NATIONAL ASSOCIATION OF MUNICIPAL ADVISORS

July 18, 2019

Ms. Rebecca Olsen
Director, Office of Municipal Securities
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Mr. Brett Redfearn
Director, Division of Trading and Markets
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Ms. Olsen and Mr. Redfearn:

We appreciated our previous discussion with your offices on issues facing municipal advisors and their municipal entity clients in connection with direct placements of their debt. As a follow-up, we would like to provide you a brief overview of our views of the core concerns that the SEC could address in a manner consistent with the duties of the various constituencies in the municipal market and consistent with past SEC guidance.

The National Association of Municipal Advisors (NAMA) represents independent municipal advisory firms and individual municipal advisors across the country. We are the largest professional organization solely dedicated to the municipal advisor (MA) profession and provide educational and compliance resources to our members and represent their interests before regulatory bodies. NAMA supports federal regulation of municipal advisors. Our members serve a fiduciary role to their clients and want to ensure that their activities are not considered broker-dealer activity. Of particular note related to this topic is that NAMA and its members do not look to displace broker-dealers from their critical role of underwriter or placement agent for offerings of municipal securities, nor to take on the broker-dealer role without the legal obligations that attach to such role.

Municipal entities often borrow funds for capital projects or other public purposes through direct placements, many of which would conventionally be considered loans with commercial banks. Within this context it is important to note that the services and roles of the municipal advisor are separate from the service and role of a placement agent. The MA has a more comprehensive set of fiduciary duties established under the federal securities laws and undertakes a broader set of responsibilities focused specifically on their issuer client. The placement agent has a more narrowly defined role to find the investor and bring parties to the table with less well recognized and more variable agency duties dependant on the applicable state law. However, both the placement agent and the municipal advisor are subject to a fair dealing obligation to investors.

The SEC's stated position on municipal advisors' role in direct placements has shifted over the course of the last several decades. The SEC's early articulation of permitted activities in its 1985 Dominion Resources no-action letter was withdrawn in 2000 during a period when the SEC was observing a growing range of unregulated entities seeking to engage in activities – primarily outside of the municipal securities market – that appeared to include some aspects of traditional broker-dealer activity. Of course, Dominion Resources and its withdrawal, and other cases relating to finders, occurred prior to when municipal advisors became subject to comprehensive federal regulation in 2010. As municipal advisors are now regulated, we believe that prior SEC actions that impact on how MAs carry out their duties to their clients that are seeking a direct placement of their debt should be reconsidered in the context of this new comprehensive MA regulatory structure.[1]

[1] Note that even the Broker-Dealer Guide on the Division of Trading and Market's website predates the Dodd-Frank Act and the development of the municipal advisor regulatory regime.

NAMA previously raised its concerns regarding this issue in its December 15, 2014 letter to the SEC, a copy of which is attached. In that letter, we identified an asymmetry between how certain market participants (including but not limited to underwriters and investment advisers) are provided with exemptions or exclusions for activities they engage in that otherwise constitute municipal advisory activities, but that municipal advisors are not provided any parallel exemptions or exclusions when municipal advisory activities might also be viewed as activities undertaken by underwriters, investment advisers or other professionals. We believe that the observations we made in 2014 continue to be true and that the manner in which direct placements often must be conducted to address the absence of a resolution of this concern continues to cause work arounds designed to maintain a safe margin around ambiguous regulatory lines. These work arounds provide no observable benefits to investors and in many cases can result in higher costs and/or the shutting out of the issuer's fiduciary during stages of the transaction where the issuer may have the greatest need for its advisor's services. Providing reciprocal exemptions for municipal advisors would address not only much of our concern regarding the direct placement scenario but also more broadly the lack of regulatory parity among municipal advisors, broker-dealers and investment advisers that would represent a fully matured comprehensive federal securities regulatory structure. Such a structure would offer greater certainty across the range of activities undertaken by each of these types of market participants. Importantly, this would benefit all firms who act as municipal advisors and not only independent municipal advisors because dual-registered advisors must choose which role they will act in on specific transactions. Once they have decided to be a municipal advisor on a direct placement they would benefit from the same additional clarity regarding the appropriate scope of their municipal advisor role so that they do not violate rules on role-switching.

While we understand that providing the regulatory parity we originally advocated in our 2014 letter would require a significant amount of analysis and regulatory activity on the part of the SEC (whether through rulemaking, interpretive guidance or exemptive actions), we stand ready to work closely with the SEC and other market constituencies to craft the appropriate measures to achieve such parity. We, however, do not believe that a solution to address the specific problem arising from the regulatory confusion around direct placements must await the completion of this potentially protracted process. Rather, we ask that the SEC consider more immediate action in the following manner.

The two most significant areas of municipal advisory activity that cause problems in direct placement circumstances for MAs are negotiating on behalf of their clients and identifying purchasers through an RFP or other publically available information for their client. These are duties recognized by the SEC as municipal advisor activity[2], and many MAs are routinely hired to undertake these activities for their municipal entity clients seeking bank loans. Yet the conduct of these very duties raises significant legal concerns when a small tweak in the terms of the loan threatens to transform it into a security, or when a bank that receives an RFP for a bank loan counters with a proposal that may involve a security. MAs perform these tasks for and on behalf of their clients with the same level of loyalty and duty as dictated by their federal fiduciary duty, regardless of whether the transaction is a loan or a security. There is no other party for which the MA serves although the MA does owe a fair dealing obligation to all other parties including investors.

We do not ask that the SEC today solve the ongoing conundrum of defining a loan versus a security, but instead that the SEC take action at the staff level to allow for MAs to assist clients with direct placements that are effectively the economic equivalent of, and raise the same array of potential risks, as a conventional loan. For example, we note that in 2014 SEC staff addressed, by means of no-action relief, a recurrent situation where the identical business objective could be achieved through transaction structures having substantially identical substantive effect but which in some cases would involve a security and in other cases would not involve a security. The so-called M&A Brokers no action letter set out a series of facts and precautions that established clear boundaries for permitting M&A Brokers to undertake a defined scope of activities on behalf of their clients, with appropriate safeguards for the corporate entity clients and the investors, without having to resolve the

[2] *See, e.g.,* Exchange Act Release No. 70462 (September 20, 2013) at text accompanying footnote 34 for the SEC's acknowledgment of MA's historic role in assisting their clients to "negotiate the financing terms" and text preceding footnote 556 regarding the role of MAs in assisting their municipal entity clients with respect to RFPs.

difficult question of whether or not the transaction involved a security. Although the specific facts and precautions would need to be tailored to the context of direct placements as discussed in this letter – perhaps incorporating some or all of the 1985 Dominion Resources guidance with adjustments based on the changed regulatory landscape and other market developments – this represents one potential approach that could be adapted by the SEC to avoid the need for making fine, fact-specific legal distinctions between a security and a loan where there would be no material difference in impact or risk to the parties. In this way, the SEC could provide effective guidance on circumstances under which municipal advisors can fully undertake their fiduciary duties to their municipal entity clients based on the substance rather than the form of a particular direct placement without the need for differentiating between a security or a loan.

SEC guidance, whether interpretive or by means of no-action relief, provided prior to resolving the broader and longer-term regulatory parity issue would go a long way in helping dual-registered or independent MAs identify and prove to their FINRA or OCIE examiners that they are following appropriate policies and procedures for their transactions. Our members have faced deficiency letters or have otherwise spent an inordinate amount of their time (and the time of examiners) explaining their activities in direct placements, under the threat of being cited for acting as unregistered broker-dealers when what they are really doing is fulfilling their fiduciary duties to their clients and engaging only in recognized municipal advisory activity. This guidance will free up both MA firms and examiners to focus on more core compliance concerns with regard to MA duties to their clients. It is also consistent with the SEC's approach to providing activities-based exemptions and not status-based exemptions.

Our municipal advisor members are committed to serving their clients effectively and faithfully to fulfill their fiduciary duty but are challenged by the significant legal ambiguities we discuss above. Many of these ambiguities are residual effects of the pre-Dodd-Frank Act period that predated municipal advisor regulation. We believe the current regulatory landscape represents a critical break from the past that offers the SEC the opportunity to dispel certain of these ambiguities in a manner that would benefit municipal entities and promote market efficiency without adversely affecting investors. While this letter identifies in broad terms potential approaches to resolving both the long-term and short-term issues facing all municipal advisors, we are very happy to continue the conversation with the SEC and other municipal market constituencies to achieve an effective solution that allows each category of market professionals to carry out their roles in a manner that promotes, rather than confounds, the best interest of market participants and the efficiency of the marketplace. We look forward to meeting with you again in the near future.

Sincerely,

Susan Gaffney
Executive Director