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VIA ELECTRONIC MAIL

December 15, 2014

The Honorable Mary Jo White, Chair
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Chair White:

On October 17, 2014, the Bond Dealers of America (“BDA”) submitted a letter to you expressing concern about non-dealer municipal advisory firms purportedly acting as “placement agents” on direct placement transactions. In that letter, the BDA noted that the “legal line” between “providing advice and providing placement services is not a bright line analysis.” The National Association of Municipal Advisors (“NAMA”) agrees that the line between providing regulated municipal advisory services and placement agent services is not clear and would benefit from additional review by the Commission in light of the adoption of new rules regulating municipal advisory activity. NAMA believes that any such review would properly result in new rules or guidance providing an exemption from broker-dealer registration for municipal advisors engaged in municipal advisory activities. Absent such an exemption, municipal advisors who are not broker-dealers could not provide advice to or negotiate on behalf of municipal entities or obligated persons in direct purchase transactions. It would be inconsistent for the Commission, as part of an overall statutory scheme that calls for the protection of municipal issuers, to allow broker-dealers to engage in such activities without a federal statutory fiduciary duty to municipal issuers but to deny municipal advisors the ability to engage in a core municipal advisory activity unless they also register as a broker-dealer.

NAMA believes that this request for review and an exemption is warranted at the present time because the Commission’s current rules and guidance on broker-dealer registration do not contemplate the existence of the municipal advisor regulatory regime. Certain activities that would appear to require registration as a broker based on existing Commission rules and guidance fit squarely within the recognized activities of registered municipal advisors particularly when coupled with the long-standing practice in the municipal market of paying all transaction advisors (including municipal advisors and attorneys) only upon the successful completion of a transaction. Similar issues are

present with respect to the Commission's existing rules and guidance on investment adviser registration. NAMA also believes that the line between providing municipal advisory services and investment adviser services could benefit from additional review by the Commission.

The final municipal advisor registration rule adopted by the Commission in September 2013 includes statutory exceptions for broker-dealers acting as underwriters as well as investment advisers providing investment advice. In both of these cases the Commission provided additional guidance in the release accompanying the rule with respect to the scope of the statutory exception. Commission staff has provided further guidance with respect to these statutory exceptions in the form of FAQs. Even though the Commission's final municipal advisor registration rule is properly based on activities and not status, it does recognize that there is still some limited scope of activities that fall squarely within multiple regulatory regimes and provides appropriate exceptions and exemptions for such activities. In addition, existing registration rules for broker-dealers include exceptions for banks¹ and even otherwise largely unregulated entities² and existing registration rules for investment advisers exclude broker-dealers³ and banks⁴. Our request for review of existing broker-dealer and investment adviser rules and regulations is based on the simple notion that such registration regimes should include appropriate exemptions for municipal advisors, a class of regulated entity that did not exist when the registration rules for broker-dealers and investment advisers were developed.

BROKER-DEALER REGISTRATION

Although the Municipal Securities Rulemaking Board did issue a Notice⁵ on the relationship between municipal advisors (financial advisors), private placements and bank loans such notice did not purport to be guidance and involved mostly discussion of the revocation in the year 2000 of a no-action letter issued in 1985 relating to placements of municipal securities by Dominion Resources, at the time an electric utility and not a regulated financial services company. The activities in which Dominion Resources was engaged included (i) providing advice on the structuring of municipal securities; (ii) recommending other transaction participants to an issuer (e.g., bond lawyers and underwriters); (iii) participating in meetings with transaction participants, including commercial banks, during which it might articulate, explain or defend negotiating proposals or positions that had been adopted by its issuer client; and, (iv) introducing issuers to commercial banks that might act as the initial purchaser of the securities and/or as a standby purchaser if the securities could not be readily remarketed by a broker-dealer.

¹ See Securities Exchange Act §§ 3(a)(4) and 3(a)(5).

² Jumpstart Our Business Startups Act, Pub. L. No. 112-106 (2012), § 201(a).

³ Section 202(a)(11) of the Advisers Act.

⁴ Id.

⁵ MSRB Notice 2011-37 (August 3, 2011) Financial Advisors, Private Placements, and Bank Loans.

The activities described in clauses (i) through (iii) are all activities central to the role of municipal advisors and the finder activity described in clause (iv) is specifically mentioned as municipal advisor activity in the Dodd-Frank Act.⁶ In its October letter, the BDA also mentions that municipal advisors may create a term sheet for an investor RFP process. Again, the Commission has recognized that assisting a municipal entity or obligated person with the preparation of an RFP or an RFQ would constitute municipal advisory activity if it involves advice with respect to the parameters of an RFP or RFQ relating to the issuance of municipal securities.⁷ Assistance with RFP preparation, particularly with respect to parameters concerning structure, timing and terms is a core municipal advisory activity.

It should also be noted that in the final municipal advisor rule, the Commission recognized that in some cases the activities of a broker-dealer acting as a placement agent would not fit within the statutory exception granted for broker-dealers acting as underwriters within the meaning of Section 2(a)(11) of the Securities Act.⁸ The Commission justified expanding the statutory exception for broker-dealers in part because broker-dealers acting in such an agency role may have fiduciary or other duties to their issuer clients that arise as a matter of common law or another statutory or regulatory scheme.⁹ Because of the existence of these common law protections for issuer clients, the Commission appeared to be comfortable extending the broker-dealer exception to include placement agent activity even if such activity would not fit within the statutory exception provided by Congress. As noted above, it would be inconsistent for the Commission, as part of an overall statutory scheme that calls for the protection of municipal issuers, to allow broker-dealers to engage in such activities without the protection of the federal statutory fiduciary duty to municipal issuers but to deny municipal advisors the ability to engage in a core municipal advisory activity unless they also register as a broker-dealer. In these cases the municipal advisor has the same or higher (fiduciary duty) standard of care with respect to their municipal entity clients and the same standard of care with respect to the purchaser of the municipal securities (fair dealing) as a registered broker-dealer. A municipal advisor would also have the same or higher standard of care with respect to their obligated person clients (depending on the final form of proposed MSRB Rule G-42) and any exemption crafted by the Commission could be conditioned upon a municipal advisor accepting a fiduciary duty with respect to its obligated person clients.

⁶ See 15 U.S.C. 78q-4(e)(4)(B).

⁷ See Exchange Act Release No. 70462, 78 Fed. Reg. 67468 (November 12, 2013) at 67509.

⁸ *Id.* at 67515, fn 629.

⁹ *Id.* at 67515, fn 628.

INVESTMENT ADVISER REGISTRATION

Issues similar to those noted above with respect to broker-dealer registration also apply in the case of investment adviser registration. Specifically, existing Commission rules and staff guidance were developed prior to the commencement of the municipal advisor regulatory regime and do not contemplate the existence of such a regulatory regime or the high standard of care that municipal advisors owe to their clients. On September 19, 2000, the staff of the Division of Investment Management published a legal bulletin outlining the “Applicability of the Advisers Act to Financial Advisors of Municipal Securities Issuers.” In that bulletin, the Division took the position that a financial advisor would not be an investment adviser if it advises its municipal clients to invest the proceeds of a bond offering that are temporarily idle pending their application toward the payment of project costs (“temporarily idle bond proceeds”) in securities. The Division’s no-action position was subject to two conditions: that the financial advisor would provide such advice (a) only upon the occasional request of a financial advisory client and (b) for no compensation.

Advice with respect to investment of bond proceeds is specifically included as municipal advisory activity and a person engaged in any such activity would be required to register as a municipal advisor. Again, the municipal advisor registration regime provides protection at least on par with Advisers Act regime. An exception for registered municipal advisors would not involve a broad exception to the Advisers Act because it would only apply to advice given with respect to the investment of proceeds of the issuance of municipal securities. And although many municipal advisors may be prohibited from registering under the Act because they would not meet the monetary thresholds for federal registration, new rules or guidance from the Commission on an exemption from registration appropriate for registered municipal advisors would provide relief under state regulatory regimes as well.

An appropriate exemption would also allow registered municipal advisors to act in the role of “independent registered municipal advisor” with respect to the investment of bond proceeds. Other regulated entities have requested that the Commission expand the definition of independent registered municipal advisor (IRMA) to include registered investment advisers. If an appropriate exemption from the Advisers Act were crafted for registered municipal advisors, other entities would be allowed to provide advice with respect to the investment of the proceeds of municipal securities without issuers losing the protection of the municipal advisory regulation regime.

CONCLUSION

The Commission has the authority under both the Exchange Act and the Advisers Act to exempt any class or classes of persons from registration pursuant to the respective Acts.¹⁰ NAMA respectfully requests that the Commission engage the staff of the Office of Municipal Securities and the Divisions of Trading and Markets and Investment Management in a review of existing rules and guidance regarding both broker-dealer registration and investment adviser registration in light of the new municipal advisor regulatory regime. NAMA believes that the Commission should craft appropriate exemptions for municipal advisors engaged in municipal advisory activities from both regulatory regimes prior to making such activities a focus of examinations or enforcement proceedings with respect to municipal advisors.

Sincerely,



Terri Heaton, CIPFA
President, National Association of Municipal Advisors

cc:

The Honorable Luis A. Aguilar, Commissioner,
The Honorable Daniel M. Gallagher, Commissioner
The Honorable Kara Stein, Commissioner
The Honorable Michael Piwowar, Commissioner
Jessica Kane, Deputy Director, SEC Office of Municipal Securities
LeeAnn Gaunt, Chief, Municipal Securities and Public Pensions Unit
Suzanne McGovern, Assistant Director (Broker Dealer), OCIE
Lynnette Kelly, Executive Director, Municipal Securities Rulemaking Board
Michael Post, Deputy General Counsel, Municipal Securities Rulemaking Board

¹⁰ See, e.g., Section 206A of the Advisers Act.