December 9, 2019

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: File Number S7-16-19; Notice of 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 ("Proposed Exemptive Order")

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association ("SIFMA")[1] submits this comment letter in response to the U.S. Securities and Exchange Commission's ("SEC" or "Commission") Proposed Exemptive Order.[2] In brief, the Proposed Exemptive Order would allow a registered municipal advisor, acting on behalf of a municipal issuer client, to solicit and engage in the direct placement of municipal securities with certain institutional investors, and receive transaction-based compensation for such activities, without registering as a broker-dealer under Section 15 of the Securities Exchange Act of 1934 ("Exchange Act"). SIFMA strongly opposes the Proposed Exemptive Order and, for the reasons articulated below, believes that if a municipal advisor acts as a placement agent (*i.e.*, underwriter) with respect to direct placements of municipal securities, it should be subject to all of the requirements that would apply to a broker-dealer when acting in that same capacity.

I. Executive Summary

For the following reasons SIFMA believes the Proposed Exemptive Order should be withdrawn in its entirety:

Reduces Investor Protections
The Proposed Exemptive Order would allow municipal securities to be placed by municipal advisors with a broad class of purchasers, including non-bank entities, without requiring any disclosures to purchasers or, in some scenarios, without reporting to regulators. Not only would purchasers be subject to an information void due to a lack of disclosures, but they also would forgo the protections that are present when a broker-dealer is the intermediary.

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[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global securities markets. On behalf of our industry's nearly 1 million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, DC., is the U.S. regional member of the Global Financial Markets Association. For more information, visit http://www.sifma.org.

[2] SEC Release No. 34-87204 (Oct. 2, 2019); 84 FR 54062 (Oct. 9, 2019).

Could Harm Main Street Investors
The Proposed Exemptive Order would permit purchasers to allocate these municipal securities, with no attendant disclosures or limitations, to investor accounts, including retail investor accounts. In addition, it would allow resales or transfers of these same non-transparent municipal securities to be made without restrictions, and thus potentially end up in the accounts of Main Street investors in the secondary market.

Ignores Congress's Intent Under Dodd-Frank and Undermines MSRB Efforts to Create Transparency
When adopting Dodd-Frank, Congress focused on the need for transparency in the financial system, including the municipal securities market. The MSRB also has focused significant effort on creating transparency in the municipal securities market. The Proposed Exemptive Order contradicts and undermines these efforts.

Contravenes Longstanding SEC Precedent
The Proposed Exemptive Order contradicts the Commission's own precedent in existing rules and staff no-action guidance regarding broker-dealer status and the activities that require broker-dealer registration. The activity that would be permitted under the Proposed Exemptive Order is not within a "gray area" as the Commission suggests, but rather is governed by a well-defined and often-applied set of factors that indicate what activities are broker-dealer in nature requiring registration.

Introduces a Conflict of Interest
A municipal advisor acting as a placement agent in reliance on the Proposed Exemptive Order would have a "salesman's stake" in the transaction and may be incentivized to recommend structures to its issuer clients that fit within the exemption. The Proposed Exemptive Order unnecessarily introduces a potential conflict of interest that disclosure would not overcome.

Creates Regulatory Inconsistency
Existing MSRB rules applicable to underwriters would not apply to municipal advisors engaged in the same activity. As a result of this regulatory inconsistency, the municipal advisors would have a competitive advantage with respect to these direct placements and the municipal securities being placed would not be subject to the same level of transparency (*e.g.*, CUSIP numbers, transaction reporting, disclosures in an offering) in the municipal securities market as they would if a broker-dealer were engaged.

Suggests a "Solution" in Search of a Problem
The Commission describes the Proposed Exemptive Order without specifying what "problem" it is trying to address and who would benefit therefrom, and then summarily concludes that the proposal meets the required standard for an exemption. However, the Commission does not meet its burden under the Exchange Act for granting exemptions because it does not explain how the Proposed Exemptive Order is consistent with the public interest and the protection of investors, or how it is necessary or appropriate in the public interest.

If, despite compelling reasons for a complete withdrawal, the Commission were to adopt an exemptive order in some form, SIFMA urges the Commission to significantly amend the proposed exemption to include various limitations as described more fully in Appendix A hereto, including by directing the MSRB to amend its rules to address all of the regulatory gaps created by allowing municipal advisors to engage in this highly regulated activity. SIFMA suggests such limitations to ensure that investors (and particularly retail investors) retain protections under the federal securities laws and the market for municipal securities remains as transparent as possible under the circumstances.

II. Introduction

As set forth in more detail below, the Proposed Exemptive Order frustrates the Commission's mission to protect investors, undermines the purpose of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act")[3] to improve transparency in financial markets and runs counter to established regulatory precedent.[4] In addition, if approved, the Proposed Exemptive Order would contradict significant SEC precedent regarding broker-dealer registration and could create a conflict of interest that would incentivize a municipal advisor to recommend a structure to its issuer clients merely because it falls within the allowable activity. Furthermore, the Proposed Exemptive Order would create a regulatory gap by allowing a financial intermediary involved in the direct placement of municipal securities with certain investors to conduct its activities outside of the well-established regulatory framework of the Municipal Securities Rulemaking Board ("MSRB").

In directing the SEC to facilitate the establishment of a national market system, Congress set out various objectives for such a system.[5] Among other objectives, Congress explicitly found that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure fair competition among brokers and dealers, and the availability to brokers, dealers and investors of information with respect to quotations for and transactions in securities. Under these objectives, no single market participant or group of market participants, or particular end goal (such as market efficiency as opposed to fair competition), should take precedence over all others. Yet, that is what the Proposed Exemptive Order appears to do, without a balancing of factors or a thorough explanation. At the very least, before the Commission chooses competitive winners and losers in the capital formation process – and here it is choosing to benefit municipal advisors at the expense of registered broker-dealers in the market for these municipal securities offerings – it must articulate the basis for doing so. The Proposed Exemptive Order does not provide such a basis.

Nowhere in the Proposed Exemptive Order does the Commission identify the purported market harm that it seeks to "fix" or any benefit that would inure to investors through exempting municipal advisors engaging in direct placements. Likewise, it fails to explain how issuers and investors are disadvantaged under the current regime that requires placement agents to be registered broker-dealers when placing municipal securities. Indeed, the Commission fails to discuss how the Proposed Exemptive Order is consistent with - or necessary or appropriate in - the public interest and how it is consistent with the protection of investors.[6] That is, the Commission never indicates exactly who would benefit from the

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[3] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[4] SIFMA previously submitted comment letters to Commission staff regarding issues similar to those discussed in the Proposed Exemptive Order. *See* Letter to Mary Jo White, Chair, SEC from Leslie M. Norwood, Managing Director and Associate General Counsel, SIFMA, Re: Placement Agent Activities of Municipal Advisors (Mar. 12, 2015); and Letter to Brett Redfearn, Director, Joanne C. Rutkowski, Senior Counsel, Division of Trading and Markets; Rebecca Olsen, Director, Office of Municipal Securities, SEC from Leslie M. Norwood, Managing Director and Associate General Counsel, SIFMA, Re: Request from PFM Financial Advisors LLC for Interpretive Relief from Broker-Dealer Registration for Registered Municipal Advisors Acting in Connection with Direct Placements (Jun. 12, 2019).

[5] *See, e.g.*, Exchange Act Section 11A(a)(1).

[6] The Commission states in the Proposed Exemptive Order that the proposal to grant the relief therein is done pursuant to Sections 15(a)(2) and 36(a)(1) of the Exchange Act. Section 15(a)(2) authorizes the Commission to conditionally or unconditionally exempt from the registration requirements under Section 15(a)(1) any broker or class of brokers, by rule or order, as it deems consistent with the public interest and the protection of investors. Section 36(a)(1) of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class of classes of persons, securities, or transactions, from any provision or

Proposed Exemptive Order and does not address the attendant harm that approval of the Proposed Exemptive Order would have on the municipal securities market in general, and investors therein, including retail investors.

For these reasons, the Commission should not exempt municipal advisors from broker-dealer registration as contemplated by the Proposed Exemptive Order.

III. Discussion

A. The Proposed Exemptive Order Ignores the Importance of Broker-Dealer Registration and Runs Counter to Established Commission Precedent.

1. *Broker-Dealer Registration*

In its statement of necessity for regulation under the Exchange Act, Congress recognized that transactions in securities "are effected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including … to insure the maintenance of fair and honest markets in such transactions."[7] In 1975, Congress amended the Exchange Act to, among other things, extend the broker-dealer registration requirements to all broker-dealers trading in municipal securities,[8] recognizing the importance of and need for regulation of broker-dealer activity, including regulation of those individuals engaged in municipal securities transactions.

As defined in the Exchange Act, a broker is "any person engaged in the business of effecting transactions in securities for the account of others."[9] Unless exempted, a person who meets this definition is subject to numerous statutory provisions and related regulations, including the requirement to register as a broker-dealer under Section 15(a) of the Exchange Act.[10] According to one court, broker-dealer registration

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provisions of the Exchange Act or a rule or regulation thereunder, by rule regulation, or order, to the extent such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors. *See* Proposed Exemptive Order at notes 17 and 18.

[7] Exchange Act Section 2.

[8] Securities Act Amendments of 1975, Pub. L. No. 94-29, §11, 89 Stat. 97, 121 (1975).

[9] Exchange Act Section 3(a)(4)(A). In contrast, a "dealer" is generally defined in Section 3(a)(5)(A) of the Exchange Act as "any person engaged in the business of buying and selling securities . . . for such person's own account through a broker or otherwise." The activity that is the subject of the Proposed Exemptive Order is typically broker activity. However, because most entities act as both brokers and dealers, we use the term "broker-dealer" throughout this letter.

[10] Congress has made clear its intent that broker-dealers effecting transactions in municipal securities should be subject to registration as broker-dealers. In this regard, Congress drew a distinction between "exempt securities" for purposes of registering securities transactions under the Securities Act of 1933 and "exempted securities" for which a broker-dealer would not be required to register in order to effect transactions in such securities. *See* Exchange Act Section 15(a). The term "exempted security" for purposes of Section 15(a) is defined in Section 3(a)(l2) of the Exchange Act and includes various types of securities, but while municipal securities may be "exempted" for other purposes under the Exchange Act and are "exempt" securities under the Securities Act, Exchange Act Section 3(a)(12)(B)(ii) explicitly provides that municipal securities shall not be deemed to be "exempted securities" for purposes of Section 15. Furthermore, by its terms, Section 15B(a)(1)(A) of the Exchange Act requires municipal securities dealers that are not registered as broker-dealers pursuant to Section 15 to register in accordance with Section 15B.

> is of the utmost importance in effecting the purposes of the [Exchange] Act. It is through the registration requirement that some discipline may be exercised over those who may engage in the securities business and by which necessary standards may be established with respect to training, experience and records.[11]

For this reason, when considering whether to adopt exemptions to broker-dealer registration, the SEC itself has repeatedly stressed the importance of broker-dealer registration in the broader regulatory scheme. For example, according to the Commission,

> [t]he broker-dealer registration and associated regulatory requirements of the [Exchange] Act, as well as those of the self-regulatory organizations, provide important safeguards to investors. Investors are assured that registered broker-dealers and their associated persons have the requisite professional training and that they must conduct their business according to regulatory standards. Registered broker-dealers are subject to a comprehensive regulatory scheme designed to ensure that customers are treated fairly, that they receive adequate disclosure and that the broker-dealer is financially capable of transacting business.[12]

Broker-dealers, as intermediaries between customers and the securities markets, play a very important role in maintaining the integrity of those markets. For example, once registered, a broker-dealer is subject to certain minimum capital requirements to protect the assets of customers and to meet their responsibilities to other broker-dealers.[13] The broker-dealer and its associated persons are subject to numerous requirements and obligations that are part of a comprehensive regulatory scheme intended to protect both investors and the securities markets. This regulatory scheme includes the obligation to be a member of a self-regulatory organization ("SRO"), through membership in a national securities exchange or a registered securities association.[14] SROs have rulemaking and enforcement responsibilities under the Exchange Act that supplement the Commission's oversight responsibilities.[15] As FINRA is currently the only registered securities association, generally all broker-dealers effecting securities transactions in the over-the-counter market are required to be FINRA members. In addition to FINRA membership, broker-dealers in municipal securities are required to register with the MSRB and comply with MSRB rules governing their conduct.[16]

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[11] Eastside Church of Christ v. Nat'l Plan, Inc., 391 F.2d 357, 362 (5th Cir. 1968).

[12] SEC Release No. 34-22172 (Jun. 27, 1985), 50 FR 27940, 27941 (Jul. 8, 1985).

[13] Exchange Act Section 15(c) and Rule 15c3-1. *See also* SEC Release No. 34-27017 (Jul. 11, 1989), 54 FR 30013, 30015 (Jul. 18, 1989) ("broker-dealers are required by the Commission's net capital regulations to maintain sufficient capital to operate safely"). In fact, "the Commission's financial supervision of entities participating in the interdependent network of securities professionals contributes to the financial soundness of this nation's securities markets." *Id*. at 30016. Note that even broker-dealers that do not hold customer funds or securities must meet minimum net capital requirements.

[14] Congress has determined that any broker-dealer that effects a transaction anywhere other than on an exchange of which it is a member should be a member of a registered securities association. *See* Exchange Act Section 15(b)(8).

[15] SRO oversight helps to ensure that broker-dealers conduct their business in accordance with just and equitable principles of trade. *See, e.g.*, H. REP. No. 1476, 93d Cong., 2d Sess. (1974).

While the federal securities laws and rules contain general antifraud prohibitions applicable to all persons, they generally do not mandate that particular sales practices be employed by broker-dealers and their associated persons. SRO rules, on the other hand, contain numerous sales practice rules that apply to registered broker-dealers. For example, with respect to broker-dealers in municipal securities, MSRB rules require that advertising and sales literature conform to specific communication standards and not be misleading,[17] and that broker-dealers have extensive supervisory systems in place, including compliance policies and procedures and written supervisory procedures covering all aspects of their business, to help ensure compliance with all applicable federal securities laws and rules and SRO rules.[18] SROs also administer qualification examinations for individuals associated with broker-dealers and ensure that they have not committed certain acts or abuses that would "statutorily disqualify" them from working in the securities industry.[19]

When an investor engages in a transaction through a registered broker-dealer, it does so with the knowledge that the broker-dealer is subject to significant requirements and that the investor will receive the protections of the securities laws and regulations that apply to that transaction by virtue of the fact that it occurred through a registered broker-dealer. If the SEC adopts the Proposed Exemptive Order, the investor in a direct placement with a municipal advisor (*i.e.*, Qualified Provider) would not have any customer or client relationship with the municipal advisor and therefore would not benefit from any of the rules and regulations that otherwise would apply to that same placement were it made through a registered broker-dealer.

2. *Established Commission Precedent*

The SEC indicates in the Proposed Exemptive Order that the issue of when a municipal advisor is acting as a broker-dealer has not been addressed before. SIFMA believes that the SEC and its staff have spoken to those activities that cause one to be deemed as acting in a broker-dealer capacity many times in both rulemaking and guidance and consistently have concluded that, for investor protection and other reasons, certain activities conducted by advisors require broker-dealer registration. While the SEC has recognized that there may be instances where broker-dealer registration is not essential to the activity being proposed, it has recognized that "[e]xemptions from registration have traditionally been narrowly drawn in order to promote both investor protection and the integrity of the brokerage community."[20] Consequently, the Commission has noted that, "[i]n the context of adopting exemptions from the U.S. broker-dealer regulatory scheme, the Commission believes that it is important to reiterate

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[16] The rules of the MSRB apply to a broker-dealer's activity related to municipal securities. FINRA rules do not apply to transactions in municipal securities, but may apply to some ancillary activities. *See* FINRA Rule 0150, on application of rules to exempted securities except municipal securities.

[17] MSRB Rule G-21, on advertising by brokers, dealers or municipal securities dealers; *see also* FINRA Rule 2210, on communications with the public.

[18] MSRB Rule G-27, on supervision; *see also* FINRA Rule 3110, on supervision and responsibilities relating to associated persons.

[19] MSRB Rule G-2, on standards of professional qualification; MSRB Rule G-3, on professional qualification requirements; MSRB Rule G-4, on statutory disqualifications, FINRA Rule 1210, on registration requirements, and FINRA Rule 1220, on registration categories.

[20] SEC Release No. 34-22172, *supra* n. 12, 50 FR at 27941. Furthermore, when exemptions have been granted, the Commission has imposed conditions aimed at ensuring investor protection.

the fundamental significance of broker-dealer registration within the structure of U.S. securities market regulation."[21]

As a preliminary matter, the SEC does not dispute that a municipal advisor that solicits investors to purchase direct placements and receives transaction-based compensation is a broker-dealer that would be required to register as such but for the Proposed Exemptive Order.[22] This is consistent with the SEC's clear and long-held position that

> any person who participates in the distribution of [securities] may be a broker. . . For example, this might include, among others, persons who, for a finder's fee, commission, bonus or other compensation, induce others to become participants in the [securities transactions][23]

The SEC similarly has stated that "effecting transactions" for purposes of broker-dealer registration includes "identifying potential purchasers of securities," "soliciting securities transactions," and "facilitating the execution of a securities transaction."[24] Likewise, receipt of transaction-based compensation, which gives the recipient a stake in the success of the transaction, has been considered a hallmark of broker-dealer status for decades. According to the Commission, the receipt of transaction-based compensation often indicates that such a person is engaged in the business of effecting transactions in securities.[25] Importantly, "[c]ompensation based on transactions in securities can induce high pressure sales tactics and other problems of investor protection often associated with unregulated and unsupervised brokerage activity."[26] Because of this danger, except in very rare circumstances, the SEC has prohibited transaction-based compensation with respect to exemptive relief from broker-dealer registration that it has granted, and the SEC staff regularly denies no-action relief under Section 15 to unregistered entities and persons who propose to receive transaction-related compensation.[27]

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[21] SEC Release No. 34-27017, *supra* n. 13, 54 FR at 30014.

[22] *See* Proposed Exemptive Order at text associated with n. 24. Also, note that Court decisions cited by SEC staff in various no-action letters in the context of finders support this conclusion. For example, one court has found that the definition of "broker" connotes "a certain regularity of participation in securities transactions at key points in the chain of distribution" Mass. Fin. Serv., Inc. v. SIPC, 411 F. Supp. 411, 415 (D. Mass.), aff'd, 545 F.2d 754 (1st Cir. 1976). Other courts have found that engaging in active selling efforts with respect to securities may lead to the conclusion that a person is a broker. *See, e.g.,* SEC v. Nat'l Exec. Planners, Ltd., 503 F. Supp. 1066, 1073 (M.D.N.C. 1980).

[23] SEC Release No. 33-5211 (Nov. 30, 1971), 36 FR 23289 (Dec. 8, 1971).

[24] SEC Release No. 34-44291 (May 11, 2001), 66 FR 27760, 27772-73 (footnotes omitted) (May 18, 2001).

[25] SEC Release No. 34-20943 (May 9, 1984), 49 FR 20512, 20514 (May 15, 1984). As a result, "the condition concerning transaction-based compensation applies throughout the rule," even to transactions involving solely financial institutions. *Id.*

[26] SEC Release No. 34-22172, *supra* n. 12, 50 FR at 27942.

[27] In fact, the SEC recognizes that service providers in municipal securities offerings are generally paid from the proceeds of a municipal offering, and therefore routinely receive transaction-based compensation, a hallmark of broker-dealer status. *See* Proposed Exemptive Order at 54064. This is precisely why the activities actually conducted by such service providers in connection with municipal securities offerings are so important to the analysis. *See* SEC v. Helms, cited in n. 23 of the Proposed Exemptive Order, which noted that, in determining whether a person has "effected securities transactions" for purposes of broker-dealer registration, courts consider not only the receipt of transaction-based compensation, but also whether the person solicited investors to purchase securities and

The Commission's position regarding broker-dealer activity and the need for registration is reflected in existing rules, enforcement actions and no-action relief. For example:

- *Exchange Act Rule 3a4-1* - In 1984, the SEC adopted the non-exclusive safe harbor under Exchange Act Rule 3a4-1 to allow "associated persons" of issuers to engage in the sale of the issuer's own securities without being considered broker-dealers.[28] In adopting the safe harbor, the Commission considered whether the safe harbor should be expanded to cover, among others, financial consultants who for a fee assist issuers in the sale of securities. The Commission concluded that it would not be appropriate to expand the rule to include such individuals because

> Insofar as they are retained by an issuer specifically for the purpose of selling securities to the public and receive transaction-based compensation, these persons are engaged in the business of effecting transactions in securities for the account of others. Accordingly, these persons should register as broker-dealers.[29]

Though the Commission recognized the benefits of allowing associated persons of the issuer to assist in the sale of the issuer's securities, it set forth conditions and limitations on how such activity would take place. To rely on the safe harbor, an associated person of the issuer must first meet three conditions, one of which is that the individual must not receive, directly or indirectly, commissions or transaction-based compensation in connection with the sale of the issuer's securities. As noted above, in adopting this requirement, the SEC took a cautious approach because of the likelihood that the receipt of transaction-based compensation would lead to undue sales pressure and other investor protection problems that should be addressed through broker-dealer registration.[30]

After meeting the initial three conditions noted above, the associated person also must comply with one of three additional conditions related to the allowable sales activity. Pursuant to one of these conditions, an associated person must restrict his or her participation to transactions involving offers and sales to certain enumerated institutions.[31] In adopting this part of the exemption, however, the SEC rejected the suggestion that the safe harbor should apply to all sales by unregistered associated persons to accredited investors, noting that "the fact that the Commission has concluded that, under limited circumstances, investors do not need the protections afforded by registration under the 1933 Act does not dictate a conclusion that a broad exemption from broker-dealer registration is appropriate."[32]

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was involved in negotiations between the issuer and the investor. As acknowledged in the Proposed Exemptive Order, municipal advisors meet all three criteria.

[28] Exchange Act Rule 3a4-1(c). In general terms, the rule defines an "associated person" of an issuer as a natural person who is a partner, officer, director or employee of: the issuer; a corporate general partner of the issuer (if the issuer is a limited partnership); a company or partnership that controls, is controlled by, or is under common control with, the issuer; or a federally-registered investment adviser to a registered investment company which is the issuer. An "associated person of an issuer" for purposes of this safe harbor does not include an unaffiliated third party.

[29] SEC Release No. 34-22172, *supra* n. 12, 50 FR at 27942.

[30] *Id*.

[31] Exchange Act Rule 3a4-1(a)(4)(A). The types of institutions to which an associated person may sell securities of the issuer in Rule 3a4-1 are considerably narrower than the entities that comprise "Qualified Providers" under the Proposed Exemptive Order.

- *Exchange Act Rule 15a-6* - The conditions of the safe harbor in Exchange Act Rule 15a-6 for foreign broker-dealers seeking to interact with U.S. investors reflects the SEC's view that U.S. broker-dealer registration is needed when engaging in securities transactions involving U.S. investors. Even when those investors are sophisticated "institutional" or "major U.S. institutional investors," the safe harbor nevertheless requires the involvement of a U.S.-registered broker-dealer in certain aspects of the foreign broker-dealer's activities, including effecting transactions entered into between the foreign broker-dealer and the U.S. investor.[33]

- *Traditional Private Placements* – In addition to the safe harbors discussed above, it is worth noting that there is no exemption from broker-dealer registration for intermediaries effecting private placements pursuant to Regulation D of the Securities Act. Even where all sales are made to "accredited investors" pursuant to the conditions of that rule, a registered broker-dealer generally must intermediate the transactions. The sheer number of registered "private placement brokers" evidences this fact. The SEC has acknowledged the importance of all of the rules and requirements applicable to the registration of broker-dealers, noting that "[t]hese considerations remain important regardless of whether a broker-dealer's activities involve contacts with individual or institutional investors." [34]

- *SEC Enforcement Actions* - Applying its standard broker-dealer analysis, the SEC has brought numerous enforcement actions against unregistered entities that (1) solicited purchasers of securities, and (2) received transaction-based compensation, even where the purchasers were sophisticated investors.[35] For example, in one enforcement action brought against an individual following the imposition of a permanent industry bar in a previous enforcement action, the individual and an entity he controlled were found to have violated Section 15(a) of the Exchange Act by acting as a broker in connection with M&A transactions between sophisticated corporations by introducing companies, suggesting business arrangements between them, participating in negotiations regarding the structure of the transactions and securities to be issued in connection with those transactions, and receiving transaction-related compensation.[36]

- *SEC Staff No-Action Positions* - On many occasions, the staff of the Division of Trading and Markets ("Staff") has addressed whether the activities of investment advisers and municipal advisors constitute broker-dealer activity such that registration is required. Staff has been careful to limit the scope of any relief granted from the Exchange Act's registration requirements. For example:

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[32] SEC Release No. 34-22172, *supra* n. 12, 50 FR at 27943. In all scenarios, when relying on this safe harbor, the associated person cannot receive any form of transaction-based compensation.

[33] SEC Release No. 34-27017, *supra* n. 13, 54 FR at 30016 ("When Congress authorized and subsequently required the Commission to register broker-dealers, Congress did not condition the requirements for registration on the type of investor involved.").

[34] *Id*.

[35] *See e.g.*, Proposed Exemptive Order at n. 22, citing enforcement actions.

[36] SEC v. Michael R. Milken & MC Grp., 98 Civ. 1398 (MP) (S.D.N.Y. 1998). *See* SEC Litigation Release No. 15,654, 1998 SEC LEXIS 323 (Feb. 26, 1998). The defendants settled the action for $47 million in penalties and disgorgement of the amount they received for their roles in connection with two securities transactions. *See also* In the Matter of BlackStreet Capital Management, LLC and Murry N. Gunty, Admin. Proc. No. 3-17267, SEC Release No. 34-77959 (Jun. 1, 2016) (BlackStreet Capital Management acted as an unregistered broker-dealer by soliciting deals, identifying buyers or sellers, negotiating and structuring transactions, arranging financing, and executing transactions, and receiving transaction-based compensation for providing these services).

- The revocation of the Dominion Resources, Inc., no-action letter in 2000 is particularly instructive.[37] Fifteen years prior, the Staff had granted no-action relief from broker-dealer registration to Dominion Resources, which as an adviser to issuers (including municipal issuers) would recommend or design financing methods and securities to fit the issuer's needs, participate in meetings with underwriters[38] and counsel concerning the terms of the offering but, with the exception of the possible introduction of the issuer to a commercial bank standby purchaser, would have no contact with potential purchasers of the securities. While Dominion Resources would receive compensation based on the size of the financing (although not on the "successful issuance of securities to the public"), it would not receive commissions or "other transaction-based compensation in connection with these activities."[39] In its revocation letter, the Staff noted that in the years since 1985, it had frequently considered the question of when someone was a broker-dealer, and noted that it had denied no-action relief in circumstances similar to those described in the 1985 no-action letter. The Staff therefore concluded that if Dominion Resources was still engaging in the activities described in the 1985 letter, it would have to register as a broker-dealer.[40]

- In PRA Securities Advisors, L.P.,[41] an investment adviser providing investment advice and investment management services with respect to investments in publicly traded securities of issuers primarily active in real estate, sought relief from broker-dealer registration in order to market REITs and other securities, on a private placement basis, to its clients. PRA would, among other things, suggest revisions to proposed terms and conditions of the transaction in order to conform the offering with its clients' investment criteria. The offering documents would then be provided to its clients. Despite the fact that PRA would only receive its standard advisory fee and receive no payment from any REITs in which its clients invested, the Staff denied no-action, stating the following:

> We note in particular that, although PRA will be compensated by an annual fee based on the percentage of assets under management, (i) PRA will be actively engaged in locating prospective REIT issuers and negotiating the terms of the private placement transaction and the securities on behalf of clients; (ii) PRA will be approaching new clients to interest them in purchasing the REITs it negotiates; and (iii) a registered broker-dealer will not be involved in effecting these transactions. **We note that Section 15(a) does not contain an exemption from the registration requirements for persons whose business is limited to private placements**. (Emphasis added.)[42]

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[37] *See* Revocation of Prior No-Action Relief Granted to Dominion Res., Inc., SEC No-Action Letter (Mar. 7, 2000).

[38] Dominion Resources' role was in addition to, and not instead of, an underwriter for the issuer's securities.

[39] Dominion Resources, Inc., SEC No-Action Letter (Aug. 22, 1985).

[40] One likely reason is that compensation based on the size of the financing would be considered transaction based in most circumstances.

[41] PRA Securities Advisors, L.P., SEC No-Action Letter (Mar. 3, 1993).

[42] *Id. See also* Capital Directions, Inc., SEC No-Action Letter (Jan. 4, 1979) (broker-dealer registration required where issuer's adviser for private placements receives transaction-based compensation and has contact with potential purchasers of securities).

- In Benjamin & Lang, Inc.,[43] the Staff granted a no-action request from a financial consultant to municipal securities issuers, on the basis, among other conditions, that the company ("B&L") would not solicit purchasers or otherwise "engage in" the buying and selling of securities. According to its request, B&L did not bid on issues, underwrite, trade or hold customer funds or securities. In its capacity as financial consultant, it analyzed the financial operations of the issuers, made pertinent suggestions and recommended methods of financing. B&L submitted to the issuer for its approval suggested bond retirement schedules and other financial data relating to the financing of the proposed project. B&L also provided other services, including providing advice to the issuer on the procedures for selling bonds by competitive bid in the open market, making suggestions for dates of sale, and causing notices of sale to be published. B&L also assisted in the delivery of the securities to the purchaser and prepared a bond register that provided a record of principal and interest payments due, legal opinions, and names of registered bondholders. The firm was paid a flat fee (*i.e.*, it did not receive transaction-based compensation) for its services.

- In The Knight Group ("TKG"),[44] the Staff granted no-action relief to an unregistered entity that provided numerous financial advisory services to municipal issuers. Among other things, TKG would structure the issue, assist in the selection of underwriters and other offering participants, help prepare preliminary and final official statements, negotiate the terms of the offering on behalf of the issuer with the selected underwriter(s). In connection with the competitive bidding process, TKG would receive bids, analyze them, and award securities to selected underwriters, and, if requested by the issuer, make recommendations about investment of temporarily idle proceeds of an issuer pending their project use. Relief from broker-dealer registration was conditioned on TKG's not receiving commissions or other transaction-based compensation, either directly or indirectly, and on TKG's not purchasing, selling or soliciting purchases of an issuer's securities, other than in connection with its dealings with underwriters.

- In Peyton Securities Co., Inc.,[45] Staff addressed a request for an exemption from registration under Exchange Act Section 15B(a)(4) for a firm providing financial advisory services to Texas municipal issuers in the issuance of their bonds. While the Staff was unable to respond to the request because they needed more information, the Staff expressly noted that "some activities which a financial adviser may perform in connection with securities transactions may involve the adviser in what is essentially a brokerage business which would require registration."

Based on the above examples and many more not cited here, the Proposed Exemptive Order contradicts the SEC's established history regarding the importance of broker-dealer registration through its rulemaking, enforcement actions and Staff no-action guidance. By exempting municipal advisors from these registration requirements, the Commission is undoing years of precedent to the detriment of issuers, investors and the public interest. In this way, the breadth of the Proposed Exemptive Order uncharacteristically ignores the Commission's traditional and more limited, conditional and narrowly

[43] Benjamin and Lang, Inc., SEC No-Action Letter (Aug. 1, 1978).

[44] The Knight Group, SEC No-Action Letter (Nov. 13, 1991).

[45] Peyton Securities Co., Inc., SEC No-Action Letter (Dec 4, 1975); *see also* Noel Johnson & Associates, Inc., SEC No-Action Letter (Dec. 4, 1975).

tailored approach to exemptions from registration. If approved, the Proposed Exemptive Order would allow a group of unregistered persons to engage in the very activity Congress intended to regulate when adopting the Exchange Act. It also results in an uneven regulatory playing field based on the type of issuer and creates the proverbial "slippery slope."

B. **The Proposed Exemptive Order Contradicts the Purpose of the Dodd-Frank Act and the Rules Applicable to the Placement of Municipal Securities**

1. *The Dodd-Frank Act*

On July 21, 2010, President Obama signed into law the Dodd-Frank Act.[46] Section 975 thereunder created "municipal advisors" as a new class of regulated persons and, among other things, established the requirement for the registration of municipal advisors with the SEC and regulation by the MSRB. In the preamble to the Dodd-Frank Act, Congress indicated its intention to, among other things, "promote the financial stability of the United States by improving accountability and transparency in the financial system."[47]

In The Restoring American Financial Stability Act of 2010, a Senate report related to the Dodd-Frank Act, the Senate noted that "a major lesson from the [financial] crisis is the importance of transparency in financial markets."[48] The Report further indicated, "the municipal securities market is subject to less supervision than corporate securities markets, and market participants generally have less information upon which to base investment decisions."[49] The Report stated that the devastation of the financial crisis was in part due to some regulators that, rather than taking measures to strengthen the financial services sector, "actively embraced deregulation, pushed for lower capital standards, ignored calls for greater consumer protections and allowed the companies they supervised to use complex financial instruments to manage risk that neither they nor the companies really understood."[50] Accordingly, in response to the financial crisis, the Dodd-Frank Act amended the Exchange Act to require "a range of municipal financial advisors to register with the SEC and comply with regulations issued by the [MSRB]."[51]

In light of the stated purposes behind Dodd-Frank's mandate to more strongly regulate the municipal securities markets, it is unimaginable that Congress intended for the Dodd-Frank Act to loosen the protections of the securities laws in the manner suggested by the Commission in the Proposed Exemptive Order. The Dodd-Frank Act recognized the need for regulation of municipal advisors in light of the financial crisis and the lack of transparency in the municipal securities market. By proposing to allow a relatively new class of regulated persons to engage in broker-dealer activity without registration seems to epitomize the very "embracing of deregulation" that the Dodd-Frank Act sought to correct.

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[46] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[47] Pub. L. No. 111-203 Preamble.

[48] S. Rep. No. 111-176, at 38 (2010) ("Report").

[49] *Id.*

[50] Report at 40.

[51] Report at 38.

2. *SEC and MSRB Rules Applicable to Placement Agents; Transparency*

Allowing municipal advisors to act as placement agents without registration contradicts not only the SEC's own precedent and the intention of the Dodd-Frank Act, as addressed above, but also contradicts a main goal of Exchange Act Rule 15c2-12 and MSRB rules applicable to underwriters to increase and maintain municipal market transparency.

Exchange Act Rule 15c2-12(f)(8) defines "underwriter" broadly to include

> any person who has purchased from an issuer of municipal securities with a view to, or offers or sells for an issuer of municipal securities in connection with, the offering of any municipal security or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking….[52]

This definition is understood to include placement agents and therefore subjects them to the disclosure terms and requirements of the rule, as applicable. Allowing municipal advisors to engage in the placement activity permitted in the Proposed Exemptive Order (*i.e.*, underwriter activity) without registration could effectively eliminate the protections of Rule 15c2-12, as those issuances would only be disclosed if the issuer had an outstanding issuance that would require a continuing disclosure filing under Rule 15c2-12(b)(5)(i)(C)(15) or (16).

Relatedly, the MSRB has indicated that, unless otherwise noted, references to "underwriters" in its rules are meant to include placement agents.[53] Therefore, private placements of municipal securities and the placement agents that participate in those transactions are subject to MSRB rules and other federal securities laws applicable to transactions in municipal securities.[54] This includes, for example: Rule G-34, on CUSIP numbers, new issue, and market information requirements; Rule G-32, on disclosures in primary offerings; Rule G-8, on books and records to be made by brokers, dealers, and municipal securities dealers and municipal advisors; Rule G-14, on reports of sales or purchases; and Rule A-13, on underwriting and transaction assessments for brokers, dealers and municipal securities dealers. If the Proposed Exemptive Order were approved, a municipal advisor engaged in the placement of municipal securities as described therein would not be subject to any of these requirements.[55]

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[52] 17 CFR §240.15c2-12(f)(8). Note that the SEC, in adopting this definition, purposefully changed the proposed language to clarify that placement agents in private placements were meant to be included. Specifically, the SEC replaced the original proposed language referring to "distributions" with "offerings" to make its intentions clear. *See* SEC Release No. 34-26985 (Jun. 28, 1989); 54 FR 28799-01 at 28810 (Jul. 10, 1989) (Final Rule; Municipal Securities Disclosure).

[53] The MSRB consistently has stated its view through notices and cross-references to Exchange Act Rule 15c2-12(f)(8) that, unless otherwise noted, placement agents are included in the definition of "underwriter" as used throughout MSRB rules. *See e.g.,* CUSIP Number Eligibility Standards and Requirements to Obtain CUSIP Numbers, MSRB Reports, Vol. 12., No. 2 (Jul. 1992); SEC Release No. 34-50773 (Dec. 1, 2004), 69 FR 70731-02 (Dec. 7, 2004) (SR-MSRB-2004-08); MSRB Notice 2008-28 (Jun. 27, 2008); and MSRB Regulatory Notice 2017-25 (Dec. 15, 2017).

[54] *See* MSRB Notice 2011-37 (Aug. 3, 2011) (Financial Advisors, Private Placements, and Bank Loans) ("If a financial advisor, by virtue of its activities, would be viewed as a placement agent for a new issue of municipal securities, its activities in connection with such placement would be subject to all MSRB rules normally applicable in connection with private placements…"); *See also*, MSRB Notice 2011-52 (Sept. 12, 2011) (Potential Applicability of MSRB Rules to Certain "Direct Purchases" and "Bank Loans").

As already indicated, the majority of MSRB initiatives undertaken in the past decade have been driven, at least in part, by the need and desire for increased market transparency.[56] Allowing municipal advisors to engage in placement activity as described in the Proposed Exemptive Order would undermine these transparency efforts. The SEC indicates that because municipal advisors are subject to the fair-dealing requirements of MSRB Rule G-17 and the anti-fraud provisions of the Securities Act and the Exchange Act, these safeguards "operate as a constraint on the conduct of registered municipal advisors."[57]

While it is true that municipal advisors are subject to the antifraud requirements, the Commission overlooks the importance and value of compliance with investor protection and general conduct rules when engaged in a private placement of municipal securities. By exempting municipal advisors from broker-dealer requirements and allowing sales to a broad universe of investors, including non-bank investors, the Commission would create an entire class of municipal securities that, in many cases, would be unaccounted for.[58] These municipal securities could be issued without CUSIP numbers[59] and sold without transaction reporting. In addition, because there are no disclosure requirements applicable to these issuances, investors would not know if the issuer has other outstanding debt that may be on parity with or senior to their own investment. In short, unless the issuer had another issuance outstanding for which continuing disclosures would be required, there essentially would be no data available on these issuances and no method of tracking these transactions – essentially a "shadow market" of municipal securities.

Because the Proposed Exemptive Order does not require that any restrictions be placed on the direct placements, the Qualified Provider would be able to immediately break up the single issue and

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[55] Oddly, in the Proposed Exemptive Order, the SEC states that the exemption will benefit firms that are dually registered as municipal advisors and brokers because they will not be required to comply with any of their broker requirements, including recordkeeping, when they place municipal securities in their municipal advisor capacity. Proposed Exemptive Order at note 33. SIFMA believes the benefits to these dually registered firms is greatly outweighed by the detriment to the municipal securities market, which will have little or no information on an entire class of securities being sold.

[56] Chair Clayton frequently speaks about the importance of transparency in the municipal securities market. Recently, in his remarks to the Government Finance Officers Association on November 14, 2019, Chair Clayton noted the significant number of retail investors in the municipal securities market and the resulting importance of transparency. *See also* the MSRB's website (http://www.msrb.org/About-MSRB/Programs/Market-Transparency-and-Research.aspx) which sets forth the methods by which the MSRB makes market information as transparent and widely available as possible to protect investors and municipal entities.

[57] Proposed Exemptive Order at 54066.

[58] The number of potential investors meeting the "Qualified Provider" definition is significant and therefore the amount of data that would be unaccounted for as a result of allowing placements with these investors would be substantial. This would create an enormous void in information available regarding these private placements that would not be accounted for in any of the market transparency mechanisms.

[59] In theory, the issuer could ask the municipal advisor to obtain a CUSIP number for the issuance. It is unclear, however, whether issuers would know they could make such a request. It is clear, however, that municipal advisors are generally opposed to any suggestion that they should apply for CUSIP numbers. *See e.g.*, comment letters received in response to Request for Comment on MSRB Rule G-34 Obligation of Municipal Advisors to Apply for CUSIP Numbers When Advising on Competitive Sales, MSRB Notice 2019-08 (Feb. 27, 2019); Request for Comment on Draft Amendments to and Clarification of MSRB Rule G-34, on Obtaining CUSIP Numbers, MSRB Notice 2017-05 (Mar. 1, 2017); and Second Request for Comment on Draft Amendments to Clarifications of MSRB Rule G-34, on Obtaining CUSIP Numbers, MSRB Regulatory Notice 2017-11 (Jun. 1, 2017).

allocate it among multiple accounts (including accounts of retail investors) or resell it, further anonymizing the issuance. Again, because these municipal securities could be sold without any restrictions, nothing would prevent a Qualified Provider from reselling the municipal securities immediately in a secondary market transaction to other investors, including those not meeting the Qualified Provider definition (*e.g.*, retail investors).[60] Given the odd nature of these municipal securities (*i.e.*, no CUSIP number or trade reporting required), it is unclear how such secondary market transactions would take place and how they would be tracked. The Commission does not suggest how such a sale would be effected.[61] The original disclosure and traceability shortcomings would follow the securities through the secondary market and affect each subsequent purchaser.

Finally, if approved, the Proposed Exemptive Order would contradict the well-established prohibition on role switching under MSRB Rule G-23, on activities of financial advisors. MSRB Rule G-23 prohibits a broker-dealer financial advisor from acting as a placement agent on the same transaction on which it provides financial advisory services. The Proposed Exemptive Order, however, would undo that prohibition and allow municipal advisors to act as both advisor and placement agent.

According to the MSRB, Rule G-23 is "designed principally to minimize the prima facie conflict of interest that exists when a dealer acts as both a financial advisor and an underwriter with respect to the same issue (*i.e.,* "role switching")."[62] In 2011, the MSRB amended Rule G-23 to expand the prohibition on role switching indicating that the conflict that is presented when a financial advisor underwrites the same issue of municipal securities "is too significant for the existing disclosure and consent provisions of Rule G-23 to cure."[63] The MSRB noted that, "[t]he imposition by [the Dodd-Frank Act] of a fiduciary duty upon municipal advisors, which includes financial advisors, made the existence of such a conflict a greater concern."[64] The undoing of this prohibition would confuse a municipal advisor's obligations and muddy the lines between conflicting activities.[65]

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[60] This is particularly the case where a state-registered investment adviser purchases the entirety of an offering and then allocates it among the accounts of its advisory clients, which are more likely to be retail investors.

[61] The Commission did not propose a safe harbor applicable to resales as exists in other markets such as pursuant to Securities Act Rule 144A.

[62] *See* MSRB Notice 2019-13 (May 20, 2019).

[63] SEC Release No. 34-63946 (Feb. 22, 2011); 76 FR 10926, at 10927 (Feb. 28, 2011) (File No. SR-MSRB-2011-03). *See also* MSRB Press Release: MSRB Adopts Dealer Role-Switching Prohibition to Eliminate Conflict of Interest in Municipal Securities Underwriting (May 31, 2011) ("This prohibition addresses conflicts of interest, real or perceived, that are too great for disclosure and consent to overcome," said MSRB Executive Director Lynnette Kelly Hotchkiss. "We have carefully considered the distinct roles involved in bringing a new municipal securities issue to market and this rule change preserves the integrity of the new issue market for the benefit of all market participants.")

[64] *Id*.

[65] SIFMA agrees with comments provided by the National Association of Municipal Advisors ("NAMA") in its letter to the MSRB in response to MSRB Notice 2019-13 (May 20, 2019) (Request for Comment on MSRB Rule G-23 on Activities of Dealers Acting as Financial Advisors). In its letter, NAMA stated that role switching creates "conflicts that defy effective mitigation and therefor interfere with an MA's fulfillment of its fiduciary duty to its issuer client." In addition, NAMA opposed allowing dealer municipal advisors from being able to switch their role from municipal advisor to placement agent, noting that the same unmitigated conflict would still be present. *See* Letter to Ronald W. Smith, Secretary, MSRB, from Susan Gaffney, Executive Director, NAMA (Aug. 19, 2019).

C. **The Proposed Exemptive Order is not Consistent with the Public Interest and the Protection of Investors**

1. *Public Interest*

As indicated above, the Proposed Exemptive Order appears to be a purported "solution" in search of a problem. The SEC has provided no clear rationale for the proposal and no information to demonstrate how the Proposed Exemptive Order would benefit the municipal securities market, municipal issuers or investors. Consequently, SIFMA has been required to guess as to the SEC's basis for the Proposed Exemptive Order and refute those potential justifications, which is inapposite to traditional rulemaking.

SIFMA believes the Proposed Exemptive Order, if approved, would be harmful to issuers and the overall public interest. Though a municipal advisor owes a duty of care to its municipal entity and obligated person clients and a duty of loyalty to its municipal entity clients, allowing a municipal advisor to both advise on a transaction for its client and act as placement agent undermines these duties and creates a conflict of interest that may be impossible to mitigate.[66]

If the Proposed Exemptive Order is approved, municipal advisors would become competitors of broker-dealers in the placement of municipal securities. As a result, municipal advisors would now have a salesman's stake in the related placements and could be incentivized to recommend their clients engage in municipal securities transactions that fit within the parameters of the exemption, even where an alternative structure may be better for the issuer (*i.e.,* one that would require a registered broker-dealer or no placement agent). In the same vein, potential Qualified Providers, knowing the municipal advisor must sell the entire issue to a single purchaser, could exert leverage over a municipal advisor to exact more favorable terms in a transaction to the detriment of the issuer.

Further, issuers may be led to believe that using a municipal advisor as a placement agent would decrease the cost to the issuer of issuing municipal securities. However, municipal advisors, undoubtedly, would see this activity as another method by which they can generate revenue - charging issuers for placement agent services in addition to their advisory fees. While it is accurate that broker-dealers charge fees to provide placement agent services, the value added as a result of engaging a broker-dealer includes the security of knowing the transaction is subject to and protected by significant laws, rules and requirements (*e.g.*, due diligence, disclosure obligations and fair pricing requirements) that otherwise are not implicated if the issuer engages a municipal advisor. In addition, because Qualified Providers would be required to conduct all their own due diligence, including determining whether the purchase involves a municipal security, subject to the federal securities laws, or a loan, the costs to those institutions regarding a direct investment could increase. This additional cost is likely to be taken into account in determining an appropriate purchase price. Thus, any purported cost savings to issuers by avoiding the participation of a registered broker-dealer as a placement agent may not materialize.

As discussed at length above, the exception to registration set out in the Proposed Exemptive Order creates a large hole in the regulatory framework applicable to financial intermediaries, and calls into question years of Commission policy. Finally, if approved, the integrity of the municipal securities markets may be compromised through the lack of transparency with respect to transactions effected by exempted municipal advisors. The inability to track the movement of securities placed through these non-registered broker-dealers follows the securities, so that publicly available information regarding subsequent sales to other investors, including retail investors, would be similarly non-transparent.

[66] *See supra* discussion of MSRB Rule G-23.

2. *Protection of Investors*

The Proposed Exemptive Order affirmatively removes investor protections from the municipal securities market by denying Qualified Providers, including non-bank entities, any of the benefits that otherwise would apply if they purchased municipal securities through a registered broker-dealer. Qualified Providers, while sophisticated in many respects, are not so sophisticated as to be unworthy of the same level of protections as other investors when investing in municipal securities. The Proposed Exemptive Order would create an extreme regulatory anomaly under which investors would only benefit from protections under the securities laws when they purchase municipal securities from a broker-dealer, but not when purchasing from a municipal advisor acting as a placement agent pursuant to the Proposed Exemptive Order. Conversely, it makes little sense that a Qualified Provider purchasing most, but not all, of an issue has the benefit of the protections afforded by sales practice and other requirements of registered broker-dealers, but foregoes those protections when purchasing an entire offering. Even qualified institutional buyers purchasing securities under Securities Act Rule 144A receive the benefit of the protections afforded by the securities laws and rules despite their sophisticated status.[67]

Because a municipal advisor acting as placement agent would have no disclosure obligations to the purchasers with respect to an issuance, the Qualified Providers may not be aware of information regarding any outstanding debt of the issuer. A municipal advisor's disclosure to a Qualified Provider that it represents only the municipal entity client would absolve the municipal advisor of all of the responsibilities that would attach to the placement of municipal securities if purchased through a broker-dealer. Indeed, the municipal advisor would not be obligated to conduct even basic due diligence on the investment (*e.g.*, even if not explicitly making a recommendation to a customer, it is generally understood that a broker-dealer should conduct at least "reasonable-basis" due diligence before offering the security to anyone). Similarly, because there would be no reporting obligations regarding these direct placement transactions, there would be a void in data available to regulators and market participants and there would be essentially no enforcement trail. Likewise, in the secondary market, transactions could occur without restriction and purchasers would have little to no information.[68]

The Commission has preliminarily concluded that the allegedly limited scope of solicitation activities that municipal advisors could engage in under the Proposed Exemptive Order, "in combination with applicable regulatory protections," would not implicate the need for broker-dealer registration. According to the Commission, however, those "applicable" regulations consist of the general obligations to deal fairly with all persons and the antifraud provisions of the federal securities laws. Protection from fraud, however, is not the only purpose of broker-dealer registration. The SEC does not address anywhere in the Proposed Exemptive Order the impact that failure to comply with dealer-related MSRB rules, applicable FINRA rules, and Exchange Act requirements applicable to registered broker-dealers would have on investors and the market for municipal securities.

In addition, despite its preliminary conclusion that its proposed exemption is appropriate, the SEC seeks comment on various potential alternative structures to the Proposed Exemptive Order. These potential limitations, however, do not address the harms to the market, investors and the established regulatory scheme that the various alternatives would cause. For instance, amending the definition of Qualified Provider to eliminate certain types of investors, such as state-registered investment advisers,

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[67] *See supra* n. 33. Note also that in a traditional private placement, as well as a sale under Securities Act Rule 144A conducted by a registered broker-dealer, due diligence requirements are imposed and once the securities are placed with a purchaser, there are restrictions on the purchaser's ability to resell the securities.

[68] Because so many rules would not apply to the initial transactions, our concern is that the purchasers in a secondary market transaction – which very well could be retail investors – would not have the information or protections they otherwise would have if a registered broker-dealer placed the securities in the first instance.

does not solve or address the larger issues of maintaining a level competitive playing field and ensuring transparent markets for municipal securities. Likewise, limiting the aggregate principal amount of a direct placement subject to the exemption or permitting only municipal issuers of a certain size to be covered by the proposed exemption would not overcome the negative impact of the exemption on the MSRB's and SEC's regulatory regimes.

Consequently, SIFMA strongly asserts that if it is approved, whether in its current form or if tweaked around the edges, the Proposed Exemptive Order would be harmful to the market as a whole with ramifications for all investors, including retail investors.

IV. Conclusion

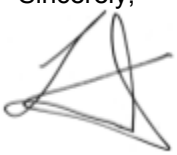
For all of the reasons set forth above, the Proposed Exemptive Order should not be approved. The Commission has well-established precedent that upholds Congress's intent when it adopted the Exchange Act and corresponding broker-dealer registration and regulatory requirements thereunder. The existing regulatory scheme further supports the purpose of the Dodd-Frank Act to promote financial stability by improving transparency in the municipal securities markets. Approving the Proposed Exemptive Order would contradict the existing regulatory structure and create a gap in information available for an entire segment of municipal securities issuances.

In short, the current direct placement market functions effectively and for the reasons set forth herein, the Proposed Exemptive Order is not consistent with the public interest or protection of investors, and it is neither necessary nor appropriate in the public interest. The Proposed Exemptive Order therefore should be withdrawn. Should the Commission determine to provide the proposed exemption from broker-dealer registration regardless of the information provided herein, it is imperative that it significantly change the scope of the exemption. At a minimum, SIFMA believes the limitations set forth in Appendix A should be imposed in order to protect issuers, investors, the regulatory scheme, transparency in the markets and the public interest.

* * *

Thank you for the opportunity to provide our views. Please do not hesitate to contact me with any questions at (212) 313-1130; or Laura S. Pruitt and Margaret R. Blake, of Jones Day, at (202) 879-3625 and (202) 879-3837, respectively.

Sincerely,



Leslie M. Norwood
Managing Director and
Associate General Counsel

Attachment: Appendix A – Proposed Conditions

Cc: (via Email): ***Securities and Exchange Commission***

Rebecca Olsen, Director, Office of Municipal Securities
Adam Wendell, Senior Special Counsel, Office of Municipal Securities
Elizabeth Baird, Deputy Director, Division of Trading and Markets
Emily Westerberg Russell, Chief Counsel, Division of Trading and Markets
Joanne Rutkowski, Assistant Chief Counsel, Division of Trading and Markets
Kelly Shoop, Special Counsel, Division of Trading and Markets

Municipal Securities Rulemaking Board

Nanette Lawson, Interim President and Chief Executive Officer
Gail Marshall, Chief Compliance Officer

Appendix A – Proposed Conditions

If the SEC chooses to move forward with the Proposed Exemptive Order, SIFMA proposes that, at a minimum, the following conditions should apply:[69]

Instrument	The municipal advisor may only place municipal securities of a municipal entity issuer[70] if the securities to be placed are rated investment grade; or are on parity with outstanding bonds of the issuer that are so rated and are subject to continuing disclosure requirements; The issue must be sold in one tranche to one Qualified Provider;
Size	Offerings must be for $1,000,000 or less; The municipal advisor may not break up a larger issuance to meet the $1,000,000 limit;
Offerees	Offerings may be made to Qualified Providers only; Qualified Providers are defined as a bank, any entity directly or indirectly controlled by the bank or under common control with the bank other than a broker, dealer or municipal securities dealer registered under the Securities Exchange Act of 1934; or a municipal entity with funds that are, at least in part, proceeds of, or fully or partially secure or pay, the purchasing entity's issue of municipal obligations (*e.g.*, state revolving fund or bond bank);[71]
Applicable Conditions	The municipal advisor must disclose in writing to each solicited Qualified Provider that (i) no broker-dealer is engaged in the direct placement; (ii) the municipal advisor has not conducted due diligence on behalf of the Qualified Provider; (iii) the municipal advisor represents only the municipal entity; and (iv) while it must act fairly towards all persons, the municipal advisor has no duty to the Qualified Provider other than fair dealing; Qualified Providers must purchase for their own proprietary account and may not allocate the issue to investor accounts; The municipal advisor may not charge a fee that is in excess of the fee it charges for municipal advisory services when a broker-dealer is engaged in the placement; The municipal advisor must have a reasonable belief that the present intent of the purchasing Qualified Provider is to hold the municipal securities to maturity or

[69] SIFMA considered the September 25, 2019 letter from the Bond Dealers of America ("BDA") to Commissioner Jackson and has incorporated some of the BDA's proposed conditions herein. *See* Letter to the Honorable Robert J. Jackson, Jr., Commissioner, SEC from Mike Nicholas, Chief Executive Officer, BDA (Sept. 25, 2019).

[70] The Proposed Exemptive Order should only allow a municipal advisor to place municipal securities on behalf of municipal entity clients for whom it has a fiduciary duty. The Proposed Exemptive Order should not allow placements on behalf of obligors to which the municipal advisor owes only a duty of care.

[71] If the Qualified Provider meets this definition, there would be no requirement to obtain a CUSIP number under Rule G-34 because the exemption set forth in that rule would apply. Similarly, because municipal advisors are not participants in DTC, and many private placements are not DTC eligible in any event, it would not be expected that these municipal securities would be DTC eligible or be subject to the requirement to input information into the New Issue Information Dissemination Service under Rule G-34(a)(ii).

Appendix A – Proposed Conditions

	earlier redemption or mandatory tender and must obtain a written representation to that effect from the Qualified Provider;
Restrictions	If resold prior to maturity or early redemption or mandatory tender, a resale or transfer may only be made to another Qualified Provider and must include a traveling "big boy" letter; The issue may not be broken up upon resale or transfer; Municipal advisors may only engage in one placement for any issuer in any 12 month period;[72]
Related Amendments and Implementation	MSRB rules related to underwritings, including direct placements, should be amended to apply to municipal advisors engaged in the activities set forth in the Proposed Exemptive Order.[73] For example, municipal advisors should be required, consistent with interpretive guidance under Rule G-17, to indicate that the municipal entity issuer and the Qualified Provider may choose to engage the services of a registered broker-dealer that is subject to investor protection rules under the federal securities laws; and The effective date for the Proposed Exemptive Order should be after final approval and implementation of all required MSRB rule amendments.

[72] This restriction is needed to prevent a municipal advisor from engaging in a regular brokerage business, and from breaking up larger-sized direct placements into smaller offerings merely to avoid broker-dealer registration.

[73] We have not attempted to list all of the MSRB rules that would need amending to address a municipal advisor's underwriting activities. At a minimum, SIFMA believes these amendments would include, for example, Rule G-8, on books and records; Rule G-14, on reports of sales or purchases; Rule G-32, on disclosures in connection with primary offerings; and Rule A-13, on underwriting and transaction assessments for brokers, dealers and municipal securities dealers. In addition, SIFMA believes the MSRB would need to review and amend Rule G-23, on activities of financial advisors to clarify that broker-dealer municipal advisors may act as placement agents on transactions on which they also acted as a municipal advisor.