

# Chapman Client Alert

June 18, 2020

Current Issues Relevant to Our Clients

## SEC Grants Municipal Advisors a Temporary Exemption from Broker Registration for Certain Direct Placement Activities

On June 16, 2020, the Securities and Exchange Commission (“SEC”) issued an order (the “Order”) granting registered municipal advisors an emergency, temporary conditional exemption (the “Temporary Exemption”) from broker registration under Section 15 of the Securities Exchange Act of 1934 (the “Exchange Act”)<sup>1</sup> in connection with certain direct placement activities. In granting the exemption, the SEC highlighted that municipal issuers and obligated persons (referred to herein as “issuers”) are experiencing financial stress related to COVID-19 and that issuers’ ability to access capital markets in a timely and efficient manner may be hindered by disruptions in the primary municipal securities market and by the ineligibility of smaller municipal issuers to access the Federal Reserve Board’s Municipal Liquidity Facility, which provides lending support to larger, highly rated municipal issuers.

The Temporary Exemption permits municipal advisors to (1) engage in the solicitation of one or more Qualified Providers in connection with a potential direct placement of municipal securities by issuer clients (which includes conduit borrowers and other obligated persons), and (2) receive transaction-based compensation for services provided in connection with that direct placement, without being required to register as a broker under the Exchange Act, so long as all of the conditions set forth in the Order are met. A Qualified Provider is defined in the Order as (i) a bank, as defined in Section 3(a)(6) of the Exchange Act;<sup>2</sup> (ii) a wholly-owned subsidiary of a bank engaged in commercial lending and financing activities, such as an equipment lease financing corporation; or (iii) a federally or state-chartered credit union. A direct placement is defined as a direct purchase from an issuer of municipal securities (as defined in the Exchange Act) by one or more Qualified Providers. The Order is effective as of June 16, 2020, until December 31, 2020.

### 2019 SEC Proposed Exemption

In October 2019, the SEC issued a proposal to grant permanent conditional exemptive relief to permit a registered municipal advisor, acting on behalf of an issuer client, to solicit specified institutional investors in connection with the direct placement of municipal securities without registering as a broker under Section 15 of the Exchange Act (the “Proposed Exemption”).<sup>3</sup> The SEC is not moving forward with the Proposed Exemption at this time, but instead is issuing the more limited Temporary Exemption, which is designed to aid smaller issuers that may be facing unexpected financing needs in light of the COVID-19 pandemic and that have faced challenges accessing the public markets.

### Required Written Representations

The Temporary Exemption is subject to a number of conditions, including the provision of certain written representations by and between the municipal advisor and the Qualified Provider(s).

- The municipal advisor must obtain written representations from the Qualified Provider(s) that such Qualified Provider:
  - Meets the definition of Qualified Provider under the Order;
  - Is capable of independently evaluating the investment risks of the transaction;
  - Is not purchasing with a view to distributing the securities; and
  - Will not transfer any portion of the direct placement within one year of the date of the issuance of the securities, except to another Qualified Provider.
- The municipal advisor must make a written representation to, and obtain written acknowledgement of receipt from, the Qualified Provider(s) that the municipal advisor:
  - Solely represents the interests of the issuer and not the Qualified Provider;
  - Is soliciting the Qualified Provider in connection with a direct placement pursuant to the Temporary Exemption;

- Has not conducted due diligence on behalf of the Qualified Provider;
- Has not, as of the date of the written representation, engaged, nor has the municipal advisor engaged, a broker-dealer as a placement agent in connection with the direct placement; and
- Acknowledges that the Qualified Provider may choose to engage the services of a broker-dealer to represent the Qualified Provider's interests.

date of issuance of the direct placement, except if it is transferred to another Qualified Provider.

- *Recordkeeping:* A municipal advisor seeking to rely on the Temporary Exemption must make and keep the records required by Exchange Act Rule 15Ba1-8(a)(1).
- *SEC Notification:* A municipal advisor seeking to rely on the Temporary Exemption must provide notice to staff in the SEC Division of Trading and Markets of any direct placement for which it has relied on the Temporary Exemption, no later than 30 calendar days after the sale of securities in the direct placement. The notice should be sent in an email to [tradingandmarkets@sec.gov](mailto:tradingandmarkets@sec.gov) and must identify (i) the issuer; (ii) the date of the direct placement; (iii) the principal amount of the direct placement; (iv) the Qualified Provider(s) who purchased the direct placement; and (v) the CUSIP, if available.

## Other Terms and Conditions

- *\$20 Million Size Limit:* The aggregate principal amount of each direct placement may not exceed \$20 million.
- *\$100,000 Authorized Denominations:* The direct placement must be issued in authorized denominations of \$100,000 or more.
- *One-Year Restriction on Transferability:* A direct placement may not be transferred within one year of the

## For More Information

If you would like further information concerning the matters discussed in this article, please contact your primary Chapman attorney or visit us online at [chapman.com](http://chapman.com).

- 1 The See 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 (June 16, 2020), *available at* <https://www.sec.gov/rules/exorders/2020/34-89074.pdf>.
- 2 The term "bank" means (A) a banking institution organized under the laws of the United States or a Federal savings association, as defined in section 1462(5) of title 12, (B) a member bank of the Federal Reserve System, (C) any other banking institution or savings association, as defined in section 1462(4) of title 12, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency pursuant to section 92a of title 12, and which is supervised and examined by State or Federal authority having supervision over banks or savings associations, and which is not operated for the purpose of evading the provisions of this chapter, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph.
- 3 See Proposed Exemptive Order Granting a 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 (Oct. 2, 2019), *available at* <https://www.sec.gov/rules/exorders/2019/34-87204.pdf>.

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