



June 26, 2020

The Honorable Jay Clayton
Chairman
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Order Granting a Temporary Conditional Exemption from the Broker Registration Requirements of Section 15(a) of the Securities Exchange Act of 1934 for Certain Activities of Registered Municipal Advisors; Release No. 34-89074

Dear Chairman Clayton:

The American Securities Association¹ writes to express our opposition to the June 16, 2020 order issued by the Securities and Exchange Commission (“SEC” or “Commission”) that allows certain municipal advisors to avoid broker-dealer registration and the regulatory requirements that accompany such registration in their interactions with municipalities (“Order”). In this one action, the Commission has simultaneously undermined the robust and effective broker-dealer regulatory regime, weakened investor protections in the municipal market, subjectively favored certain market participants over others, and evaded the process and public input requirements of the Administrative Procedures Act (“APA”).

We believe (1) the Order should be immediately rescinded and (2) the protections under Section 15(a) of the Securities Exchange Act must be restored. Our views on this matter are discussed in greater detail below.

I. The SEC has circumvented statutory requirements that govern SEC rulemaking.

By issuing the Order, the SEC created an exemption from Exchange Act registration requirements out of thin air and without the authorization of Congress. The Commission has consistently taken the position that certain activities – including the receipt of transaction-based compensation, identifying purchasers of securities, and soliciting securities transactions are specific functions of a broker-dealer, and therefore, engaging in any of those actions requires

¹ The ASA is a trade association that represents the retail and institutional capital markets interests of regional financial services firms who provide Main Street businesses with access to capital and advise hardworking Americans how to create and preserve wealth. The ASA’s mission is to promote trust and confidence among investors, facilitate capital formation, and support efficient and competitively balanced capital markets. This mission advances financial independence, stimulates job creation, and increases prosperity. The ASA has a geographically diverse membership base that spans the Heartland, Southwest, Southeast, Atlantic, and Pacific Northwest regions of the United States.





registration under the Exchange Act. While the SEC has issued exemptive orders in the past, these exemptions typically would not cover individuals or entities that received transaction-based compensation.² This Order departs from the Commission's own longstanding policy by explicitly allowing municipal advisors to receive transaction-based compensation.

While "temporary" and "conditional," the Order is another example of an administrative state regulator skirting the necessary process requirements to arrive at a preferred policy outcome. Tellingly, the Order includes no empirical evidence showing a market failure that warrants an exemption for municipal advisors, and it makes no mention of the possible risks to municipalities or investors from allowing unregistered entities to expand their role in the municipal market. The SEC also failed to conduct any type of economic analysis as to the Order's effect on the municipal market.

And make no mistake, the Commission will soon be under pressure – if it is not already - to make this exemption permanent. The Commission's willingness to subvert its own regulatory process at the behest of a small group or a single well-connected entity is very a worrying sign. If the Commission wants to fully examine the costs and benefits of this exemption, it should proceed with a formal notice-and-comment rulemaking to solicit input from all sides.

The Order is the perfect example of the "administrative state" using a crisis to grant preferable treatment to favored parties without public scrutiny at the expense of American investors of all sizes. Moreover, it is an abdication of the Commission's authority to move forward with an order that will have such an adverse impact on an otherwise well-functioning market.

II. The Order has been issued due to requests from municipal advisors for favorable treatment, and is entirely unrelated to the COVID-19 crisis.

As the Commission well knows, certain municipal advisors have long desired a cafeteria-style approach towards their role in the municipal market: they want to engage in the same activities as a broker-dealer but ignore the rules, regulations, and capital requirements that go along with those activities, leaving investors at risk of fraud and abuse. The ASA has commented on these previous efforts³, which took place well before the global COVID-19 pandemic and economic downturn began earlier this year.

Using the COVID-19 pandemic as a pretext for creating a regulatory loophole only further amplifies the process fouls that led to the Order being issued. Broker-dealers have continued to serve municipalities of all sizes during this crisis and have maintained their critical role of providing capital and liquidity to cities and communities across America. There is no data to support the argument that unregulated municipal advisors are somehow a missing ingredient

² See e.g. Exchange Act Rule 3a4-1

³ https://static.wixstatic.com/ugd/d1d329_8fc4cf8589894e4081f5e80205b8ab68.pdf





to an economic recovery. In fact, the evidence and history demonstrate the risks that unregulated municipal advisors pose, and that the Order may only serve to undermine confidence in this market.⁴

III. The Order is contrary to Congressional intent regarding oversight of the municipal market.

Due to the perceived lack of transparency in the municipal securities market, Congress in included provisions in the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) that required certain municipal advisors to register with the Commission and to comply with both Commission and Municipal Securities Rulemaking Board (“MSRB”) regulations. The Commission issued rules implementing the Dodd-Frank Act’s provisions in 2013. Congress made clear with the Dodd-Frank Act that *more*, not less, supervision of municipal advisory activities and the municipal securities market was warranted, particularly given the number of high-profile frauds involving municipalities over the last decade. It defies logic to interpret Congressional intent as warranting less supervision for municipal advisors. The Order undermines the important protections Congress put in place to protect the ultimate buyer and issuer by ignoring the lessons of previous frauds and crises at the municipal level.

IV. Conclusion.

The ASA strongly opposes this initiative and urges the Commission to swiftly rescind the Order. The Commission has not produced any evidence that a regulatory exemption for municipal advisors is desirable or in the best interest of investor, and it has evaded APA requirements by issuing this Order. If the Commission does not reconsider this Order, the ASA will have no choice but to consider further action to protect investors and ensure trust and confidence in the market.

We suggest the Commission focus its resources on formal, process-driven actions that can be taken to benefit America’s mom and pop investors, promote capital formation, and help our economy recover from the COVID-19 pandemic. What it should not do is weaken investor protections and rollback regulations to pick winners and losers in the municipal market. If you would like to further discuss these matters, the ASA stands ready to assist.

⁴ See e.g. “South Carolina School District Sues FA and Bond Counsel” (Bond Buyer, March 8th 2019); “Commentary Duty of Care Enforcement for Municipal Advisors” (Bond Buyer, August 30 2017); “SEC Starts 2018 with an MA Enforcement Action” (Bond Buyer, January 5th 2018); “SEC Settles Charges of Unregistered Activities on Behalf of Municipal Advisor” (Bond Buyer, July 16th 2019)





american securities association

America's Voice for Main Street's Investors

Sincerely,

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