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Commentary: Long-Awaited Municipal Advisor Regulation Should Not Restrict Issuers.

In response to a recent commentary on the Securities and Exchange Commission's approval of a final rule defining municipal advisors, we agree with Ms. Rodgers Caruso on an important point.

The SEC's final rule is long-awaited and welcome as it will permit the Municipal Securities Rulemaking Board to move forward on regulations governing the activities of non-dealer municipal advisors.

For too long, bond issuers have been poorly served by a regulatory scheme where municipal financial advisors are exempt from even the most fundamental level of oversight and regulation. With that said, Ms. Rodgers Caruso's commentary is misleading in several key areas. First, the free flow of information and ideas between investment bankers and their clients is vital to ensuring the best possible transaction execution for municipal bond issuers.

Throughout the debate over the Dodd-Frank Act in 2009 and 2010, Congress' attention with regard to municipal advisor regulation was directed exclusively at bringing unregulated financial advisors under the federal regulatory umbrella, not at impeding the relationship between underwriters and their clients.

Indeed, legislation approved by the U.S. House of Representatives in 2012 with unanimous bipartisan support, including former Rep. Barney Frank, would have clarified Congress' intent in this regard.

Many issuers depend on their public finance bankers for ideas, market color, analysis and other value-added services during the time between transactions as much as they do when a transaction is being structured and brought to market. It is not in any issuer's interest to limit their ability to communicate freely with any market participant.

Second, it is often difficult or impossible, due to constraints imposed by state and local procurement rules, for municipal issuers to formally engage underwriting firms when a new-issue transaction is in its early, formative stages. That is one reason why formal underwriter engagement letters are so rare in our market.

Third, since Dodd-Frank was enacted, the MSRB and SEC have made significant revisions to MSRB Rules G-17 and G-23, which for nearly two years have prohibited dealers from serving as both an advisor and an underwriter on the same transaction. Dealers are required to announce the role they are seeking (advisor or underwriter) at the time of first contact with the issuer. This is consistent with the intentions of the SEC's muni advisor rule. MSRB Rule G-17 mandates substantial disclosures on the part of underwriters as to their role in a transaction, conflicts of interest, transaction risks and other key factors, including that the dealer is an underwriter and not an advisor or fiduciary.

Finally, many issuers, large and small, choose not to employ financial advisors for bond transactions for a variety of reasons. Sometimes the issuer has sufficient internal resources to manage the transaction without an advisor. Sometimes the issuer may simply believe the value offered by a financial advisor does not justify the cost.

In any case, the choice should be left to the issuer and not become a matter of federal regulation. If Congress wanted to mandate the use of muni advisors on every bond sale, the Dodd-Frank Act would have explicitly included such a requirement as it effectively does for swap transactions. The Dodd-Frank municipal advisor provisions were never intended to be the “full employment act” for advisors.

As Ms. Rodgers Caruso recognizes in her commentary, the Securities Industry and Financial Markets Association strongly supported the municipal advisor provisions in the Dodd-Frank Act because we believe it is in issuers’ interests for their advisors to be regulated.

In many cases, these firms have little or no financial capital. They regularly engage in “pay-to-play” behavior. Their employees usually have not passed any licensing or qualification examinations, and they are not required to manage or even disclose conflicts of interest.

In a large majority of cases, non-dealer municipal advisors are compensated only when a transaction closes, resulting in a huge incentive to advise a client to complete a transaction even if it’s not in the client’s interest, despite the municipal advisor’s “fiduciary duty.”

Today, well over three years after the enactment of the Dodd-Frank Act, non-dealer municipal advisor conduct remains unregulated. For that reason, we are pleased that the MSRB is now free to pursue appropriate municipal advisor regulation. We urge the board to move expeditiously in their rulemaking in this area.

The dealer community is not, as Ms. Rodgers Caruso states, trying to “undo the rules’ issuer protections before they are even effective.” On the contrary, we seek to preserve the ability of issuers to communicate freely with bankers, to receive ideas and analysis, and, as Ms. Rodgers Caruso states, to “control whether, why and how to issue securities.”

Hopefully, the new municipal advisor rule will not inappropriately impede the ability of issuers to work with their bankers.

Michael Decker is a managing director and co-head of the municipal securities group at SIFMA.