



Understanding and Utilizing the SEC's Temporary Exemptive Order for MA Activities in Certain Direct Placements

To help NAMA members understand and comply the SEC's Temporary Conditional Exemption for Broker Registration Requirements for Certain MA Activities ([Release No. 34-89074](#), June 16, 2020), below is an overview of the Temporary Order and items that MA firms should consider when engaging in activity covered by the Temporary Order.

Background

The Temporary Order allows MAs to be exempt from broker-dealer registration requirements when they engage in MA activities related to direct placements in the following circumstances –

- MAs may solicit a defined set of banks, wholly-owned subsidiaries of banks and credit unions in connection with direct placements of municipal securities by their municipal issuer clients. Such entities are defined as “Qualified Providers” (QP) in the Temporary Order.
- Transactions may not exceed \$20 million. (See additional Considerations below)
- The Temporary Order is in place until 12/31/2020. (See additional Considerations below)
- The MA must report to the SEC's Office of Trading and Markets certain details of the transaction within 30 days of the completion of the transaction.
- The MA must represent to the Qualified Provider (investor) in writing: that it solely represents the interests of the Municipal Issuer and not the investor, that this solicitation is being done in connection with the Temporary Order; that the MA has not conducted due diligence on behalf of the Qualified Provider; that neither the MA nor issuer has engaged a broker-dealer as placement agent and that acknowledges that the Qualified Provider may choose to engage the services of a broker-dealer to represent their interests.
- MA must receive written representations from the Qualified Provider (investor) that they meet the Temporary Order's Qualified Provider definition, they are capable of independently evaluating the investment risks of the transaction, is not purchasing with a view of distributing the securities, and will not transfer any portion of the direct placement within one year of the date of the issuance except to another Qualified Provider.

In the Temporary Order and in other forums, the SEC has reiterated that under the SEC's MA Rule, MA activity includes assisting clients throughout a direct placement transaction, including negotiating terms of a transaction, as permitted under the existing municipal advisory regulatory regime regardless of whether they are relying on the Temporary Order.

MAs should also be aware that when assisting clients in bank loan transactions – where the financing is NOT a security, MAs may provide services to clients, including solicitation and negotiation of terms, that are not bound by this Temporary Order or other MA rulemaking, since the transaction does not involve a municipal security. However, as MA firms may be asked about such transactions during an OCIE exam, maintaining internal records of such transactions is useful. MAs should also consult counsel if there are questions or concerns whether a transaction is a loan or security.

Considerations for MAs to Best Utilize and Comply with the Temporary Order

MAs should consider various practices, discussed below, to assist with complying with the Temporary Order.

Internal Compliance

Update Firm Written Supervisory Procedures. For firms engaging in direct placement work that is included in the Temporary Order (e.g., solicitation of investors), a review of your WSP will be needed. Your WSP may need to be expanded to have temporary procedures in place to comply with the Temporary Order.

Review Client Contracts/Agreements. MAs should review current client contracts/agreements to ensure that the scope of work that is being done, if related to direct placements covered by the Temporary Order, is included. If not, such agreements/contracts should be amended. Under MSRB Rule G-42, MAs must provide these changes to the client.

Recordkeeping Requirements. Firms should be maintain records related to direct placement work done under the Temporary Order that demonstrate compliance with the Temporary Order. This includes internal compliance changes, and transaction documentation requirements as discussed below.

Direct Placement Work Related to Temporary Order

MA Representations. The Temporary Order specifies that MAs must provide representations to qualified providers that they are soliciting of the role of the MA (see [NAMA's Model Document – MA Representations to QP](#)). MAs should send this information to *ALL* qualified providers that are being solicited – not just the institution that will ultimately engage in the transaction. All QPs must acknowledge receipt of the MA representations and return the acknowledgement to the MA.

QP Representations. The MA must receive from *ALL* qualified providers that are solicited that they are a QP under the definition in the Temporary Order. See [NAMA's Model Document - QP Representations to the MA](#).

Transaction Information to SEC. MAs must send transaction information to the SEC's Office of Trading and Markets no later than 30 days after the closing of the transaction. See [NAMA's Model Template for sending MA Transaction Information to the SEC](#). There are no other reporting requirements associated with the Temporary Order.

CUSIP Numbers. MAs are NOT required to obtain CUSIP numbers for the transactions covered by the Temporary Order unless such task is directed by the client to the MA, independent of the Temporary Order.

Transaction Size. The Temporary Order applies for direct placement transactions that do not exceed \$20 million in stated principal amount. If at the closing the \$20 million amount has been exceeded, MAs are urged to maintain careful records regarding the reason for the increase and the action taken thereof.

Transactions may not be split to avoid the \$20 million limit.

Transaction Deadline. The Order is in place until December 31, 2020. MAs must carefully document any exceptions.