

VIA ELECTRONIC MAIL

October 17, 2014

The Honorable Mary Jo White  
Chair  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

*RE: Placement Services from Non-Dealer FA's*

Dear Chair White:

The Bond Dealers of America and its members have been concerned about the long-standing practice and growth of instances in which non-dealer advisory firms have been acting as “placement agents” on direct placement transactions in which they have been hired as a “municipal advisor” (formerly financial advisor) by municipal entities. The rapid growth of “direct placement, direct loan or private placement” transactions to banks and other investors has been well documented. Now that the SEC is enforcing its own, and the MSRB’s regulations in regards to non-broker dealer municipal advisors we believe that this practice should be an important area of focus for the Commission’s municipal advisor enforcement priorities.

Non-broker dealer municipal advisors are often violating the securities laws when they assist a municipal entity with the placement of its debt through the “direct placement” markets and when the activities of these non-broker dealer municipal advisors cross the line from providing advice to soliciting multiple potential investors, working as a placement agent. The legal line between when debt is a security or a loan, as well as, the line between providing advice and providing placement services is not a bright line analysis. To assist the municipal marketplace in understanding these distinctions, the MSRB issued releases on each of these topics in August<sup>1</sup> and September<sup>2</sup> of 2011 when the growth of these transactions in the marketplace became apparent.

Now, three years later, with the regulatory rules and enforcement mechanism in place, or nearly in place, the BDA and many of its broker dealer members wish to bring to your attention that lines are being crossed and securities laws are being violated in many instances by non-dealer advisors who are

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<sup>1</sup> MSRB NOTICE 2011-37 (AUGUST 3, 2011)  
FINANCIAL ADVISORS, PRIVATE PLACEMENTS, AND BANK LOANS

<sup>2</sup> MSRB NOTICE 2011-52 (SEPTEMBER 12, 2011); POTENTIAL APPLICABILITY OF MSRB RULES TO CERTAIN “DIRECT PURCHASES” AND “BANK LOANS”

being hired as municipal advisors on direct placement transactions that qualify as securities while actually providing services that constitute placement agent activities. When this occurs, these firms provide broker dealer services without being licensed to do so; violate the essence of G-23 and the SEC's municipal advisor rule by conducting placement agent activities while serving as a municipal advisor; and ignore market protection functions that are provided by broker dealers on similar transactions including anti-money laundering reviews, investor suitability reviews and trade reporting submissions.

The BDA would acknowledge that the legal review and determination of when these transactions constitute securities rather than loans is complicated as is the determination of when a firm is determined to have provided placement agent services as opposed to advisory services. However, many of our member firms have reviewed these issues in depth with various different outside law firms and, based on the documents and terms of these transactions, have come to the conclusion that the majority of the direct placement transactions conducted in the marketplace today do constitute security transactions rather than loan transactions. To satisfy the requirements of the Municipal Advisor Rule in its own advisory activities, member firms have also been advised by their attorneys that one of the key issues for determining when a firm acting in an advisor role crosses over into a placement agent role is the involvement in the solicitation of and the negotiation with investors, including providing a list of potential investors to an issuer to contact.

In the marketplace, BDA members have reported many instances in which they are seeking placement agent business with issuers where they are told that a municipal advisor will be handling the transaction directly. If an investor has already been identified by the issuer, and the issuer negotiates terms with the investor, this does not present a problem. However, typically the investor is found by having the municipal advisor create a term sheet for an investor RFP process that the advisor either directly sends to investors or has the issuer send to a list of potential investors provided by the advisor. The municipal advisor then negotiates the terms of the debt on behalf of the issuer to try to get the best terms for their client. In most cases, this solicitation to a pool of investors identified by and provided by the advisor and the negotiation of the terms of the debt, constitutes placement agent activities.

Member firms have reported to the BDA instances in which banks have made statements to dealers about "having purchased their last several transactions from ABC Advisors (a non-dealer advisory firm)", instances where dealers have lost RFP processes for direct placement activities to non-dealer advisory firms while being told that the advisory firm had "more placement experience and a larger pool of potential investors," and instances where dealers served as placement agent on a transaction for an issuer being represented by a non-dealer advisor which is being placed to a less well known investor get reports from that investor shortly after closing that the investor is now being solicited by the same non-dealer advisor. There have also been instances reported, where non-broker dealer municipal advisors have represented to issuers, that they could provide direct placement services to an issuer at a lower cost than a broker dealer placement agent because they were not regulated in this activity like broker-dealers.

The BDA and its members believe that these violations of various securities laws and regulations create confusion in the market as to the role of participants (municipal advisors in particular) in transactions.

All of this is happening at exactly the time when the SEC and MSRB are creating and implementing rules that are designed to assure that roles and duties on transactions are more clearly defined.

We would like to see the MSRB take these violations into consideration when drafting the final rules governing municipal advisor activities and communicate to the market again your concerns about non-dealer advisors conducting placement agent activities. We would also like to see the SEC emphasize a review of direct placement transactions and the role played by a municipal advisor as the SEC is conducting its field audits of non-dealer municipal advisors.

Sincerely,

A handwritten signature in blue ink that reads "M. Nicholas". The signature is fluid and cursive, with the first name "Mike" and last name "Nicholas" clearly legible.

Mike Nicholas  
Chief Executive Officer  
**Bond Dealers of America**

cc:

Commissioner Luis Aguilar  
Commissioner Daniel Gallagher  
Commissioner Michael Piwowar  
Commissioner Kara Stein