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John Cross
Director, Office of Municipal Securities
Securities and Exchange Commission
100 F Street N.E.
Washington, DC 20549-7010

RE: Final Municipal Advisor Rule (Release No. 34-70462)

Dear Mr. Cross:

On September 18, 2013, the U.S. Securities and Exchange Commission (the "*Commission*") adopted final rules (the "*Final Rule*"), pursuant to Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("*Dodd-Frank*"). The Bond Dealers of America ("BDA") is writing this letter to you to seek some clarification from the Commission concerning several aspects of the Final Rule.

BDA is the only DC-based group representing the interests of middle-market securities dealers and banks focused on the U.S. fixed income markets. Accordingly, we believe that we uniquely offer insight into how the Final Rule will impact the relationships between underwriters and middle-market issuers. BDA member firms collectively were responsible for a third of all underwriting transactions in 2012, and many of those transactions were with small to mid-sized issuers. Of nearly 10,000 distinct issuers of municipal bonds last year, nearly 40% did not hire financial advisors – that's 3,897 issuers coming to market with no financial advisor in 2012. This illustrates the pivotal historic role that firms with underwriting capacity play in providing small and mid-sized issuers with professional services. Advice issuers receive from broker-dealers is informed by comprehensive access to market information and governed by regulations, such as MSRB rules on role disclosure and fair-dealing, that reinforce the tradition of integrity and competence required to maintain longstanding relationships with issuers.

General Concerns

BDA members seek clarification concerning the Final Rule in order to bring their operations into compliance with the definition of municipal advisor. Broker-dealer firms will need to quickly determine how to structure operations in response to the Final Rule, in particular their investment banking activities with middle-market issuers, and develop new policies and procedures governing how they will approach and interact with issuers in the future. Guidance from the SEC related to interpretations of the municipal advisor rule will be very important to BDA members as they think about how to interact with particular issuers, what role they need to seek to provide the appropriate

service to these issuers and how they think about their business models and approach to the market moving forward.

Issuers have historically depended upon underwriters to bring them new ideas both for refundings and financings for capital projects. Under the Final Rule, BDA members must determine to what extent they can maintain dialogues with middle-market issuers using the underwriting, independent registered municipal advisor, and RFP exclusions, as well as other provisions. Given the timing aspect inherent in those exclusions, BDA members also seek guidance on (1) when they may start to rely on those exclusions and (2) what kinds of dialogue can occur prior to the operation of those exclusions.

If the rules are not appropriately clarified, the risk would be to strictly curtail issuer access to ideas from underwriters and inadvertently create a soft mandate requiring that issuers retain an independent "financial advisor" ("FA") in addition to an underwriter – a decision that should be left to the discretion of the issuer, who might have otherwise have determined that the FA did not provide sufficient benefit to justify the cost. Moreover, we hope that the MSRB will develop rules that speak to the qualifications of non-dealer FAs including regulation of the use of the term "independent," which is often used to imply that an FA has no potential conflicts when, in fact, a number of potential conflicts may exist.

If the FA exemption is the only exception that becomes workable, the impact would be disproportionate across the nation, as individual states have very diverse business practices and traditions. The Final Rule quotes a 2009 MSRB Study on financial advisor participation rates that was based on the par amount of bonds issued. However, the picture looks different when the data is analyzed by number of transaction and across different states. For example, since the beginning of 2012, according to Thompson Reuters data (the same data source for the 2009 MSRB Study), out of 1,645 issues in California, only 28% of the transactions had no FA. On the other hand, in Ohio, out of 1,256 issues, 72% of the transactions had no FA. In certain smaller states, the percentage of transactions completed with no financial advisor is even greater and very few if any financial advisors may operate in these states. Moreover, these numbers do not reflect that in many cases, issuers will not engage an FA until they actually commence their bond issue, leaving the issuer without an FA for large portions of the year. There is great diversity across the country in business practices and relationships and a one-size-fits-all approach would not be appropriate in this regard. The suggestions for clarifications provided below are designed to provide issuers, underwriters and FAs with appropriate flexibility.

Definition of Advice

Q: Are statements that are factual in nature (*i.e.*, do not contain an expression of a view) and are particularized to a municipal entity or obligated person "general information" under the Rule? For example:

(1) If a dealer not engaged as an underwriter meets with a municipal entity, (a) observes that at MMD yields and spreads of similar credits the municipal entity would have a potential refunding candidate, (b) provides mathematical

calculations concerning potential savings, (c) disclaims any recommendation or view that the municipal entity would be successful at obtaining savings and (d) asks the municipal entity should pursue the refunding or that it would be interested in engaging the dealer to serve as underwriter for purposes of investigating refunding opportunities and providing advice to that end, does that conduct constitute "general information" under the Final Rule?

(2) If a dealer, not engaged as an underwriter, meeting with a municipal entity, (a) observes that state law authorizes the municipal entity to issue certain kinds of bonds to finance capital projects, (b) disclaims any recommendation or view that the municipal entity would be successful at issuing those bonds and (c) asks the municipal entity if it would be interested in engaging the dealer to serve as underwriter for the purpose of investigating possible financing structures to finance one or more capital projects, does that observation constitute "general information" under the Final Rule?

A: Yes. If a person limits its statements to statements that are factual in nature and do not contain an expression of a view and states that it is not making any recommendations, those statements constitute "general information" under the Rule, even if they are particularized to the municipal entity or obligated person or are specific statements about the municipal entity or obligated person. Observations about refunding candidates or capital project financings that are purely factual statements but that do not express a view but simply that they represent an "opportunity" or a view of potential savings constitute "general information" under the Final Rule.

Underwriting Exclusion

Q: When does a dealer become "engaged" by a municipal entity or obligated person and is considered under the Rule to be "serving as an underwriter"?

A: The dealer would become "engaged" and would be "serving as an underwriter" once the municipal entity or obligated person provides the dealer a clear, non-binding verbal or written statement that municipal entity or obligated person (a) may potentially engage the dealer as an underwriter and (b) acknowledges that it understands that, if the dealer were to serve as underwriter, it would be acting in an arm's length relationship with the municipal entity or obligated person and would not owe the municipal entity or obligated person a fiduciary duty and that it understands the other aspects of the role of the underwriter described in the disclosures required to be delivered by underwriters to issuers under MSRB Rule G-17.

Q: If a dealer who is "serving as an underwriter" provides the municipal entity or obligated person "advice" relating to its overall debt portfolio, budgetary constraints or impacts on overall rating agency strategy, but the purpose of the advice is reasonably related to the particular issuance of municipal securities for which the dealer is serving as underwriter, is that "advice" inside the scope of underwriting? For example, if the dealer provides advice concerning how a municipal entity should amortize a particular issuance of municipal securities and that advice relates to how its overall debt portfolio may impact the budget of the municipal entity or obligated person, is that advice within

the scope of underwriting even though it implies advice concerning more general issues relating to the municipal entity?

A: Yes. As long as "advice" is reasonably related to the particular issuance of municipal securities and does not constitute advice within the excluded categories of advice concerning investment of bond proceeds or derivatives, that advice is inside the scope of the underwriting exclusion.

Response to RFP Exclusion

Q: How open-ended may a request for proposals or qualifications ("RFP") be for an underwriter to rely on the Rule's exclusion for responses to RFPs? For example, if a municipal entity posts an RFP on a website requesting potential underwriters to submit proposals, for a period of six months, regarding how to refund any particular series of its outstanding municipal securities or to finance a particular capital financing project, would advice offered by a dealer in response to such an RFP be excluded from the definition of municipal advisor?

A: Yes. As long as the RFP is issued by the municipal entity or obligated person and is reasonably related to a particular financing need of the municipal entity or obligated person and is open for a period not to exceed six months, then it qualifies as an RFP under the Final Rule and advice offered in response to that RFP does not cause the dealer to be a municipal advisor under the Final Rule.

Q: To how many persons must a municipal entity or obligated person deliver an RFP for it to qualify as an RFP under the Final Rule?

A: As long as the municipal entity or obligated person delivers the RFP to at least two persons then the RFP qualifies as an RFP under the Final Rule. There is no requirement that the municipal entity or obligated person deliver the RFP to many persons or all persons who are qualified to respond.

Q: Does an invitation by a municipal entity or obligated person to two or more dealers to meet in person to present advice concerning possible refunding or capital project financing alternatives constitute an RFP under the Final Rule? For example, if a municipal entity invites two dealers to separately meet with the municipal entity to provide advice concerning possible refunding alternatives, is any advice offered by the dealers in those meetings excluded from the definition of municipal advisor?

A: Yes. An RFP under the Final Rule can include invitations to make presentations or offer advice in in-person meetings as well as in written responses.

Engagement As Underwriter

There is another topic outside of the specific exclusions that we would like to set forth for your consideration – the topic of when a firm might act both a Municipal Advisor during the exploratory phase of a potential transaction and as an underwriter with respect to the resulting issuance of municipal securities. We believe that the regulatory

structure provided by MSRB Rules G-17 and G-23 has been a workable and helpful framework in assuring that issuers understand the differences between the roles and advice provided by underwriters and financial advisors. These rules have largely addressed past concerns in which a small minority of firms or bankers held themselves out in confusing ways and/or issuers received poor advice.

BDA members vary in structure, and some provide financial advisory services or underwriting services to issuer clients. Regardless of the role ultimately served, professionals within BDA member firms view themselves as working in the best interests of their issuer-clients when providing them with recommendations and advice, and so the formalization of a fiduciary standard with respect to the advice they provide is not necessarily seen as too burdensome to assume. Under the current MSRB framework, while an underwriting role is declared at the earliest stages of representation on an issue, such as upon first meeting with an issuer or when an RFP is presented, conversations do occur between a public finance banker and an issuer in the natural course of a firm's longstanding relationship with an issuer ("a pre-transaction phase.") These conversations may include advice which, under the Rule, will cause the public finance banker to register as a "Municipal Advisor" and thus will carry the newly added protection for the issuer of a fiduciary duty – something BDA members view as beneficial to issuers and not inherently incompatible with their duties related to underwriting municipal securities.

In addition to the concerns related to a pre-transaction phase, dealers may offer advisory services with respect to the investment of bond proceeds or escrow deposits and with respect to derivatives, which can be discretely carved out as a separate scope of engagement. This means that the dealer could be serving as a "municipal advisor" with respect to that scope and an underwriter with respect to the structure, timing and terms of the issuance of municipal securities. Dealers would understand that they would owe the duties of a Municipal Advisor with respect to the discrete advisory relationship related to investments and derivatives (including the fiduciary duty) and the duties of an underwriter with respect to the underwriting services. Our members do not see these dual-capacities as inherently incompatible.

We believe that the compatibility of capacities as a Municipal Advisor and underwriter is not intended to be addressed by the Final Rule, and is best developed within a larger review of what constitutes the fiduciary duty of a Municipal Advisor, with the benefit of significant attention and consideration by all stakeholders. Towards that end, we suggest the following question and answer:

Q: Does the Final Rule prohibit a dealer who becomes a Municipal Advisor with respect to a related transaction to the issuance of municipal securities or provides advice during the pre-transaction phase of the issuance of municipal securities, from underwriting that issuance of municipal securities? For example, if a dealer establishes a limited scope of engagement concerning the investment of the proceeds of an issuance of municipal securities, does the Final Rule prohibit the dealer from underwriting that issuance of municipal securities? As another example, if a dealer provides preliminary advice under the Final Rule concerning a particular issuance of municipal securities that

is not excluded from the definition of "municipal advisor," but otherwise satisfies the requirements of MSRB Rule G-23, does the Final Rule prohibit the dealer from underwriting that issuance of municipal securities?

A: The Final Rule does not itself contain such a prohibition. The Rule provides interpretative guidance concerning the definition of municipal advisor as well as provisions concerning a permanent registration regime and books and records requirements. The MSRB will be undertaking a rulemaking process to interpret the fiduciary duty of a municipal advisor under the Dodd-Frank and the Office of Municipal Securities will be providing its comments and views to any such rule.

Conclusion

In summary, if ultimately clarified to 1) provide workable underwriting exceptions, and 2) assure that a dealer can underwrite municipal securities using the current G-23/G-17 framework -- even if the dealer assumes a fiduciary duty with respect to prior conversations -- the municipal advisor rule can be viewed as the next step in strengthening protections for issuers while ensuring that they maintain access to a full range of options for service and information.

Thank you again for the opportunity to submit these questions.

Sincerely,

Michael Nicholas
Chief Executive Officer