

January 24, 2013

John J. Cross
Director, Office of Municipal Securities
Securities and Exchange Commission
100 F Street NE, Room 7100/SP
Washington, DC 20549-1090

RE: Release 34-63576 ("Proposed Rule")

Dear Mr. Cross:

I am writing to thank you for meeting with Bond Dealers of America ("BDA") members November 8, 2012 regarding the SEC's recent "Report on the Municipal Securities Market," and the anticipated final rule to regulate municipal advisors ("Proposed Rule"). BDA represents middle-market securities dealers and banks nationwide, with a focus on fixed income. BDA members thought the exchange was productive, and are actively working to develop recommendations with respect to the municipal study that you may find useful as you implement its findings.

I wanted to take this opportunity to reiterate BDA's concern regarding how the Proposed Rule regarding municipal advisors addresses underwriters. These concerns are expressed in previous BDA comments, but given that the SEC is finalizing its rulemaking, we wanted to ask that you consider the importance of providing sufficient clarity with respect to the role of underwriters within broker-dealers at the same time that you adopt rules to appropriately regulate unregulated municipal advisors. Attached you will find a chart that crystalizes the importance of regulating advisors on a comparable basis.

BDA believes the regulation of municipal advisors in a fashion similar to the regulation already applied to broker-dealer affiliated municipal advisors will greatly benefit the municipal marketplace, but that it must be promulgated in a manner that honors the existing MSRB regulatory framework that govern broker-dealers. If it does not respect the role of an underwriter as accepted by existing MSRB regulations, there is a risk that the vital role of underwriters in the municipal marketplace, particularly within the context of negotiated sales that assist many types of issuers, will be rendered extinct.

Under the Proposed Rule, the SEC defines an "underwriter" as it is defined in Section 2(a)(11) of the Securities Act of 1933, which, in essence, is a person who purchases a security with the view to distribute it. This narrow definition focuses exclusively on trading and sales functions of a broker-dealer and does not consider the advisory role that an underwriter plays in negotiated sales.

No help in describing the practical-world role that underwriters play can be found elsewhere in the Rule, either. The Rule fails to define the term “advice,” and states that an underwriter could be a municipal advisor even when not separately compensated as an advisor.

At the same time the Proposed Rule fails to define the role of the underwriter for practical purposes, it fails to honor the framework carefully established under MSRB rules that govern broker-dealers. Under current law, MSRB Rule G-17 establishes a duty to deal fairly for underwriters. G-17’s recent interpretative guidance obligates underwriters to provide exhaustive disclosures to issuers that clarify the role of an underwriter, disclose the risks and financial characteristics of structures an underwriter recommends and any material conflicts of interests of the underwriter. MSRB Rule G-23 specifically prohibits a broker-dealer from serving as both a financial advisor and underwriter on a given issuance of municipal securities. Thus, the MSRB has already established a workable framework through Rule G-17 and Rule G-23. This framework provides that an underwriter may render advice to an issuer on structure, terms, timing and other matters related to municipal securities, so long as the dealer discloses to the issuer at the earliest possible stage key information, including whether it will act as an underwriter with an arms-length relationship.

Should the Proposed Rule, with its narrow definition of an underwriter, become final, it will ensnare an underwriter who is following the letter of applicable rules that protect issuers under MSRB Rules G-17 and G-23 within a conflicting set of regulations that ultimately prevent the underwriter from performing any task other than the trading of bonds. A negotiated sale occurs because of the need for the underwriter, informed by the best available market information through its trading and sales function, to provide advice to the issuer, including about how an issuer can structure and describe its transaction to obtain the best reception and pricing in the marketplace. Yet if the underwriter were to provide such advice under the Proposed Rule, he or she could become a municipal advisor with a fiduciary duty to the issuer. Under this circumstance, it would be impossible to continue to be an underwriter who, rather than owing a fiduciary duty to an issuer, must owe a fair dealing duty to both the investors and issuer. If an underwriter is thereby prevented from providing advice in connection with trades, the negotiated sale as a means of issuing municipal securities would essentially be eliminated.

BDA believes that the elimination of the negotiated sale as an option for the issuance of municipal securities harms many types of issuers, from those seeking to place complex transactions requiring significant professional experience and a wide lens of market data, to weaker credits seeking unique buyers. The ability of an underwriter to provide issuers with advice based on its interactions with the actual purchasers of municipal securities is an important asset to the issuer. Ultimately, the issuer should have the ability to determine the best way to conduct the sale of municipal securities.

Underwriters serve as the artery of creativity within the municipal securities market. This creativity derives from the combination of the knowledge of investor demand and appetite that an underwriter’s trading desk offers with the knowledge and understanding of issuers that bankers offer. BDA believes that the Proposed Rule would sever that artery or seriously damage

it because it will force underwriters to back away from any analyses or recommendations that can be perceived as advice (which is the essence of the negotiated transaction).

There is no need for this confusion. When the SEC and the MSRB are concerned that advice or recommendations from an underwriter can cause an issuer to misunderstand the intention or role of the underwriter, the MSRB is fully capable of adopting rules that protect the issuers from that potential confusion without any need to define the underwriter as a municipal advisor. This is what the MSRB did when it promulgated Rule G-23 and adopted the new interpretative guidance relating to Rule G-17.

Using the municipal advisor regulations to regulate the activity of underwriters is not the intent of Congress, as under Dodd-Frank, underwriters are specifically excluded from the definition of a municipal advisor. Worse than duplicative, it is an approach that does not fit and which could extinguish a vital role underwriters play in municipal markets. Complex deals would be left to municipal advisors who lack the necessary information, knowledge and training – and ironically, may lack the same level of training and regulation which covers broker-dealers, even with a finalized Rule.

BDA fully supports the SEC's efforts to finalize a vitally important rulemaking designed to finally ensure that all municipal advisors uphold appropriate professional standards that already apply to broker-dealers. We urge the SEC to let the municipal advisor regulations regulate an issuer's advisors and the extensive existing broker-dealer regulatory regime regulate underwriters. I appreciate this opportunity to clarify the views of BDA members and hope you find this useful as you progress with a very important rulemaking, the intent of which BDA fully supports. Do not hesitate to contact me if I, my staff or BDA members can be of assistance to you. We look forward to additional opportunities to exchange information with your offices.

Sincerely,



Michael Nicholas
Chief Executive Officer

Attachment

WHY REGULATE INDEPENDENT MUNICIPAL ADVISORS?

Regulatory Requirements	Regulated Broker-Dealer Advisors	Unregulated Municipal Advisors
MSRB Regulation	x	
SEC Regulation	x	
Regular and Random Audit Compliance reviews	x	
Licensing Requirements	x	
Continuing Ed Testing	x	
Written Supervisory Procedures	x	
Restrictions on Political Contributions	x	
Restrictions on Gifts and Entertainment	x	
Record Retention Requirements	x	
Obligations and Requirements for Fair Dealing	x	
Disclosures on Compensation, Third Party Fees and Conflicts of Interest	x	
FINRA*	x	

*FINRA training and licensing requirements apply to broker dealers because they handle customer accounts.