BDA Bond Dealers of America

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Submitted Electronically

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

RE: Potential 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") is submitting this letter to follow up on our September 9, 2019 letter and our recent meetings with staff leadership and Commissioner Jackson 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 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

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 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.

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:

- 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

[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.

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 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

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

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.