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Submitted Electronically

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

RE: Requested relief by the SEC regarding private placement activity by municipal advisors

Dear Mr. Redfearn, Ms. Rutkowski, and Ms. Olsen:

The Bond Dealers of America (“BDA”) understands that PFM Financial Advisors LLC (“PFM”) and the National Association of Municipal Advisors (“NAMA”) have each submitted letters (the “MA Letters”) to the United States Securities and Exchange Commission (“SEC”) requesting guidance or other relief that would permit municipal advisors to identify and negotiate with investors in direct placements of municipal securities without registering as broker-dealers or municipal securities broker-dealers with the SEC. The MA Letters base their request primarily on the fact that municipal advisors owe a fiduciary duty to their municipal entity clients, and therefore additional regulation as a broker-dealer is unnecessary.

BDA opposes the grant of such relief. The BDA is concerned that the requested relief is inconsistent with the SEC and its staff’s long held views regarding the need for broker-dealer registration and the purposes of that regulatory regime. As municipal advisor regulation focuses only on the protection of issuers, the requested relief would erode away critical investor protections provided by the broker-dealer regulatory regime and enable municipal advisors to further disregard the interests and needs of investors in a manner that conflicts with the requirements for parties acting as broker-dealers and the purposes underlying those

requirements.

Our concerns expressed below are not limited to any specific kind or segment of investors and apply across the variety of investors who participate in direct placements of municipal securities. The market for direct placements of municipal securities is a large and diverse market consisting of a wide variety of sizes of transactions, sizes and kinds of issuers and sizes and kinds of investors. Between 2014 and 2018, there have been nearly 5,000 private placements of less than \$20 million and nearly 6,000 under \$50 million. These statistics only reflect direct placements of municipal securities and do not take into account the broad impact beyond that market. For your reference, we have attached some statistics that demonstrate the depth and diversity of the market for direct placements of municipal securities between 2014 and 2018.

FINRA and MSRB rules that apply to dealers are intended to protect investors, not just issuers. Those protections do not apply to municipal advisors that are not dealers.

Without registration as a broker-dealer or municipal securities dealer, municipal advisors would not be subject to FINRA or MSRB rules intended to protect investors. FINRA and MSRB rules regulate a wide array of activities by broker-dealers to ensure that dealers have appropriate duties when interacting with investors. These duties include:

- Suitability and “Know Your Customer” duties to ensure that investments are suitable for investors;
- Due diligence duties to ensure that dealers reasonably investigate information provided to investors;
- Sales practice duties that ensure that dealers interact with investors in a fair and transparent manner;
- Communication standards that ensure that dealers deliver appropriate communications to investors;
- Fair commission and pricing standards that ensure that dealers charge appropriate compensation and undertake reasonable efforts to ensure the fairness of pricing of transactions; and
- Dealer-specific antifraud and disclosure standards.

The requested relief would eliminate these protections for investors when municipal advisors identify and negotiate with investors for placements of municipal securities. Both MA Letters express that these duties should not apply to municipal advisors and that investors in these transactions do not need these protections. The history of the broker-dealer regulatory regime has shown that these protections are necessary to protect investors—whether large or small.

Exempting municipal advisors from broker-dealer registration status when engaging in broker-dealer activity is inconsistent with the SEC's and its staff's historical positions and creates a bad precedent with broad implications for other industries.

In 2000, SEC staff took the unusual step of revoking the Dominion Resources no-action letter on facts very similar to those for which the MA Letters are requesting relief.¹ The SEC staff revoked the Dominion Resources no-action letter to explicitly take the position that assisting an issuer to find investors and negotiating between the parties and receiving a transaction-based fee would require broker-dealer registration. The requested relief would effectively reverse that position. The activities for which the MA Letters are requesting relief have all the hallmarks of brokerage activity that the SEC has consistently insisted require registration: assisting an issuer to structure an issuance, preparing disclosures, soliciting investors, screening investors, negotiating as an intermediary, and receiving transaction-based compensation.

The requested relief would have far reaching implications for other industries. The BDA is astonished at the position of PFM and NAMA that large institutional investors are not in need of the investor protections of the broker-dealer regulatory regime. If the SEC grants the requested relief, it not only addresses when municipal advisors can identify and negotiate with large institutional investors to place municipal securities but also will by implication address that these same kind of activities can happen with any person placing any security in any industry with institutional investors. The implications of the requested relief are hard to underestimate.

The requested relief would also call into question the SEC's position in other industries. If municipal advisors need not register as broker-dealers because they have a fiduciary duty to an issuer, while no duty to investors, the analogous case could be made to exempt investment advisers from broker-dealer registration where they have a fiduciary duty to investors, but no duty to issuers. But the SEC staff has previously rejected this very argument. Even in the absence of transaction-based compensation, the staff declined to issue no-action relief where an investment adviser proposed to locate issuers, solicit investors, and act as investors' agent in structuring and negotiating transactions.² In fact, the SEC and its staff in recent years has taken enforcement actions against investment advisers³ and made public statements reminding advisers that they may not cross over into providing brokerage services without being additionally registered as a broker-dealer.⁴

A person negotiating between an issuer and an investor, while also receiving compensation if a transaction is to occur, has to manage several conflicts of interest—between the issuer, the investor, and itself. It is those very conflicts that the SEC has historically pointed to as one of the reasons that broker-dealer registration and the SRO regulatory structure are

¹ See Division of Market Regulation, Revocation of Prior No-Action Relief Granted to Dominion Resources, Inc. (March 7, 2000).

² PRA Securities Advisers, L.P. (March 3, 1993).

³ In re Blackstreet Capital Management, LLC, Exchange Act Release No. 77959 (June 1, 2016).

⁴ David W. Blass, Chief Counsel, SEC Division of Trading and Markets, A Few Observations in the Private Fund Space (Apr. 5, 2013).

needed, which requires that the broker-dealer balance those interests and treat all parties fairly.⁵ The requested relief would do nothing to address or solve these conflicts of interests, and in fact, would exacerbate them by permitting municipal advisors to act as brokers while having no duties to investors.

Adopting the requested relief would set back the SEC's efforts to reassert that broker-dealer registration is required for all persons engaged in bringing buyers and sellers of securities together for a fee—with the SEC recently taking the enforcement position that “there is no finder's exception” from broker-dealer registration,⁶ notwithstanding certain prior no-action relief and judicial precedents.⁷ The requested relief would risk reinvigorating defendants in SEC enforcement proceedings arguing that such an exception exists.

The BDA also believes that the requested relief would undermine the efforts of the SEC to bring more transparency to the private municipal securities market. The recent amendments of Rule 15c2-12 to require issuers to disclose non-public financial obligations to public bondholders demonstrates the need for investor protections in the private municipal securities market. The requested relief would depart from these efforts and allow a host of transactions to be offered and sold to investors away from the broker-dealer regulatory regime.

PFM and NAMA are requesting broad relief covering a wide variety of activities.

The MA Letters seek broad relief for a wide variety of activities. PFM and NAMA request the SEC to provide relief that:

- *Would apply to a wide variety of investors.* The PFM letter in particular specifically requests the SEC to provide relief for a broad segment of the market – including traditional capital market investors.
- *Is not limited to pre-existing relationships or geographic region.* The MA Letters seek relief allowing municipal advisors to engage aggressive finding activities that would allow municipal advisors to introduce investors to issuers that do not have any pre-existing relationship or of knowledge of each other.
- *Places no limit on form of compensation.* Both MA Letters are silent on the fact that municipal advisors frequently receive transaction-based compensation that is contingent on the successful completion of the transaction—an historical hallmark of broker-dealer activity.

⁵ See, e.g., 1st Global, Inc., No-Action Letter (May 7, 2001) (“Persons who receive transaction-based compensation generally have to register as broker-dealers under the Exchange Act because, among other reasons, registration helps to ensure that persons with a “salesman’s stake” in a securities transaction operate in a manner consistent with customer protection standards governing broker-dealers and their associated persons, such as sales practice rules.”); see also Order Exempting the Federal Reserve Bank of New York, Maiden Lane LLC and the Maiden Lane Commercial Mortgage Backed Securities Trust 2008-1 from Broker-Dealer Registration, Exchange Act Release No. 61884 (Apr. 9, 2010).

⁶ Brief for Appellee Securities and Exchange Commission at 28, SEC v. Collyard et al. (8th Cir. June 3, 2016) (No. 16-1405).

⁷ See, e.g., Paul Anka, SEC No-Action Letter (July 24, 1991); SEC v. Kramer, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011).

- *Places no limit on number of investors solicited.* The requested relief would not limit the number of investors solicited.
- *Establishes no safeguards to ensure that investor is not misled as to the municipal advisor's role.* Since investors have historically been afforded the protections of the broker-dealer regulatory regime, the MA Letters provide no protection of investors from misconstruing the role of the municipal advisor.

The MA Letters do not give a clear sense of how pervasively municipal advisors already clearly cross over into unregistered broker-dealer activities.

Currently, municipal advisors distribute requests for proposals (“RFP”) for direct placements of municipal securities to a wide variety of investors in the municipal securities market and seek to negotiate the terms of those direct placements with those investors. Many of these investors are not banks or even large investors but capital market funds created for the purpose of making investments in securities. That is, municipal advisors have strayed very far from the mere role of advising municipal entities and obligated persons and are regularly acting as unregistered broker-dealers. Municipal advisors are currently violating the registration requirements of the broker-dealer regulatory regime including the SEC staff’s specific statements in the revocation of Dominion Resources.

Municipal advisors have interpreted a lack of guidance on these topics by the SEC in the past as permission to engage in clear broker-dealer activity. Actual guidance in their favor will exacerbate this practice. Regardless of what any requested guidance says, it will embolden municipal advisors to push their activities further into the realm of broker-dealer activity and further violate the regulatory regime.

An exemption would lead to competitive disparities and regulatory arbitrage.

If municipal advisors can receive transaction-based compensation for engaging in private placement broker-dealer activities, there would be little reason for dealers to engage in this activity within a municipal securities dealer entity. Currently, there are many firms that are dually registered as municipal advisors and broker-dealers. Under MSRB Rule G-23, they need to select which role they will have on a given transaction. With the proposed exemption, many of these firms may separate out their municipal advisor into a stand-alone entity, and conduct all their municipal security private placement activities through the municipal advisor rather than the broker-dealer, relieving them of much of the regulatory burden (and investor protections) that comes with engaging in these activities under the broker-dealer regime. Thus, the requested relief would create a regulatory arbitrage allowing firms to create competitive advantages from the requested relief, or shift the activity to less-regulated entities.

The MA Letters express that, because municipal advisors are subject to the municipal advisor regime, there is no need to be subject to the broker-dealer regulatory regime, but the SEC took the opposite position in the municipal advisor rule.

The MA Letters express that now that municipal advisors are subject to a regulatory regime, it eliminates the need for them to be subject to the broker-dealer regulatory regime. But this ignores the different regulatory policy concerns of the two regulatory regimes that the SEC

made clear in the municipal advisor rule. The municipal advisor rule carved out a very narrow exemption for broker-dealers engaged in underwriting because the mere fact that a broker-dealer is subject to investor-driven duties did not mean that the issuer understood the underwriter's role and the kind of advice the underwriter was providing. All of the exceptions to the municipal advisor rule ensure that the policy purposes of the municipal advisor regulatory regime are not undermined by persons who should register as municipal advisors. The same is true of the broker-dealer regulatory regime. The mere fact a person is registered as a municipal advisor does not mean that it should be permitted to act in a manner that would undermine the purposes of the broker-dealer regulatory regime.

* * *

Thank you for the opportunity to provide these comments. We look forward to the opportunity to discuss our concerns with you.

Sincerely,



Mike Nicholas
Chief Executive Officer

CC: The Honorable Jay Clayton, Chairman, SEC
The Honorable Robert J. Jackson, Jr., Commissioner, SEC
The Honorable Allison Herron Lee, Commissioner, SEC
The Honorable Hester M. Pierce, Commissioner, SEC
The Honorable Elad L. Roisman, Commissioner, SEC

**DIRECT PLACEMENT MARKET STATISTICS
(CALENDAR YEARS 2014 THROUGH 2018)**

Par Category	Industrywide Placements (SDC)		
	# Deals	Total Par	% Total (# Deals)
Under \$1 Million	687	\$335,606,000	10.67%
Greater than \$1 Million up to \$5 Million	1755	\$4,681,275,000	27.27%
Greater than \$5 Million up to \$10 Million	986	\$7,600,674,000	15.32%
Greater than \$10 Million up to \$20 Million	1167	\$17,071,751,000	18.13%
Greater than \$20 Million up to \$50 Million	1136	\$36,564,565,000	17.65%
Greater than \$50 Million up to \$100 Million	400	\$28,948,065,000	6.22%
Greater than \$100 Million	305	\$68,232,135,000	4.74%
Grand Total	6,436	\$163,434,071,000	100.00%