Setting the Record Straight On SEC Order

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Over the course of the past few months there have been conversations and even arguments about the Securities and Exchange Commission's Exemptive Order. Although a thorough and meaningful debate is always welcomed, that debate should recognize the actual facts and settled policy matters related to this important issue.

NAMA's letter to the SEC last summer, and our December comment letter, articulated the concerns that municipal advisors must navigate when trying to provide municipal advisory services to clients when bank loans and direct placements options should be considered and/or executed.

While some in the market incorrectly assert that MAs want to be placement agents without registering as broker-dealers, that the order would give MAs an unfair business advantage in the marketplace, and that investor protections are being sacrificed within the order, there is strong evidence to the contrary. We believe that the order will strengthen protection for issuers in keeping with the recent reforms in the municipal market.

First and foremost, the order would allow MAs to provide advisory services to their clients when negotiating terms and conditions of bank loans and placements. This is of fundamental importance, as issuers should be able to use the services of their MA — who has a fiduciary duty to the client — whether or not the transaction is a direct placement or loan or a public offering. MAs have seen examination deficiencies and regulatory questions raised about circumstances when they were in the room assisting their clients in these transactions. Having the SEC clarify that it is within the parameters of MA activity for MAs to advise their clients in all types of transactions is a straightforward but important part of the order.

Second, broker-dealer groups have claimed that the order puts a thumb on the scale in favor of municipal advisors. However, what is actually true is that the Order provides regulatory parity for MAs of the type enjoyed by virtually all other regulated entities across a broad range of regulatory platforms. The SEC's MA Rule, includes an exemption from municipal advisory activity for broker-dealers when acting as placement agents. This exemption was not part of the statutory exclusion for underwriters, it was a specific extension of that exclusion that was provided to broker-dealers by the Commission.

Without it, broker-dealers acting as placement agents would have to also register as municipal advisors and would not be allowed to require their municipal issuer clients to waive fiduciary protection as they currently do. Similar exemptions apply to investment advisers and other professionals from having to register as MAs as well as across many other regulatory schemes. The order would provide regulatory parity and allow MAs to provide MA services in certain circumstances, without having to register as broker-dealers. Rather than favoring one set of professionals over another, the order would equalize the preference that broker-dealers currently enjoy.

Third, investor protections are a key tenet of securities law and the mission of the SEC. NAMA fully supports maintaining these protections. The order would maintain the same protective landscape that currently exists for investors, including the MSRB Rule G-17 fair dealing provisions which apply equally to MAs and broker-dealers. Consistent with what the SEC has done when providing exemptive relief to non-regulated entities under the broker- dealer provisions, the order requires MAs to provide all of the same disclosures to potential investors that broker- dealers presently provide.

Further, NAMA recently commented that if there is concern about retail investor protections, language should be included in the order that states that these products are not appropriate for this class of investors. Broker-dealer form documents in private placement transactions require investors to waive all protections not explicitly provided for by regulation. Therefore, as a matter of actual practice, the limited class of investors that participate in private placements are appropriately protected and not harmed by the provisions of the order.

Finally, much of this conversation has ignored the very important consideration of issuer protection. One the key components of Section 15B in the Securities Exchange Act is to regulate municipal advisors to ensure issuer protection. In private placements, placement agents broker the deal between the issuer and the investor, but they do not have a fiduciary duty to the municipal client nor do they have a duty to bring to that client's attention problematic contract terms or to negotiate more favorable terms on their behalf. However, a municipal advisor will provide those services.

A municipal advisor, not a broker-dealer placement agent, can help the issuer determine if a direct placement or bank loan is appropriate, and assist the issuer in negotiating favorable terms for that transaction. The presence of an MA provides crucial financial protections to municipal governments in ways that currently are not available or that are restricted.

The Executive Order can be approved in a manner that provides both investor and issuer protections, provides regulatory parity for municipal advisors and broker-dealers which allows each to perform their duties without concern that regulatory lines are crossed, ensures that municipal advisors can provide financial protections for their clients regardless of the financing option that is chosen, and continues to allow placement agents to serve important functions in the market in circumstances where those services are actually needed.

Market participants and regulators should work together to implement the order and other rules as needed to improve market efficiencies and capital formation without sacrificing key protections. We welcome the opportunity to work with our colleagues to do just that.

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