Cristeena Naser
Vice President
Center for Securities, Trust & Investments
202-663-5332
cnaser@aba.com

VIA ELECTRONIC MAIL

March 24, 2017

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

Re: Regulatory Notice 2017-05, Request for Comment on Draft Amendments to and Clarifications of MSRB Rule G-34, on Obtaining CUSIP Numbers

Dear Mr. Smith:

The American Bankers Association (ABA)[1] appreciates the opportunity to comment on the above proposal issued by the Municipal Securities Rulemaking Board (MSRB). ABA members regularly purchase municipal obligations directly from the obligors and extend loans and provide other credit accommodations to municipalities and conduit borrowers. In addition, many of our members provide services as regulated municipal securities dealers, either through separately identifiable departments in commercial banks or through broker-dealer affiliates of commercial banks.

The MSRB seeks comment on draft amendments to Rule G-34(a) that (1) confirm the requirement for a dealer to obtain CUSIP numbers for new issue securities sold in private placement transactions, including direct purchases where the dealer acts as a placement agent; and (2) add a new requirement that municipal advisors that are not dealers must also obtain CUSIP numbers for new issue securities when acting as a financial advisor in new issue municipal securities sold in a competitive offering.[2] Our comments will be limited to issues in the proposal relating to the requirement to obtain CUSIP numbers for new issue of municipal securities sold in private placement transactions.[3]

[1] The American Bankers Association is the voice of the nation's $17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits and extend more than $9 trillion in loans.
[2] The proposal would amend the text of Rule G-34(a)(i)(A) to delete the existing phrase "for the purpose of distributing such new issue," to make clear that the CUSIP requirement applies to placement agents.
[3] We understand the proposal will apply to newly issued obligations of both municipalities and conduit borrowers.

The MSRB asserts that "the existing rule may result in unequal costs and regulatory treatment for dealers that comply with the requirement to obtain CUSIP numbers . . . as opposed to dealers that do not. The existing rule may also result in a diminished level of information available to investors regarding new issue municipal securities sold in a private placement where CUSIP numbers are not obtained."[4] The proposal further states, "[s]ince issues that lack CUSIP numbers circumvent the MSRB's (and other regulatory agencies') market transparency initiatives, clarifying the CUSIP number requirement would improve the information available to investors."[5]

We have no issue with these statements on their face. However, while the proposal is framed as being applicable solely to "municipal securities" – indeed the only type of instrument over which the MSRB has jurisdiction – the questions raised in the proposal clearly implicate loans from commercial banks.to municipal entities and other municipal market participants.[6]

The proposal states that banks making direct purchases "often request that dealers not obtain a CUSIP for the transaction."[7] ABA believes this is the case because banks have determined for the most part that these direct purchases are loans which the bank has underwritten in accordance with its loan credit process and attendant credit committee approvals and, therefore, no CUSIPs or other identifiers are necessary. We are unaware of any federal case law precedent that considers an identifier as a factor in the determination of whether an instrument is a loan or security. Nonetheless, marketplace participants believe that this identifier – rightly or wrongly – is an indicator that an instrument is a security.[8]

We are concerned that a practice by placement agents, out of an abundance of caution, of attaching CUSIP numbers to obligations identified as loans could ultimately unduly influence the accounting determination itself of whether an instrument is a loan or security. Applying what is believed by segments of the market to be a significant indicium of a security to bank loans could result in an after-the fact review by examiners using this cursory characterization – a review which could have potentially significant economic and regulatory consequences – one of which could be a requirement for the bank to mark the obligation to market.[9]

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[4] Release 2017-05 at 11.
[5] *Id*. at 15.
[6] In this letter we use the term "bank" as including bank subsidiaries and affiliates, some of which may be non-bank subsidiaries that originate loans to municipalities.
[7] *Id.at 7.*
[8] In the context of this proposal, that view is further supported by the requirement of G-34(a)(ii) that the underwriter apply for depository eligibility. We note that a key element of The Depository Trust Company's new issue eligibility criteria is that the security is "freely tradable." *See*, http://www.dtcc.com/en/matching-settlement-and-asset-services/underwriting/new-issue-eligibility.
[9] Due to the illiquid nature of these instruments, marking these obligations to market is an arduous process that can subject the bank to volatile swings in regulatory capital. Over the long term, such swings could increase the credit cost to the borrowers.

We believe that the increase in the number of bank loans over recent years reflects the cost effectiveness and utility of this funding mechanism to municipal entities and other municipal market participants, especially at a time when their own resources are so strained. Bank loans afford a broader menu of funding options to a wider range of issuers and obligors than those served primarily by the publicly offered municipal securities market. This benefits both large issuers and obligors (which at times prefer bank loan funding for specialty transactions) and smaller issuers and obligors (which may face limited, costly access to the publicly offered municipal securities market).

A possible consequence of adopting this proposal could be that banks, facing uncertainty from examiners as to proper accounting treatment, may reduce their presence in or be forced to exit this market leaving some issuers or obligors without an affordable funding source. Smaller, unusual (*e.g.* special districts), and infrequent municipal market issuers confront an information asymmetry problem that can create misperceptions of their inherent credit risk which adds to the time and expense of issuing debt in the public market and creates execution challenges. By contrast, banks – by virtue of their willingness both to evaluate small and nontraditional issuers and to negotiate specialized credit terms – have significantly mitigated this issue over the past five years through their increasing activity in the municipal market.

To disrupt an extremely beneficial credit mechanism for issuers we believe serves neither municipal entities nor other municipal market participants. While the intended outcome of leveling the costs for dealers may be achieved, the unintended consequence would likely be an increase, perhaps significant, in the financing costs for certain municipal entities, particularly smaller issuers that can least afford such additional costs.

Support for Exception

Because of these concerns, ABA strongly supports a proposed exception from the CUSIP and depository eligibility requirements of Rule G-34(a) for dealers and municipal advisors in private placements of municipal obligations to a single bank or bank affiliate purchaser or consortium of banks We believe such an exception would help alleviate the concerns of MSRB-regulated entities with respect to whether a particular financial obligation is a loan or a security while at the same time facilitating their compliance with securities laws[10] as well as addressing the concerns of our member banks raised in this letter.

ABA recognizes that market transparency and investor protection are the drivers of the MSRB's approach. With respect to a perceived security identifier in particular, we believe the key concern should be to ensure that instruments that are expected to trade in the market can be tracked.

By contrast, however, direct purchase transactions are not expected to make their way into the hands of investors in the public market. Banks and their affiliates offering loans or

[10] *See*, MSRB Regulatory Notice: Direct Purchases and Bank Loans as Alternatives to Public Financing in the Municipal Securities Market (April 4, 2016).

direct purchases to municipal entities or other municipal market participants generally intend to hold the obligations in their loan portfolios to maturity and make that intent clear in the transaction documents. Many banks include in their transaction documents language limiting transfers, in support of their determination to treat the instrument as a loan. Therefore, we believe MSRB-regulated entities would have little difficulty obtaining a certificate or other representation that the bank, bank affiliate or consortium of banks is acquiring the obligation for its/their own account, and has no present intent to distribute the instrument in a public offering.

Conclusion

ABA acknowledges the MSRB's view that the proposed amendments serve merely to confirm its existing position that CUSIPs must be obtained both for publicly offered and privately placed municipal securities. However, for MSRB-regulated entities, the proposal raises the threshold issue of whether an obligation is a loan or security and their possibly conflicting duties under securities laws. To mitigate such concerns, as discussed above, ABA strongly supports an exception for MSRB-regulated entities from the requirements of Rule G-34(a) for private placements of municipal securities to a single bank, bank affiliate or consortium of banks in those transactions where the bank, bank affiliate or consortium of banks is acquiring the obligations for its/their own account without any present intent to distribute the instrument in a public offering.

ABA would be pleased to discuss this issue further with you.

Sincerely,

Cristeena G. Naser
Vice President and Senior Counsel
Center for Securities, Trust & Investment