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December 9, 2019

Submitted Electronically

Ms. Vanessa Countryman, Secretary
US Securities and Exchange Commission
100 F St NE
Washington DC 20549

In regard to File No. S7-16-19

Dear Ms. Countryman,

The Bond Dealers of America (BDA) is pleased to have the opportunity to provide comments in response to the Securities and Exchange Commission's ("SEC" or the "Commission") "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" (File No. S7-16-19, the "Proposal").[1] BDA is the only DC-based group exclusively representing the interests of securities dealers and banks focused on the US fixed income markets.

The issue of exemptive relief for Municipal Advisors ("MAs") raises foundational issues in securities regulation such as investor protection and fiduciary duty. The SEC has proposed to permit MAs "to solicit specified institutional investors in connection with the direct placement of municipal securities without registering as a broker under Section 15 of the Exchange Act, where certain conditions are met." BDA is opposed to the Proposal because it would allow MAs to conduct activities which in statute and regulation are reserved for broker-dealers ("BDs"). The Proposal is a very dangerous shift in public policy because it would exempt relevant transactions from nearly the entire extensive investor protection regime that has been refined in statute and regulation for 80 years. It would grant authority to MAs to conduct activity for which they would not be registered or examined and for which MA professionals have not been qualification tested. MAs would bear practically no duties to investors they have solicited including due diligence responsibilities, institutional investor suitability, and various other investor protection rules.

BDA opposes the Proposal for reasons we outline here and those which we described in our previous communications to the Commission and its staff regarding this matter, each of which is

[1] Securities and Exchange Commission, "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, *Federal Register*, Vol. 84, No. 196, October 9, 2019, page 54026.

attached to this letter for consideration by the Commission in connection with the Proposal.[2] In addition, in our letter to the Commission dated September 25, 2019 (the "September 2019 Letter"), we outlined a narrowly tailored approach to exemptive relief for MAs' service on private placement transactions that we believe would avoid the most dangerous aspects of the Proposal. Our suggested relief focuses on direct bank placements and is intended to assist municipal issuers whose transactions closely resemble bank loans. We urge the Commission to withdraw the Proposal or refocus it on a more narrowly refined approach to the issue as we have recommended. Below are key points related to the Proposal.

Municipal private placements and bank loans.

As the release accompanying the Proposal recognizes, "Since 2009, municipal entities have increasingly relied on direct placements, that is, direct purchases of municipal securities and direct loans from banks and other lenders, as an alternative to public offerings of municipal securities. The demand for these direct placements has grown substantially over the past several years, as the involvement of commercial banks in the municipal capital markets has increased in terms of both purchases of municipal securities and extensions of loans to state and local governments and their instrumentalities."[3] This trend has been driven by two factors. First, banks have offered borrowing terms for short to medium-term placements that are as attractive or better than execution in the public markets. Second, executing a private placement with a bank means the issuer can avoid the expense of primary and continuing disclosures associated with a public deal.

Most investment-grade municipal private placements are entirely placed with one or a small group of commercial banks. From the banks' perspective, these transactions closely resemble loans. Operationally, many banks treat municipal private placement transactions as loans. They require financial disclosures and documentation similar to commercial borrowers. They exercise a credit review process similar to commercial lending transactions. And they generally maintain municipal private placement assets in their loan or investment portfolios, not their trading portfolios.

At the same time, most state and local borrowers are by statute able to incur debt only in the form of a debt security, so bank loans are typically not an authorized form of indebtedness. Often the bank's perspective is that the transaction is a loan for bank regulatory purposes and does not constitute a security. If a transaction falls under the definition of a loan, SEC and MSRB rules

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[2] See letters from Michael Nicholas, BDA to Brett Redfearn, Joanne Rutkowski, and Rebecca Olsen, SEC, Appendix A June 28, 2019, Appendix B September 9, 2019 and Appendix C September 25, 2019. We ask that these letters be included as part of the record for File No. S7-16-19.

[3] While it is true that bank placements have become an increasingly important source of financing for states and localities, that trend may be reversing. In its most recent release of *Financial Accounts of the United States*, the Federal Reserve cited a drop in bank holdings of municipal securities and loans from $573 billion at the end of 2017 to $499 billion at the end of 2018, the first reduction since before the financial crisis. That figure has fallen by another $10 billion in the first six months of 2019. See Board of Governors of the Federal Reserve, *Financial Accounts of the United States*, Second Quarter 2019, page 121. This trend reversal is likely due to a reduction in the federal corporate income tax rate applicable to banks which took effect in 2018 and which discouraged bank investment in tax-exempt assets.

governing the activities of MAs and BDs do not apply. If the transaction is a security, all SEC and MSRB rules apply.

BDs and MAs play distinct roles in municipal financing transactions. Bond issuers and investors have conflicting interests in a new issue pricing. The investor is seeking the highest possible yield, and the issuer is seeking the lowest possible cost of capital. BD regulation is designed to balance those competing interests while also imposing rules on the BD that require it to serve a gatekeeping function that protects investors. BDs have regulatory obligations to both issuers and investors in a new issue sale. MAs on the other hand are fiduciaries and bear duties of loyalty and care only to their issuer clients. They bear no regulatory obligations to investors other than to deal fairly and not commit fraud. This distinction in roles between BDs and MAs is at the heart of why the Proposal should be rejected.

Exempting transactions that closely resemble bank loans from securities regulation may be acceptable under limited circumstances. Unfortunately, that is not the approach the SEC has proposed to take with the Proposal. Rather than focusing on a narrow universe of transactions that resemble loans, the Proposal would permit MAs to solicit nearly any institutional investor in nearly any municipal private placement. The Proposal should be withdrawn or its scope narrowed so that it applies only to transactions that are very similar to loans.

The SEC has provided no support or justification for why the Proposal is necessary, and the Proposal would provide no apparent benefit to issuers or investors.

The SEC has provided no policy justification for the Proposal. It is unclear on what basis the SEC would find that the proposed exemption is “consistent with” or “necessary or appropriate in” the public interest and the protection of investors, findings that are required in order to adopt an exemption pursuant to Section 15(a)(2) and Section 36 of the Exchange Act. The SEC also has not identified what problem it is attempting to solve with the Proposal. The municipal private placement market works well under current rules. In the last five years municipal issuers reportedly have sold $124 billion of privately placed new issues, nearly all placed by BD placement agents or, in limited circumstances, issuers themselves.[4] Regulatory limitations on the activities of MAs are not preventing municipal issuers from accessing the private placement market efficiently.[5]

Moreover, neither the SEC nor stakeholder advocates for the Proposal have provided any evidence how the Proposal would benefit any issuer or investor in any way. No one has claimed that issuers would experience lower costs, better transaction execution, quicker time to market, or any other benefit. Neither the SEC nor stakeholder advocates have provided evidence that the Proposal would benefit issuers, investors, or any market participants other than non-dealer MAs.

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[4] *The Bond Buyer*, “Municipal Market Statistics — A Decade of Municipal Bond Finance,” www.bondbuyer.com/broker/bond-buyer-data.

[5] BDA has consistently heard many anecdotal instances of MAs soliciting investors for private placements under current rules, even though SEC rules clearly prohibit such activity. We urge the SEC’s Office of Compliance, Inspections, and Examinations in its periodic examinations of non-dealer MAs to focus efforts on ensuring that MAs are not encroaching into areas of prohibited activity.

The Proposal's breadth will create new incentives to move a significant portion of the public municipal securities market into the private placement market and create a transactional environment where investors will receive far less protections than they receive in the public market.

The breadth of the Proposal affords municipal advisors the ability and incentive to redirect a significant portion of the publicly offered transactions to private placement transactions. The Proposal would broadly define Qualified Provider ("QP") to include many traditional investors in public offerings, such as institutional bond funds and Registered Investment Advisers ("RIAs"). The Proposal imposes no restrictions or limitations whatsoever on secondary market transfers of placed municipal securities. Furthermore, there is no definition of "entire issuance," which would allow MA to break up one large transaction into several smaller transactions to meet the Proposal's requirements. For example, a MA could argue that each maturity of a serial bond was an "entire issuance" and could be placed with separate investors.

We note that the Commission included in the definition of QP RIAs, who are not even now significant participants in the private placement market. Not even the MA advocates for exemptive relief ever asked that RIAs be included in their requested guidance. The Proposal paves the way for MAs to solicit dozens of institutional bond funds and RIAs to purchase an "entire issuance" of municipal securities—which then could be purchased and resold at will by the QP. As transactions not involving a dealer, these transactions would not be subject to Rule 15c2-12, would require no primary offering disclosure, and would contain no required periodic updating of disclosure under a continuing disclosure undertaking.

Furthermore, the Proposal contains no restrictions or boundaries that would prevent the distribution of any such securities to retail investors (on whose behalf RIAs could be purchasing, or to whom QPs could resell). Accordingly, the Proposal would incentivize MAs, institutional bond funds, and RIAs to redirect a significant portion of the publicly offered market to private placements where the municipal securities will be removed from the many investor protections that have been established through Rule 15c2-12, SEC enforcement activities surrounding due diligence responsibilities of dealers, and fair pricing rules.

In particular, the inclusion of RIAs within the definition of QP is likely to create a fundamental policy shift. The Proposal would not impose any requirement that RIAs purchase new issues for their own account or for the accounts of other QPs in order to qualify for the definition of QP. This would allow a new kind of market to emerge for municipal securities where RIAs would be permitted to purchase "entire issuances" of municipal securities for the accounts of retail investors and then sell them directly into the municipal securities market, or to other ultimate retail investors. Thus, the Proposal goes much further than merely providing for a narrow exemption with respect to an existing private placement market. Instead, the Proposal would create a significant loophole that would allow the private placement market to greatly expand without the crucial investor protections in place in the public market. This is not likely the result the Commission intends.

The definition of Qualified Provider is much too broad.

As noted above, the Commission has proposed a scope of activities for MAs which are too broad and expansive and encroach too far into what has been clearly defined BD activity. As we stated in our September 2019 letter, there may be limited circumstances where a MA soliciting a restricted number of commercial banks would not threaten the SEC's long-standing investor protection regime. The Proposal, however, would permit MAs without registering as BDs to solicit (i) a bank, savings and loan association, insurance company, or registered investment company; or (ii) an investment adviser registered with the Commission or with a state; or (iii) any other institution with total assets of at least $50 million. Together, these categories of investors comprise virtually the entire institutional municipal securities market. There is practically no restriction on the category or number of institutional investors MAs could solicit for municipal private placements.

The SEC notes in the Proposal that the definition of QP nearly matches the MSRB's definition of Institutional Investor and the MSRB's definition of Sophisticated Municipal Market Participant ("SMMP").[6] However, MSRB rules impose obligations on dealers with respect to determining the SMMP status of investors. MSRB Rule D-15 requires that dealers "have a reasonable basis to believe that the [SMMP] customer is capable of evaluating investment risks and market value independently, both in general and with regard to particular transactions and investment strategies in municipal securities." Dealer compliance with Rule D-15 requires active steps, including obtaining a signed certificate from the customer. It is not clear that a similar requirement would apply to non-dealer MAs conducting solicitations, or on what basis would non-dealer MAs make that determination. The SEC should at least withhold finalizing the Proposal until the MSRB can conform Rule D-15 to ensure that the SMMP obligations of underwriters and dealers also apply to non-dealer advisors who solicit investors.

MAs have insufficient regulatory duties to investors to ensure investors are protected.

The SEC states that the Proposal would "limit the universe of Qualified Providers to entities that otherwise would be 'institutional investors' for purposes of FINRA rules or 'sophisticated municipal market professionals' (other than natural persons) under MSRB rules, a status that is equated with a certain level of investor sophistication."[7] While it is true that institutional investors are in general more sophisticated than retail, the vast majority of MSRB and FINRA apply to dealers soliciting investors in private placements regardless of whether they are institutional accounts or SMMPs.

Moreover, BDs are required to maintain minimum levels of regulatory capital and fidelity bonds. MAs have no requirement to hold capital or to maintain liability insurance or any type of indemnification. While capital is not as relevant on a transactional basis in a placement as opposed to an underwriting, it is important in a broader sense. Capital serves as a backstop for BD liability in a transaction that goes sour after issuance. The need to protect capital creates incentives for BDs to ensure that deals are sound. No such incentive exists for non-dealer MAs.

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[6] SEC, page 54066.

[7] SEC, page 54065.

If the Proposal is adopted as proposed and MAs are permitted to solicit nearly any institutional investors in municipal private placements, the following investor protection provisions that otherwise apply to BD placement agents would not apply to MA investor solicitations:

- Suitability and "Know Your Customer" duties to ensure that investments are suitable for investors;
- Due diligence duties to ensure that dealers reasonably investigate information provided to investors;
- Sales practice duties that ensure that dealers interact with investors in a fair and transparent manner;
- Communication standards that ensure that dealers deliver appropriate communications to investors;
- Fair commission and pricing standards that ensure that dealers charge appropriate compensation and undertake reasonable efforts to ensure the fairness of pricing of transactions; and
- Dealer-specific antifraud and disclosure standards.

The Proposal implies that the SEC views these institutional investor protections as not necessary in a municipal private placement, but the SEC, FINRA and the MSRB found them appropriate for registered broker-dealers. Presumably, the SEC would not propose to exempt registered broker-dealers from these requirements when they undertake municipal private placements to Qualified Providers. It is not clear why these investor protections are necessary when dealing with broker-dealers, but not with MAs.

With regard to suitability, the institutional account exemption to the FINRA and MSRB suitability rules only relieves a BD of conducting customer-specific suitability. A BD still has "reasonable-basis" suitability obligations, even for sales to institutional accounts. In that case, the BD still "must have a reasonable basis to believe, based on reasonable diligence, that the recommendation is suitable for at least some investors."[8] As a result, even for sales to institutions, BDs still have an obligation to perform due diligence on the security being sold, an obligation which MAs would not have under the Proposal.[9] The Proposal does not provide conditions to ensure that Qualified Providers would have the ability to evaluate the municipal private placements they were being offered.

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[8] MSRB Rule G-19.05; MSRB Notice 2012-27, Securities and Exchange Commission Approves Revised MSRB Definition of Sophisticated Municipal Market Professional (July 14, 2009) ("Under Rule G-19, in the case of a recommended transaction, a dealer must have a reasonable basis for recommending a particular security ("reasonable-basis suitability"), as well as reasonable grounds for believing the recommendation is suitable for the customer to whom it is made, based upon information available from the issuer of the security or otherwise and based upon the facts disclosed by the customer or otherwise known about the customer ("customer-specific suitability") … [W]hen a dealer has reasonable grounds for concluding that an institutional customer is an SMMP, the dealer's customer-specific suitability obligation is fulfilled.").

[9] See FINRA, Regulatory Notice 11-02, "SEC Approves Consolidated FINRA Rules Governing Know-Your-Customer and Suitability Obligations," which states "In regard to an institutional investor, a firm that satisfies the conditions of the exemption fulfils its customer-specific obligation, but not its reasonable-basis and quantitative obligations under the suitability rule. FINRA believes that, even when institutional customers are involved, it is crucial that

The Proposal contemplates that QPs are capable of evaluating the creditworthiness of a Municipal Issuer and the terms of the offering. If so, those investors would also be capable of evaluating publicly offered transactions on the same terms—and yet the exemption is limited to private placements involving MAs. It is not clear why investor protection rules such as dealer due diligence and institutional suitability are important for these categories of investors for publicly offered transactions or for private deals involving a dealer placement agent but not for private deals placed by non-dealer MAs. As noted above, there appears to be no policy reason to apply these investor protections when a B-D solicits investors in municipal private placements, but not when the same activity is performed by an MA.

Fair dealing requirements applicable to MAs under MSRB Rule G-17 are not sufficient to mitigate the loss of investor protections. The SEC states in the Proposal that "like brokers, registered municipal advisors have an obligation to deal fairly with all persons—which, as relevant here, includes any potential Qualified Providers."[10] This position ignores the detailed, explicit, obligations that the SEC, FINRA, and the MSRB place on BDs beyond simply the duty to deal fairly. Unlike as applied to BDs, there is no body of MSRB guidance and interpretations as to what the application of Rule G-17 to non-dealer MA investor solicitations would require of MAs subject to the Rule. If adopted, the SEC should require that the MSRB clarify that all its interpretive guidance under Rule G-17 that applies to underwriters and placement agents also applies to non-dealer MAs soliciting investors. Separately from Rule G-17, dealer placement agents are required under MSRB rules to obtain CUSIP numbers for securities they place and to pay MSRB fees related to their placement agent activity. Those obligations would not apply to non-dealer MAs engaging in solicitation and placement activity.

In addition, the Proposal states "a registered municipal advisor seeking to rely on this proposed exemption could not bind the Municipal Issuer client, or handle funds or securities in connection with the direct placement. The Commission preliminarily believes that these types of activities would implicate the policies underlying the broker regulatory framework."[11] If MAs are prohibited from engaging in those activities, it is not clear would perform those functions where a non-dealer MA was conducting the placement. An issuer may still need to hire a dealer placement agent to conduct those activities. Only dealer members of the Depository Trust Company ("DTC") can establish securities in the DTC's clearing and settlement system. Similarly, BDs are subject to a panoply of anti-money laundering ("AML") statutes and rules.[12] If the SEC permits MAs to place securities with investors without also amending MSRB Rule G-41 to require MAs to implement an AML program, municipal placements could provide a gateway for allowing those with criminal intent to infiltrate the financial system anonymously, as they would not be required to comply with rules designed to obtain beneficial ownership information from investors at account opening. If

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brokers understand the securities they recommend and that those securities are appropriate for at least some investors."

[10] SEC, page 54066.

[11] *Ibid*.

[12] See SEC, "Anti-Money Laundering (AML) Source Tool for Broker-Dealers," www.sec.gov/about/offices/ocie/amlsourcetool.htm.

these regulations are important for BD placement agents conducting private placements, they should also be important for MAs performing identical functions.

FINRA rules explicitly recognize and account for entities not unlike MAs which provide a limited scope of securities-related services. FINRA registrants include Capital Acquisition Brokers ("CABs") as a distinct category of BD. CABs are BDs whose activity is limited to advising companies (including private funds) on capital raising and corporate restructuring and acting as placement agents for sales of unregistered securities to institutional investors under limited conditions. Rather than entirely exempting CABs from any regulation beyond vague "fair dealing," FINRA has published a distinct, streamlined rulebook for CABs which reflects their specific role in the market and adapts FINRA rules to CABs' business model.[13] If the SEC moves forward with the Proposal, the SEC and MSRB should consider establishing a separate category of Municipal Securities Dealer that could incorporate a regulatory structure similar to CABs. MAs seeking to enter the business of soliciting investors for private placements would also register as CAB-like Municipal Securities Dealers and be subject to appropriate dealer rules.

The Proposal does not include sufficient restrictions on MAs' solicitation of investors.

If the SEC moves forward with the Proposal in some form, we urge it to limit the types and scope of solicitations that MAs could undertake. Specifically, the Proposal would not restrict MA solicitations with regard to the following.

Secondary market — The proposal places no restriction on whether the securities being issued may be resold in the secondary market. Even if one accepts that QPs do not need any protections, the investor protections that come from the involvement of a regulated broker-dealer flow to secondary market investors as well, given the diligence and disclosure obligations that brokers have.

Obligated persons — The proposal would apply to issuances by obligated persons, rather than just municipal entities, even though MAs do not have a fiduciary duty to obligated persons. Some stakeholder advocates of exemptive relief similar to that in the Proposal have erroneously argued that such relief is necessary for MAs to serve as fiduciaries to their municipal entity clients.[14] MAs, however, do not have the same fiduciary obligation to obligated persons—conduit borrowers—that they do to municipal entities. So although it is not correct that soliciting investors is necessary to fulfill a MA's fiduciary duty, even if it were correct, MAs do not have the same fiduciary duties to obligated persons. The Proposal, if finalized, should not apply to obligated persons.

Number of Qualified Providers — There is no limitation on the number of persons solicited, other than limiting it to QPs, allowing an MA to conduct a broad solicitation to all manner and number of potential QPs.

[13] FINRA, "Capital Acquisition Broker Rules," www.finra.org/rules-guidance/rulebooks/capital-acquisition-broker-rules.

[14] See for example letter to Brett Redfearn and Joanne C. Rutkowski, Division of Trading and Markets and Rebecca Olsen, Office of Municipal Securities, from Cheryl Maddox, General Counsel, and Leo Karwejna, Chief Compliance Officer, Public Financial Management, Inc., Oct. 30, 2018.

The Proposal should constrain the number of investors that a municipal advisor may solicit in order to avoid the types of broader solicitations and marketing activity undertaken by broker-dealers. Such broad solicitations are likely to give investors the appearance that the municipal advisor is serving a "gatekeeping" function and acting in a manner that requires the application of the regulations imposed on broker-dealers.

Specifically, as stated in our September 2019 Letter, we urge the SEC to limit non-dealer MA solicitations in the following ways, which would allow non-dealer MAs to engage in limited direct bank placement activities where the need for investor protections is less apparent:

- The only investors that the MA solicits in connection are "banks" as defined in the Securities Exchange Act of 1934;
- The MA does not solicit any more than three banks to purchase municipal securities per transaction;
- The MA is representing a municipal entity with respect to the private placement;
- The private placement is reviewed, approved, and accounted for by the bank in the same manner as a commercial bank lending transaction;
- The issuer has a bona fide preexisting relationship with each solicited bank, which can be evidenced by prior transactions with the issuer or prior relevant contact between the solicited bank and the issuer not facilitated by the MA;
- Each solicited bank has an established presence in the region where the issuer is located, which can be established by the presence of a branch or headquarters in such region or the bank having a history of transactions with issuers of municipal securities in the region where the issuer is located; and
- The entire private placement is sold to a single solicited bank.
- The municipal securities sold are not expected to be assigned a CUSIP number and are not assigned a CUSIP number at delivery;
- The municipal securities sold are not expected to be registered on DTCC's book-entry system and are not registered at delivery;
- The private placement contains transfer restrictions that prohibit the purchasing bank from selling or transferring the municipal securities part of the private placement to any person other than a transfer of the entire issuance of municipal securities to one single other bank;
- The bank represents that, at the time of issuance, the bank intends to hold the securities until maturity or mandatory tender;
- The MA is not involved in handling funds or securities for either the issuer or the bank;
- The MA discloses in writing to each solicited bank, which each solicited bank acknowledges in writing, that no broker-dealer is involved in the private placement, that the municipal advisor has not conducted a due diligence investigation on behalf of investors, and that the municipal advisor represents only the issuer and has no duty to the investor other than to deal with it fairly;
- The MA may not charge a fee that is in excess of the fee that it charges for comparable municipal advisory services where there is a broker-dealer placement agent involved in the private placement; and

- The MA has determined and documents that limiting its activities to those permitted under the letter is consistent with its fiduciary duty under the Exchange Act and MSRB Rule G-42.

Moreover, it is our understanding that much of the interest in the Proposal among issuers is concentrated among smaller issuers. Arguably, smaller issuers have a more difficult time accessing the capital markets and are not “covered” by as many BDs and MAs. The SEC should consider limiting the scope of the proposal to small issuers or small issues. One definition of small issue that bears consideration is the exemption in SEC Rule 15c2-12 for issues of less than $1 million.[15]

In addition, MAs should be explicitly required to conduct and document an analysis according to the standards established in the *Reves*[16] case and other relevant case law for determining whether a transaction is a loan or security similar to the analysis FINRA requires BDs to conduct.[17] This determination is necessary in the context of private placements addressed in the Proposal and for municipal issuance in general in order for the MA to determine whether SEC and MSRB rules apply to the transaction. Finally, if the SEC decides to move forward with exemptive relief, the effective date should only be after the effective date of the requisite MSRB rule changes. Such rulemaking should be fully funded by the non-dealer MA community.

The Proposal would create a new conflict of interest between MAs and their issuer clients.

The proposed exemption would create a new, significant conflict of interest between municipal advisors and their issuer clients. Municipal advisors that would like to rely on the proposed exemption in order to be able to act as a placement agent and earn brokerage compensation would have an incentive to advise issuers to structure their issuances to meet the terms of the exemptive order such as engaging in a direct placement rather than a competitive underwriting, limiting solicitations to Qualified Provider, selling the entire issuance to one such QP, not engaging in a public offering, etc.

We do not believe MSRB Rule G-42 provides sufficient constraints on MAs to fully mitigate this new conflict brought on by regulation. Under current rules, MAs are prohibited from soliciting investors for municipal new issues. However, we understand that MAs are already conducting widespread solicitation of institutional investors even though current rules explicitly prohibit such action. If MAs are able and willing to flout current restrictions on their activity in private placements, there is little hope that Rule G-42 would provide much mitigation against the conflict that the Proposal would impose.

The Proposal would result in an uneven competitive playing field between non-BD MAs and BDs seeking MA business.

Footnote 33 of the Proposal states that “[t]he Commission preliminarily believes that this exemption will also benefit firms that are dually registered as municipal advisors and brokers. A dually-registered firm that is acting in a municipal advisory capacity advising a Municipal Issuer

[15] 17 CFR § 240.15c2-12(a)

[16] *Reves v. Ernst & Young*, 494 U.S. 56, 110 S. Ct. 945, 108 L. Ed. 2d 47, 1990.

[17] See FINRA, Regulatory Notice 16-10, “Municipal Securities: Direct Purchases and Bank Loans as Alternatives to Public Financing in the Municipal Securities Market,” April 2016.

client on a direct placement of municipal securities would be permitted as well to engage in limited solicitation activities in accordance with the terms and conditions of the proposed exemption without being required to comply with broker requirements, such as books and records requirements, with respect to those activities." However, two key impediments would prevent dual BD-MAs from benefitting from the Proposal.

First, the SEC's conclusion on Footnote 33 is inconsistent with the SEC's and FINRA's historical view of the extent to which a BD can avoid compliance with BD obligations on the basis that it is a dual registrant acting in its non-BD capacity. For example, FINRA has long taken the view that its rules apply to all activities of a dually registered BD/RIA, even requiring that communications advertising advisory services comply with FINRA's rules on broker-dealer communications with the public.[18] Similarly, it seems unlikely that the SEC would take the position that a dual BD/MA that sends an email in its MA capacity would not need to retain that email in "write once, read many" (WORM) format, as required for BDs[19] but not MAs. As another example, a dual BD/MA's expenses that relate solely to MA activity would presumably need to be taken into account when calculating the entity's net capital requirements and compliance. Many rules simply do not permit an entity to choose whether to comply based on the capacity it selects.

Second, Footnote 33 would be inconsistent with explicit MSRB rules, and if the SEC intends to finalize the Proposal, the Commission should require the MSRB to amend its rules to conform to the exemptive relief. Specifically, MSRB Rule G-23, which pre-dates the municipal advisor regulatory scheme, generally prohibits registered municipal securities dealers that are providing financial advice to an issuer (i.e., conduct that may not require registration as an MA) from "switching roles" and engaging in broker-dealer activity with respect to the same transaction. Rule G-23(d)(i) applies explicitly to solicitations in the context of a private placement. While dual BD/MAs are prohibited by G-23 from acting as both MAs and BDs on the same transaction, the proposed exemptive order would permit stand-alone MAs to also act as BDs, a nonsensical result. If the SEC adopts any form of exemptive order, it should not relegate this issue to a vague footnote, but specifically abrogate Rule G-23 pursuant to Section 19(c) of the Exchange Act. In general, if the SEC takes action on the Proposal, we urge the Commission to establish an effective date for the Exemptive Order after the MSRB amends all rules that would conflict the Order, including Rules G-23 and D-15, as cited here, and others.

MAs may not be qualified or examined to properly conduct solicitation activities.

There is nothing in MSRB rules governing MA solicitation of investors and, even more importantly, MAs are not tested on issues related to solicitations or securities distribution in either of the MSRB's MA professional qualification examinations, the Series 50 exam for MA representatives and the Series 54 exam for MA principals. The SEC should not move forward with the Proposal unless

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[18] See David A. Spotts, Office of General Counsel, NASD Regulation, Interpretive Letter to Dawn Bond, FSC Securities Corporation, (June 30, 1998) at www.finra.org/rules-guidance/guidance/interpretive-letters/dawn-bond-fsc-securities-corporation, ("FSC is both a registered broker/dealer and a registered investment adviser and is subject to both the broker/dealer and investment adviser regulations."

[19] 17 CFR § 240.17a-4

and until the MSRB can update its MA-related professional qualification exams to cover issues related to investor solicitation and securities distribution. The SEC and MSRB should also consider retesting non-dealer MAs who have already passed their Series 50 and 54 exams to cover the substantial new activities provided for in the Proposal. Issues surrounding qualification testing are especially important given the nature of the non-dealer MA industry. There are many very small MAs who service the smallest and least sophisticated segment of Municipal Entities. It is important that these small MAs possess adequate qualifications to conduct solicitation and placement activities.

Moreover, the SEC's Office of Compliance, Inspections, and Examinations ("OCIE") obviously does not currently examine MAs for compliance with obligations related to soliciting investors and placing securities. Before finalizing the Proposal, we urge the OCIE to develop robust examination schedules and standards related to solicitations and placements, including the requirement for MAs to develop written compliance policies and procedures related to Rules G-17 and G-42 and private placements.

Summary

The Proposal represents a fundamental shift in securities regulation. For the past 80 years, soliciting investors and placing securities has been clearly defined as BD activity and subject to extensive investor protections. The Proposal would change principles that have been cornerstones of securities regulation. In doing so, the proposal would dangerously exempt many municipal private placements from investor protections. This might be acceptable if the municipal private placement market was completely dominated by large, global banks. But that is not the character of the municipal private placement market. Banks of all sizes and levels of participation buy bank placement deals. Indeed, the Internal Revenue Code encourages small banks to buy "bank qualified" tax-exempt bonds issued by small issuers in order to avoid a tax penalty associated with earning most tax-exempt interest.[20]

Dealer placement agents are subject to investor protection rules for a reason. The SEC has provided no justification for exempting a potentially large swath of municipal private placements from investor protection rules. There has been no evidence offered that the Proposal would save issuers money or provide any other benefit.

Moreover, the Proposal has broader implications. It would create perverse conflicts of interest between non-dealer MAs and issuers as MAs sought to drive more issuance to the private market. It would push a greater portion of municipal new issues to the opacity of the private placement market and away from the public market, where requirements for Official Statements and annual financial disclosures create transparency. Finally, it represents a radical departure from long established SEC policies, with potentially far-reaching implications for other market sectors beyond the municipal securities market.

[20] 26 USC § 265(b)(3)

We urge the SEC to withdraw the Proposal outright. In case the Commission is inclined to act in some manner on the Proposal, we urge that the Proposal be scaled back considerably according to the constraints we recommend in this letter.

* * *

Thank you for the opportunity to provide these comments. We look forward to working with Commission and its staff as this issue moves forward. Please contact me if you have any questions or concerns.

Sincerely,

Mike Nicholas
Chief Executive Officer

Appendix A

BDA Bond Dealers of America

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June 28, 2019

Submitted Electronically

Brett Redfearn, Director
Joanne C. Rutkowski, Esq.,
Senior Special Counsel
Division of Trading and Markets

Rebecca Olsen, Esq.
Director
Office of Municipal Securities

U.S. Securities and Exchange
Commission 100 F Street, NE
Washington, DC 20549

RE: Request from PFM Financial Advisors LLC ("PFM") for Interpretative Relief for Private Placements

Dear Mr. Redfearn, Ms. Rutkowski, and Ms. Olsen:

On behalf of the Bond Dealers of America ("BDA"), we are writing this letter to state our concerns regarding a letter from PFM to you (the "PFM Letter") dated October 30, 2018. In the PFM Letter, PFM requests interpretative guidance that would overturn decades of settled law on what constitutes broker-dealer activity. PFM asks that it and other non-dealer municipal advisors be permitted to place municipal securities with investors without being required to register as a broker-dealer or be subject to any of the regulations that apply to broker-dealers engaged in that same activity. PFM argues that this would benefit issuer clients who seek to borrow in the private market, but they provide no actual evidence to support that assertion. At the same time, they ask that they be permitted to solicit a wide variety of investors and engage in extensive activities on behalf of their borrowing clients without incurring any obligations to these investors.

The BDA strongly disagrees with the legal and factual predicates of the PFM Letter. It misstates the current state of the law, misstates the reasons why the law is what it is, misstates what this actually looks like in the municipal securities market and misstates the practical implications that would ensue if the law is changed. If the SEC provides the guidance requested, it could lead to a rollback of decades of investor protections for these and potentially a host of similar financings. In addition, if the SEC provides the guidance requested, it would further worsen an existing competitive imbalance between dealer and non-dealer municipal advisors due to legal ambiguities.

The Current State of the Direct Placement Market

One would think from reading the PFM Letter that scores of transactions are not getting done today because of regulatory uncertainty. As we know, however, issuers have been entering into direct placements with banks and other lenders in such amounts and with such regularity that it prompted the SEC to amend Rule 15c2-12. According to Refinitiv, in the five-year period between 2014-2018, more than $163 billion of municipal private placements were sold by municipal issuers in nearly 6,500 transactions. Nearly 700 private placements were of $1 million or less, more than 1,700 private placements were between $1 million and $5 million, and nearly 1,000 private placements were between $5 million and $10 million. The market statistics undermine PFM's argument that small issuers are being handcuffed in their ability to effect private placements as the market is robust at all levels of size and sophistication.

Before a broker-dealer is permitted to engage in a transaction involving a municipal issuer, it is required to have policies and procedures in place to ensure that it determines if the instrument being placed is a security under the test established in *Reves v. Ernst & Young*[1]. Dealers have undertaken a significant amount of effort to develop appropriate policies and procedures in response to these regulatory requirements. The MSRB has also cautioned municipal advisors that they need to be careful because they may be engaging in broker-dealer activity if they fail to determine - or determine incorrectly – that the transaction does not involve a municipal security.[2] This guidance notwithstanding, there remains uncertainty and inconsistency in how different market participants execute direct placement transactions.

Originally, like the rest of the industry, PFM sought guidance regarding when instruments of municipal debt constitute securities when it responded to the MSRB's request for comment relating to the recent amendment of Rule G-34.[3] In its comment letter, PFM objected to the idea that municipal advisors – or at least independent municipal advisors – should have any obligation to investors. Instead, they argued that the SEC should act so that there is "explicit refinement of the definition of a municipal security such that it is clearly differentiated from a non-securitized bank loan or a municipal financial product not requiring a CUSIP to give guidance to all market participants, including municipal entity issuers and obligated persons beyond the test provided by the U.S. Supreme Court in *Reves v. Ernst & Young, Inc.*" PFM goes on to say that "the MSRB should work with the SEC to provide practical guidance to all market participants . . . such that determination of whether an instrument is a security is clear" as "this clarity would obviate the need for any of the proposed amendments to Rule G-34 aimed at addressing questions in the industry regarding the application of Rule G-34 to private placements of municipal securities." They ask for a "listing of instruments which clearly either are or are not considered to be a 'security.'"

Not having received the guidance they sought from the MSRB and the SEC that would help clarify when a given transaction involves a loan or a security, PFM has become bolder and now seeks to achieve an even greater goal. Not content to limit itself to arranging loans with commercial banks, PFM is now arguing that it shouldn't matter if the debt being placed is a loan or a security, it shouldn't matter if the investor is a bank, and it shouldn't matter if a municipal

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1 494 U.S. 56, 110 S. Ct. 945 (1990). *See* FINRA Notice 16-10 (April 2016).

2 MSRB Notice 2016-12 (April 4, 2016).

3 *See* MSRB Notice 2017-25 (December 15, 2017)

advisor identifies, negotiates with and coordinates the sale of municipal securities with investors. As long as there is non-dealer municipal advisor representing the interests of the borrower in the transaction, PFM's view is that the investors can fend for themselves. In other words, PFM is asking the SEC to provide guidance that inherently broker-dealer activity is not broker-dealer activity at all.

The PFM Letter understates what municipal advisors are doing in the municipal securities market.

The PFM Letter does not explain how common it has become for municipal advisors to identify capital market investors (investors who exist for the purpose of investing in securities transactions) for the purpose of arranging placements of municipal securities. The PFM Letter does not explain that these investors range in size and sophistication and diversity in the regions in which they are located. In short, there are many municipal securities financings effected each year where the municipal advisor finds a capital market investor, actively negotiates a bond transaction directly with the investor and coordinates the financing between the municipal entity and the investor. These transactions are not isolated to commercial banks or even investors who engage in a quasi-commercial banking capacity. Further, the BDA believes that investors do not understand that these municipal advisors owe very different duties to investors than broker-dealers do. In short, the PFM Letter does not explain that the frequency and breadth of activity by municipal advisors in approaching investors leaves no doubt that they pervasively engage in broker-dealer activity.

If the SEC acts on the PFM Letter, it will roll back essential protections for investors without providing the purported benefits to issuers.

The broker-dealer regulatory regime exists for good reasons. In this context, persons who identify, negotiate and coordinate securities transactions need to be properly regulated, qualified and capitalized because the interests of the investors are as worthy of protection as those of issuers. For example, broker-dealers serving as placement agents of municipal securities have an array of legal obligations that are intended to protect investors, including but not limited to due diligence responsibilities under the Federal antifraud laws. When broker-dealers make recommendations to investors, the antifraud laws require that the broker-dealers conduct some reasonable investigation to ensure the integrity of the information provided to investors. In addition, broker-dealers have obligations to ensure the pricing of the transaction is fair for both issuers and investors. For many years now, the SEC has placed particular focus on the gatekeeping function of broker-dealers. Those gatekeeping functions are seen as essential to the protection of investors. In addition, broker-dealer registration, licensing and continuing education requirements form a core part of the Federal regulatory regime of broker-dealers because each of these requirements helps protect investors. The financial crisis of 2008-2009, inflicted significant financial damage to institutional investors as much as retail investors and has put the value of the broker-dealer regime to all investors beyond doubt. In addition, any notion that institutional investors can fend for themselves runs contrary to the reasons why the SEC adopted the new Rule 15c2-12 amendments. The SEC was clear institutional investors requested those amendments because they were powerless to receive basic information about competing debt of issuers.

PFM fails to make the case that its request is essential for issuers.

PFM fails to make the case that this is the time and these are the transactions that warrant such a radical departure from broker-dealer legal standards. Issuers and borrowers have many financing options. They can choose (or not) to retain a municipal advisor to help them determine the best approach to achieve their goals at the lowest cost. To determine which option to choose, the borrower would need to have a sense of what lenders or investors might be interested in their debt and the terms under which they would be willing to lend or invest.

Broker-dealers are connected with both the broad market and with individual investors. They also have the expertise that is borne of those relationships and the direct investor feedback they receive. PFM, which is the largest non-dealer municipal advisor, may argue that it has similar market knowledge but PFM is not representative of municipal advisors generally. Many advisors have practices limited to and centered around a small geographic location. Many of those likely lack the market information or expertise to identify and engage investors from parts of the country remote to them. It would be a disservice to their clients and potentially a breach of their fiduciary duty not to engage a qualified broker-dealer to help ascertain the lowest cost of financing.

Implicit in the PFM letter is the notion that broker-dealers are unnecessary to a transaction and their presence simply increases costs to the issuer. As noted above, broker-dealers may add significant value to the issuer. They can help identify interested investors willing to agree to terms favorable to the issuer. Fees earned by the broker-dealer may be offset by the lower price or more favorable terms negotiated.

More importantly, the BDA believes that it is not a question of what the costs will be to the issuer but rather a question of PFM wanting to receive for itself a fee that broker-dealers otherwise would earn. PFM works for fees too and those fees are also paid by the issuer. In the end, the PFM letter fails to explain why any of the sought-after guidance would result in a better market environment for issuers let alone is essential to the well-being of issuers.

If the SEC provides the guidance that PFM is seeking in the PFM Letter, it would exacerbate a long-standing competitive imbalance between non-dealer and dealer municipal advisors.

As stated above, there is presently no clear definition of when bonds and other instruments of municipal debt constitute securities, and similarly, no clear definition of what constitutes the activity of a placement agent under MSRB Rule G-23. As a result, many dealer municipal advisors have taken conservative positions in order to avoid simultaneously acting as both a municipal advisor and placement agent in the same financing. But since only dealers are subject to Rule G-23, non-dealer municipal advisors have felt less constrained about blurring the lines between those roles. The absurd result is that dealers, who are subject to rules intended to protect both issuers and investors, are not engaging in activity in which non-dealer municipal advisors routinely engage. In the end, the regulatory confusion caused by the SEC and the MSRB not coordinating their regulation of dealers has allowed non-dealer municipal advisors a competitive advantage. If the SEC provides PFM the guidance it seeks, it would make this competitive imbalance even worse.

* * *

Thank you for the opportunity to provide these comments.

Sincerely,

Mike Nicholas
Chief Executive Officer

Appendix B

Bond Dealers of America

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September 9, 2019

Submitted Electronically

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Commission 100 F Street, NE
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RE: Requested relief by the SEC regarding private placement activity by municipal advisors

Dear Mr. Redfearn, Ms. Rutkowski, and Ms. Olsen:

The Bond Dealers of America ("BDA") understands that PFM Financial Advisors LLC ("PFM") and the National Association of Municipal Advisors ("NAMA") have each submitted letters (the "MA Letters") to the United States Securities and Exchange Commission ("SEC") requesting guidance or other relief that would permit municipal advisors to identify and negotiate with investors in direct placements of municipal securities without registering as broker-dealers or municipal securities broker-dealers with the SEC. The MA Letters base their request primarily on the fact that municipal advisors owe a fiduciary duty to their municipal entity clients, and therefore additional regulation as a broker-dealer is unnecessary.

BDA opposes the grant of such relief. The BDA is concerned that the requested relief is inconsistent with the SEC and its staff's long held views regarding the need for broker-dealer registration and the purposes of that regulatory regime. As municipal advisor regulation focuses only on the protection of issuers, the requested relief would erode away critical investor protections provided by the broker-dealer regulatory regime and enable municipal advisors to further disregard the interests and needs of investors in a manner that conflicts with the requirements for parties acting as broker-dealers and the purposes underlying those requirements.

Our concerns expressed below are not limited to any specific kind or segment of investors and apply across the variety of investors who participate in direct placements of municipal securities. The market for direct placements of municipal securities is a large and diverse market consisting of a wide variety of sizes of transactions, sizes and kinds of issuers and sizes and kinds of investors. Between 2014 and 2018, there have been nearly 5,000 private placements of less than $20 million and nearly 6,000 under $50 million. These statistics only reflect direct placements of municipal securities and do not take into account the broad impact beyond that market. For your reference, we have attached some statistics that demonstrate the depth and diversity of the market for direct placements of municipal securities between 2014 and 2018.

FINRA and MSRB rules that apply to dealers are intended to protect investors, not just issuers. Those protections do not apply to municipal advisors that are not dealers.

Without registration as a broker-dealer or municipal securities dealer, municipal advisors would not be subject to FINRA or MSRB rules intended to protect investors. FINRA and MSRB rules regulate a wide array of activities by broker-dealers to ensure that dealers have appropriate duties when interacting with investors. These duties include:

- Suitability and "Know Your Customer" duties to ensure that investments are suitable for investors;
- Due diligence duties to ensure that dealers reasonably investigate information provided to investors;
- Sales practice duties that ensure that dealers interact with investors in a fair and transparent manner;
- Communication standards that ensure that dealers deliver appropriate communications to investors;
- Fair commission and pricing standards that ensure that dealers charge appropriate compensation and undertake reasonable efforts to ensure the fairness of pricing of transactions; and
- Dealer-specific antifraud and disclosure standards.

The requested relief would eliminate these protections for investors when municipal advisors identify and negotiate with investors for placements of municipal securities. Both MA Letters express that these duties should not apply to municipal advisors and that investors in these transactions do not need these protections. The history of the broker-dealer regulatory regime has shown that these protections are necessary to protect investors—whether large or small.

Exempting municipal advisors from broker-dealer registration status when engaging in broker-dealer activity is inconsistent with the SEC's and its staff's historical positions and creates a bad precedent with broad implications for other industries.

In 2000, SEC staff took the unusual step of revoking the Dominion Resources no-action letter on facts very similar to those for which the MA Letters are requesting relief.[1] The SEC staff revoked the Dominion Resources no-action letter to explicitly take the position that assisting an issuer to find investors and negotiating between the parties and receiving a transaction-based fee would require broker-dealer registration. The requested relief would effectively reverse that position. The activities for which the MA Letters are requesting relief have all the hallmarks of brokerage activity that the SEC has consistently insisted require registration: assisting an issuer to structure an issuance, preparing disclosures, soliciting investors, screening investors, negotiating as an intermediary, and receiving transaction-based compensation.

The requested relief would have far reaching implications for other industries. The BDA is astonished at the position of PFM and NAMA that large institutional investors are not in need of the investor protections of the broker-dealer regulatory regime. If the SEC grants the requested relief, it not only addresses when municipal advisors can identify and negotiate with large institutional investors to place municipal securities but also will by implication address that these same kind of activities can happen with any person placing any security in any industry with institutional investors. The implications of the requested relief are hard to underestimate.

The requested relief would also call into question the SEC's position in other industries. If municipal advisors need not register as broker-dealers because they have a fiduciary duty to an issuer, while no duty to investors, the analogous case could be made to exempt investment advisers from broker-dealer registration where they have a fiduciary duty to investors, but no duty to issuers. But the SEC staff has previously rejected this very argument. Even in the absence of transaction-based compensation, the staff declined to issue no-action relief where an investment adviser proposed to locate issuers, solicit investors, and act as investors' agent in structuring and negotiating transactions.[2] In fact, the SEC and its staff in recent years has taken enforcement actions against investment advisers[3] and made public statements reminding advisers that they may not cross over into providing brokerage services without being additionally registered as a broker-dealer.[4]

A person negotiating between an issuer and an investor, while also receiving compensation if a transaction is to occur, has to manage several conflicts of interest—between the issuer, the investor, and itself. It is those very conflicts that the SEC has historically pointed to as one of the reasons that broker-dealer registration and the SRO regulatory structure are

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1 *See* Division of Market Regulation, Revocation of Prior No-Action Relief Granted to Dominion Resources, Inc. (March 7, 2000).

2 PRA Securities Advisers, L.P. (March 3, 1993).

3 In re Blackstreet Capital Management, LLC, Exchange Act Release No. 77959 (June 1, 2016).

4 David W. Blass, Chief Counsel, SEC Division of Trading and Markets, A Few Observations in the Private Fund Space (Apr. 5, 2013).

needed, which requires that the broker-dealer balance those interests and treat all parties fairly.[5] The requested relief would do nothing to address or solve these conflicts of interests, and in fact, would exacerbate them by permitting municipal advisors to act as brokers while having no duties to investors.

Adopting the requested relief would set back the SEC's efforts to reassert that broker-dealer registration is required for all persons engaged in bringing buyers and sellers of securities together for a fee—with the SEC recently taking the enforcement position that "there is no finder's exception" from broker-dealer registration,[6] notwithstanding certain prior no-action relief and judicial precedents.[7] The requested relief would risk reinvigorating defendants in SEC enforcement proceedings arguing that such an exception exists.

The BDA also believes that the requested relief would undermine the efforts of the SEC to bring more transparency to the private municipal securities market. The recent amendments of Rule 15c2-12 to require issuers to disclose non-public financial obligations to public bondholders demonstrates the need for investor protections in the private municipal securities market. The requested relief would depart from these efforts and allow a host of transactions to be offered and sold to investors away from the broker-dealer regulatory regime.

PFM and NAMA are requesting broad relief covering a wide variety of activities.

The MA Letters seek broad relief for a wide variety of activities. PFM and NAMA request the SEC to provide relief that:

- *Would apply to a wide variety of investors.* The PFM letter in particular specifically requests the SEC to provide relief for a broad segment of the market – including traditional capital market investors.
- *Is not limited to pre-existing relationships or geographic region.* The MA Letters seek relief allowing municipal advisors to engage aggressive finding activities that would allow municipal advisors to introduce investors to issuers that do not have any pre-existing relationship or of knowledge of each other.
- *Places no limit on form of compensation.* Both MA Letters are silent on the fact that municipal advisors frequently receive transaction-based compensation that is contingent on the successful completion of the transaction—an historical hallmark of broker-dealer activity.

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[5] See, e.g., 1st Global, Inc., No-Action Letter (May 7, 2001) ("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."); see also Order Exempting the Federal Reserve Bank of New York, Maiden Lane LLC and the Maiden Lane Commercial Mortgage Backed Securities Trust 2008-1 from Broker-Dealer Registration, Exchange Act Release No. 61884 (Apr. 9, 2010).
[6] Brief for Appellee Securities and Exchange Commission at 28, SEC v. Collyard et al. (8th Cir. June 3, 2016) (No. 16-1405).
[7] *See, e.g.,* Paul Anka, SEC No-Action Letter (July 24, 1991); SEC v. Kramer, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011).

- *Places no limit on number of investors solicited.* The requested relief would not limit the number of investors solicited.

- *Establishes no safeguards to ensure that investor is not misled as to the municipal advisor's role.* Since investors have historically been afforded the protections of the broker-dealer regulatory regime, the MA Letters provide no protection of investors from misconstruing the role of the municipal advisor.

The MA Letters do not give a clear sense of how pervasively municipal advisors already clearly cross over into unregistered broker-dealer activities.

Currently, municipal advisors distribute requests for proposals ("RFP") for direct placements of municipal securities to a wide variety of investors in the municipal securities market and seek to negotiate the terms of those direct placements with those investors. Many of these investors are not banks or even large investors but capital market funds created for the purpose of making investments in securities. That is, municipal advisors have strayed very far from the mere role of advising municipal entities and obligated persons and are regularly acting as unregistered broker-dealers. Municipal advisors are currently violating the registration requirements of the broker-dealer regulatory regime including the SEC staff's specific statements in the revocation of Dominion Resources.

Municipal advisors have interpreted a lack of guidance on these topics by the SEC in the past as permission to engage in clear broker-dealer activity. Actual guidance in their favor will exacerbate this practice. Regardless of what any requested guidance says, it will embolden municipal advisors to push their activities further into the realm of broker-dealer activity and further violate the regulatory regime.

An exemption would lead to competitive disparities and regulatory arbitrage.

If municipal advisors can receive transaction-based compensation for engaging in private placement broker-dealer activities, there would be little reason for dealers to engage in this activity within a municipal securities dealer entity. Currently, there are many firms that are dually registered as municipal advisors and broker-dealers. Under MSRB Rule G-23, they need to select which role they will have on a given transaction. With the proposed exemption, many of these firms may separate out their municipal advisor into a stand-alone entity, and conduct all their municipal security private placement activities through the municipal advisor rather than the broker-dealer, relieving them of much of the regulatory burden (and investor protections) that comes with engaging in these activities under the broker-dealer regime. Thus, the requested relief would create a regulatory arbitrage allowing firms to create competitive advantages from the requested relief, or shift the activity to less-regulated entities.

The MA Letters express that, because municipal advisors are subject to the municipal advisor regime, there is no need to be subject to the broker-dealer regulatory regime, but the SEC took the opposite position in the municipal advisor rule.

The MA Letters express that now that municipal advisors are subject to a regulatory regime, it eliminates the need for them to be subject to the broker-dealer regulatory regime. But this ignores the different regulatory policy concerns of the two regulatory regimes that the SEC made clear in the municipal advisor rule. The municipal advisor rule carved out a very narrow exemption for broker-dealers engaged in underwriting because the mere fact that a broker-dealer is subject to investor-driven duties did not mean that the issuer understood the underwriter's role and the kind of advice the underwriter was providing. All of the exceptions to the municipal advisor rule ensure that the policy purposes of the municipal advisor regulatory regime are not undermined by persons who should register as municipal advisors. The same is true of the broker-dealer regulatory regime. The mere fact a person is registered as a municipal advisor does not mean that it should be permitted to act in a manner that would undermine the purposes of the broker-dealer regulatory regime.

* * *

Thank you for the opportunity to provide these comments. We look forward to the opportunity to discuss our concerns with you.

Sincerely,

Mike Nicholas
Chief Executive Officer

CC: The Honorable Jay Clayton, Chairman, SEC
The Honorable Robert J. Jackson, Jr., Commissioner, SEC
The Honorable Allison Herron Lee, Commissioner, SEC
The Honorable Hester M. Pierce, Commissioner, SEC
The Honorable Elad L. Roisman, Commissioner, SEC

DIRECT PLACEMENT MARKET STATISTICS
(CALENDAR YEARS 2014 THROUGH 2018)

	Industrywide Placements (SDC)		
Par Category	**# Deals**	**Total Par**	% Total (# Deals)
Under $1 Million	687	$335,606,000	10.67%
Greater than $1 Million up to $5 Million	1755	$4,681,275,000	27.27%
Greater than $5 Million up to $10 Million	986	$7,600,674,000	15.32%
Greater than $10 Million up to $20 Million	1167	$17,071,751,000	18.13%
Greater than $20 Million up to $50 Million	1136	$36,564,565,000	17.65%
Greater than $50 Million up to $100 Million	400	$28,948,065,000	6.22%
Greater than $100 Million	305	$68,232,135,000	4.74%
Grand Total	**6,436**	**$163,434,071,000**	**100.00%**

Appendix C

Bond Dealers of America

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September 25, 2019

Submitted Electronically

The Honorable Robert J. Jackson Jr.
Commissioner
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RE: Potential relief by the SEC regarding private placement activity by municipal advisors

Dear Commissioner Jackson:

The Bond Dealers of America ("BDA") is submitting this letter to follow up on our September 9, 2019 letter and our recent meetings with your office and staff of the Securities and Exchange Commission ("SEC"). In our letter and meetings, we discussed BDA's concerns with the SEC potentially issuing relief that would allow a municipal advisor to engage in municipal securities brokerage activities with respect to direct placements of municipal securities without registering as a broker-dealer or municipal securities dealer (in either case, a "broker-dealer"). In particular, we discussed the difference in the purpose and scope of the municipal advisor and broker-dealer regulatory regimes, particularly with respect to investor protections. As requested by the staff, attached as Annex I is a table highlighting a number of key differences between the municipal advisory regulatory regime and broker-dealer regulatory regime as applied to placement agent activities.

While BDA remains opposed to the SEC issuing any form of the requested relief, we believe that, if relief were to be granted, it should be in the form of a narrowly tailored exemptive order that makes clear that engaging in the activity constitutes acting as a broker-dealer but, under the limited circumstances, the SEC would exempt municipal advisors from broker-dealer registration requirements. The BDA sets forth below a proposed framework for such narrow relief.

A framework for potential relief

In our discussions with the SEC and its staff, it was suggested that the BDA submit a framework for potential SEC exemptive relief (the "Potential Relief") that would permit a municipal advisor to engage in a limited scope of municipal securities brokerage activities (as defined in more detail below, the "Permitted Activities")[1] without registering with the SEC as a

[1] We note that a municipal advisor is not required to register as broker-dealer to solicit and negotiate on behalf of their issuer clients in connection with transactions in instruments that are not municipal securities, such as

broker-dealer, while limiting the legal and policy concerns raised by the BDA. As we discussed in our meeting, in developing the following framework, the BDA has taken into consideration the following:

- The Potential Relief should be limited to those circumstances where investors' need for the protections that come from interacting with a registered broker-dealer are less substantial;

- The Potential Relief should be premised on the idea that a direct placement of municipal securities with a bank, which is treated by the parties as similar to a traditional bank loan, does not require the protection of the securities laws, and thus the Potential Relief should be limited to those scenarios;[2]

- The Potential Relief should constrain the Permitted Activities to protect against municipal advisors serving a role that could reasonably be perceived by the investor as a "gatekeeper" function that is protective of the investor;

- The Potential Relief should make the municipal advisor's role and obligations clear to all parties involved, and apply only where the municipal advisor has a fiduciary duty to its client;

- The Potential Relief should constrain the number of investors that a municipal advisor may solicit, so as to avoid the types of broader solicitations and marketing activity undertaken by broker-dealers that are likely to give investors the appearance that the municipal advisor is engaging in a broad solicitation of investors and thus serving a "gatekeeping" function and acting in a manner that requires the application of the regulations imposed a broker-dealers; and

- The Potential Relief should only cover transactions, similar to traditional bank loans, that are not expected to be immediately traded in the secondary market, to ensure that municipal advisors do not engage in broker-dealer activities that impact a larger market beyond a direct placement transaction.

Accordingly, the BDA believes that the SEC could provide the Potential Relief, without significantly harming important investor protections or having a broader unintended precedential effect, if they engage in Permitted Activities (as defined below) related to direct placements of municipal securities (a "Direct Placement Transaction") that meets all of the following criteria:

traditional bank loans. The Potential Relief is not necessary and is not intended to apply to these transactions. Rather, the Potential Relief is intended to apply to those transactions that bear many of the characteristics of traditional bank loans but, after application of the appropriate *Reves* analysis, are determined to be securities.

2 We note that FINRA Notice 16-10 reminds broker-dealers that they must conduct an analysis to determine if the instrument being placed is a security and of the various rules and regulations that may come into play if the instrument is a security. The SEC should require municipal advisors to conduct such a test and provide guidance about whether and how those rules would or would not apply in the context of transactions subject to the Potential Relief. Similarly, the SEC should make clear whether and to what extent its own rules relating to securities, including but not limited to the anti-fraud rules, would or would not apply.

- The only investors that the municipal advisor solicits in connection with the Direct Placement Transactions are "banks" as defined in the Securities Exchange Act of 1934 ("Exchange Act");

- The municipal advisor does not solicit any more than three banks to purchase municipal securities in the Direct Placement Transaction;

- The municipal advisor is representing a municipal entity with respect to the Direct Placement Transaction;

- The Direct Placement Transaction is reviewed, approved, and accounted for by the bank in the same manner as a commercial bank lending transaction;

- The issuer has a *bona fide* preexisting relationship with each solicited bank, which can be evidenced by prior transactions with the issuer or prior relevant contact between the solicited bank and the issuer not facilitated by the municipal advisor;

- Each solicited bank has an established presence in the region where the issuer is located, which can be established by the presence of a branch or headquarters in such region or the bank having a history of transactions with issuers of municipal securities in the region where the issuer is located;

- The entire Direct Placement Transaction is sold to a single solicited bank;

- The municipal securities sold are not expected to be assigned a CUSIP number and are not assigned a CUSIP number at delivery;

- The municipal securities sold are not expected to be registered on DTC's book-entry system and are not registered at delivery;

- The Direct Placement Transaction contains transfer restrictions that prohibit the purchasing bank from selling or transferring the municipal securities subject to the Direct Placement Transaction to any person other than a transfer of the entire issuance of municipal securities to one single other bank (as defined in the Exchange Act);

- The bank represents that, at the time of issuance, the bank intends to hold the securities until maturity or mandatory tender;

- The municipal advisor is not involved in handling funds or securities for either the issuer or the bank;

- The municipal advisor discloses in writing to each solicited bank, which each solicited bank acknowledges in writing, that no broker-dealer is involved in the Direct Placement Transaction, that the municipal advisor has not conducted a due diligence investigation on behalf of investors, that the municipal advisor represents only the issuer and has no duty to the investor other than to deal with it fairly;

- The municipal advisor may not charge a fee that is in excess of the fee that it charges for comparable municipal advisory services where there is a broker-dealer placement agent involved in the Direct Purchase Transaction; and

- The municipal advisor has determined and documents that limiting its activities to those permitted under the letter is consistent with its fiduciary duty under the Exchange Act and MSRB Rule G-42.[3]

With respect to these Direct Placement Transactions, the term "Permitted Activities" means any combination of the following activities:

- Identifying banks that will be solicited;

- Preparing a Request for Proposal or Request for Qualifications for the Direct Placement Transaction;

- Assisting the issuer in determining which of the responding banks to select to effect the Direct Placement Transaction; and

- Represent the issuer in negotiating the terms of the Direct Purchase Transaction.

In providing this framework, the BDA encourages the SEC to take into consideration two concerns.

The BDA remains concerned about how any Potential Relief will impact behavior in the municipal securities market in two respects. First, municipal advisors may view the Potential Relief as a "safe harbor" and limit their review of potential transactions for municipal entities to those that fit within the Potential Relief, thereby limiting the potential financing options for their clients. MSRB Rule G-42 contains responsibilities on the part of municipal advisors to make recommendations that take into consideration all financing options, yet any Potential Relief will create a new conflict of interest that would give municipal advisors a roadmap to limit the scope for their recommendations. Any Potential Relief needs to be tailored to curtail this incentive and also accompanied by an effective examination approach by the SEC to ensure that municipal advisors fully take into consideration all financing options.

Second, while we believe the Potential Relief should be in the form of an exemption from broker-dealer registration, rather than guidance that acting as a placement agent is not broker-dealer activity, an unintended result would be to further exacerbate an existing unfair and unlevel playing field between dealer and non-dealer municipal advisors. Currently, dealers essentially define "placement agent" activities under MSRB Rule G-23 as broker-dealer activities, which prohibits dealer municipal advisors from also acting as placement agent on a transaction. Because non-dealer municipal advisors are not subject to Rule G-23, a result of the Potential Relief will be to allow non-dealer municipal advisors to act both as municipal advisors and placement agents on the same transaction—conduct prohibited for dealer municipal advisors. As we have stated before, it makes no sense for non-dealer municipal advisors to be permitted to engage in activities

[3] BDA is concerned that, by providing the Potential Relief, municipal advisors may be incentivized to limit the potential financing options for their clients to those permitted under the Potential Relief. This condition attempts to address this concern by requiring municipal advisors in Direct Placement Transactions relying on the Potential Relief to document that doing so is consistent with its fiduciary duty under the Exchange Act and MSRB Rule G-42.

that dealer municipal advisors cannot simply because dealer municipal advisors are subject to both regulatory regimes. Therefore, the SEC should not issue any Potential Relief unless the MSRB simultaneously issues interpretative guidance that interprets the phrase "or act as agent for the issuer in arranging the placement of such issue" in Rule G-23 in a manner that permits dealer municipal advisors to engage in the full range of activities permitted by the Potential Relief without violating Rule G-23.

* * *

Thank you for the opportunity to provide these comments. We look forward to the opportunity discuss our concerns with you.

Sincerely,

Mike Nicholas
Chief Executive Officer

Annex I

Comparison of Municipal Advisor and Broker-Dealer Regulatory Obligations

The table below summarizes a number of key differences between the municipal advisory regulatory regime and broker-dealer regulatory regime as applied to Direct Placement Transaction placement agent activities.

Regulatory Component	Municipal Advisors	Broker-Dealers
Key duties to investors	Duty of fair dealing	Duty of fair dealing Due diligence obligations Disclosure obligations Sales practices obligations Suitability Fair pricing obligations Trade confirmations
Key duties to municipal entity issuers	Fiduciary duty / Rule G-42	Duty of fair dealing Rule G-37 prohibition on "role-switching"
Capitalization requirements	None	SEC and FINRA capitalization rules
Market Transparency	None	Trade reporting obligations
Examinations	SEC examinations of Exchange Act and MSRB municipal advisor rules. Examinations focused on protection of issuer.	FINRA and SEC examinations of Exchange Act, SEC, MSRB and applicable FINRA rules. Examinations focused on protection of issuers, investors and integrity of market.

Licensing	MSRB licensing relating to municipal advisory activities to ensure that municipal advisors competently represent municipal entities.	SEC and FINRA licensing relating to broker-dealer activities to ensure that broker-dealers understand their responsibilities and competently engage in interactions with all market participants, especially investors.