NATIONAL ASSOCIATION OF MUNICIPAL ADVISORS

September 18, 2018

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street, NW Suite 1100
Washington, DC 20005

RE: MSRB Notice 2018-15

Dear Mr. Smith:

The National Association of Municipal Advisors ("NAMA") appreciates the opportunity to comment on MSRB Notice 2018-15 related to Primary Offering Practices. NAMA represents independent municipal advisor firms, and individual municipal advisors ("MA") from around the country, and our members are keenly interested in this rulemaking.

Last year NAMA provided comments on the MSRB's Concept Proposal related to Primary Offering Practices (Notice 2017-19). We are pleased to see that the proposed rulemaking eliminated discussion of mandating that Preliminary Offering Statements be posted on EMMA, and eliminated the inclusion of municipal advisor fees on the list of information needed to complete Form G-32. Our November 2017 letter outlined our concerns with including these tasks in rulemaking, and we appreciate having our voice heard in these matters.

However, there are two areas with which we still have significant concerns with the proposed rulemaking. First, having a municipal advisor who is involved with the development of an issuer's official statement (OS) be responsible for delivering that OS to the underwriter, and second, any dilution of information that should be provided to issuers from syndicate managers.

<u>Placing Responsibility on Municipal Advisors to Deliver the Official Statement to Underwriters When the MA Prepares an Official Statement for Issuer Clients</u>

No Municipal Advisor Should Be Responsible for Delivering an Official Statement to the Underwriter

We have previously commented both in our November 2017 letter related to Primary Offering Practices and in letters regarding Rule G-34, having MAs obtain CUSIP numbers in competitive sales, that the MSRB has failed to incorporate into its consideration that there is a SEC definition of municipal advisor, which was not in place when the MSRB first developed these rules for dealer-municipal advisors.

The requirement for dealer-MAs to have this responsibility was developed at a time prior to the *Dodd Frank Act* and the SEC Municipal Advisor Rule when the differences between broker/dealer and MA activities had not been defined by federal regulation. The role of the municipal advisor is to serve the issuer, as determined by the written scope of services between the MA and their client. **Outside of services provided and fiduciary duty to the issuer, there are no statutorily defined market responsibilities on municipal advisors. Unfortunately, this proposed Rule, as well as recently adopted changes to MSRB Rule G-34 ignores this important point and seems to create scope of services for MAs, rather than have that rest solely in their client's hands. We again ask the MSRB to relinquish this requirement for <u>all</u> municipal advisors.**

SEC Rule 15c2-12 Already Covers the Responsibility of OS Delivery

Another concern with having the MSRB extend – and not eliminate – the requirement that MAs deliver the OS to investors, is that SEC Rule 15c2-12 already covers this issue. The SEC's rule allows the issuer great flexibility to provide the Official Statement to the underwriter directly, or have their designated agent do so. As a reminder, the OS is the issuer's document. We are unclear why then there must be a MSRB rule to place further conditions on what the SEC already allows for OS delivery, which may subvert how the issuer wishes its OS to be delivered.

Further, SEC Rule 15c2-12(b)(1) and (3) require an underwriter to obtain and review the Official Statement and contract with the issuer to receive a final Official Statement. For the Municipal Advisor to have this responsibility, currently and going forward if the amendments are adopted, it would unnecessarily interfere with the contractual relationship between the issuer and the underwriter. **The MSRB appears to be placing rulemaking driven responsibilities on MAs rather than applying rules related to the MAs fiduciary duty and scope of services it is contracted to perform for the issuer.**

The Proposed Rule Does Not Define the Term "Prepares"

In its proposed rulemaking, the MSRB does not define the term "prepares" and leaves MAs with confusion about how then the Rule would be applied. Does the rulemaking apply only if the MA prepares the entire document? What if an MA only prepares one section, are they then responsible only for that section and then how would that be made available? What if the MA simply collects the information from the issuer and formats the OS document and the document is then reviewed by others on the deal team? What if the client asks the MA to review the OS, does that review constitute preparation? What if the MA's responsibility is solely to coordinate the final electronic posting of the OS? What if multiple MAs work on the OS (likely with other bond team members)? **Because MAs may provide a variety of types of services to their clients, including tasks related to the OS, how this rulemaking would apply does not have a one size fits all solution. That in combination with the lack of clarity in the proposal, leaves MAs wondering – and concerned – about what threshold must be met for the proposed amendment to apply.**

Additionally, our members are often part of a deal team where bond counsel, or disclosure counsel, has the last look of the OS prior to the issuer signing off that it is ready for distribution. **The MA is most likely not the professional with the last look of the document, and anecdotally we have heard that in some cases, the bond counsel is the party who distributes the document, and does not allow others to do that task. This exposes the concern, and perhaps misunderstanding, that the MA is solely the party responsible when "preparing" an OS, when in practice that is not the case.**

The Proposed Rule Does Not Define the Term "Make Available"

Rule G-32(c) states that a municipal advisor who "prepares an OS shall make the OS available to the managing underwriter or sole underwriter in a designated electronic format promptly after the issuer approves its distribution." The MSRB does not provide discussion or clarification of how the document is made available, nor what the current practice is for dealer-MAs. This issue leads to concerns related to compliance with the rulemaking which is further discussed below. If the document is posted on electronic platforms for all members of the deal team, does that satisfy the requirement that it is made available? If the OS is delivered to the underwriter by the issuer, rather than the MA per the decision of the issuer, then does that satisfy the requirement? **The uncertainties with this definition go back to our argument that delivery of the OS is already discussed in SEC Rule 15c2-12 (b)(3) and therefore adding conflicting requirements within MSRB rulemaking is at the very least unnecessary and at most inconveniently burdensome.**

Questioning the Purpose of G-32(c) in Today's Environment vs When it was First Adopted

Notice 2018-15 also did not include (despite the request in our November, 2017 letter) why Rule G-32(c) was first developed, nor MSRB's current thinking about why it should be applied to all municipal advisors. **This explanation is especially needed as the Board considers seeking SEC approval of changes to the Rule. The professionals impacted as well as decision makers should be able to know the reasoning behind why the Rule was set in the first place and then determine if it applies in today's regulatory, technological, and market environment.** If, as we believe, Rule G-32(c) was developed when market practices allowed for a municipal advisor to serve in that capacity and then resign and be eligible to underwrite the same deal, then in that context this Rule served a purpose. However, now with the changes to MSRB Rule G-23 which prohibits that practice, the advent of technologies which allow for the OS to be distributed easily and widely to market participants at the same time with a click of a mouse, and a federal definition for municipal advisors in place, we do not see the need for the MSRB to seek this change.

No Discussion of How OS is Made Available to Underwriter Where There is No MA Assisting with Its Preparation

The MSRB does not address how the OS is made available to an underwriter in a transaction where there is no MA or the MA is not assisting the issuer with preparing the OS. We are aware that such practices currently exist, and we are unaware of problems of OS delivery in these circumstances. Again, this harkens back to the argument that SEC Rule 15c2-12 already covers the ground of OS availability to underwriters, and there are no critical market concerns that we are aware of related to underwriters not having official statements in reasonable time to carry out their duties or that would require an MSRB rule to address municipal advisors having to deliver the OS to the underwriter.

Crossing the Line into Dealer Activity

We are very concerned that the MSRB is seeking to involve municipal advisors in the investor offering process which contradicts the SEC's MA Rule and the *Dodd Frank Act*. Doing so ignores the important distinction between dealer activities for offering municipal securities to investors and the municipal advisor's fiduciary duty to issuer clients. This is an overarching concern of our members as they have seen the rulemaking related to CUSIPs and now the proposal for official statement delivery to be laying

the groundwork for further rulemaking being implemented on MAs that are outside the scope of law and the MSRB's charge to develop rules as an extension of the SEC's MA Rule.

Costs Associated with Proposed Amendments - Compliance with the Rulemaking

The MSRB noted in its proposal that "the costs associated with this change should be insignificant since the requirement exists only where the municipal advisor prepares the official statement and it is therefore readily available to the municipal advisor (dealer or non-dealer) and can easily be provided to the underwriter via electronic means." **However, the MSRB only considers the action of delivering an official statement, and not the costs associated with complying with the rulemaking and its vague terms and standards.**

As currently proposed, and as noted above, municipal advisors would have to decipher and determine how the Rule should be applied, as the proposed amendments are not clear either in their discussion of "preparing the OS" or "making the OS available**." In many cases, municipal advisors would have to seek the advice of counsel to understand how their scope of services and work for an issuer may be considered applicable to Rule G-32. At the very least, they would spend significant internal hours making determinations based on the various facts and circumstances associated with their scope of services, the specific provider that is electronically disseminating the official statement, the wishes of their issuer client and the responsibilities of each deal team member. With the MSRB not discussing how the OS can be made available, it is also unclear how the MA will be able to document for compliance purposes that it has made the OS available to the underwriter**. Does posting on electronic deal platforms such as IPREO and MuniOS, qualify and if so, how does the MA document this for their file? If the issuer delivers the OS to the underwriter – as well as others on the financing team – can the MA keep that for the file to demonstrate that the underwriter received the OS or would G-32 require that the MA also send the OS to the underwriter and maintain a copy of that record?

The MSRB continues to avoid addressing the costs associated with complying with their rulemaking, and developing rules clear enough so that MAs can more readily understand how they apply in a variety of transactions and contracts that MAs have with their clients, without seeking interpretation from outside counsel.

In assessing the "benefits and costs of the proposed changes" to Rule G-32, our comment is that there is essentially no benefit to placing this requirement on any MA, and that the MSRB did not adequately analyze the costs associated with complying with the rulemaking. Further, the MSRB is required by the *Exchange Act* not to place undue burdens on small MA firms, and we do not believe this was addressed in the Notice, nor is there acknowledgement of the costs associated with this Rule in aggregation with other MSRB rules.

Parity in Rulemaking Needs to be Thoughtful Not Automatic

Furthermore, while we understand the MSRB's need to review its rulemaking to ensure that the rules are applied fairly to all parties, this is one instance where the argument that this should be applied unilaterally to all MAs needs further discussion and consideration. This also exposes the concern that the Rule is not being proposed to solve a problem in the market but rather to just automatically apply as many rules currently applicable to dealer MAs to all MAs in a misguided attempt at regulatory parity. For reasons discussed in in this letter, **we are unaware of any problems with underwriters receiving the**

OS and believe the MSRB should review its rules not just to see where they can unilaterally apply current dealer-MA rules to all MAs, but whether or not in this new regulatory environment, the original dealer-MA rules (such as Rule G-32(c)) make sense today or, as we suggest should instead be altogether withdrawn.

Providing Designation and Allocation Information From the Senior Syndicate Manager to the Issuer

The MSRB proposed amendments to Rule G-11 that would require senior syndicate managers to provide designations and allocation information to issuers. We support these amendments, and believe issuers should be given that information at all times. We do not believe that having the issuer ask for the information, allowing the issuer to opt out of receiving the information, or to point to where this information can be found on some outside website provided by the senior manager are helpful. **As the MSRB and SEC focus on transparency in the markets, including the municipal market, there seems to be no reason why the issuer should not be given this crucial information about their transaction without hurdles or hesitation.**

We would welcome the opportunity to discuss our comments with MSRB staff and the Board in greater detail. This is especially true related to the MSRB's work to place additional responsibilities on MAs which are outside of SEC's MA Rule that defines municipal advisors and municipal advisory activity and draws a distinction between such activity and broker-dealer activity. Within this Notice and other MSRB rulemaking efforts, we would also ask that the MSRB first look at the reason why rules were first developed, and if those reasons apply in today's regulatory and market environments.

Related to Rule G-32, the MSRB should take into consideration the incorporation of the MA Rule and a definition of municipal advisors and municipal advisory services into the overall regulatory landscape, and realize that placing an unnecessary, vague responsibility on MAs, is unnecessary and does not advance their regulatory mission. Further, the proposed changes to MSRB Rule G-32 are in conflict with and seemingly override what the SEC already has put in place regarding issuer delivery of the OS to the underwriter, and could broach the line of dealer activity.

Thank you for the opportunity to comment on these important issues.

Sincerely,

Susan Gaffney
Executive Director