NATIONAL ASSOCIATION OF MUNICIPAL ADVISORS

October 10, 2017

Mr. Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: SR-MSRB-2017-06 - Notice of Filing of a Proposed Rule Change to Amend MSRB Rule G-34, on CUSIP Numbers, New Issue, and Market Information Requirements

Dear Mr. Fields:

The National Association of Municipal Advisors (NAMA) appreciates the opportunity to comment on the Municipal Securities Rulemaking Board's (MSRB) 2017-06 filing with the Securities and Exchange Commission (SEC). NAMA represents independent Municipal Advisory Firms and individual Municipal Advisors ("MA") from across the country, who in turn provide advice to municipal securities issuers and obligated persons. NAMA, among other objectives, serves to promote and provide educational offerings and assist our members navigate through the federal regulatory and municipal market landscapes.

Key areas of the proposal remain of great concern for our members. These include –

- mandating that municipal advisors secure CUSIP numbers (CUSIPs) in competitive deals;
- forcing municipal advisors to know the intent of investors to determine if CUSIPs are required;
- not taking into account the costs associated with implementing the Rule for municipal advisors, especially small municipal advisory firms, which the *Exchange Act* specifically requires for MSRB Rulemaking; and
- general market concerns that the proposal may not achieve the intended goal of a CUSIP exception for direct placements that are not intended to be traded.

Municipal Advisors Applying for CUSIPs in Competitive Sales

The MSRB proposes to expand the current standards for securing CUSIPs in competitive sales from broker/dealer municipal advisors to all municipal advisors. NAMA's position is that no MAs – broker/dealer or independent -should be responsible for securing CUSIPs in competitive deals. Rather, the underwriter should be the party responsible for obtaining CUSIPs, as they assist with the selling and trading of securities. Underwriters also rely on the availability of CUSIPs to comply with certain regulatory requirements. Even the MSRB's own definition of CUSIPs points to their use for the benefit of investors and underwriters - "*The MSRB continues to believe that obtaining CUSIP numbers is generally a necessary aspect of, for example, tracking the trading, recordkeeping, clearance and settlement, customer account transfers and safekeeping of municipal securities, including those issued in private placements*." [MSRB File No. SR-MSRB-2017-06, https://www.sec.gov/rules/sro/msrb/2017/34-81595.pdf page 10.] None of the responsibilities listed in the MSRB's definition align with the MA's fiduciary duty to serve their issuer clients and, in fact, put municipal advisors at risk of engaging in broker-dealer activity as discussed below.

Having the underwriter obtain CUSIPs would also help avoid the possibility of cancelling CUSIPs, as the underwriter can secure them after the final determinations are made related to the maturity structures of the bonds and other final details of the offering or allow for no CUSIPs to be sought when n award is made. If the underwriter obtains CUSIPs it would also alleviate the problem of not knowing who is responsible for obtaining CUSIPs when an issuer does not use a municipal advisor.

The timeline by which the municipal advisor must apply for the CUSIPs is also unnecessarily prescriptive. If the current proposal is maintained, the MA should only have to apply for CUSIPs within a "reasonable time to allow CUSIPs to be obtained at the time of sale."

The proposal also promotes violations of the *Exchange Act* by continuing to exacerbate the ongoing confusion of municipal advisor activity versus broker/dealer activity. Both the process for obtaining CUSIPs as well as the process by which the MA would have to determine whether an exception is available (by reasonably determining the intent of the investor) require an MA to stray into activities that are generally regarded as broker/dealer activity. Courts and the SEC have found such activities as (i) helping an issuer to identify potential purchasers of securities, (ii) negotiating between the issuer and the investor and (iii) facilitating the execution of securities transaction to be evidence of "effecting transactions in securities for the account of others" in a manner that would contribute to requiring persons engaged in such activities to register as a broker.

Finally, we are unaware of any problems that exists with current market practices and rulemaking that this Rule would solve. No deals have gone awry due to the current practice of having the underwriter obtain CUSIPs in competitive and negotiated offerings.

Therefore, we recommend that instead of expanding the current responsibility of MAs to obtain CUSIPs in competitive sales, the MSRB should eliminate altogether the responsibility of having any MA (independent or broker/dealer MAs) obtain CUSIP numbers. This is an activity best suited for underwriters who use the identifiers to sell the bonds and to comply with their own regulatory requirements. It would also avoid any unintended consequences of having a municipal advisor interface with investors which could be deemed broker/dealer activity.

Determining Intent of Investors to Allow for An Exception to the CUSIP Requirement

As we noted above, there are concerns with the proposal and whether obtaining CUSIPs could indicate broker/dealer rather than municipal advisor activity. This issue is present not only when obtaining CUSIPs but also within the proposal's exception to obtaining CUSIPs if the MA or underwriter can demonstrate that they "*reasonably believe* that the investor "*is likely* to hold the securities. We can not state more strongly the concerns with having municipal advisors interact with investors to determine their intent with a securities purchase. Such activity is far from that of a municipal advisor, and as we have learned in various OCIE exam proceedings, there is a high level of scrutiny put on municipal advisors in exams to test if they are engaging with investors in direct placement financings and thus crossing the line into broker/dealer activity. As stated earlier, this proposal invites possible violation of the *Exchange Act* and the SEC should not allow the MSRB to impose these types of functions on municipal advisors.

Additionally, the vagueness of the exception language is also problematic. The proposal allows for an exception to secure CUSIPs in instances when "*the underwriter or municipal advisor reasonably believes that the purchasing bank is likely to hold the municipal securities to maturity or limit the resale of the municipal securities to another bank affiliated banks or a consortium of banks" (*(a)(i)(F)). The terms "*reasonably believe* and "*is likely* are very open to different interpretations and should be further clarified within the Rule to allow for MAs and underwriters to use the same standard in all transactions. This language sets a blurred standard that would be difficult to adequately comply with and invites multiple interpretations from MA and underwriter firms as well as SEC and FINRA examiners. While the most recent proposal added a statement that provides an

example of how the investor's intent may be determined (see parenthetical in (i)(F) – "*e.g.,* by obtaining a written representation"), that language still does not provide satisfactory relief for MAs who will have to certify to the investor's intent to avoid obtaining CUSIPs. The MSRB has also stated that it would not provide any additional prescriptive steps to comply with the exception. Without further explanation, there are multiple words in the Rule language that are vague and should be clarified, and are not included in the definitions section of the proposed Rule. This exacerbates the other problems in the proposal, and itself deserves further clarity to assist all marketplace participants.

Costs Associated with the Proposal

The proposed amendments still do not adequately consider the costs associated with this proposal nor the impact the proposal would have on small municipal advisor firms. The MSRB's economic analysis fails to address these two areas. Especially of note, there is no recognition of the time MA firms would need to develop policies and procedures for their firm to comply with the Rule. We estimate that to be a minimum of 3-5 hours per firm. The implementation of the policies and procedures would also entail additional work for municipal advisors, and we estimate that at 2-3 hours per transaction. The overriding factor for these per transaction costs are due to the need for municipal advisors to implement policies and procedures on a case by case basis to determine if all potential banks/investors will "likely" hold the securities or meet other criteria that also must be considered. Even if the parenthetical placed in (i)(F) becomes commonly used, the MA will likely need to make further inquiries with all potential investors before believing that their firm's internal policies and procedures have been met, as required in the proposed Rulemaking, and documenting such actions, especially with the understanding that such information will likely be asked for during an examination. Also, this parenthetical does not address the problems of: identifying which banks are likely to bid in order to seek a representation; dealing with a bank that will not make such a statement prior to the award of the bid; and the additional work that will need to be done by the MA (and UW) to meet the exception standard in the Rule.

The costs for obtaining CUSIPs could also place a burden on MAs. There is concern that MAs will obtain CUSIPs due to the requirement in Section (a)(i)(d) of the proposed Rule, but then it may be determined that the CUSIPs are not needed because the exception has been met. This would place an unnecessary and unrecoverable cost onto MAs, for a product that has nothing to d with MA activities and responsibilities. Many MAs will also have to invest time into obtaining access to and then learning the CUSIP platform. That new responsibility has not been accounted for in the MSRB's proposal.

Aside from the costs associated with obtaining CUSIPs, MAs would have to engage in additional work to determine if the financing is a loan or a security. The MSRB stated in its second request for comments on Rule G-34 that *nothing in the proposed amendment would obviate a dealer's initial obligation to determine whether the transaction in question involves a municipal security as opposed to a loan* or other instrument [http://msrb.org/~/media/Files/Regulatory-Notices/RFCs/2017-11.ashx?n=1, page 6]. Further in Footnote of this Release, the MSRB states that *the regulated entity should have reasonably designed policies and procedures in place to make a determination as to whether the transaction involves a municipal security that results in the application of MSRB rules*. This flags the ongoing questions related to what is a security versus loan, and is not an issue that will be clarified in time to better determine, in general, whether a CUSIP number must be obtained for certain financings. This will demand additional time and consideration, both internally within the MA firm and perhaps with outside counsel. Because this is not a simple legal determination, the costs of developing a workable policy will vary significantly for individual firms depending on the types of financings for which they advise. For most independent MAs, this will be new policy and will require minimum of 5-10 hours to create and up to several hours per transaction (depending on the complexity of the terms of the loan/security) to implement, in addition to possible outside legal consulting costs.

Economic Impact on Small MA Firms

The proposal ignores the multiple roles a principal in a small MA firm or a sole-practitioner MA have to their clients and under the rulemaking regime already imposed by the MSRB. In addition to providing MA services to their clients, they serve as the Chief Compliance Officer with multiple additional ongoing and annual responsibilities as well as adhering to documentation expectations for their transactions and other recordkeeping duties, and complying with professional qualification standards.

The MSRB has an explicit duty under the *Exchange Act* to refrain from imposing undue burdens on small municipal advisory firms. Section 15B(b)(2)(L)(iv) of the *Exchange Act* requires that the MSRB "*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*." This proposed Rule violates this Section of the *Act* both due to the sheer economic burden that would be placed o small municipal advisors and that it is not necessary for the protection of municipal entities and obligated persons. For example, there is absolutely no aspect of the proposed Rule requiring MAs to obtain CUSIP numbers in competitive sales that is necessary or appropriate to protect investors or issuers or protect against fraud.

Deal Execution

While a chief concern with the proposal is to ensure that professionals can easily meet the exception for obtaining CUSIPs, there are examples of investors that specifically request CUSIP assignment and DTCC eligibility. In these cases, we have observed that it may be difficult for parties to secure access to the DTCC platform. A example of this is an experience that one of our members had last month where this situation jeopardized the ability to close the issue –

For the first time in my career, I recently sold a competitive issue which was awarded to a local bank which wanted the financing to be CUSIP/DTCC eligible. It was a two week nightmare which occurred while Bond Counsel, Registrar Paying Agent, MA an Issuer were trying to finalize closing documents and the situation was barely resolved by the Bank before the scheduled closing. The local bank had n access to the platform to obtain CUSIPs for DTC eligibility and ha to reach out to an underwriter-broker/dealer third party's online system to make it happen.

General Marketplace Concerns

In addition to NAMA's concerns with the proposal, there are other issues of importance to the general municipal securities market that should be reviewed. One is that the expansion of the exception for obtaining CUSIPs still does not cover placements of local government bonds with State Revolving Funds. Not only is that essential since these types of financings are not traded, but it could also expose professionals to other MSRB rule violations. As noted in GFOA's letter, we strongly encourage the SEC to include these important types of financings in the exception for obtaining CUSIPs.

Marketplace problems also remain with the exception language that is intended to avoid having CUSIPs assigned to direct placement financings. The exception language related to the investor's intent to hold the securities until maturity may not reflect actual market practices and places stronger restrictions on the types of securities that should meet this exception. If the exception is overly stringent, and banks are deterred from direct placement investing then the exception's intent to be helpful is negated. More importantly the increased costs for these financings due to lower demand would be imposed o state and local governments.

Conclusion

NAMA continues to oppose a requirement for municipal advisors to obtain CUSIPs in competitive sales as proposed in this filing. CUSIPs are used for underwriting activities and for investors, and have nothing to do with MA activities and the MA's fiduciary duty to their clients. Further, there is no sufficient need in the marketplace to mandate this change, and it would place potentially costly burden on MAs and create marketplace inefficiencies in violation of the *Exchange Act* requirements imposed on the MSRB.

Further, the proposed exception creates an untenable situation for MAs, since there would still be a need for the MA (and UW) to make further determinations of the intent of the investor outside of written representations and competitive sale situations, before the identity of the investor is even known. Determining the intent of investors is not the responsibility of MAs and could possibly cause MAs to violate the *Exchange Act* by engaging in broker/dealer activity. Further, the proposed Rule creates conflict by allowing for an exception for CUSIPs yet mandating that CUSIPs be obtained no more than one business day after dissemination of the Notice of Sale. This would create situations where CUSIPs are applied to securities where they are not needed and could interfere with the selling process, especially to banks seeking to use the exception. This unnecessarily adds confusion, costs and administrative burdens for MAs, without a benefit to issuers or investors.

We strongly suggest that the SEC consider, as NAMA previously proposed to the MSRB, that underwriters be responsible for obtaining CUSIPs and that no municipal advisors (independent or broker/dealer) have that obligation. In addition to the concerns expressed above, this makes the most common sense as there is an underwriter on every transaction, and MAs are hired at the discretion of the issuer - their role is not mandatory in the bond issuing process.

These outstanding items and the administrative and economic burdens imposed on municipal advisors for no benefit to their clients nor investors, and continuing marketplace concerns, force us to oppose the proposed changes to MSRB Rule G-34.

We welcome the opportunity to discuss our comments with SEC Commissioners and staff at their convenience.

Sincerely,

Susan Gaffney
Executive Director