



May 28, 2019

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

RE: MSRB Notice 2019-08

Dear Mr. Smith:

The National Association of Municipal Advisors (“NAMA”) appreciates the opportunity to comment on Rule G-34 as part of the MSRB’s retrospective rule review. NAMA represents independent municipal advisory firms, and individual municipal advisors (“MA”) from around the country.

In 2017 NAMA provided comments to the MSRB when it proposed having all municipal advisors be responsible for obtaining CUSIP numbers in competitive sales when they advise their clients in these transactions. Many of the items we raised at the time will be reiterated in this letter.

It is important to note that NAMA’s key concern with the changes made to Rule G-34 in 2017 do not specifically relate to the act of obtaining CUSIP numbers. Rather, our concerns are related primarily to the policy matters surrounding the changes to the Rule and the associated compliance costs. Additionally, as was the case in 2017, we are not aware of any market problems that warranted a change in the way in which CUSIPs are obtained. If any changes might be introduced that would make the CUSIP number process more efficient, it was not the introduction of a new party into the process, but instead a focus on streamlining the CUSIP number assignment process into the dealer-driven dataflow that the MSRB has been working toward in its efforts to maximize straight-through processing in the municipal market. Such an approach would more closely align with what should be two of the key factors supporting the reasoning of the MSRB’s rule review – what problems need to be addressed, and what efficiencies can be introduced into the market data flow, to better serve the market and protect issuers and investors.

Below please find our input on the questions asked in the Notice.

Questions 1- 3: Should Rule G-34 Requirements be Eliminated and/or applied differently to Broker-Dealer MA firms and Independent MA Firms

NAMA believes that following the regulation of municipal advisors in the Dodd-Frank Act and the subsequent SEC Rules 15Ba1-1 through 1-8 (the “SEC MA Rule”), Rule G-34 should not apply to municipal advisors, whether a municipal advisor firm is affiliated with a broker-dealer or is an independent firm. This was a consistent message in NAMA’s previous comments on Rule G-34 and we believe that, although MAs have largely adapted their processes to comply with the Rule amendment (as we discuss below), the MSRB should take this opportunity to make a course correction on how CUSIP numbers are obtained. Thus, we would welcome the MSRB’s reversal of its decision made in 2017.

Our concern with the approach taken in 2017 is that the MSRB chose to look at whether Rule G-34 should be applied to all municipal advisors, not just broker-dealer MAs, without taking into account the new MA regulatory structure as stated in the Dodd-Frank Act and the subsequent SEC MA Rule. We believe that this new regulatory structure lends itself to the conclusion that the responsibility of obtaining CUSIP numbers in competitive sales should not apply to any municipal advisors, and support eliminating the requirement for all municipal advisors.

The significant policy reason is that the MA is on a transaction to serve the issuer or obligated person. Obtaining CUSIP numbers is a diversion from the MA's duties. Instead, CUSIP numbers are at the core of broker-dealer activities, used to facilitate the clearing and selling of the securities, which are responsibilities outside the MA regulatory framework. The 2017 Rule Filing stated that "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..." These responsibilities are not within the purview of MA activities and therefore should be the responsibility of underwriters, as a consistent matter across all transactions, as CUSIP numbers facilitate the trading of bonds.

While a client may request that their MA secure CUSIP numbers,¹ the MA should not have a more general regulatory obligation to obtain CUSIPs unless such obligation arises within the scope of services determined by the client. In connection with adopting Rule G-42, the MSRB previously recognized that its authority to regulate municipal advisors should not be used to establish what activities are within the scope of duties of an MA's engagement with its client, but instead that the MSRB's rulemaking should be governed by "the overarching principle that the client should be empowered to determine the scope of services and control the engagement with the municipal advisor."²

Additionally, as there is not an MA on every transaction, yet there is always an underwriter on every transaction, the market would be best served by having the party who is always at the table secure CUSIP numbers. Our members have also come across the situation where a CUSIP has been pre-assigned (not due to any efforts by the MA) by CUSIP Global Services (CGS), even when the MA applies prior to the Notice of Sale being released. It is unclear as to the reasons or circumstances for such pre-assignment by CGS of CUSIP numbers, and how the MA is to indicate (both for their records and to examiners) that they ordered the CUSIPs when in fact that has already been done. This opaque process makes it challenging for many MA firms to understand and comply with the Rule.

We also note that there did not appear to be a market problem that the changes in 2017 fixed. The market was operating well and we are not aware of any transactions that could not be completed or where there was a problem with CUSIPs being assigned to bond issuances. As such, eliminating the requirement on municipal advisors to obtain CUSIPs in competitive sales would have not adversely affected the market or investors. If anything, it would have made consistent across all scenarios the obligation of the underwriter to ensure that CUSIPs were assigned on a timely basis, thereby reducing opportunities for unintended failures as a result of personnel not understanding whether each individual offering triggered the obligation of one party or another.³

To the extent the MSRB believes that there are efficiencies to be achieved in the CUSIP assignment process, the MSRB may wish to explore expanding the straight-through processing of municipal market data that currently

¹ In fact, the provision currently at Rule G-34(a)(i)(C) was included in the original version of the rule in recognition that the issuer might elect to have its financial advisor or other agents obtain CUSIP numbers. See "Rule G-34: Proposed Rule on CUSIP Numbers Filed," MSRB Reports, Vol. 2, No. 6 (August 1982) at p. 8.

² "Request for Comment on Revised Draft MSRB Rule G-42, on Duties of Non-Solicitor Municipal Advisors," MSRB Notice 2014 (July 23, 2014) at p. 7.

³ For example, Rule G-34 does not have a definition of "competitive sale." It is unclear if municipal advisors can rely on the concept of a "competitive bid basis" in Rule G-37 for guidance, or should instead look to the usage of that term under other MSRB rules (such as Rule G-11, the Rule G-17 interpretation regarding underwriter duties to issuers, or elsewhere). In any event, the notion of a competitive sale does not seem to always have the same meaning in every MSRB rule.

exists and which the MSRB has recently proposed to enhance⁴ by also including the CUSIP application and assignment process in that work flow for dealers. Thus, an underwriter could submit at a single venue, with a one-time entry of each relevant data element, all information required to be provided to the Depository Trust Company (DTC) for its New Issue Information Dissemination Service (NIIDS), to the MSRB for its Electronic Municipal Market Access (EMMA) website, and to CGS for its CUSIP assignment system, and CGS could automatically distribute to the other entities the newly assigned CUSIP numbers without additional intermediary steps. Currently, regardless of who applies for a CUSIP number, much of the information supplied to CGS to obtain CUSIPs must be rekeyed for purposes of NIIDS and EMMA. As the MSRB's designee under Rule G-34, it would be appropriate for CGS to team with the MSRB and DTC to achieve this more efficient flow of data that would provide greater enhancements to the marketplace than the current CUSIP application process.

Question 4 and 5: Costs Associated with Rule G-34

While the act of obtaining CUSIP numbers is not very burdensome, for independent MA firms who had to ramp up when the Rule became effective in 2018 and for all MAs on an ongoing basis, the most costly aspects of the Rule are related to compliance matters and related liability.

We would highlight especially the costs of complying with the exception to the Rule related to the intent of the investor. The MSRB stated in its Notice 2017-11 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. In order to make this determination on a case by case basis, MAs often have to seek the advice of outside counsel to determine if the exception is met. The unclear language of the Rule, and the premise that the MA should talk with the investor about its intention, are riddled with compliance hurdles. The Rule forces the MA to determine (again likely with the assistance of outside counsel as the vast majority of MA firms do not have in house counsel) whether the transaction is a loan or a security – something that the SEC, MSRB and a plethora of other municipal bond professionals cannot agree on. While at the time of the updated Rule's implementation the MSRB noted that in many occasions language could be added (either by certification or otherwise) stating that the investor does have a current intent to hold the securities so as not to necessitate a direct inquiry by an MA with the investor, our members have indicated that it is frequently NOT the case that this language is used and that in many cases the MA must directly interact with the investor to determine their intent. Additionally, having the MA interact with the investor is a task that the MA community has been repeatedly warned, by regulators and attorneys, may cross the line into broker-dealer activity, which is something that MAs are to avoid. Without further guidance that provides either a relatively bright line (which we understand is not likely) or some other form of relief in cases where the distinction is difficult to make, and without some comfort that regulatory examination staff will not routinely second-guess the firms on their determinations, it is unclear whether this exception can be broadly effective, and for those MAs that seek to use the exception it may prove to be prohibitively costly.

Furthermore, there is an inherent timing inconsistency in the exception, in that Rule G-34(a)(i)(A)(3) requires application for CUSIP numbers no later than one business day after the Notice of Sale, which will almost always be before the identity of the investors are known, and therefore the MA could not reasonably obtain the investors' written representations under Rule G-34(a)(i)(F). While it is conceivable that the competitive sale could be structured to make it possible to use the exception, this raises concerns discussed below.

Questions 6: Specific Costs

Our members indicate that the process of updating their policies and procedures related to the Rule was the most time consuming element and that, on an ongoing basis, the compliance costs related to firm practices will be about 6-10 hours per year.

⁴ See "Notice of Filing of a Proposed Rule Change to Amend Rules G-11 and G-32 and Form G-32 Regarding a Collection of Data Elements Provided in Electronic Format to the EMMA Dataport System in Connection with Primary Offerings," Exchange Act Release No. 85551; File No. SR-MSRB-2019-07 (April 8, 2019).

However, firms have also noted that there is a cost per transaction to review whether CUSIP numbers are needed, and the recordkeeping requirements needed to demonstrate that the CUSIPs were applied for prior to the Notice of Sale. Some firms have also stated that there is additional time spent on the “back and forth” with CGS when the structure of the bonds change after the application is sent, and thus the CUSIP numbers need to be adjusted.

Question 7: When the MA Does not Secure CUSIPs in Competitive Sales

NAMA suggests that the MSRB obtain information from CGS about the types of professionals that secure CUSIP numbers.

Question 8: MAs and CUSIP Number Fee

A majority of our members have indicated that they utilize the function that is part of the CGS’s system allowing the winning underwriter to be billed for the CUSIP numbers.

CGS was very helpful in providing information and instructions to municipal advisors about how to signal within the CUSIP application to invoice the ultimate underwriter in the transaction, which has helped alleviate the need for the MA to have to pay for the CUSIPs.

Question 9: Obtaining CUSIPs and the role of MAs

As stated previously, the role of the MA is to serve and have a fiduciary duty to their clients. Unless asked by the client to secure CUSIPs, the requirement to obtain information that is used for the purpose of trading and sales with investors should not be unilaterally applied to MAs through regulations as it is unrelated to the duties that the MA owes to the municipal entity as its fiduciary.

Furthermore, the requirement for obtaining CUSIP numbers prior to the award and the conditions for the exception for direct sales both create a potential for regulatory requirements influencing the structure of a new issue and the advice provided by the MA with regard to such structure. The requirement to apply for CUSIPs before the bids have been entered and the new issue has been awarded necessitates that the MA and its issuer client propose a specific structure in its Notice of Sale to allow CUSIP numbers to be applied for. While in many cases an issuer and its MA may already have a particular structure in mind, in other cases they may be happy to receive whatever alternative structures that bidders may want to propose. The provision requiring pre-award CUSIP number application creates a drag on the issuer’s freedom to structure its issue and can require a “strawman” structure to be proposed just to fulfill the CUSIP number application requirement, thereby potentially (even if unintentionally) influencing what bidders may think to propose.

In addition, we discussed above the inherent timing inconsistency in the exception under Rule G-34(a)(i)(F). One way an MA could take advantage of the exception would be to prescreen all bidders to fit within the parameters of the exception (that is, as to nature of investors and the provision of the written representation). Given how narrowly drawn the exception is, it could serve as an inducement for a competitive sale to be limited to a particular qualifying group of bidders primarily to meet the exception rather than because it is necessarily in the best interest of the municipal entity. Of course, an MA would be obligated to meet its fiduciary duty and so could not ignore such duty simply to qualify for the exception – nonetheless, the nature of the exception does create a tension with the MA’s fiduciary obligation.

Question 10: Specific Problems Related to Independent MAs

We have noted that the most striking policy issue raised within Rule G-34 is that the role of MAs is to serve issuer, while the need for CUSIPs to facilitate the sale and clearing of securities are to help underwriters sell to investors. These are separate and opposite facing tasks. The marketplace would be best served if tasks necessary for a particular set of market activities are placed on those participants undertaking such activities.

We have also commented on the costs of compliance, especially for smaller MA firms which the MSRB has a responsibility to acknowledge and avoid overly burdening (Section 15B(b)(2)(L)(iv) of the *Exchange Act*). A vast majority of independent municipal advisory firms fall within the definition of a small advisory firm as articulated in the SEC MA Rule (<https://www.sec.gov/rules/final/2013/34-70462.pdf>, page 575), using the Small Business Administration's definition of \$7 million in annual revenues. Many firms have had to incur costs to ensure appropriate policies and procedures are in place; but especially with this rule and the exception language therein, they have also had to consult counsel on an ongoing basis to ensure compliance. This has been a disproportionate burden on smaller MA firms, and should be addressed during the MSRB's review of the rulemaking.

Also, as there is not a requirement to have an MA on every transaction, in many ways the Rule as currently in place does not serve the market well, and the market would be better served if the party who is required to be on every transaction, and who is most closely aligned with the market participants who will use CUSIP numbers in their sales, trading and clearance activities, has the responsibility of obtaining CUSIPs.

Question 11: Other Aspects

We have stated that this was a change that did not fix any problem in the marketplace. Based on anecdotal evidence of practices prior to 2018 when only dealer MAs were required to obtain CUSIP numbers, it is our understanding that the underwriters in some cases obtained the CUSIPs themselves and that the broker-dealer MA did not need to do so. There is no reason to think that the type of MA obtaining CUSIP numbers would change the behavior of underwriters with regard to their obtaining CUSIPs. This further points out that there really is no difference in the transaction if the underwriter rather than MA obtains the CUSIP, and in fact reflects preferred practice in the marketplace.

There is also the situation in competitive sales when there is no MA and, therefore, the responsibility rests on the underwriter. This contributes to the unnecessary confusion arising from having to scrutinize each transaction to understand who is on the hook to obtain CUSIPs that would not exist if the underwriter was assigned this task across the board.

We would also note that in an abundance of caution to comply with the Rule, MAs may apply for CUSIPs, but then when changes occur as the final transaction is set (either with an investor where the Rule would not apply or changes to the structure of the transaction), the CUSIPs have to be cancelled or adjusted. This is a problem that the MSRB should discuss with CGS. It is our understanding that CGS prefers to avoid the situation where CUSIPs are cancelled as it causes problems within their own systems (e.g., CUSIP numbers once assigned really can never be erased). If the underwriter applies for CUSIPs, these problems could be avoided.

Conclusion

NAMA requests that the MSRB take this opportunity to review the rulemaking to better focus the CUSIP obligation on a forward-looking, more efficient process and to eliminate the Rule's requirement for (any) municipal advisors to obtain CUSIPs in competitive sales.

We would welcome the opportunity to talk with staff more about NAMA's position on this matter.

Sincerely,



Susan Gaffney
Executive Director