Any such "bad finder" disqualifications should target actors committing fraud and serious violations, and not non-compliance with prior finders registration rules, in order to encourage finders to come forward into the light. Persistent bad finders should thus be discouraged, but gray actors should be encouraged to start over, thereby bringing about healing in the society on this issue. As the ABA report noted: "Our objective, and hopefully that of Regulators, will be to establish an environment in which at least several hundred entities and individuals will come forward to register either as broker-dealers or as agents of those broker-dealers."[434]

5. Investor Requirements

In other securities regulation contexts, the regulators at times lighten disclosure and other regulatory obligations when the regulated entity deals with very wealthy or sophisticated counterparties, such as in the private placement securities-offering context. For example, in Rule 506 private placements, issuers can achieve an exemption from the public offering regulations, provided that they sell primarily to accredited investors, with a permitted additional number of nonaccredited but sophisticated investors.[435] The term "accredited investor" is defined in Rule 501, which basically means investors who are sufficiently wealthy, measured either by net worth or income.[436] More importantly, under Rule 506, no disclosure is typically needed when marketing to accredited investors, subject only to antifraud prohibitions.[437] Obviously, then, if the regulators were

433. *Id.* § 9.3.1.

434. *ABA Report*, *supra* note 2, at 1008.

435. *See Rule 506 of Regulation D*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/answers/rule506.htm (last visited Nov. 29, 2016).

436. *See* 17 C.F.R. § 230.501 (2013).

437. *See Rule 506 of Regulation D*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/answers/rule506.htm (last visited Nov. 29, 2016).

hesitant, the regulators could add to the finder's exemption either an accredited investor, or sophisticated investor requirement, particularly in the issuer context. On this subject, Orcutt writes:

> One of the most significant concerns about empowering Private Placement Finders under a reduced regulatory regime should be whether their presence exposes potential investors in private capital transactions to undue risk of fraud or abuse by the finders. One way to reduce this concern is to regulate the type of investors that could be exposed to the services of Private Placement Finders. More specifically, the regulatory system should restrict the type of investors who could be "found." If the type of investor that could be found was narrowed to those that are relatively sophisticated and "able to fend for themselves," concerns about potential nonfeasance and malfeasance by Private Placement Finders should diminish since these more sophisticated investors should be able to protect their own financial interests, at least in part, and therefore require less regulatory protection.[438]

Because finder matchmakers do not only deal with purchasers, unlike issuer securities offerings, the regulators might assess whether any accreditation requirements should also apply to sellers with whom finders have business.

6. Anti-Fraud

To avoid under-regulation dangers, finders regulation also needs to focus on reducing market problems such as fraud. That could be done with a strong anti-fraud provision, which tags along the other components of a finder's exemption. For example, analogizing to the Advisers Act, even exempt investment advisers remain subject to the anti-fraud centerpiece of the Advisers Act, Section 206.[439] Apart from an anti-fraud centerpiece, there are also some other possibilities for reducing fraud, such as, per Orcutt, more fiduciary duties, a public database containing information about finders, and accreditation standards.[440] The tag-along components of this Study's proposal, beyond being simply clearer and more transparent, should also help mitigate fraud problems.

7. Evolution

It is critical to point out that an SEC safe harbor exemption should be subject to evolution, as all laws are. As mentioned earlier, continuous feedback will be required for an effective and efficient closed-loop system to thrive on a long-term basis. Notwithstanding

438. Orcutt, *supra* note 19, at 932–33.
439. 15 U.S.C. § 80b-6 (2015).
440. *See* Orcutt, *supra* note 19, at 935–45.

this proposal, there is nothing that should preclude no-action writers from continuing to write to the SEC for no-action relief, if needed.

The SEC for its part should reserve the right to reassess and reevaluate such an exemption on a periodic basis, as well as the right to either expand or narrow the finder's exemption based on additional no-action reliefs, especially as the Digital Age continues to progress and evolve, and future additional eras come into being, all of which might spark off novel finders issues or different perspectives on the finder's exemption.

8. Preemption

One final point is that, even should the federal regulators adopt a finder's exemption, there are no assurances that finders would achieve similar treatment under applicable state law. As already noted, "FINRA tends to follow SEC no-action letters and exemptions; states may or may not."[441] The solution is preemption of applicable state law, but probably reserving to the states anti-fraud powers, to enable the states simultaneously to police fraud. As discussed, the NSMIA preempted certain aspects of state broker-dealer regulation.[442] It is likely, then, that Congress would need to legislate to extend preemption to the finder's exemption.

CONCLUSION

There has been a long-standing cloud of obscurity hanging over the finder's regulatory lawscape, due to the uncertainty about a finder crossing the line into the role of a broker-dealer. This Study's purpose was to (1) compile a whole set of 126 finders' no-action letter reliefs over forty-four years; (2) summarize, categorize and characterize each and every no-action letter relief to extrapolate the nature of the corresponding finder's activities, which have led to a grant or denial of its exemption request; (3) establish a computational approach to quantify the permissible contextual range of categorical finders' activities and to compare the epochal grant/denial ratios between four different decades; (4) formulate hypotheses that correlate the evolutionary regulatory lawscape with the social platforms for finders' finding activities before and after the Digital Age; (5) reveal a possible causal relationship between the changing times and the functional roles of finders, and between the evolving finders and the evolving laws, as maze-like, ambiguous, and impenetrable as the rules would have otherwise been without a temporal and causal analysis such as conducted in this Study; and (6) offer instrumental solutions for solving the problems of the finder's lawscape.

This Study constructed twelve factors that characterize the finder's activities and offered a detailed as well as a panoramic view

441. David Freeman, Jr., *supra* note 335.
442. *See supra* note 27 and accompanying text.

on finders' permissible operating contexts and subcontexts that are exempt from broker-dealer registration. This Study offered an intricate compliance guide for finders and their legal representatives. More importantly, this Study finds strong evidence of the changing SEC staff postures toward the finder's exemption due to the obscurity of the exemptive criteria. Intriguingly, this Study zeroed into the epochal transition of historical no-action letter reliefs and hypothesized the underlying social cause for the evolution of the law, as the wheel of humanity lumbered through momentous eras of our history. It is my inspiration and aspiration to study the polar forces of the regulated and regulatory entities, to reveal the possible chasm between two paramount sectors of our society, and to offer instrumental solutions for restoring their missing link and driving our macrosociety forward, with the optimal equilibrium between freedom and responsibility, and between efficacy and efficiency of our vast legal, economic, and social infrastructure. The solutions proposed to the narrow finder's problem at hand also provide insights into bridging this wider chasm.

In this stagnant time of our economy, the regulators should strive to find the optimal balance between business freedom and regulation and find a middle ground between under-regulation and over-regulation. Over-regulation of finders should present typical over-regulation dangers, considering that "[o]ver-regulation of economic markets acts as a drag on investment and entrepreneurial enterprise"[443] and that "over[-]regulation will suffocate the economy and deepen the crisis."[444]

Only through effective communications between these two sectors of the society can a more prosperous and balanced economy be achieved, *and this* is where the true art of building a flourishing macrosociety lies. Social harmony and a better result will lie in finding a compromise. I believe that regulation works better when a bridge is built across the seemingly impassable chasm of regulators and regulated entities, so as to achieve neither over-regulation, nor under-regulation.

As Socrates taught,

> [t]hat any kind of mixture that does not in some way or other possess measure of the nature of proportion will necessarily corrupt its ingredients and most of all itself. For there would be

443. Rodney A. Smolla, *Reflections on the Rule of Law America's 400th Anniversary at Jamestown — Foreword: Contemplating the Meaning of the "Rule of Law,"* 42 U. RICH. L. REV. 1, 6 (2007).

444. Chelsea P. Ferrette, *The Myth of Investor Protection: The Dodd-Frank Act and the Office of the Investor Advocate*, 12 J. BUS. & SEC. L. 61, 67 (2011).

> no blending in such a case at all but really an unconnected medley, the ruin of whatever happens to be contained in it.[445]

445. PLATO, *Philebus*, in PLATO: COMPLETE WORKS 454 (John M. Cooper ed., 1997).