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Dealers Concerned About MA Rule.

Broker-dealers are concerned about the exemptions provided for underwriters in the Securities and Exchange Commission's municipal advisor registration rule, but securities lawyers and non-dealer municipal advisors say the more than 700-page release makes some important clarifications.

Much of the scrutiny of the rule, which came over the weekend after the rule was released late Friday, centers on the exemption from MA registration for underwriters.

While groups in every corner of the market praised the SEC for delivering the rule and for listening closely to industry feedback, broker-dealers also said the new rule may do some harm by preventing would-be underwriters from pitching ideas to issuers for fear they won't be able to underwrite the bonds.

"This final rule does present some problems," said Leslie Norwood, managing director, associate general counsel, and co-head of municipal securities at the Securities Industry and Financial Markets Association.

Norwood said dealer firms frequently make suggestions to municipalities, and under the new rule these suggestions would itself create a fiduciary relationship inconsistent with underwriting. Under MSRB Rule G-23, firms cannot be both a financial advisor and an underwriter on the same bond issue. The SEC rule allows underwriters selected to handle a specific transaction to offer limited advice related to underwriting, but Norwood said uncertainty about what kind of communications might trigger a fiduciary relationship could lead broker-dealers to pull back from offering input that might be helpful to municipalities.

"That is a significant problem and we feel issuers will be harmed by not receiving these ideas," she said.

Mike Nicholas, chairman and chief executive officer at the Bond Dealers of America, also said that there may be some lingering question about where the line between an advisor and an underwriter is drawn.

"If that is unclear in any fashion, the result is underwriters are going to be cautious," he said.

But non-dealer MAs are pleased by the narrowness of the exemption.

"Based upon our preliminary review of the release, we are pleased that the SEC has determined to develop registration triggers that center upon whether the individual is providing municipal advisory services to municipal issuers and obligated persons," said National Association of Independent Public Finance Advisors president Jeanine Rodgers Caruso. "Although we are concerned that underwriters will be exempt from the registration requirements when providing advice relative to the issuance of securities and in the scope of their underwriting engagement, we are pleasantly surprised by the limited nature of this exception."

Securities lawyers said a broad new exception that allows anyone to offer financial advice to the

issuer as long as the issuer has retained a registered MA on the same topic might create into some issues as well. The rule requires that the issuer certify in writing that it will rely solely on the advice of its MA. But issuers may balk at having to make such certifications. Other issuers might be confused by complex correspondence from dealers aimed at making clear they are not municipal advisors under the independent advisor exception.

An attorney who preferred not to be identified said it could be a compliance headache. “You may not be able to use the independent MA exception as often as you would like,” that lawyer concluded.

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