BDA Bond Dealers of America

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Submitted Electronically

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

RE: Request for Comment on Draft Amendments to and Clarifications of MSRB Rule G-34, on Obtaining CUSIP Numbers

Dear Mr. Smith:

On behalf of the Bond Dealers of America ("BDA"), I am pleased to submit this letter in response to the MSRB's request for comment on proposed draft amendments ("Draft Amendments") to MSRB Rule G-34 on obtaining CUSIP numbers. The BDA supports the MSRB's effort to make the requirements of underwriters to obtain CUSIP numbers as clear as possible, but we disagree with how the MSRB has fashioned that requirement and suggest some alternative considerations below. Our most fundamental point is that the MSRB should not craft a rule that requires CUSIP numbers in transactions where the issuer and purchasing investors strongly do not want a CUSIP number and doing so will have substantial unintended consequences that will hurt the entire market.

The Draft Amendments will not permit issuers to issue and investors to purchase privately placed municipal securities without CUSIP numbers even though there are good reasons why issuers and investors alike may not want the securities to be assigned a CUSIP number.

Issuers and investors have very good, legitimate reasons to elect not to have municipal securities assigned a CUSIP number. While municipal securities are exempt under the Securities Act of 1933, with limited offerings under Rule 15c2-12, dealers, issuers, and investors need to make sure that investors are not purchasing the municipal securities for the purpose of distribution. In the appropriate fact pattern, ensuring that the municipal securities do not have a CUSIP number is one way to accomplish that. In addition, banks who directly purchase bonds or notes that may be construed as a municipal security ("direct purchase transactions") may need to establish that they are not

purchasing the bonds or notes in the investment market in order to secure appropriate internal accounting treatment for banking regulatory purposes. The Draft Amendments forego any of this flexibility if a placement agent is involved in the transaction. The Draft Amendments should allow the private placement transaction participants to decide whether a CUSIP number makes sense under the circumstances because there do in fact exist very good, legitimate reasons for them to do so.

To the extent that the MSRB views the Draft Amendments as a solution to direct bank transactions, the BDA believes that the Draft Amendments would be ineffective and cause unintended consequences.

To the extent that the MSRB believes that the Draft Amendments would provide greater market visibility for direct bank transactions, we do not believe that the Draft Amendments will have such an impact. The BDA has been highly supportive of every effort of the securities regulators to bring better visibility to direct bond transactions to investors in the municipal securities market. But we do not believe that the Draft Amendments will improve "market visibility" for direct bank transactions for two reasons. First, we believe that a CUSIP requirement would be ineffective to solve the problem. Investors need to know much more about direct bank transactions than just their existence. In addition, should the Draft Amendments become final, as we explain below, if an issuer and a bank do not want a direct bank transaction to have a CUSIP number, all that will mean is that they will avoid including a placement agent as a component of the transaction. Second, it could lead to unfair trading. CUSIP numbers improve visibility but only for institutional investors because it requires considerable technology infrastructure in order to be able to know a CUSIP number has been created for a security, and thus the Draft Amendments do not further a market-wide solution to the problem.

The SEC is already in the process of providing a much more complete solution to the problem. The recent proposed amendments to Rule 15c2-12 represent the kind of market-wide solution to this problem which, once the proposal is tightened, refined, and approved, will provide investors with the relevant information they need, when they need it, and do so in way that does not unfairly advantage some investors over others, or some market participants over others.

BDA believes that requiring CUSIP numbers in private placements will have the effect of eliminating placement agents in many transactions.

In many transactions, such as direct bank transactions, there is no absolute need for a placement agent to be a part of the transaction. If the parties to a privately placed transaction have a compelling reason for not assigning a CUSIP number to an issuance of municipal securities, the BDA believes that market participants will adjust around the

Draft Amendments by foregoing the use of placement agents. We see this as particularly the case with direct bank transactions where many banks will not participate in the transaction if the instrument is assigned a CUSIP number. The presence of a dealer in a transaction injects a professional presence and a person who is subject to the jurisdiction of securities regulators, and thus affords a degree of regulatory presence. The MSRB should not adopt rules that create such a clear incentive on the parties to not involve placement agents because the only impact in many cases will be to remove the placement agent from the transaction.

BDA believes that requiring CUSIP numbers in private placements may create an un-level playing field with non-dealer affiliated municipal advisors in direct bank transactions.

Our members have experienced instances where non-dealer affiliated municipal advisors will frequently take an aggressive interpretation of when a direct bank transaction constitutes a security because they are not subject to FINRA examinations and are only now starting to be subject to SEC examinations. Consequently, the Draft Amendments will likely have the effect of encouraging issuers and banks to move away from dealers who traditionally take a more conservative approach in assessing when a direct bank transaction constitutes a security. As a result, the MSRB will cause the industry to push this business to non-dealer affiliated municipal advisors. Our members believe that this will cause a shift in the business from placement agents to non-dealer affiliated municipal advisors so as not to cause problems with banks who do not want to have a direct bank transaction assigned a CUSIP number. Further, this could be widespread, resulting in an unknown negative market-wide shift, causing other unanticipated problems for issuers, regulators and investors. For instance, at the time an issuer seeks to solicit banks to submit proposals, the issuer will not know how many of those banks will insist on not having a CUSIP number assigned to the direct bank transaction. Accordingly, if two market participants are competing for the task of approaching the banks, and one of them is under the requirement to obtain a CUSIP number and other does not think that it is, issuers will have considerable incentive to work with the latter. We do not believe this sort of situation is what the MSRB intends to result from these Proposed Amendments.

BDA urges the MSRB to change the definition of "underwriter" in the Proposed Rule to exclude private placements.

The BDA proposes that the MSRB adopt the following definition of "underwriter" for purposes of Rule G-34:

"*The term "underwriter" shall mean (a) with respect to any issue of municipal securities that is exempt from Rule 15c2-12 under paragraph (d)(1)(i) and sold to not*

more than five persons, any broker, dealer or municipal securities dealer who purchases a new issue of municipal securities from the issuer, as a principal, with a view to and for the purpose of reselling such new issue; and (b) with respect to any issue of municipal securities other than an issue described in clause (a) of this definition, an underwriter as defined in Securities Exchange Act Rule 15c2-12(f)(8)."

This revised definition synchronizes the definition of underwriter with the limited offering exception under Rule 15c2-12. This definition of underwriter empowers the investor to decide whether it wants a CUSIP number because the number of purchasers is narrowed to not more than five who are sufficiently sophisticated and thus will have the bargaining power to insist on a CUSIP number if that is helpful. But, if a purchaser who has sufficient bargaining power on its own does not want a CUSIP number attached to the transaction, the MSRB should not dictate to investors the characteristics of securities they should be buying. Accordingly, we believe that the parenthetical that says, "(which includes a placement agent)" contained in (a)(i)(A) of the text of the draft amendments, should be deleted.

We think that this is responsive to Question 4 under the first section of questions of the Regulatory Notice. We do not think that the MSRB should create an exemption but should refashion the definition of "underwriter" to create space within the requirement for investors of any transaction to determine whether they want a CUSIP number on the transaction they are purchasing.

The Draft Amendments create a conflict with other provisions of Rule G-34.

If the Draft Amendments were effective, Rule G-34 would apply the term "underwriter" both to the requirement of obtaining CUSIP numbers and also submitting the application and other information to The Depository Trust Company ("DTC") for the issue. The MSRB's interpretation of the definition of "underwriter" would include instances where a dealer "offered and sold" securities but did not in fact purchase the securities and resell them to the investor. Under DTC operational rules, dealers many not take the steps required of them under Rule G-34 if they merely offer and sell the securities and do not purchase the securities and then resell them. Thus, if the MSRB changes the definition of "underwriter," the MSRB will need to consider revisions to other parts of the rule to ensure that dealers are not under a requirement that is impossible for them to satisfy.

BDA urges the MSRB to apply the Proposed Rule only prospectively.

The BDA is very concerned with the lack of clarity concerning the effectiveness of the Draft Amendments. While the MSRB may view the Draft Amendments as clarification, the industry believes that the very existence of the Draft Amendments

shows that the current Rule G-34 does not impose the requirements set forth in the Draft Amendments. Accordingly, we urge the MSRB to make the Draft Amendments, in whatever final form, prospectively effective only. Failure to do this will create chaos and confusion in the market, which will not further any goal of the MSRB. The idea that the MSRB could create any sort of rule, even a clarification, and dealers need to live with uncertainty that past deals will be evaluated in light of that future development is untenable and a dangerous precedent to set.

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Accordingly, the BDA urges to the MSRB to take a different course with the Draft Amendments. We urge the MSRB to create some space in the rule for issuers and investors who do not want privately placed municipal securities to be assigned a CUSIP number.

Thank you for the opportunity to provide these comments.

Sincerely,

Mike Nicholas
Chief Executive Officer