



January 31, 2020

The Honorable Jay Clayton
Chairman
The Honorable Robert J. Jackson, Jr.
The Honorable Allison Herren Lee
The Honorable Hester M. Peirce
The Honorable Elad L. Roisman
Commissioners
U.S. Securities and Exchange Commission
100 F. Street, NE
Washington, DC 20549

Re: Additional Information In Response to Proposed Exemptive Order Granting Conditional Exemption from Broker Registration Requirements of Section 5(a) of the Securities Exchange Act of 1934 for Certain Activities of Registered Municipal Advisors (“Proposed Exemptive Order”)

Dear Chairman Clayton and Commissioners:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ submitted a comment letter to the U.S. Securities and Exchange Commission (“SEC” or “Commission”) on December 9, 2019 in response to the Proposed Exemptive Order.² Subsequent to such submission, on December 12, 2019, representatives of SIFMA and its member firms met with staff from the Division of Trading and Markets and the Office of Municipal Securities (“Staff”), and met separately with Commissioner Lee and Commissioner Roisman and members of their respective staffs to discuss SIFMA’s comments and concerns about the Proposed Exemptive Order. SIFMA and member firm representatives also met separately with Commissioner Jackson and Commissioner Peirce and their respective staffs on December 17, 2019, and with Chairman Clayton and his staff on January 9, 2020, to further discuss those concerns. SIFMA would like to thank you each for taking the time to meet with us and hear our thoughts on this very important proposal. We understand you are extremely busy and we appreciated the opportunity to express our views in person.

¹ SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over \$2.4 trillion for businesses and municipalities in the U.S., serving retail clients with over \$16 trillion in assets and managing more than \$62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit <http://www.sifma.org>.

² Letter to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, from Leslie M. Norwood, Managing Director and Associate General Counsel, SIFMA (Dec. 9, 2019) (the “December Letter”). For your reference, Appendix A of the December Letter is also attached hereto as Appendix A.

During the above meetings and discussions, Chairman Clayton, Commissioners and Staff posed insightful questions and requested any data SIFMA could provide to support certain of its articulated positions. This letter responds to these requests.

The Number of Placements that could be Made Pursuant to the Proposed Exemptive Order is Significant – and Could Result in an Entire Universe of Non-Transparent Municipal Securities

During our meeting with Staff on December 12, Staff indicated that the Proposed Exemptive Order is meant to address concerns of smaller issuers wishing to raise capital for smaller projects (*e.g.*, a \$750,000 firetruck).³ Staff noted its belief that such small offerings are not a significant portion of the municipal securities market and as a result, the Proposed Exemptive Order would not be a commonly relied-upon process for placing municipal securities. Both Commissioners and Staff indicated their interest in seeing data that would provide insight into how the Proposed Exemptive Order, if approved, might affect the municipal securities market.

According to information available on the Municipal Securities Rulemaking Board’s (“MSRB”) website, for the period of January 2019 through December 2019, there were 12,841 negotiated and competitive new issues of municipal securities reported. Of those, *more than half* (7,142 or 56%) were transactions of \$10 million and under. Additionally, according to the Securities Data Company (“SDC”), for the same period of time, approximately one third of negotiated and competitive issuances (4,609 or 36%) were for transactions of \$5 million and under.

Based on this data, if the Proposed Exemptive Order were approved in its current form (*i.e.*, without a limitation on the size of the direct placement), the Commission can be assured that a large percentage of future municipal securities offerings would be placed by a municipal advisor without the involvement of a broker-dealer acting as placement agent. Depending on whether, and to what extent, the Commission places a dollar limit on allowable offerings under the Proposed Exemptive Order (*e.g.*, up to \$10 million), it is possible that more than half the negotiated municipal securities offerings in the market could be made outside the existing broker-dealer regime.⁴ Indeed, even if the Proposed Exemptive Order applied only to offerings of up to \$5 million, approximately one third of the entire market could consist of securities with no transparency associated with them. It is difficult to estimate the impact such a shocking outcome would have on the municipal securities market.

³ Representatives of SIFMA also met with Staff on November 18, 2019 for an initial discussion of the Proposed Exemptive Order. In that meeting, Staff also indicated its view that the Proposed Exemptive Order is meant to address concerns of small issuers.

⁴ For this reason, as well as to retain consistency with existing Rule 15c2-12 of the Securities Exchange Act of 1934 (“Exchange Act”) and to limit the portion of the municipal securities market that will not be subject to rules requiring transparency and public disclosure, SIFMA suggested that, if the SEC were to adopt a version of the Proposed Exemptive Order, the relief should be limited to issuances of up to \$1 million.

Because the Proposed Exemptive Order would place no reporting or other similar obligations on municipal advisors relying thereon, it is highly likely that a significant portion of the municipal securities market would be completely opaque. Specifically, these municipal securities would be issued without a CUSIP number and corresponding primary offering disclosures, and there would be no trade reporting information available.⁵ In addition, there would be no requirement that a municipal advisor comply with even basic fair pricing or confirmation requirements in the placement of the municipal securities.⁶ This universe of illiquid, non-transparent securities could then be allocated or resold, including to retail investors, without any restrictions.

Accordingly, unless the issuer already had an issue outstanding for which continuing disclosures would be required, there literally would be no transparency for these municipal securities offerings and no market data available for secondary market transactions. Not only does this eliminate transparency for the particular issue in question, but it also could hinder the pricing of future municipal securities issuances because of the lack of market data available for dealers to consider in establishing fair pricing for such issues. Relatedly, the Proposed Exemptive Order could cause the municipal securities market to move towards a culture of direct placements in order to reduce regulatory burdens, essentially doing away with public issuances of municipal securities, thus hindering access by retail investors. These results are a significant step backward in the Commission's efforts to bring more transparency and order to the municipal securities market and simply cannot be what the Commission intended as necessary or appropriate in the public interest or for the protection of investors. (*See Appendix B – Small Issues Dominate the Municipal Market.*)

A Municipal Advisor's Fiduciary Duty Does Not Alleviate Potential Harms to the Market under the Proposed Exemptive Order

In SIFMA's comment letter, as well as in the above-referenced meetings, SIFMA noted its concerns with investor protection and market integrity issues, including lack of market transparency, if the Proposed Exemptive Order were adopted. Staff and some Commissioners questioned these concerns and asked whether a municipal advisor's fiduciary duty to its issuer client would essentially cure any potential harms that could result from the Proposed Exemptive Order.

If approved in its current form, the Proposed Exemptive Order would allow municipal advisors to place municipal securities with a broad audience of purchasers, including state-registered investment advisers. As discussed above, these placements could be made without the municipal advisors making even minimal disclosures or engaging in basic due diligence

⁵ See MSRB Rule G-34, on CUSIP numbers, new issue, and market information requirements; Rule G-32, on disclosures in connection with primary offerings; and Rule G-14, on reports of sales or purchases, respectively.

⁶ See MSRB Rule G-30, on prices and commissions and Rule G-15, on confirmation, clearance, settlement and other uniform practice requirements with respect to transactions with customers.

regarding the municipal securities being sold. A municipal advisor's fiduciary duty to its *issuer* client would not undo or somehow cure these lapses in municipal securities market transparency and information disclosure.

As discussed, broker-dealers are specifically licensed to engage in placement activity and are subject to a panoply of rules that require them to perform due diligence, provide disclosures and trade reporting data and abide by fair pricing requirements. Broker-dealers are also subject to stringent examinations and inspections with respect to their placement activity. In addition, broker-dealers follow, and indeed are even examined on, industry best practices. In a typical direct placement, the broker-dealer is engaged because of its knowledge of the market, its ability to assess the particular municipal security against similar issues and to ensure a fair price. A municipal advisor engaged to conduct a direct placement would not provide the same level of expertise and market knowledge that broker-dealers are specifically trained to provide. This lack of knowledge and information transparency would not be alleviated, or be any less important, merely because the municipal advisor has a fiduciary duty to the issuer of municipal securities.

In addition, it was suggested during some meetings that retail investors to whom an investment adviser allocates a portion of a direct placement it has purchased could be protected from harm because an investment adviser allocating such shares owes its retail investor clients a fiduciary duty. SIFMA believes, however, that a purchasing adviser's fiduciary duty to its clients cannot cure the impact of the attendant lack of transparency and disclosure with respect to directly placed municipal securities allocated to retail investor accounts. For example, the retail investor likely would not be aware of problems its investment adviser might encounter when the adviser subsequently attempts to sell the security and cannot find purchasers willing to engage in a transaction due to lack of available information and/or liquidity for the issue. The possibility that retail investors could end up holding illiquid, non-transparent municipal securities exists regardless of the investment adviser's fiduciary duty to that investor.

The Proposed Exemptive Order Creates a Conflict Of Interest That Cannot Be Cured by a Municipal Advisor's Fiduciary Duty to Its Issuer Client

SIFMA previously stated its view that the Proposed Exemptive Order would give municipal advisors a "salesman's stake" in the direct placement of municipal securities and would incentivize them to recommend transactions that fit within the parameters of the exemption. SIFMA believes this would create an inherent conflict of interest that could not be cured by the mere existence of a municipal advisor's fiduciary duty to its issuer client. However, Staff and some Commissioners again asserted that, because a municipal advisor has a fiduciary duty to its issuer client, these concerns could be eliminated.

SIFMA believes that if the Proposed Exemptive Order were approved, the municipal advisor would have no reason to decline the opportunity to engage in placement activity, even if declining would be consistent with its duty of loyalty. The municipal advisor would be a competitor of registered broker-dealers and would benefit by keeping that business for itself. Indeed, the municipal advisor could use its claim of fiduciary duty to obtain or retain placement

activity that otherwise might be better suited for a registered broker-dealer. We further note that, when it adopted Rule G-23, on activities of financial advisors, the MSRB determined that an underwriter for a municipal securities offering could not also act as municipal advisor to the issuer in connection with that transaction because of the conflicts inherent in acting in that dual capacity. As a result, pursuant to Rule G-23, broker-dealers engaging in placement agent activity are not permitted to also act as advisor to a municipal issuer with respect to that offering. The Proposed Exemptive Order, however, would permit a municipal advisor to be both advisor to an issuer and underwriter for the same offering. SIFMA is at a loss to understand why the inherent conflict, which municipal advisors strenuously opposed in comment letters submitted regarding Rule G-23, is no longer relevant when a municipal advisor seeks to act as both advisor and broker-dealer for an issue.

The Proposed Exemptive Order will not Reduce the Cost to Issuers

Staff and some Commissioners indicated a belief that issuers will save money if they engage a municipal advisor to assist with a direct placement as opposed to a broker-dealer. As SIFMA stated in its prior letter, it is likely that municipal advisors will charge issuers for the placement agent services in addition to their advisory fees. While broker-dealers do charge for placement agent activity, the value added includes knowing that the transaction is subject to and protected by a number of laws, rules and requirements that are otherwise not implicated if a municipal advisor is engaged.

In addition, in complying with its fair pricing obligations, a broker-dealer relies on extensive market data from other municipal securities transactions as well as extensive marketing efforts in order to achieve the lowest cost for the issuer. A municipal advisor would not be required to take such steps, and in many instances would not have access to the same level of information as a broker-dealer in the market. Thus, even if the municipal advisor did not charge an additional fee for its services, its lack of access to relevant information could negatively impact the pricing of a transaction resulting in the potential for a higher cost to the issuer.

The SEC Has Failed to Meet Its Burden Under the Exchange Act

In each meeting, SIFMA sought to understand whom the Commission intended to benefit with the Proposed Exemptive Order other than municipal advisors. While the Commission has authority under Exchange Act Section 15(a)(2) to “conditionally or unconditionally exempt” a broker or class of brokers from the registration requirements under Section 15(a)(1), it must do so consistent with the public interest and the protection of investors. Similarly, Exchange Act Section 36(a)(1) authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions from any provision or provisions of the Exchange Act or a rule or regulation thereunder, by rule, regulation, or order. However, the exemption must be “necessary or appropriate in the public interest” and be “consistent with the protection of investors.” Staff and some Commissioners noted that the Proposed Exemptive Order is meant to provide clarity to municipal advisors regarding those activities that are broker-dealer in nature. As SIFMA stated in its letter, Staff

and the Commission, through no-action relief and rulemakings, has provided ample guidance over the years to clarify what activity requires broker-dealer registration. Municipal advisors appear to be the only parties that remain confused. The Proposed Exemptive Order restates the activity that requires broker-dealer registration and then proposes to exempt municipal advisors from having to register as broker-dealers – all without *any* explanation as to the necessity or appropriateness of the public interest or the protection of investors. With respect to the Proposed Exemptive Order, the Commission has failed to meet its burden under Section 15(a)(2) or Section 36(a)(1).

For the reasons set forth herein, in our December Letter and in conversations with Commissioners and Staff, SIFMA believes the SEC should not approve the Proposed Exemptive Order. If the SEC chooses to move forward, SIFMA urges the Commission to limit the Proposed Exemptive Order as previously suggested by SIFMA and set forth again in Appendix A hereto.

* * *

Thank you for the opportunity to provide additional information. If you have further questions regarding SIFMA's position on the Proposed Exemptive Order, we would be happy to discuss them at your convenience.

Sincerely,



Leslie M. Norwood
Managing Director and
Associate General Counsel

Attachments: Appendix A - Proposed Conditions

Appendix B – Small Issues Dominate the Municipal Market

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:¹

Instrument	<p>The municipal advisor may only place municipal securities of a municipal entity issuer² 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;</p> <p>The issue must be sold in one tranche to one Qualified Provider;</p>
Size	<p>Offerings must be for \$1,000,000 or less;</p> <p>The municipal advisor may not break up a larger issuance to meet the \$1,000,000 limit;</p>
Offerees	<p>Offerings may be made to Qualified Providers only;</p> <p>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 (<i>e.g.</i>, state revolving fund or bond bank);³</p>
Applicable Conditions	<p>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;</p>

¹ 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).

² 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.

³ 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

	<p>Qualified Providers must purchase for their own proprietary account and may not allocate the issue to investor accounts;</p> <p>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;</p> <p>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 earlier redemption or mandatory tender and must obtain a written representation to that effect from the Qualified Provider;</p>
Restrictions	<p>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;</p> <p>The issue may not be broken up upon resale or transfer;</p> <p>Municipal advisors may only engage in one placement for any issuer in any 12 month period;⁴</p>
Related Amendments and Implementation	<p>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.⁵ 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</p> <p>The effective date for the Proposed Exemptive Order should be after final approval and implementation of all required MSRB rule amendments.</p>

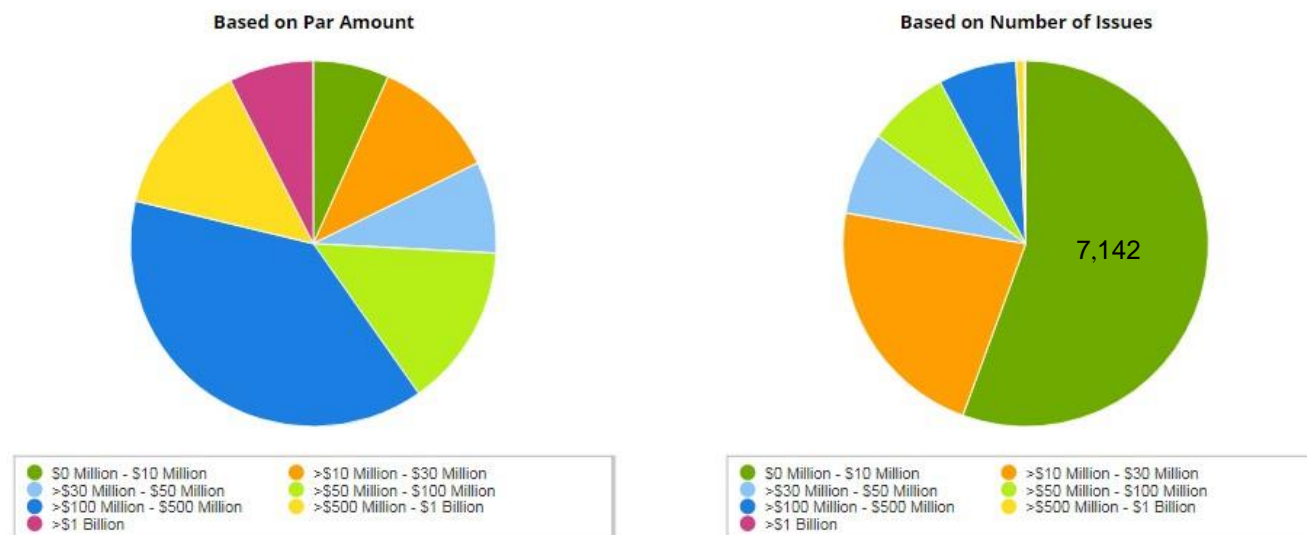
⁴ This restriction is needed to prevent a municipal advisor from engaging in a regular brokerage business, and from breaking up larger-sized direct placements into smaller offerings merely to avoid broker-dealer registration.

⁵ 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.

Small Issues Dominate the Municipal Market

New Municipal Issuance	Par Amount (\$MM)	Average Size (\$MM)	Neg & Comp Number of Issues	Neg & Comp		Neg (incl notes) # of Issues		Comp # of Issues		Neg (incl notes) + Comp # of Issues	
				\$0 to \$10 million	\$0 to \$10 million	\$0 to \$5 million*	\$0 to \$5 million*	\$0 to \$5 million*	\$0 to \$5 million*	\$0 to \$5 million*	\$0 to \$5 million*
January	\$28,262.60	\$40.80	693	371	54%	117	17%	119	17%	34%	
February	\$26,996.20	\$35.50	761	389	51%	108	14%	124	16%	30%	
March	\$28,212.70	\$37.70	749	444	59%	99	13%	177	24%	37%	
April	\$29,981.00	\$31.90	939	539	57%	144	15%	188	20%	35%	
May	\$30,246.60	\$24.90	1,217	743	61%	185	15%	334	27%	43%	
June	\$45,024.30	\$31.90	1,413	804	57%	207	15%	320	23%	37%	
July	\$34,561.90	\$31.90	1,085	622	57%	151	14%	275	25%	39%	
August	\$49,394.90	\$43.60	1,132	622	55%	155	14%	253	22%	36%	
September	\$37,895.00	\$34.80	1,090	597	55%	156	14%	243	22%	37%	
October	\$60,167.70	\$38.80	1,550	801	52%	212	14%	290	19%	32%	
November	\$47,346.10	\$38.00	1,247	684	55%	208	17%	224	18%	35%	
December	\$41,346.80	\$42.80	965	526	55%	161	17%	159	16%	33%	
Total	\$459,435.80	\$36.05	12,841	7,142	56%	1,903	15%	2,706	21%	36%	

New Issuance by Size: January 2019 - December 2019 ?



Source: MSRB as of 1/23/2020 (Negotiated & Competitive Deals + Notes)

Source: * SDC as of 1/23/2020 (Negotiated & Competitive Deals Analysis Report - Including Notes)