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NAIPFA: SEC Rulemaking on Muni Advisors Should Be Top Priority.

With the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, individuals providing certain types of advice to muni issuers became regulated as "municipal advisors."

Although all of the rules have yet to be proposed or implemented, there are laws and regulations currently in existence with which municipal advisors, or MAs, must comply, including those relating to fiduciary duty and fair dealing.

Nevertheless, some market participants have stated on numerous occasions that muni advisors are still totally unregulated, and have urged that the regulation of MAs be implemented as quickly as possible.

While the National Association of Independent Public Finance Advisors disagrees with these participants' statements that municipal advisors are wholly unregulated, NAIPFA does agree that the Securities and Exchange Commission's MA rulemaking should be completed as soon as possible to allow for further development of Municipal Security Rulemaking Board rules.

Therefore, we were surprised to learn that the bill referred to as the Dold Amendment was reintroduced in the current congressional session by Rep. Steve Stivers, R-Ohio.

The bill has the support of a number of those market participants who have and will continue to advocate for the quick implementation of Municipal Advisor rules.

Yet, this position seems contradictory in light of the SEC's statements indicating that if such a bill were to be enacted its rulemaking undertakings could be delayed by as much as two years.

NAIPFA believes that the Dodd-Frank Act got it right by clearly delineating the roles of certain municipal market participants, particularly the roles of municipal advisors and underwriters.

These roles had been blurred for too long as a result of underwriters having provided advice to issuers within the scope of their underwriting engagement that was identical to that which was provided by financial advisors (i.e. municipal advisors), with the only distinction being that underwriters lacked corresponding fiduciary duties for such services.

As a result, muni issuers began to rely on their underwriters to provide advice that was perceived to have been given with the issuer's best interests in mind.

Notably, even previous to the passage of the Dodd-Frank Act, the Government Financial Officers Association officially recognized that financial advisors owed duties to their clients that underwriters did not.

As such, GFOA went so far as to recommend the engagement of financial advisors in its best

practices guide for municipal issuers.

But unlike the Dodd-Frank Act, the Stivers bill will allow underwriters to continue their long-standing business practices to the detriment of municipal issuers as well as taxpayers and ratepayers. In this regard, the proposed bill contains two provisions that are of particular concern.

First, the Stivers bill requires an individual to receive compensation for certain types of advice in order to be considered a municipal advisor.

Nevertheless, advice without compensation is still advice. What's more, this measure, if it is enacted, will likely result in the eradication of substantial portions of the issuer protections put in place by the MA provisions of the Dodd-Frank Act.

Individuals who otherwise would have sought to receive compensation for providing advice as an issuer's MA will simply stop seeking compensation for their advisory services in order to avoid regulation, and will instead seek to mask their advisory activities by receiving compensation for non-advisory related services.

Our concern in this regard is not limited to merely underwriters, but also attorneys, engineers, nonprofit organizations and any other individual who wishes to avoid regulation as a municipal advisor.

Second, the Stivers bill allows broker-dealers to provide advice "in connection with" their role as underwriter. This provision will allow broker-dealers serving as underwriters to provide advice on virtually every aspect of the financing, including with respect to the structure, timing, terms and other similar matters related to municipal securities issuance (municipal advisory services), but without owing a corresponding fiduciary duty to the issuer.

The Stivers bill purports to be a clarification of the regulation of municipal advisors. But in light of the foregoing it seems that this effort by Rep. Stivers with the support of the underwriting community to define MAs – not by the services they provide, but by whether they receive compensation for them – will instead undermine the original intent of Dodd-Frank's municipal advisor provisions.

We do believe, however, that broker-dealers should be allowed to discuss matters with issuers that are related to the transaction and that are within the scope of their underwriting role as a purchaser and distributor of securities.

Nevertheless, broker-dealers that provide muni advisory services, regardless of the title they utilize, do have a conflict of interest and should not be allowed to provide them without obtaining fiduciary duties and triggering the corresponding prohibition on underwriting the issuer's securities, by simply not receiving compensation for such services.

While some market participants may reminisce about their pre-Dodd-Frank business practices, unfortunately it is some of those very practices that led to the enactment of Dodd-Frank's municipal issuer protections. It is time to move forward.

The role of the municipal advisor and underwriter are distinct, and the definition corresponding to each must be clear. Issuers must be able to distinguish between those individuals whose role is to provide advice and those whose role is to purchase and distribute securities.

It is our fear that Dodd-Frank's accomplishments in this regard will be undone by the enactment of the Stivers bill.

We believe that the SEC understands the concerns of market participants and that it is fully capable of addressing these concerns.

Conversely, the Stivers bill takes the wrong approach to addressing the markets' concerns and will simply allow certain market participants to return to the business practices that contributed to the worst financial crisis since the Great Depression.

Therefore, the SEC must be allowed the opportunity to develop and release a rule clarifying the definition of muni advisor prior to any legislative action that will only further delay the rulemaking process and undermine Dodd-Frank's municipal issuer protections.

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