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Submitted Electronically

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Rebecca Olsen, Esq.
Director
Office of Municipal Securities

U.S. Securities and Exchange
Commission 100 F Street, NE
Washington, DC 20549

RE: Request from PFM Financial Advisors LLC (“PFM”) for Interpretative Relief for Private Placements

Dear Mr. Redfearn, Ms. Rutkowski, and Ms. Olsen:

On behalf of the Bond Dealers of America (“BDA”), we are writing this letter to state our concerns regarding a letter from PFM to you (the “PFM Letter”) dated October 30, 2018. In the PFM Letter, PFM requests interpretative guidance that would overturn decades of settled law on what constitutes broker-dealer activity. PFM asks that it and other non-dealer municipal advisors be permitted to place municipal securities with investors without being required to register as a broker-dealer or be subject to any of the regulations that apply to broker-dealers engaged in that same activity. PFM argues that this would benefit issuer clients who seek to borrow in the private market, but they provide no actual evidence to support that assertion. At the same time, they ask that they be permitted to solicit a wide variety of investors and engage in extensive activities on behalf of their borrowing clients without incurring any obligations to these investors.

The BDA strongly disagrees with the legal and factual predicates of the PFM Letter. It misstates the current state of the law, misstates the reasons why the law is what it is, misstates what this actually looks like in the municipal securities market and misstates the practical implications that would ensue if the law is changed. If the SEC provides the guidance requested, it could lead to a rollback of decades of investor protections for these and potentially a host of similar financings. In addition, if the SEC provides the guidance requested, it would further worsen an existing competitive imbalance between dealer and non-dealer municipal advisors due to legal ambiguities.

The Current State of the Direct Placement Market

One would think from reading the PFM Letter that scores of transactions are not getting done today because of regulatory uncertainty. As we know, however, issuers have been entering into direct placements with banks and other lenders in such amounts and with such regularity that it prompted the SEC to amend Rule 15c2-12. According to Refinitiv, in the five-year period between 2014-2018, more than \$163 billion of municipal private placements were sold by municipal issuers in nearly 6,500 transactions. Nearly 700 private placements were of \$1 million or less, more than 1,700 private placements were between \$1 million and \$5 million, and nearly 1,000 private placements were between \$5 million and \$10 million. The market statistics undermine PFM's argument that small issuers are being handcuffed in their ability to effect private placements as the market is robust at all levels of size and sophistication.

Before a broker-dealer is permitted to engage in a transaction involving a municipal issuer, it is required to have policies and procedures in place to ensure that it determines if the instrument being placed is a security under the test established in *Reves v. Ernst & Young*¹. Dealers have undertaken a significant amount of effort to develop appropriate policies and procedures in response to these regulatory requirements. The MSRB has also cautioned municipal advisors that they need to be careful because they may be engaging in broker-dealer activity if they fail to determine - or determine incorrectly - that the transaction does not involve a municipal security.² This guidance notwithstanding, there remains uncertainty and inconsistency in how different market participants execute direct placement transactions.

Originally, like the rest of the industry, PFM sought guidance regarding when instruments of municipal debt constitute securities when it responded to the MSRB's request for comment relating to the recent amendment of Rule G-34.³ In its comment letter, PFM objected to the idea that municipal advisors - or at least independent municipal advisors - should have any obligation to investors. Instead, they argued that the SEC should act so that there is "explicit refinement of the definition of a municipal security such that it is clearly differentiated from a non-securitized bank loan or a municipal financial product not requiring a CUSIP to give guidance to all market participants, including municipal entity issuers and obligated persons beyond the test provided by the U.S. Supreme Court in *Reves v. Ernst & Young, Inc.*" PFM goes on to say that "the MSRB should work with the SEC to provide practical guidance to all market participants . . . such that determination of whether an instrument is a security is clear" as "this clarity would obviate the need for any of the proposed amendments to Rule G-34 aimed at addressing questions in the industry regarding the application of Rule G-34 to private placements of municipal securities." They ask for a "listing of instruments which clearly either are or are not considered to be a 'security.'"

Not having received the guidance they sought from the MSRB and the SEC that would help clarify when a given transaction involves a loan or a security, PFM has become bolder and now seeks to achieve an even greater goal. Not content to limit itself to arranging loans with commercial banks, PFM is now arguing that it shouldn't matter if the debt being placed is a loan or a security, it shouldn't matter if the investor is a bank, and it shouldn't matter if a municipal

¹ 494 U.S. 56, 110 S. Ct. 945 (1990). See FINRA Notice 16-10 (April 2016).

² MSRB Notice 2016-12 (April 4, 2016).

³ See MSRB Notice 2017-25 (December 15, 2017)

advisor identifies, negotiates with and coordinates the sale of municipal securities with investors. As long as there is non-dealer municipal advisor representing the interests of the borrower in the transaction, PFM's view is that the investors can fend for themselves. In other words, PFM is asking the SEC to provide guidance that inherently broker-dealer activity is not broker-dealer activity at all.

The PFM Letter understates what municipal advisors are doing in the municipal securities market.

The PFM Letter does not explain how common it has become for municipal advisors to identify capital market investors (investors who exist for the purpose of investing in securities transactions) for the purpose of arranging placements of municipal securities. The PFM Letter does not explain that these investors range in size and sophistication and diversity in the regions in which they are located. In short, there are many municipal securities financings effected each year where the municipal advisor finds a capital market investor, actively negotiates a bond transaction directly with the investor and coordinates the financing between the municipal entity and the investor. These transactions are not isolated to commercial banks or even investors who engage in a quasi-commercial banking capacity. Further, the BDA believes that investors do not understand that these municipal advisors owe very different duties to investors than broker-dealers do. In short, the PFM Letter does not explain that the frequency and breadth of activity by municipal advisors in approaching investors leaves no doubt that they pervasively engage in broker-dealer activity.

If the SEC acts on the PFM Letter, it will roll back essential protections for investors without providing the purported benefits to issuers.

The broker-dealer regulatory regime exists for good reasons. In this context, persons who identify, negotiate and coordinate securities transactions need to be properly regulated, qualified and capitalized because the interests of the investors are as worthy of protection as those of issuers. For example, broker-dealers serving as placement agents of municipal securities have an array of legal obligations that are intended to protect investors, including but not limited to due diligence responsibilities under the Federal antifraud laws. When broker-dealers make recommendations to investors, the antifraud laws require that the broker-dealers conduct some reasonable investigation to ensure the integrity of the information provided to investors. In addition, broker-dealers have obligations to ensure the pricing of the transaction is fair for both issuers and investors. For many years now, the SEC has placed particular focus on the gatekeeping function of broker-dealers. Those gatekeeping functions are seen as essential to the protection of investors. In addition, broker-dealer registration, licensing and continuing education requirements form a core part of the Federal regulatory regime of broker-dealers because each of these requirements helps protect investors. The financial crisis of 2008-2009, inflicted significant financial damage to institutional investors as much as retail investors and has put the value of the broker-dealer regime to all investors beyond doubt. In addition, any notion that institutional investors can fend for themselves runs contrary to the reasons why the SEC adopted the new Rule 15c2-12 amendments. The SEC was clear institutional investors requested those amendments because they were powerless to receive basic information about competing debt of issuers.

PFM fails to make the case that its request is essential for issuers.

PFM fails to make the case that this is the time and these are the transactions that warrant such a radical departure from broker-dealer legal standards. Issuers and borrowers have many financing options. They can choose (or not) to retain a municipal advisor to help them determine the best approach to achieve their goals at the lowest cost. To determine which option to choose, the borrower would need to have a sense of what lenders or investors might be interested in their debt and the terms under which they would be willing to lend or invest.

Broker-dealers are connected with both the broad market and with individual investors. They also have the expertise that is borne of those relationships and the direct investor feedback they receive. PFM, which is the largest non-dealer municipal advisor, may argue that it has similar market knowledge but PFM is not representative of municipal advisors generally. Many advisors have practices limited to and centered around a small geographic location. Many of those likely lack the market information or expertise to identify and engage investors from parts of the country remote to them. It would be a disservice to their clients and potentially a breach of their fiduciary duty not to engage a qualified broker-dealer to help ascertain the lowest cost of financing.

Implicit in the PFM letter is the notion that broker-dealers are unnecessary to a transaction and their presence simply increases costs to the issuer. As noted above, broker-dealers may add significant value to the issuer. They can help identify interested investors willing to agree to terms favorable to the issuer. Fees earned by the broker-dealer may be offset by the lower price or more favorable terms negotiated.

More importantly, the BDA believes that it is not a question of what the costs will be to the issuer but rather a question of PFM wanting to receive for itself a fee that broker-dealers otherwise would earn. PFM works for fees too and those fees are also paid by the issuer. In the end, the PFM letter fails to explain why any of the sought-after guidance would result in a better market environment for issuers let alone is essential to the well-being of issuers.

If the SEC provides the guidance that PFM is seeking in the PFM Letter, it would exacerbate a long-standing competitive imbalance between non-dealer and dealer municipal advisors.

As stated above, there is presently no clear definition of when bonds and other instruments of municipal debt constitute securities, and similarly, no clear definition of what constitutes the activity of a placement agent under MSRB Rule G-23. As a result, many dealer municipal advisors have taken conservative positions in order to avoid simultaneously acting as both a municipal advisor and placement agent in the same financing. But since only dealers are subject to Rule G-23, non-dealer municipal advisors have felt less constrained about blurring the lines between those roles. The absurd result is that dealers, who are subject to rules intended to protect both issuers and investors, are not engaging in activity in which non-dealer municipal advisors routinely engage. In the end, the regulatory confusion caused by the SEC and the MSRB not coordinating their regulation of dealers has allowed non-dealer municipal advisors a competitive advantage. If the SEC provides PFM the guidance it seeks, it would make this competitive imbalance even worse.

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Thank you for the opportunity to provide these comments.

Sincerely,

A handwritten signature in blue ink that reads "Nicholas". The signature is written in a cursive style with a long, sweeping underline.

Mike Nicholas
Chief Executive Officer