June 30, 2017

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street, NW - Suite 1000
Washington, DC 20005

RE: MSRB Notice 2017-11/Rule G-34

Dear Mr. Smith:

The National Association of Municipal Advisors (NAMA) appreciates the opportunity to comment on the MSRB's *Second Request for Comment on Draft Amendment to and Clarifications of MSRB Rule G-34, on Obtaining CUSIP Numbers*. NAMA represents independent Municipal Advisory Firms and 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 efforts and assist its members navigate through the federal regulatory and municipal market landscapes.

Many of our comments are similar to the ones we made earlier this year in response to the MSRB's first proposal regarding CUSIP numbers (CUSIPs), as a key area of the proposal - mandating that municipal advisors obtain CUSIPs in all competitive sales - remains intact in the MSRB's updated draft. This letter also addresses the MSRB's new proposal to allow for an exception to obtain CUSIPs in private placements when certain standards are met. Finally, we discuss some of the costs associated with complying with the proposed rulemaking.

Municipal Advisors Applying for CUSIPs in Competitive Sales

The MSRB continues to propose having all municipal advisors apply for CUSIPs when they serve as a municipal advisor to their client on a competitive sale. NAMA opposes this section of the proposed rulemaking. As we noted previously, this requirement has been in place for broker/dealer MAs since 1986, although it is still unclear why that decision was made at that time and the MSRB has offered no rationale as to why a requirement implemented over 30 years ago should be followed now when the processes for obtaining CUSIPs and implementing a competitive sale have dramatically changed. Further, municipal advisors in 1986 did not have the statutory and regulatory frameworks that are now in place, which set a fiduciary duty and other standards for these professionals. These standards and the professional activities of municipal advisors are designed to enable MAs to serve their clients, and are not a fit for undertaking the responsibilities of obtaining CUSIP numbers, which is an activity to assist investors and the trading of bonds.

The current Notice makes that point as it states that "CUSIP numbers are relied on in the municipal securities market to identify securities for a number of purposes, including trading, recordkeeping, clearance and settlement, customer account transfers and safekeeping" (page 3). The MSRB's own description of the use of CUSIP numbers does not align with the roles and responsibilities of MAs.

Further, the revised proposal continues to ignore the unnecessarily cumbersome process and regulatory dichotomy that it would create by:

- Having the MA be responsible for one part of the underwriter's multi-step process for selling bonds.
- Having different parties be responsible for obtaining CUSIPs in competitive sales, because the Notice does not address instances where an issuer may not use an MA on a competitive sale transaction.
- Having to obtain CUSIPs prior to determining the maturity structures of the bonds and other final details of the offering or when no award is made. This would lead in some circumstances to having MAs resubscribe for CUSIPs. A far better approach would be to have the underwriter be responsible for obtaining CUSIPs after the bid is awarded.
- Further exacerbating the confusion of MA 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 a 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.
- Not addressing when a client may have multiple MAs, which MA would be responsible for obtaining the CUSIP. It is unlikely that the issuer will incorporate this task within the scope of municipal advisory services.

The revised Notice also does not approach the issue we raised in our March 31, 2017 letter, of what problem needs to be fixed that warrants this rule change. We are not aware of any deals that have not been completed or that have been hampered by the underwriter obtaining CUSIPs in a competitive sale, and having the CUSIPs obtained before the bonds are available. There seems to be no benefit to MA clients to have the MA obtain the CUSIPs, nor is there a benefit to MAs since they themselves do not benefit from the selling and trading of bonds to and by investors. Although the MSRB has broadly discussed the value of CUSIPs, there is nothing about municipal advisors applying for CUSIPs in competitive sales that enhances that value. Securities sold in competitive sales already have CUSIPs assigned to them. The MSRB should point to the specific benefit of this proposed rule versus the present system.

Instead of expanding the current responsibility of MAs to obtain CUSIPs in competitive sales, the MSRB should altogether eliminate 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. Further, since not every competitive sale has a MA, yet every bond sale has an underwriter (or placement agent), the most appropriate and simple solution is to have the underwriter obtain CUSIPs in all bond sales.

Exception for Obtaining CUSIPs

While again, NAMA's position is to withdraw the proposed rulemaking that would mandate MAs to obtain CUSIPs in competitive sales, we will comment on the current proposal's approach to avoid having CUSIPs assigned in private placements if certain standards are met. Having an exception in place is an important change that the MSRB has made. However, concerns remain with how to execute the CUSIP exception proposed by the MSRB.

MAs Role in Determining Intent of Investor

Being able to ascertain the intent of investors is absolutely not the role or responsibility of MAs. Per Section (a)(i)(A)(3) of the proposal, the MA must obtain CUSIPs on competitive sales no later than one business day after dissemination of the Notice of Sale. However, to determine if a CUSIP is needed on a competitive sale direct placement, the MA must *reasonably believe* the *likely* intent of the investor. Since an MA is not allowed to interface with investors prior to the completion of the competitive sale process (and at the direction of their client/within the scope of services) without crossing the line into broker/dealer activity, it is unclear how an MA will be able to meet that standard, and know the intent of the investor. The intent of the investor has nothing to do with the MA's role to serve a fiduciary duty to their clients, and provide advice on the sale of bonds and other financings.

CUSIP Procedures

The proposal mandates that the MA in a competitive sale shall make an application for CUSIPs by "no later than one business day after dissemination of the Notice of Sale or other such requests for bid." It is unclear, per the proposal how the MA will be able to satisfy that CUSIP requirement, in (a)(i)(3), with the exception, noted in (a)(i)(F), even with the language changes to the rule suggested by the ABA (discussed below). This would lead to the MA (and UW) having to obtain CUSIPs for a security which ultimately may not require the CUSIP, and during the bidding process have a CUSIP assigned to the security. Such action could deter investor interest and cause confusion about whether the security is a direct placement or a traded security. The MSRB should discuss with the CUSIP Global Services, the procedures for obtaining and withdrawing CUSIPs, as well as how CUSIP information is disseminated to the public.

Rule Language

The language in the proposal and the responsibilities it would place on MAs in competitive sales and underwriters in negotiated sales, 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. Specifically, item (a)(i)(F) states that the exception applies *if 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, and therefore affixing CUSIP identifiers is unnecessary.* Further the Notice states that *the proposed amendment would not set forth prescriptive steps to comply with the exception and would not further specify those instances where the exception would apply, nor would the amendment define parameters for how a dealer should craft applicable policies and procedures to arrive at a reasonable belief with respect to a transaction* (page 6). We believe that the proclamation that the MSRB will not provide further details on how to meet the standards of the exception would also apply to municipal advisors since the rule language is the same for MAs and UWs.

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 is especially true for the statement that the MA (and UW) must "reasonably believe" that the purchasing bank "is likely" to hold the municipal securities…. 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 UWs to use the same standard in all transactions. We encourage the MSRB to incorporate into the rule the suggestion from the American Bankers Association that the investor will "represent" its intention for the exception to apply. By having such language in the rule itself, all parties will have a better understanding and ability to ensure that the intent of the investor is known based on fact (see the June 30, 2017 letter to MSRB from the American Bankers Association).

In allowing for circumstances when this exception is met to include holding the municipal securities to maturity or limit the resale of the municipal securities to "*another bank, affiliated banks or a consortium of banks"….*, the proposed rule language should be further clarified in section (e) Definitions. We again suggest that the MSRB consider suggested language from the ABA to better clarify when the exception will apply in resale situations.

Finally, we suggest that the MSRB look at applying the exception to other types of sales where the purchaser may hold onto the securities until maturity. These would include instances when a government purchases another government's debt and when a financing is derived from a program such as a State Revolving Fund.

Costs

While we do not support having MAs play a role in determining the intent of investors, it is important for the MSRB to take into consideration the costs that MAs would incur to comply with the proposed rule. In the proposed rulemaking, the MSRB did not quantify these costs as part of its economic analysis. In particular, the Notice does not recognize the costs associated with developing policies and procedures to determine the intent of an investor. We estimate that the time to develop the policies and procedures are 3-5 hours per firm.

Further, the time needed to implement policies and procedures on a case by case basis that the bank/investor will "likely" hold the securities or meet other criteria also must be considered. The time to do so depends on whether the rule is further changed to accept a 'representation' from the bank regarding its intention with the bonds and whether the MSRB will actually require MAs to seek out such certification from every possible potential bidder. Even with helpful and streamlined "representation" offered by the ABA, the MA will likely need to make further inquiries with the investor 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, ABA's suggestion for the bank to make a representation of its intent, 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. We estimate that MAs will spend approximately 2-3 hours per transaction to meet the CUSIP exception standard as currently drafted, and that estimate will decrease to one hour if the MSRB includes the suggestion from the ABA about investor representation directly in the rulemaking.

The costs for obtaining CUSIPs would also place a burden on MAs. Since it is standard to have the underwriter pay for the CUSIPs, it is unclear how the MA who paid for and received the CUSIPs, would be able to be reimbursed for those fees from the underwriter. There is also a concern that the MA 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 do with MA activities and responsibilities. CUSIP costs are $173 for the first maturity in a bond sale, and $22 for all other maturities within that sale, under regular circumstances. Priority service for assignment increases those costs by 50%.

On page 6 of the Notice, the MSRB states 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*. Further in footnote 12, the MSRB states that *the dealer [or municipal advisor] should have reasonably designed policies and procedures to assist in making a determination as to whether the transaction involves a municipal security that results in the application of MSRB rules and other federal securities laws.* While the question of what is a security versus another financial product is one that will not be definitively answered in the language of this rulemaking, it will have to be answered within the context of whether a CUSIP number must be obtained. 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 a new policy and will require a minimum of 5-10 hours to create and up to an hour per transaction to implement.

Additionally, as is our position on all MSRB rulemaking, we would ask that the MSRB look not only at the costs associated with complying with this specific rulemaking but the cumulative regulatory burden of this rulemaking in combination with the entire MSRB MA rulebook, paying special attention to small MA firms.

Conclusion

NAMA continues to oppose having municipal advisors obtain CUSIPs in competitive sales. As discussed in this letter, the need and use for CUSIPs are related to underwriting activities and investors, and have nothing to do with the activities of the municipal advisor and their fiduciary duty to clients. Further, we do not believe there is sufficient need in the marketplace to mandate this change, and believe it will both place a costly burden on MAs and create market inefficiencies.

We appreciate the MSRB's action to provide an exception to having CUSIPs obtained for direct placements where certain situations apply. However, the proposed rule would be vastly improved by accepting the suggested language from the ABA that would allow for the MA and UW to know the intent of the investor due to representations made by the investor. This would also help issuers maintain demand for their securities since requiring a CUSIP would not be warranted. Without such additional language in the rule, it will be even more difficult and very costly for MAs to develop and implement proper procedures to meet the exception, and could be harmful to state and local governments.

However, the exception proposal creates an untenable situation for MAs, since the exception in its current form would have MAs determine the intent of the investor in order to know whether CUSIPs are needed, but knowing the intent of investors is not the responsibility of MAs. Further, the proposed rule creates friction 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.

These outstanding items related to the exception for obtaining CUSIPs, and the proposal as a whole lead us to reiterate our position that no MAs – independent or broker/dealer - should have the responsibility for obtaining CUSIPs.

We welcome the opportunity to discuss our comments with MSRB legal staff at their convenience.

Sincerely,

Susan Gaffney
Executive Director