

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-89074]

June 16, 2020

Order Granting a Temporary Conditional Exemption from the Broker Registration Requirements of Section 15(a) of the Securities Exchange Act of 1934 for Certain Activities of Registered Municipal Advisors

AGENCY: Securities and Exchange Commission.

ACTION: Temporary Exemptive Order.

SUMMARY: The Securities and Exchange Commission (“Commission”) is granting a temporary conditional exemption from broker registration under Section 15 of the Securities Exchange Act of 1934 (“Exchange Act”) for registered municipal advisors to address disruption in the municipal securities markets as a result of the coronavirus disease 2019 (“COVID-19”) pandemic. The temporary conditional exemption permits registered municipal advisors to solicit banks, their wholly-owned subsidiaries that are engaged in commercial lending and financing activities, and credit unions in connection with direct placements of securities issued by their municipal issuer clients, subject to the requirements set forth below.

DATES: This exemptive order is effective from the date of this Order until December 31, 2020.

FOR FURTHER INFORMATION CONTACT: Emily Westerberg Russell, Chief Counsel, Joanne Rutkowski, Assistant Chief Counsel, Kelly Shoop, Special Counsel, or Geeta Dhingra, Special Counsel, at 202-551-5550, in the Division of Trading and Markets; Rebecca Olsen, Director, Adam Wendell, Senior Special Counsel, or Emily Hanson Santana, Attorney Adviser, at 202-551-5680, in the Office of Municipal Securities; Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

I. OVERVIEW

The Commission continues to closely monitor the impacts of the COVID-19 pandemic. The Commission understands that the outbreak has had far-reaching and unanticipated effects, including disruption to the municipal securities market.¹ Municipal issuers have been experiencing COVID-19-related stress, but must continue to operate despite facing increased unbudgeted costs coupled with revenue uncertainty.² Timely and efficient access to the capital markets is critical in order for municipal issuers to continue to meet their operational needs. On June 3, 2020, the Federal Reserve Board announced the revised terms of its Municipal Liquidity Facility, originally established in April 2020 to purchase debt from state and local governments.³ The revised facility will support lending to U.S. states and the District of Columbia, U.S. cities with a population exceeding 250,000 residents, and U.S. counties with a population exceeding 500,000 residents that had an investment grade rating as of April 8, 2020, from at least one credit rating agency that the Federal Reserve has classified as a “major nationally recognized statistical

¹ See, e.g., Heather Gillers and Gunjan Banerji, “How the Muni Market Became the Epicenter of the Liquidity Crisis” Wall Street Journal, April 2, 2020; Lynne Funk, “Virus Leads to Growing, Severe Selling Pressure on Muni Market,” The Bond Buyer, March 18, 2020 and Lynne Funk, “Billions Pulled from Funds as Investors Flee Munis,” The Bond Buyer, March 19, 2020.

² On April 14, 2020, the United States Conference of Mayors (USCM) and the National League of Cities (NLC) released findings of a survey that reported nearly nine in 10 cities expect a budget shortfall due to the impact of the COVID-19 pandemic on their economies. See “Cities Report Pandemic Creating Painful Budget Shortfalls, May Force Furloughs and Layoffs” April 14, 2020 available at <https://www.usmayors.org/2020/04/14/cities-report-pandemic-creating-painful-budget-shortfalls-may-force-furloughs-and-layoffs/> (“USCM and NLC Survey”); Tony Romm, “More than 2,100 U.S. cities brace for budget shortfalls due to coronavirus, survey finds, with many planning cuts and layoffs,” The Washington Post, April 14, 2020. See also National League of Cities – COVID available at <https://www.nlc.org/topics/health-wellness/covid-19> for general information on the impact of COVID on cities and COVID-19 Pandemic County Response Efforts & Priorities available at <https://www.naco.org/covid19> for general information the impact of COVID on counties.

³ See Federal Reserve Board Term Sheet, June 3, 2020 (“Term Sheet”) available at <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200603a1.pdf>. In addition, to ensure that each U.S. state has at least two total cities and counties (on a combined basis) that may participate in the facility, certain U.S. state governors are permitted to designate up to two of the state’s most populous cities and/or counties (on a combined basis) to access the facility, resulting in an additional 34 cities and/or counties that may access the facility as of June 2020. See Term Sheet –Appendix A for details of the allocation.

rating organization.”⁴ In addition to the population and ratings requirements, in order to access the facility, an eligible issuer must also provide a written certification that it is unable to secure adequate credit accommodations from other banking institutions and that it is not insolvent.⁵ Most municipal issuers, including many small cities, towns and villages, facing significant budget shortfalls do not meet the population thresholds and are not eligible to access the facility.⁶ At the same time, municipal issuers have faced challenges accessing the primary market, and as an alternative many municipal issuers have turned to other means of financing, such as private placements, loans, and lines of credit with banks.⁷

⁴ For further information on the cities and counties that meet the population requirement, see Federal Reserve Bank of New York FAQs: Municipal Liquidity Facility and FAQs Appendix A available at <https://www.newyorkfed.org/medialibrary/media/markets/municipal-liquidity-facility-eligible-issuers>. For details of the required ratings criteria, see Federal Reserve Bank of New York FAQs: Municipal Liquidity Facility and FAQs Appendix B available at <https://www.newyorkfed.org/medialibrary/media/markets/municipal-liquidity-facility-pricing>.

⁵ *Id.*

⁶ There are 19,495 incorporated cities, towns, and villages in the U.S. Only 87 have populations above the required 250,000 threshold. See City and Town Population Totals: 2010-2018, available at <https://www.census.gov/data/tables/time-series/demo/popest/2010s-total-cities-and-towns.html>. There are 3,142 counties in the US. Only 140 have populations above the 500,000 required threshold. See County Population Totals 2010-2019, available at <https://www.census.gov/data/tables/time-series/demo/popest/2010s-counties-total.html>. An additional 34 cities and/or counties that do not meet these population thresholds may be “designated” as eligible to access the facility. See Term Sheet –Appendix A; see also USCM and NCL Survey. A total of 2,463 cities, towns and villages provided information to NLC and USCM. 2,191 of the cities are under 50,000 population; 181 are between 50,000 and 199,999; 56 are between 200,000 and 499,999; and 35 have a population of 500,000 and above — a group that includes 19 of the nation’s 20 largest cities. The cities who participated in the survey represent 57% of the nation’s municipal finance sector and 10% of its municipal governments, and their population totals 93,015,252, which is 28% of the total U.S. population. The Government Finance Officers Association also conducted an online survey of finance officers regarding the fiscal impacts of the COVID-19. See “Survey Results Quick Snapshot as of March 23, 2020,” available at <https://www.gfoa.org/early-data-gfoa-survey-shows-substantial-fiscal-impact-governments-covid-19-outbreak-and-response> (“March 2020 GFOA Survey”). Approximately 1,100 finance officers responded, more than half of whom represent smaller jurisdictions. The survey responses indicated that for respondents with operating budgets of \$100 million or less, nearly 15% projected that unanticipated expenses for the next six months could be anywhere from 1 percent to over 30 percent of their operating budget (e.g. for a small government with an operating budget of \$75 million, 1 percent is \$750,000). These unanticipated expenses are expected to be driven largely by staff sick leave, equipment and technology, and staff overtime.

⁷ Lynne Funk, “With Muni Primary in Limbo, Issuers Turn to Private Placements,” *The Bond Buyer*, March 23, 2020 available at <https://www.bondbuyer.com/news/private-placements-on-uptick-as-issuers-search-for-buyers>; Amanda Albright and Danielle Moran “BoFA Gets States That Want to Borrow Now Rather Than Wait on Fed,” *Bloomberg*, April 21, 2020; Robert Slavin, “Alternative Muni Borrowings Have Spiked Since March,” *The Bond*

Municipal issuers often retain registered municipal advisors to provide advice on financing options, including but not limited to the types of financing described above. In order to facilitate more timely and efficient access to bank financing alternatives by municipal issuers during this historic COVID-19-related market disruption, we are issuing this Order granting an emergency, temporary conditional exemption permitting registered municipal advisors to solicit a defined set of banks, wholly-owned subsidiaries of banks, and credit unions in connection with certain direct placements of municipal securities by their municipal issuer clients (the “Temporary Conditional Exemption”).

In October 2019, the Commission proposed and sought public comment on a conditional exemption from the broker registration requirements under Section 15(a)(2) of the Exchange Act for registered municipal advisors engaging in specified activities with respect to direct placements of municipal securities.⁸ While the Commission is not moving forward with the proposed exemption at this time, it believes that it is important to issue the Temporary Conditional Exemption with the parameters and requirements specified to address the exigent circumstances during this unprecedented time. Specifically, the Temporary Conditional Exemption is designed to aid smaller municipal issuers that may be struggling to meet their unexpected financing needs in light of the COVID-19 pandemic. This Temporary Conditional Exemption will provide additional flexibility for registered municipal advisors to assist their municipal issuer clients in more efficiently obtaining financing during this market disruption in a way that remains consistent with investor protection. To the extent market participants have

Buyer, May 19, 2020 *available at* <https://www.bondbuyer.com/news/alternative-municipal-borrowings-have-spiked-since-mid-march>.

⁸ See Proposed Exemptive Order Granting a Conditional Exemption From the Broker Registration Requirements of Section 15(a) of the Securities Exchange Act of 1934 for Certain Activities of Registered Municipal Advisors, Release No. 34-87204 (Oct. 2, 2019), 84 FR 54062 (Oct. 9, 2019) (“Proposed Exemption”). Comments on the Proposed Exemption are available at <https://www.sec.gov/comments/s7-16-19/s71619.htm>.

information or views related to the Proposed Exemption, including in light of actions taken pursuant to the Temporary Conditional Exemption, that information can be submitted to the comment file for the Proposed Exemption for the Commission's consideration.

The Temporary Conditional Exemption is subject to a number of conditions designed to protect investors. The Temporary Conditional Exemption requires that the Registered Municipal Advisor obtain written representations from the Qualified Provider, which limits the potential investor base for direct placements issued pursuant to the Temporary Conditional Exemption to institutions that routinely engage in credit risk analysis (and typically do so consistent with their commercial lending practices and regulatory obligations) and typically do not resell such securities to retail investors. The Temporary Conditional Exemption requires that the Registered Municipal Advisor make written representations, which protect potential investors by putting them on notice of what duties and obligations the municipal advisor will undertake in connection with the transaction. It also requires the Registered Municipal Advisor to obtain written representations from the Qualified Provider(s) regarding the Temporary Conditional Exemption's investor eligibility and transfer restriction conditions. The Temporary Conditional Exemption further requires Registered Municipal Advisors to notify the Commission staff of any instances of reliance on the exemption, which will inform the Commission about how the exemption may affect the municipal securities market.

The solicitation activities permitted under the Temporary Conditional Exemption, as discussed below, would be in addition to the core advisory activities in which a registered municipal advisor might otherwise engage under the existing regulatory regime. These core advisory activities include assisting municipal entities and/or obligated person clients in: (i) developing a financing plan; (ii) assisting in evaluating different financing options and

structures; (iii) assisting in selecting other parties to the financing, such as bond counsel; (iv) coordinating the rating process, if applicable; (v) ensuring adequate disclosure; and/or (vi) evaluating and negotiating the financing terms with other parties to the financing, including the provider of the direct placement.⁹

II. TEMPORARY CONDITIONAL EXEMPTION FROM BROKER REGISTRATION FOR CERTAIN ACTIVITIES OF REGISTERED MUNICIPAL ADVISORS IN CONNECTION WITH DIRECT PLACEMENTS OF MUNICIPAL SECURITIES

It is ORDERED, pursuant to Sections 15(a)(2) and 36(a)(1) of the Exchange Act, that:

During the Exemption Period as defined in Section III below, a Registered Municipal Advisor may (1) engage in Permitted Activities—i.e., solicitation—of one or more Qualified Providers in connection with a potential Direct Placement of municipal securities by its Municipal Issuer client and (2) receive transaction-based compensation for services provided in connection with that Direct Placement, without being required to register as a broker under Section 15(a) of the Exchange Act, so long as all of the conditions in this Order are met.

Definitions

For purposes of this Temporary Conditional Exemption:

- *Registered Municipal Advisor* means a municipal advisor registered with the Commission under Section 15B of the Exchange Act.
- *Municipal Issuer* means either a municipal entity or obligated person as defined in the Exchange Act.¹⁰

⁹ See *Registration of Municipal Advisors*, Exchange Act Rel. No. 70462 (Sept. 30, 2013), 78 FR 67468, 67472.

¹⁰ See Exchange Act Section 15B(e)(8) (defining “municipal entity” as “any State, political subdivision of a State, or municipal corporate instrumentality of a State, including (A) any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality; (B) any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency,

- *Qualified Provider* means (i) a bank as defined in Section 3(a)(6) of the Exchange Act; (ii) a wholly-owned subsidiary of a bank engaged in commercial lending and financing activities, such as an equipment lease financing corporation; or (iii) a federally- or state-chartered credit union.¹¹
- *Direct Placement* means a direct purchase from a Municipal Issuer of municipal securities by one or more Qualified Providers.
- *Permitted Activities* means solicitation activities to identify and assess potential Qualified Providers based upon, among other things, the Municipal Issuer’s or Registered Municipal Advisor’s prior knowledge and experience, the use of publicly-available information sources, or identification of Qualified Providers through broader solicitation activities.

Required Representations. The Registered Municipal Advisor must obtain written representations from the Qualified Provider(s) that the Qualified Provider:

authority, or instrumentality thereof; and (C) any other issuer of municipal securities.”). 15 U.S.C. 78o-4(e)(8); *see also* 17 CFR 240.15Ba1-1(g). *See also* Exchange Act 15B(e)(10) (defining “obligated person” as “any person, including an issuer of municipal securities, who is either generally or through an enterprise, fund, or account of such person, committed by contract or other arrangement to support the payment of all or part of the obligations on the municipal securities to be sold in an offering of municipal securities.” 15 U.S.C. 78o-4(e)(10). Exchange Act Rule 15Ba1-1(k) generally provides that obligated person has the same meaning as in Exchange Act Section 15B(e)(10), “provided, however, the term obligated person shall not include: (1) A person who provides municipal bond insurance, letters of credit, or other liquidity facilities; (2) a person whose financial information or operating data is not material to a municipal securities offering, without reference to any municipal bond insurance, letter of credit, liquidity facility, or other credit enhancement; or (3) the federal government.” 17 CFR 240.15Ba1-1(k). Obligated persons can include entities acting as conduit borrowers, such as private universities, non-profit hospitals, and private corporations. *See* Municipal Advisor Adopting Release, 78 FR at 67483 n. 200 (Nov. 12, 2013).

¹¹ The Commission believes these institutions typically perform their own credit evaluations of the municipal issuer consistent with their commercial lending practices and regulatory obligations and therefore likely are in less need of a placement agent to undertake the due diligence activities on their behalf. The Commission notes that federal credit unions are already expressly permitted pursuant to National Credit Union Administration regulations to purchase municipal securities so long as they undertake a required analysis. *See, e.g.*, 14 U.S.C. 1752(1) (defining federal credit union as, among other things, an association “creating a source of credit for provident or productive purposes”); 12 CFR 703.14(e) (permitting a federal credit union to purchase municipal securities so long as it performs an analysis and “reasonably concludes the security is at least investment grade”).

- Is a Qualified Provider as defined in the Temporary Conditional Exemption;
- Is capable of independently evaluating the investment risks of the transaction;
- Is not purchasing with a view to distributing the securities;¹² and
- Will not transfer any portion of the direct placement within one year of the date of issuance of the securities, except to another Qualified Provider(s).

These required representations are designed to help ensure a Registered Municipal Advisor acting in reliance on this Temporary Conditional Exemption is soliciting only eligible Qualified Providers. They also are intended to help minimize the potential for resale to retail investors of direct placements, which the Commission understands may not be rated and are not required to have disclosure documents.¹³

The Registered Municipal Advisor must also make a written representation to, and obtain a written acknowledgment of receipt from, the Qualified Provider(s) that the Registered Municipal Advisor:

- Represents solely the interests of the Municipal Issuer and not the Qualified Provider;
- Is soliciting the Qualified Provider in connection with the direct placement pursuant to the Commission’s Temporary Conditional Exemption;
- Has not conducted due diligence on behalf of the Qualified Provider;

¹² These restrictions, which apply to the Qualified Provider, are consistent with the restrictions applicable to broker-dealers with respect to the limited offering exemption in Exchange Act Rule 15c2-12 regarding Municipal Securities Disclosure. *See* 17 CFR 240.15c2-12(d)(1)(i).

¹³ In contrast to direct placements, which are not subject to Exchange Act Rule 15c2-12’s requirements, a participating underwriter in a primary offering of municipal securities subject to Rule 15c2-12 must obtain and review a “deemed final” official statement and a final official statement prepared by an issuer or its representatives. *See* 17 CFR 240.15c2-12(b)(1) and (3) and (f)(3).

- Has not, as of the date of the written representation, engaged, nor has the Municipal Issuer engaged, a broker-dealer as a placement agent in connection with the direct placement; and
- Acknowledges that the Qualified Provider nonetheless may choose to engage the services of a broker-dealer to represent the Qualified Provider's interests.

These required representations are designed to help avoid any confusion by the Qualified Provider concerning the role of the Registered Municipal Advisor in the transaction, and further to make explicit that a Qualified Provider is in no way restricted from engaging the services of a broker-dealer as intermediary in the transaction, if it chooses to do so.

Other Required Terms and Conditions

- *Restricted Scope of Temporary Conditional Exemption:* A Registered Municipal Advisor cannot rely on this Temporary Conditional Exemption to engage in broker activity relating to municipal securities offerings beyond the scope of this Order. For example, this exemption does not apply with respect to public offerings of municipal securities or the sale of securities to a retail investor. Additionally, a Registered Municipal Advisor seeking to rely on this Temporary Conditional Exemption cannot bind the Municipal Issuer, or handle funds or securities, in connection with the subject Direct Placement. The Permitted Activities have been narrowly drawn to address the needs of municipal issuers that may be struggling to meet their unexpected financing needs. These restrictions are intended to provide further protections by limiting the scope of brokerage activities permitted by this order.
- *Size Limit:* The aggregate principal amount of the Direct Placement may not exceed \$20 million. This is consistent with the Commission's intended objective of facilitating

access to capital for smaller Municipal Issuers that may be ineligible for the Federal Reserve's Municipal Liquidity Facility.¹⁴

- *Authorized Denomination Requirement:* The Direct Placement must be issued in authorized denominations of \$100,000 or more. This floor on denomination size is designed to diminish the likelihood of a secondary market resale of these direct placements, particularly to retail investors, because these direct placements may not be rated and are not required to have disclosure documents.¹⁵
- *Restriction on Transferability:* If the Qualified Provider(s) transfers all or any portion of the direct placement within one year of the date of issuance of the direct placement, the Qualified Provider(s) may transfer the securities only to another Qualified Provider(s). This condition, along with the Authorized Denomination Requirement, is designed to discourage secondary market resale of direct placements, particularly to retail investors, for the same reasons stated above.
- *Recordkeeping:* A Registered Municipal Advisor seeking to rely on the Temporary Conditional Exemption must make and keep the records required by Exchange Act Rule 15Ba1-8(a)(1).
- *Notification Requirement:* A Registered Municipal Advisor seeking to rely on the Temporary Conditional Exemption must notify staff in the Division of Trading and Markets of any Direct Placement for which it has relied on the Temporary Conditional

¹⁴ See, e.g., *supra* n. 6. The March 2020 GFOA Study states that of the subgroup of respondents with an operating budget of less than \$100 million, over 15 percent of those smaller governments anticipate issuing debt for projects in amounts ranging from 10 percent to nearly 50 percent of their operating budgets. See *id.* The Commission believes that, in light of these responses, a size limit of \$20 million would be sufficiently large to permit these smaller jurisdictions to address their liquidity needs through the use of direct placements if they choose to do so.

¹⁵ See *supra* note 13.

Exemption no later than 30 calendar days after the sale of securities in the Direct Placement. The notification must identify: 1) the Municipal Issuer; 2) the date of the Direct Placement; 3) principal amount of the Direct Placement; 4) the Qualified Provider(s); and 5) the CUSIP, if available. Notification should be made by sending this information in an email to Commission staff at tradingandmarkets@sec.gov.

III. TIME PERIOD FOR THE TEMPORARY CONDITIONAL EXEMPTION

The relief provided by this Temporary Conditional Exemption begins on the date of this Order and will expire on December 31, 2020.

The Commission intends to continue to monitor the situation as it develops. The Temporary Conditional Exemption may be modified as appropriate.

IV. CONCLUSION

In light of the current and potential ongoing effects of COVID-19 on the municipal securities market discussed above, the Commission finds that the Temporary Conditional Exemption set forth above is consistent with the public interest and the protection of investors and is necessary or appropriate in the public interest, consistent with Sections 15(a) (2) and 36(a)(1) of the Exchange Act.

By the Commission.

Vanessa A. Countryman
Secretary