



Municipal Securities Rulemaking Board

November 7, 2017

Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Response to Comments on SR-MSRB-2017-06

Dear Secretary:

On August 30, 2017, the Municipal Securities Rulemaking Board (MSRB) filed with the Securities and Exchange Commission (SEC or “Commission”) a proposed rule change to MSRB Rule G-34, on CUSIP numbers, new issue, and market information requirements (the “proposed rule change”). The SEC published the proposed rule change for comment in the Federal Register on September 18, 2017¹ and received 11 comment letters.²

To inform its development of the proposed rule change, the MSRB sought public comment on draft amendments in two separate requests for comment.³ In response to the requests for

¹ See Exchange Act Release No. 81595 (Sept. 13, 2017), 82 FR 43587 (Sept. 18, 2017).

² See letters from Noreen P. White, Co-President and Kim M. Whelan, Co-President, Acacia Financial Group, Inc. dated Oct. 10, 2017 (“Acacia”); Cristeena G. Naser, Vice President and Senior Counsel, American Bankers Association, dated Oct. 10, 2017 (“ABA”); Peter Warms, Senior Manager of Fixed Income, Entity, Regulatory Content and Symbology, Bloomberg, L.P., dated Oct. 10, 2017 (“Bloomberg”); Dennis Dix, Dixworks LLC, dated Oct. 10, 2017 (“Dixworks”); Steve Apfelbacher, President, Ehlers, undated (“Ehlers”); Stephan Wolf, CEO, Global Legal Entity Identifier Foundation, dated Oct. 9, 2017 (“GLEIF”); Emily S. Brock, Director, Federal Liaison Center, Government Finance Officers Association, undated, (“GFOA”); Susan Gaffney, Executive Director, National Association of Municipal Advisors, dated Oct. 10, 2017 (“NAMA”); Marianne F. Edmonds, Senior Managing Director, Public Resources Advisory Group, dated Oct. 10, 2017 (“PRAG”); Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated Oct. 10, 2017 (“SIFMA”); Michael G. Sudsina, President, Sudsina & Associates, LLC, dated Oct. 10, 2017 (“Sudsina”).

³ See Request for Comment on Draft Amendments to and Clarifications of MSRB Rule G-34, on Obtaining CUSIP Numbers, MSRB Notice 2017-05 (Mar. 1, 2017); and Second Request for Comment on Draft Amendments and Clarification of MSRB Rule G-34, on Obtaining CUSIP Numbers, MSRB Notice 2017-11 (June 1, 2017).

comment, the MSRB received a total of 36 comment letters from a diverse group of commenters. Some commenters expressed support for parts of the draft amendments. Others generally expressed various concerns or suggested revisions. Some commenters opposed the draft amendments in any form. The MSRB found the input to be highly informative and valuable. This letter responds to the 11 comment letters received by the Commission. In addition, after carefully considering, and in response to, the comments, the MSRB is filing this day Amendment No. 1 to SR-MSRB-2017-06 ("Amendment No. 1") to make certain changes as discussed below and in further detail in Amendment No. 1.⁴

Application of CUSIP Number Requirements to All Municipal Advisors. Six commenters opposed requiring municipal advisors in competitive sales to apply for CUSIP numbers, and instead suggested dealers, in all instances, should bear the responsibility of obtaining a CUSIP number for new issue municipal securities.⁵ Commenters indicated that removing the obligation to obtain a CUSIP number from the municipal advisor would result in a more efficient process and consistent expectations since the CUSIP numbers would always be obtained by the dealer in all relevant transactions.⁶

Some commenters indicated that imposing the CUSIP number requirement on non-dealer municipal advisors would not increase transparency or efficiencies, or serve a useful purpose and instead would pose an undue burden on independent municipal advisors.⁷ One commenter stated that the costs to non-dealer municipal advisors to comply with the proposed rule change were not addressed in the MSRB's economic analysis.⁸

As stated in the proposed rule change, the policy reason for initially adopting a requirement for financial advisors to apply for CUSIP numbers in competitive sales of new issue municipal securities was meant to provide for assignment of a CUSIP number prior to the award date of the sale. This policy reason continues to apply where a municipal advisor is retained because in such a scenario, the winning dealer would no longer be the first party to begin the process of

⁴ The MSRB believes that Amendment No. 1 does not materially change the MSRB's previous assessment that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Exchange Act.

⁵ Acacia; Dixworks; Ehlers; NAMA; PRAG and Sudsina.

⁶ Acacia; Ehlers; NAMA; PRAG and Sudsina.

⁷ Acacia; Dixworks; NAMA; PRAG and Sudsina.

⁸ NAMA.

obtaining a CUSIP number after the award has been made in a competitive sale.⁹ Because the CUSIP numbers would have been applied for earlier in the process, this facilitates the ability to trade in the new issue immediately upon award.

While the MSRB appreciates commenters' views that the dealer, in all instances, should be required to apply for the CUSIP number, the MSRB believes this arrangement could have unintended results in the market. Under the current rule, where an issuer in a competitive sale of municipal securities engages a non-dealer municipal advisor and does not engage a dealer, there is no party responsible for applying for CUSIP numbers. Similarly, if the responsibility to apply for CUSIP numbers were placed only on dealers, as commenters suggested, issuers choosing to engage only a municipal advisor in a competitive sale would find themselves in a situation where no party is responsible for applying for CUSIP numbers on the new issue. Across the market, there potentially would be a universe of new issue municipal securities being issued without CUSIP numbers assigned. By requiring all municipal advisors in a competitive sale to apply for CUSIP numbers, and dealers in a competitive sale to apply for CUSIP numbers where none have been pre-assigned,¹⁰ Rule G-34 ensures that all new issue municipal securities in a competitive sale where a dealer or municipal advisor is engaged, other than those falling within the proposed principles-based exception, have CUSIP numbers assigned as early as possible in the issuance process.

The MSRB previously considered the impact of the new requirement on non-dealer municipal advisors and concluded that, while non-dealer municipal advisors are likely to incur up-front costs associated with development of regulatory compliance policies and procedures to address

⁹ Several commenters indicated their understanding that the practice of obtaining a CUSIP number in competitive sales only applies where a municipal advisor is engaged. Commenters noted that this practice would make municipal entities less likely to retain municipal advisors in such transactions and indicated that the MSRB should clarify who is responsible for obtaining CUSIP numbers when a municipal advisor is not retained. The MSRB notes that Rule G-34(a)(i)(A)(2) requires underwriters in a competitive sale to obtain CUSIP numbers where no CUSIP number has been pre-assigned.

¹⁰ Rule G-34(a)(i)(A)(2) requires an underwriter in a competitive sale to obtain the CUSIP number where the CUSIP numbers have not been pre-assigned and requires the underwriter to obtain the CUSIP numbers "immediately after receiving notice of award from the issuer." Further, the rule requires that the underwriter ensure CUSIP numbers are assigned prior to disseminating the time of first execution as required under other provisions of the rule.

the new requirements, the costs would be justified by the likely aggregate benefits of the proposed rule change over time.¹¹

The MSRB continues to believe that expanding the requirements of Rule G-34 to apply to all municipal advisors in competitive sales of new issue municipal securities will encourage uniformity and efficiency in competitive sales of municipal securities by ensuring that CUSIP numbers are obtained consistently and earlier in the process so as to allow for immediate trading upon award.

Municipal Advisor Engaging in Broker-Dealer Activity. Commenters noted their concern about the proposed requirement that a municipal advisor relying on the principles-based exception in a competitive transaction must have a reasonable belief as to the purchaser's present intent. These commenters indicated that when a municipal advisor interacts with investors, for example, to obtain their present intent, the municipal advisor may be viewed as engaging in broker-dealer activity.¹² One commenter indicated that requiring municipal advisors to apply for CUSIP numbers promotes violations of the Exchange Act by requiring municipal advisors to act in a manner that may be viewed as broker-dealer activity.¹³

The MSRB appreciates commenters concerns and understands that determining the activity that may be deemed broker-dealer in nature is a facts and circumstances analysis that must be closely considered.¹⁴ When drafting the proposed rule change, the MSRB purposefully proposed a principles-based exception to allow dealers and municipal advisors alike to establish policies and procedures consistent with their relevant business activities. The MSRB is not

¹¹ One commenter expressed its view that the cost to non-dealer municipal advisors of obtaining a CUSIP would have to be absorbed by the municipal advisor or invoiced to the municipal entity client. As noted in the proposed rule change, the MSRB understands that a municipal advisor applying for a CUSIP number may direct CUSIP Global Services to invoice a designated party, typically, the winning bidder in a competitive sale. Thus, there is no cost to the municipal advisor to apply for a CUSIP number unless it designates itself as the party to be invoiced.

¹² Acacia; Dixworks; NAMA and Sudsina.

¹³ NAMA.

¹⁴ See, e.g., "Investor Publications: Guide to Broker-Dealer Registration," Division of Trading and Markets, U.S. Securities and Exchange Commission (Apr. 2008). The MSRB is not aware of any guidance indicating that merely applying for a CUSIP number or requesting and reviewing an investor representation causes one to be acting as a broker-dealer.

suggesting that a municipal advisor engage in any activity that could be viewed as broker-dealer in nature, but rather that the municipal advisor develop a process for reaching a reasonable belief as to an investor's present intent consistent with the municipal advisor's allowable business activities. Thus, in the proposed rule change, the MSRB suggested looking to a written representation from the purchaser as just one example for determining the purchaser's present intent. The MSRB believes that by creating a principles-based exception, municipal advisors (and dealers) relying thereon are free to define the process by which they reach a reasonable belief regarding a purchaser's present intent. In addition to reviewing a written representation, this could include, for example, reviewing transaction documentation without interacting with the purchaser. The proposed rule change is not intended to require or encourage municipal advisors to engage in activity they deem outside the scope of their allowed activities.

Present Intent to Hold to Maturity. Several commenters indicated that the principles-based exception in the original proposed rule change did not accurately reflect the fundamental workings of the direct purchase market.¹⁵ More specifically, according to commenters, the requirement in the principles-based exception that the dealer (or municipal advisor in a competitive sale) have a reasonable belief that the purchaser is purchasing the municipal securities with the "present intent to hold the securities to maturity" does not take into account those scenarios where the transaction documentation provides for an earlier call provision to permit a refinancing or other restructuring. Commenters suggested revising the proposed language to account for this common practice. After carefully considering commenters' suggestions, the MSRB is filing Amendment No. 1, which makes amendments to Rule G-34(a)(i)(F) to reflect the suggested changes. In particular, the MSRB in Amendment No. 1 is proposing to require the dealer (or municipal advisor in a competitive sale) relying on the principles-based exception to have a reasonable belief that the purchaser is purchasing the municipal securities with the "present intent to hold the securities to maturity or earlier redemption or mandatory tender." The MSRB believes this amendment more accurately reflects the terms of direct purchase transactions and as a result creates a more useful exception. For consistency, the MSRB also is making this same amendment to the proposed principles-based exception for dealers from the depository eligibility requirements in Rule G-34(a)(ii)(A)(3).

One commenter suggested that more clarity should be provided as to the documentation underwriters and municipal advisors may be required to produce during an examination and that sufficient documentation to reach the "reasonable belief" should include any reasonable indicia of an investor's present intent.¹⁶ The commenter suggested this should include an investor letter or other certification or a term sheet stating conditions of the transaction. The

¹⁵ ABA, NAMA and SIFMA.

¹⁶ SIFMA.

MSRB indicated in the proposed rule change and also in the proposed rule language that one example by which an underwriter or municipal advisor could arrive at a reasonable belief as to the purchaser's present intent would be by obtaining a written representation. The MSRB agrees that there are other reasonable indicia that could be considered in order to reach a reasonable belief regarding the purchaser's present intent, but does not believe an amendment to the proposed rule change is necessary on this point. As already noted, the proposed rule language makes clear that obtaining a written representation is just one method by which a reasonable belief as to a purchaser's present intent could be met.

Sales of Municipal Securities to Other Municipal Entities. Several commenters stated that the principles-based exception from the CUSIP number requirements should be expanded to include private placements of municipal securities with other municipal entities, including state revolving funds.¹⁷ According to commenters, in this sort of transaction, a state revolving fund issuance is secured by local government bonds which are held by the state issuer and not traded in the secondary market. Other commenters asked generally that all sales of municipal securities to another municipal entity be excepted from the requirements of Rule G-34.

After careful consideration of the comments received, the MSRB in Amendment No. 1 is proposing to expand the principles-based exception to include issuances of municipal securities purchased by a municipal entity with funds that are, at least in part, from the proceeds of, or used to fully or partially secure or pay, the purchasing entity's issue of municipal obligations, such as in the case of a state revolving fund or bond bank. The MSRB believes these scenarios are, for purposes of this context, comparable to sales of municipal securities to banks in direct purchase transactions in that the municipal securities being sold to the purchasing municipal entity are not intended to be sold in the secondary market. In addition, as with the principles-based exception for direct purchase transactions with a bank, in order to rely on the exception, a dealer (or municipal advisor in a competitive sale) must have a reasonable belief that the purchasing municipal entity has the present intent to hold the securities to maturity or earlier redemption or mandatory tender.

¹⁷ GFOA, NAMA and SIFMA. The term "municipal entity" is defined by Section 15B(e)(8) of the Securities Exchange Act of 1934 to mean:

any State, political subdivision of a State, or municipal corporate instrumentality of a State, including—(A) any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality; (B) any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof; and (C) any other issuer of municipal securities.

The MSRB believes a dealer (or municipal advisor in a competitive sale) should apply for a CUSIP number in sales of municipal securities between municipal entities, other than in the scenarios discussed above. The MSRB understands that municipal entities purchasing municipal securities for investment purposes may have a need for liquidity prior to the maturity of the issue and may want to sell the municipal securities into the secondary market. In such a scenario, the purchasing entity may find it difficult to resell the municipal securities without a CUSIP number and, based on discussions with industry participants, the MSRB understands there is no existing process in place to obtain a CUSIP number later for secondary market trading. The MSRB believes that applying for a CUSIP number at the time of the new issue will avoid this situation and will ensure the municipal securities are tradeable in the secondary market.

Use of Other Standard Identifiers. One commenter suggested that the proposed rule change be amended to permit the use of “appropriate open-standard identifiers.”¹⁸ In particular, this commenter emphasized concerns that Rule G-34 is an endorsement of a commercial entity’s product and is contradictory to SEC policy. The MSRB recognizes the commenter’s concerns and is aware of efforts in the industry exploring a move towards an open-standard identifier environment. However, the MSRB understands that the use of an identifier other than a CUSIP number extends well beyond the municipal securities market and a change to expand the universe of identifiers would require significant coordination between all market participants. The MSRB believes that merely adding in language to Rule G-34 to allow the use of “other standard identifiers”, as the commenter suggested, without significant coordination among other market participants and consideration of how such a change would impact all aspects of the overall securities market could cause substantial confusion. The MSRB, along with other industry stakeholders, will continue exploring the expansion of the universe of securities identifiers, but does not believe amending Rule G-34 at this time to include the use of other identifiers is appropriate without further information gathering and industry input.

Use of Legal Entity Identifier. One commenter suggested that the SEC should require issuers of municipal securities to be identified by a legal entity identifier (“LEI”) as part of the proposed rule change.¹⁹ The commenter suggested the SEC could use LEIs in its regulatory data collection framework to identify parties and market participants by a standard method. The MSRB recognizes the potential for LEIs to provide useful information on municipal issuers and is in the process of gathering industry input on the availability and value of obtaining this information in the market. Specifically, in a concept proposal issued on September 14, 2017, the MSRB sought industry comment on whether issuers and obligors typically have LEIs and if so, whether that information should be collected by the MSRB on its Form G-32 and included in Rule G-34 to

¹⁸ Bloomberg.

¹⁹ GLEIF.

permit or require dealers to submit such information if available.²⁰ The MSRB will consider this issue further, once the results of the request for comment are received and fully evaluated.

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If you have any questions regarding this matter, please contact me at [REDACTED].

Sincerely,



Margaret R. Blake
Associate General Counsel

²⁰ See MSRB Regulatory Notice 2017-19, "Request for Comment on a Concept Proposal Regarding Amendments to Primary Offering Practices of Brokers, Dealers and Municipal Securities Dealers" (Sept. 14, 2017).