



Municipal Advisors and SEC Asset Backed Securities Rule – Compliance Considerations

NAMA has developed this Resource to help members understand recent the Final SEC Rule on Asset Backed Securities (ABS) transactions. Firms should determine their own policies and procedures and consult counsel as needed. This Resource does NOT serve as legal advice and Firms that engage in ABS transactions should carefully review the Rule and seek input from counsel. (January, 2024)

Background

In November, the SEC released a Final Rule on Asset Backed Securities transactions (**Rule 192 of the Securities and Exchange Act of 1933**). During the Proposed Rule comment period, NAMA submitted comments seeking to limit MA exposures to this updated rulemaking and joined a comment letter from numerous, other market participants. All documents can be found below in the Resources section.

The Final prohibits a participant [“an underwriter, placement agent, initial purchaser, or sponsor of an asset-backed security (including a synthetic asset-backed security), or certain affiliates or subsidiaries of any such entity”] from engaging in any transaction that would involve or result in a material conflict of interest. (Final Rule, page 9). The Rule prohibits these participants from engaging in conflicting transactions for one year from the original ABS transaction. (Rule language, pages 245-246)

NAMA had expressed concerns that MAs are included within the “sponsor” definition, and asked for MAs to be excluded since their federal fiduciary duty already prohibits them from engaging in transactions that present a material and unmitigable conflict of interest with their clients. NAMA and other market participants also sought to more narrowly define ABS in the municipal securities sector by excluding issuers, including conduit issuers, from the sponsor definition.

The Final Rule did not exclude MAs from the sponsor definition (see pages 55-56), did not exclude issuers of any kind from the sponsor definition (see pages 191-192) nor more narrowly define municipal securities (see pages 17-19). However, the Final Rule did provide some relief for MAs and municipal securities than the proposed Rule.

What MAs Need to Know

The Final Rule goes into effect February 5, 2024.

Municipal advisors and firms that are not hedging against transactions where they served as MA, are not involved in a short sale, credit default swap or derivative transaction that conflicts with their duties under the original ABS transaction, should generally not be concerned with this Rule. However, MAs should determine themselves and with counsel if their practice could intersect with the Rule and develop appropriate statements for the Firm’s WSP and policies and procedures.

MA firms with affiliated Registered Investment Advisor and/or Broker-Dealer units should give a higher level of consideration on how the Final Rule may impact their firm.

MA firms that engage in ABS transactions should consider appropriate policies and procedures to comply with the Rule.

There are no prescriptive documentation standards for MAs (and issuers) within the Rule for parties that do not engage in transactions that conflict with the original ABS transaction.

Remaining Concerns

The definition of “sponsor” currently includes where “contractual rights” are in place. Contractual rights are defined as “to direct or cause the direction of the structure, design or assembly of an asset backed security or composition of the pool of assets underlying or referenced by the asset backed security,” NAMA may seek guidance from the SEC that MA activity is not part of this definition; and the broader market participant group may seek further clarification when an issuer may be included within this definition.

The ABS definition remains murky related to municipal securities transactions, and further clarification of this may be warranted.

Resources

Final SEC Rule 192: <https://www.sec.gov/files/rules/final/2023/33-11254.pdf>

NAMA March 2023 Comment Letter: <https://nama2.memberclicks.net/assets/NAMAABSMARCH2023FINAL.pdf>

Industry Groups March 2023 Comment Letter: <https://www.nabl.org/wp-content/uploads/2023/03/20230327-SEC-ABS-Proposal-Comments.pdf>.

Proposed Rule: <https://www.sec.gov/files/rules/proposed/2023/33-11151.pdf>

MSRB Resource (developed prior to proposed/final Rulemaking) on Asset Backed Securities - <https://www.msrb.org/sites/default/files/Municipal-Asset-Backed-Securities.pdf> (2022)