NATIONAL ASSOCIATION OF MUNICIPAL ADVISORS

March 31, 2023

Ms. Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: Release No. 33-11151; File No. S7-01-23; Prohibition Against Conflicts of Interest in Certain Securitizations

Dear Secretary Countryman:

The National Association of Municipal Advisors ("NAMA") is a professional organization founded in 1989, and represents independent municipal advisory firms and individual municipal advisors ("MAs") from across the country. Our mission is focused on educating our members on regulatory and compliance matters, as well as general municipal market practices.

It is with great interest that we submit comments on SEC File No. S7-01-23, Prohibition Against Conflicts of Interest in Certain Securitizations ("Proposal"). The Proposal's inclusion of new regulations on municipal advisors and municipal securitizations deserves attention and discussion.

Our comments focus on the current regulatory requirements in place for MAs and how the Proposal in effect and unnecessarily duplicates them. NAMA also joined others in the municipal securities community in a joint comment letter advocating for exempting municipal securities from the scope of this regulation.[i]

Responses to Questions Asked in the Proposal Specifically Related to Municipal Advisors

9. *As discussed above in Section II.A., municipal securitizations that are Exchange Act ABS would fall within the definition of asset-backed security for purposes of the re- proposed rule. Therefore, parties related to a municipal securitization that are "securitization participants" would be subject to the re-proposed rule. For example, under the re-proposed rule a "municipal advisor" under 17 CFR 240.15Ba1-1(d)(1) could be a "securitization participant" under the re-proposed rule based on the functions that it performs in connection with a municipal securitization. Should certain parties related to a municipal securitization be excluded from the scope of the re-proposed rule? If so, how would those exclusions be consistent with Section 27B? Are there any special considerations related to municipal advisors that should be considered in applying the re- proposed rule? (page 20)*

We strongly believe that municipal advisors should be excluded from being considered "securitization participants" due to the nature of their advisory work, existing MSRB Rules, and the powerful federal fiduciary duty that is already imposed on MA professionals.

The Dodd Frank Act created a federal fiduciary duty imposed on MAs in the Exchange Act (Section 15(B)(c)) that is further articulated in the SEC's Municipal Advisor Rule (SEC Release No. 34-70462) and required the MSRB to create a regulatory regime for MAs (collectively the "MA Rules"). Taken together, the federal fiduciary duty and MA Rules impose stringent conduct standards on MAs. As such, we have a very difficult time seeing how an MA could engage in the activity that Proposed Rule 192 seeks to prohibit (i.e., preventing the sale of ABS that are tainted by material conflicts of interest).

Taken another way, how could an MA that is engaged in municipal advisory activity with a client be involved in the sale of "tainted" ABS without violating its fiduciary duty? We do not see how this is possible. With all the regulatory safeguards that have been put in place since the passage of the Dodd Frank Act, MAs simply cannot make proprietary bets against their client's instruments without violating the federal securities laws. While the SEC may have considered developments in the ABS market since 2011, it appears that the SEC did not consider developments in the municipal securities market (e.g., the imposition of a regulatory regime on municipal advisors).

Further, even if the client is an obligated person, and only the duty of care applies per MSRB Rule G-42, the MA still has obligations under MSRB Rules to disclose material conflicts of interest, including how the MA must manage or mitigate such conflict. We don't see (even without the federal fiduciary duty) how an MA would mitigate this type of conflict. By disclosing to an obligated person client that the MA is betting against the performance of its ABS, the MA is jeopardizing and likely ending an existing client relationship. So, while there may not be both a duty of care and a duty of loyalty for obligated person clients, the MA Rules do provide another mechanism (i.e., disclosure) to address MAs betting against the performance of an ABS and safeguarding against this type of misconduct.

In addition, Proposed Rule 192 effectively places a duplicative, overlapping, and unwarranted layer of regulations on MAs by potentially considering MAs to be "securitization participants" and "sponsors." This unnecessary application of the scope of the regulation, would place immense compliance burdens on MAs for no material benefit to the public or to protect issuers, borrowers, or investors. Including MAs within these definitions does not provide a safeguard against misconduct but instead hinders routine securitization transactions that MAs are involved in with clients. For example, many MAs are small firms including solo practitioners and including them in these definitions would require them to spend a great deal of time, effort and expense to "prove a negative" that they do not engage in other conflicting transactions related to an ABS transaction, when that activity is already covered by the federal fiduciary standard and the MA Rules.

The "Proposal" appropriately raises the impact it would have on small entities (page 177). In addition to the critical threshold point that a federal fiduciary standard is in place, making unlawful an MA being involved in transactions that are of concern to the SEC, the Proposal would particularly and unnecessarily create compliance burdens for small MA firms. The Proposal notes that the estimate developed in 2013 - prior to MAs having to be registered with both the SEC and the MSRB – represents around 62% of MA firms (using the Small Business Administration's definition of a business having less than $7 million in annual revenues). This Proposal then estimates that this new Rule would directly impact 69 small MA firms. In fact, if the numbers were recalculated to reflect the current composition of registered MA firms, that number would increase. It is also important to note that the Securities Exchange Act specifically states in 15B(b)(2)(L)(iv) that no unnecessary regulatory burdens be placed on small municipal advisors. The Proposal's potential impact on small MA firms would directly conflict with this Section of the Exchange Act.[ii]

MAs play a crucial role in advising and representing their clients in a transaction. Their duty and work focuses on ensuring the issuer's goals for the transaction are met. This is why they are at the table, with a fiduciary duty to their client. It is difficult to fathom how an MA firm could lawfully engage in a conflicting transaction or bet against a municipal securitization. Most of our members have only a municipal advisory business, with no other regulated businesses. This is not to say of course that there are not broker-dealer MA firms, as well as firms that have both MA and Registered Investment Adviser businesses. In these cases we raise the issues discussed in the answers to questions below about how conflicting transactions to an ABS are nearly non-existent in the municipal securities market.

16. *We seek comment on the concept in the definition of the term "sponsor" of a person directing or causing the direction of the structure, design, or assembly of an ABS or the composition of the pool of assets underlying the ABS. Is this concept, in the context of a person that does not have a contractual right to exercise such direction, overinclusive or underinclusive, and why? In particular, is the reference to "causes the direction of" necessary in order to capture direction given through a third party, or is the reference unnecessary because of the inclusion of the anti-circumvention provision in proposed Rule 192(d)? Why or why not? Are there additional indicia that should be included or referenced for purposes of the facts and circumstances that would be relevant to this determination? What parties that have a role in a securitization could fall within the proposed definition of "sponsor" because they direct or cause the direction of the structure, design, or assembly of an ABS or the composition of the pool of assets underlying an ABS? Should all of these parties be included? Should other parties be included in the definition of "sponsor"? Which of these parties would not be a sponsor because of the exclusion in paragraph (ii)(C) of the proposed definition of "sponsor" for a person that performs only administrative, legal, due diligence, custodial, or ministerial acts related to the structure, design, or assembly of the ABS or the composition of the pool of assets underlying the ABS? The proposed definition of the term "sponsor" includes, but is not limited to, a sponsor as defined in Regulation AB. If the rule were limited to the Regulation AB definition of "sponsor," would that make the rule underinclusive? Would it be clear how to determine which party or parties would be a sponsor when applying the Regulation AB definition of "sponsor" to the wider population of ABS that are not subject to Regulation AB, but are subject to the prohibitions of Section 27B?*[86] *(pages 41-42)*

The term "sponsor" is overinclusive and municipal advisors should not be included in this definition and thereby not be included in the definition of "securitization participant." An MA only serves in the development of the "structure, design, or assembly" of a municipal securitization as part of its work for and duty to their issuer clients. The MA, issuer and others on the deal team construct a transaction and financing for the purpose of meeting the issuer's goals, mainly focused on capital projects that are done to meet the needs of their citizens. The SEC should carefully review and consider the attributes of municipal securities and conclude that municipal advisors should not be considered sponsors or participants, in addition to excluding municipal securitizations from the ABS definition, as discussed below.

59. *Should the re-proposed rule include a requirement that a securitization participant have documented policies and procedures in place that are reasonably designed to prevent the securitization participant from violating the re-proposed rule's prohibition with respect to conflicted transactions? What should the consequences be for a securitization participant that did not follow such procedures? Would such a requirement provide effective protection for investors? Should such a requirement be in addition to or in lieu of the proposed compliance*

program requirements discussed below with respect to the risk- mitigating hedging activities exception and the bona fide market-making activities exception? (page 80)

60. *If a general compliance program requirement as described in question 59 were to be included in the re-proposed rule, are there any types of securitization participants that should be exempted from such requirement? For example, should government entities (including municipal entities) and/or smaller securitization participants be exempt from such requirement, or should the specific requirements or conditions of such requirement vary based on the type of entity? Alternatively, should the implementation of such requirement as applied to government entities and/or smaller securitization participants be delayed in order to give such entities more time to comply with the requirement? In your responses, please explain how "smaller securitization participant" should be defined for purposes of any such exemption or delayed implementation. (Pages 80-81)*

The Proposal should not require municipal advisors to be included in the definition of securitization participant and especially should not be required to have documented policies and procedures in place to prevent the MA from violating the proposed prohibition against conflicted transactions. As discussed above, MAs already have a federal fiduciary standard and MSRB Rules in place to address their municipal advisory activity that would prohibit their participation in a conflicted transaction. If an exemption for municipal advisors – and/or for municipal securitizations - is not provided then the SEC should be mindful of the compliance burdens on municipal advisory firms, especially small municipal advisory firms, as the compliance costs to prove the negative that they do not engage in conflicting transactions, would be challenging and difficult to develop and execute.

100. What would be the impact of the re-proposed rule on the ultimate borrowers (e.g., households, businesses)? What aspects of the re-proposed rule would have the biggest impact, and how would the impact change if that aspect of the rule were revised? What would be the direction and magnitude of possible impact of the re-proposed rule on the borrowing rates and credit availability? What, if any, data could be used to estimate the impact? (page 165)

If there is not an exemption for municipal advisors in the definitions of "sponsor"/"securitization participants", then the compliance costs to adhere to this rule as drafted, especially coupled with the totality of requirements already in place, could be significant for MAs. These burdensome costs are not outweighed by any potential benefits of the rulemaking. Further, since the SEC did not acknowledge in the Proposal any potential duplicative or overlapping requirements applicable to municipal advisors (i.e. federal fiduciary duty and MSRB Rules) that would prevent MAs from engaging in bets against the performance of an ABS, and the economic analysis did not appropriately consider the costs and benefits of the rulemaking. The SEC should reconsider the economic analysis in light of MAs already being required to comply with the federal fiduciary duty and MA Rules. This appears to be lacking in the current proposed rulemaking.

In addition, these burdensome costs would likely either have to be absorbed by the MA firm, or passed along to clients that are municipal issuers. While as a practical matter it appears that many MAs have refrained from increasing their fees to address internal compliance costs, especially as the MA market is very competitive and the fees earned are typically determined by the client, this Proposal could serve as a tipping point. That raises another concern that if MA costs do increase, issuers may choose not to engage with an MA. Unlike other participants, most notably the underwriter and bond counsel, the MA is not a required participant on a transaction. If such actions cause issuers to disengage from MA services,

this would be an unfortunate result and run contrary to the entire purpose of having MAs regulated as the policy goals in the Dodd Frank Act and subsequent rulemaking from the MSRB are to protect issuers. By imposing greater costs on MAs, the SEC could dilute the purpose of the entire MA regulatory regime to ensure that issuers are protected and act consistently with a federal fiduciary duty to their clients.

On the broader issue of the impact the Proposal would have on the municipal securities market, it is important for the SEC to realize that municipal securitization transactions do not lend themselves to the types of practices that the SEC is seeking to avoid. Yet the expanded ABS definition could have an adverse impact, including greater costs on issuers for no material benefit. Additionally, it is highly unlikely that governments would engage in conflicting transactions as governments typically are precluded from using many types of risky investments due to state statutes and their own governing investment policies. Municipal transactions are also subject to numerous federal securities and tax law provisions.

Government entities engage in transactions on behalf of their citizens and taxpayers who either directly authorize the entity to enter into a securities transactions, or the entity's governing body approves such transaction. Municipal securitizations are not developed with any purpose other than to meet capital infrastructure and other policy goals of a government. There are numerous federal securities and tax laws, state laws and local ordinances and policies that place strict limits on how a municipal entity may sell municipal securities and securitizations. There is no experience that a government entity would participate in a conflicting transaction that is discussed in the Proposal. Municipal transactions are constructed to achieve the goals of the entity to provide for their citizens and not to benefit from a collateral transaction that jeopardizes, questions or diminishes the goals of the underlying transaction.

Additionally, the term "sponsor" is overinclusive and issuers should not be included in this definition nor the definition of "securitization participant." An issuer executes a municipal securitization in a manner that meets its entity's goals, mainly related to capital projects or other policy initiatives. Municipal transactions have a thorough process and are subject to numerous federal securities and tax law provisions. It is clear to NAMA and other municipal market participants that this market already has safeguards and processes in place – due to federal, state, and local laws – that would not allow or lend themselves to engage in practices that the Proposal seeks to address. The SEC should carefully review and consider the attributes of municipal securities market and conclude that issuers (and municipal advisors) should not be considered sponsors or securitization participants.

We appreciate the opportunity to comment on this important issue. We would welcome the opportunity to further discuss the regulatory regime over municipal advisors, specifically related to the federal fiduciary duty, and why then the terms discussed in the Proposal should not apply to these professionals.

Additionally, we suggest, as have other municipal market participants, that appropriate SEC staff meet with municipal market representatives to gain a full understanding of this market, and why the conditions discussed in the Proposal do not exist within the municipal securities and municipal securitizations sectors.

Sincerely,

Susan Gaffney
Executive Director

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[i] https://www.sec.gov/comments/s7-01-23/s70123-20161786-330607.pdf

[ii] 15B(b)(2)(L)(iv): With respect to municipal advisors –not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud."