SEC issues emergency order providing limited relief for Municipal Advisors; Commission "Not Moving Forward" with Draft EO

The Securities and Exchange Commission today announced that it has issued an emergency order providing a "temporary conditional exemption" allowing Municipal Advisors to engage in certain small private placement activities without registering as broker dealers. The relief will expire on December 31, 2020.

In referencing the draft Exemptive Order issued for public comment last year which would provide broad latitude for MAs in private placements, today's order states "While the Commission is not moving forward with the proposed exemption at this time, it believes that it is important to issue the Temporary Conditional Exemption with the parameters and requirements specified to address the exigent circumstances during this unprecedented time."

The SEC characterized the order as a response to financing difficulties experienced by issuers as a result of the coronavirus crisis, stating "municipal issuers have faced challenges accessing the primary market, and as an alternative many municipal issuers have turned to other means of financing, such as private placements, loans, and lines of credit with banks."

The order goes on to state "In order to facilitate more timely and efficient access to bank financing alternatives by municipal issuers during this historic COVID-19-related market disruption, we are issuing this Order granting an emergency, temporary conditional exemption permitting registered municipal advisors to solicit a defined set of banks, wholly-owned subsidiaries of banks, and credit unions in connection with certain direct placements of municipal securities by their municipal issuer clients."

Today's emergency order imposes certain conditions on the relief provided. These include:

- The investor or lender must be a bank or credit union;
- The maximum deal size is $20 million;
- Private placements only, no public offerings.

In addition, the investor or lender—the "Qualified Provider" in the parlance of the order—must make certain representations to the MA, including:

- That the firm is a bona fide "Qualified Provider";
- That the QP is capable of evaluating the risks of the transaction;
- That the QP is not purchasing the bonds with the intention of redistribution; and
- The QP will not transfer the bonds within one year of closing the transaction.

The MA must also make the following representations:

- That the MA represents only the interests of the issuer;
- That the solicitation takes place under the emergency order;
- That the MA has not diligenced any of the issuer's disclosures;
- That no dealer placement agent is involved in the transaction; and
- That the QP may choose to engage the services of a broker-dealer to represent its interests.

In addition, the order specifies the following additional restrictions:

- It does not apply to publicly offered deals;
- The minimum denomination for bonds place under the order is $100,000; and
- During the first year after closing the QP may sell the bonds only to another QP.

The order also imposes record-keeping and reporting rules for MAs relying on the exemption and specifies a December 31, 2020 expiration.

While the order is disappointing, we are encouraged that it applies to a narrow slice of transactions and that the restrictions imposed by the SEC track closely the restrictions BDA recommended in our advocacy with the SEC related to the 2019 draft Exemptive Order over the last 15 months. We continue to work with SEC commissioners and staff on issues related to bank placements and the 2019 draft EO. As always, we will continue to apprise you of developments.