



November 13, 2017

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

**RE: MSRB Notice 2017-19**

Dear Mr. Smith:

The National Association of Municipal Advisors (“NAMA”) welcomes the opportunity to submit comments to the Municipal Securities Rulemaking Board (“MSRB”) on Regulatory Notice 2017-19. NAMA represents independent municipal advisory firms and individual municipal advisors from around the country. Our organization works to ensure our members achieve a high standard of professionalism, education, and understanding of the regulatory and market environments related to their work.

NAMA supports MSRB’s efforts to critically review and modernize their existing rules. We appreciate prior conversations with the MSRB on primary offering issues and their outreach to solicit public comment on the many components in this Concept Proposal Regarding Amendments to Primary Offering Practices of Brokers, Dealers and Municipal Securities Dealers (“Concept Proposal”). Capitalized terms used but not defined in this letter shall have the meanings ascribed to them in the Concept Proposal.

Our most significant concern is that elements of the Concept Proposal suggest MSRB rule changes that exceed the MSRB’s statutory authority. We are also concerned that these elements do not correctly reflect the statutorily defined roles and duties of Municipal Advisors, whether independent or broker/dealer Municipal Advisors, as demarcated in the *Exchange Act* and further clarified in subsequent SEC rulemaking. Our comments include discussion of these general concerns as well as the key areas of the Concept Proposal that directly impact Municipal Advisors.

**Rule G-32 - Disclosures in Connection with Primary Offerings**

**Submission of Preliminary Official Statements (POS) to EMMA  
*MSRB Lacks Authority for this Proposal***

In the Concept Proposal, the MSRB notes that Rule G-32 currently does not require submission of the POS to EMMA, even if one is available and is seeking comment about whether the MSRB should require the Municipal Advisor or the underwriter to submit the POS to EMMA. We believe that the MSRB lacks the statutory authority to create such a rule for either Municipal Advisors or Broker/Dealers and that such a requirement would violate the *Exchange Act*. Section 15B(d) of the *Exchange Act* specifically states that *the Board is not authorized ... to require any issuer of municipal securities, directly or indirectly through a municipal securities broker, municipal securities dealer, municipal advisor, or otherwise, to furnish to the Board or to a purchaser or prospective purchaser of such securities any application, report, document or information with respect to such issuer.*

The issuer is the source of the POS and the SEC has repeatedly stated that issuers are primarily responsible for disclosure documents.<sup>1</sup> Municipal Advisors have no legal obligation to obtain a POS or “deemed final” Official Statement (OS) from the issuer and generally would not be able to obtain one except from the issuer in order to comply with this proposed rule. Therefore, requiring a Municipal Advisor to post the issuer’s POS to EMMA would constitute an indirect yet clear requirement on issuers to furnish such document to the MSRB. For the MSRB to impose such a requirement, they would have to obtain new authority from Congress.

An additional concern with the requirement to have Municipal Advisors provide the POS to EMMA is that it imposes a Broker/Dealer obligation on Municipal Advisors and potentially involves Municipal Advisors in the solicitation of transactions in municipal securities. As noted above, while SEC Rule 15c2-12 currently requires an underwriter to obtain a “deemed final” Official Statement from the issuer, it does not require a Municipal Advisor to do the same. Presumably, SEC Rule 15c2-12 imposes that requirement on underwriters for them to have sufficient information to discharge their obligations under the anti-fraud provisions of the federal securities laws to form a “reasonable basis<sup>2</sup>” for offering municipal securities to investors.<sup>3</sup> This reasonable basis is also known as an implied representation by underwriters with respect to the securities they are offering. Municipal Advisors make no such similar implied representation to investors nor does their statutorily defined role contemplate such a role for Municipal Advisors.

We are concerned that this and other MSRB proposals<sup>4</sup> put Municipal Advisors in roles that are outside the historical practice and regulatory bounds of municipal advisor activity.

## **Specific Questions**

### **1. Should the underwriter or Municipal Advisor be required to submit the POS to EMMA, if one is available?**

No. There should be no requirement to submit the POS to EMMA. The MSRB does not have authority to mandate POS submissions. Rather the decision about the proper scope of POS dissemination should be made by the issuer in consultation with its financing team.

Also of note, there is no discussion in the present proposal clarifying in what instances the Broker/Dealer or Municipal Advisor would be required to submit the POS to EMMA or discussion about what is to be done when there is no Municipal Advisor engaged on the transaction if the requirement is to be imposed on Municipal Advisors and not underwriters.

### **2. Should the Underwriter or Municipal Advisor be required to seek confirmation from the issuer that they may post the POS on EMMA.**

Unless (1) an issuer voluntarily decides to post their POS on EMMA and (2) posting the POS on EMMA is part of a Municipal Advisor’s scope of services as determined by the issuer, a Municipal Advisor should have no responsibility to post the issuer document on EMMA. The POS should be disseminated and posted on EMMA as the issuer determines. Neither underwriters nor Municipal Advisors should make submissions of a POS to EMMA unless directed to do so by an issuer.

### **3. Would a requirement that the POS be submitted to EMMA assist in ensuring all market participants have access to the POS at the same time?**

As noted above, the MSRB does not have authority to mandate POS submissions. As additionally noted above, our issuer clients are in the best position to determine how to distribute the document to market participants.

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<sup>1</sup> See, e.g., Securities Exchange Act Release No. 26985 (June 28, 1989), 54 FR 28799 (“1989 Release”) at n. 84.

<sup>2</sup> See, Securities Exchange Act Release No. 26100 (Sept. 22, 1988), 53 FR 37778 (“1988 Release”);

<sup>3</sup> See, e.g., Exchange Act Release No. 33741 (March 9, 1994), 59 FR 12748 (March 17, 1994) (“1994 Interpretive Release”)

<sup>4</sup> See, <http://www.msrb.org/RFC/2017-11/NationalAssn.pdf>

Furthermore, while requiring submission of a POS to EMMA may simplify access for some, the lack of uniform naming conventions for issuers and use of a CUSIP based search function, limits the value of EMMA postings for this purpose.

**4. What are the advantages or disadvantages of such a requirement for dealers, Municipal Advisors, issuers and market participants?**

The MSRB does not have the authority to mandate the submission of a POS to EMMA by any party. For Municipal Advisors, requiring them to submit a POS to EMMA, which may be counter to the issuer's wishes or benefit, could potentially force the Municipal Advisor to violate their fiduciary duty responsibilities to their client. *Exchange Act* Section 15B(c)(1) states that: "A Municipal Advisor and any person associated with such Municipal Advisor shall be deemed to have a fiduciary duty to any municipal entity for whom such Municipal Advisor acts as a Municipal Advisor, and no Municipal Advisor may engage in any act, practice, or course of business which is not consistent with a Municipal Advisor's fiduciary duty." Stated another way, a Municipal Advisor's fiduciary duty requires them to put the interests of their municipal entity client ahead of their own. In the context of the idea of requiring POS submission by Municipal Advisors, the Municipal Advisor potentially could have to put the interests of their client not to post the POS to EMMA ahead of their interest in complying with the rule if adopted.

Requiring Municipal Advisors to submit a POS to EMMA with the intended purpose of providing investor access also arguably inserts the Municipal Advisor into the process of solicitation of investors, which is clearly the role of the broker/dealer. This potentially creates a regulatory risk for Municipal Advisors.

**5. Is there a valid reason to provide a POS to some market participants but not others?**

This is not an area for MSRB rulemaking; such discussion should be addressed by the SEC in their Rule 15c2-12. Additionally, not all transactions need broad, national distribution.

**6. Are there alternative methods that the MSRB should consider for providing the information in the POS that would be more effective and efficient for investors and/or less costly or burdensome to Underwriters and Municipal Advisors?**

The POS and information from the POS should be distributed according to the issuer's wishes based on input from its team and its own experience and preferences. GFOA's Best Practices currently encourage governments to distribute a POS, including posting on the issuer's website (GFOA Best Practice, Primary Disclosure Responsibilities, 2017). The MSRB should emphasize working with issuer and other groups to ease the process for submitting a POS to EMMA through voluntary means.

**7. Should the requirement to submit a POS to EMMA apply in negotiated and competitive sales? If so, should there be different rules for each type of offering?**

There should be no requirement. Underwriters are currently required to obtain and review a "deemed final" Official Statement in both competitive and negotiated sales to fulfill their obligations as broker/dealers. The Municipal Advisor has no such responsibility and does not play a role in the distribution of securities. The POS is an issuer's document and should be distributed according to the issuer's wishes based on input from its team and its own experience and preferences.

**8. Should the rule require the underwriter or Municipal Advisor to post an updated POS if information changes? Should the rule allow an underwriter or Municipal Advisor to withdraw the POS if the information becomes stale?**

Aside from the jurisdictional objections NAMA has regarding whether the MSRB could mandate POS submissions in general or by Municipal Advisors, this question raises a key concern with the practical realities of implementing such a provision. It is unclear how the revised information would be 1) flagged as being revised, 2)

whether the EMMA system has the capacity to allow for an override for an updated document, and 3) how to reach investors who may have received a previous POS that now contains stale or incorrect information. The complexities involved in administering such a rule from both an antifraud and MSRB rule compliance perspective would be very burdensome.

**Whether Non-Dealer Municipal Advisors Should Make the Official Statement Available to the Underwriter After the Issuer Approves It for Distribution**

***SEC Rule 15c2-12 Already Covers This Proposal. Municipal Advisors Should Not Have the Responsibility to Make the OS Available to the Underwriter Unless Tasked to do so by the Issuer.***

***Instead of looking to have newly regulated non broker/dealer Municipal Advisors conform to former broker/dealer Municipal Advisor rules, as part of its “modernization” of its Rulebook, the MSRB should be looking to delete rules applicable to broker/dealer Municipal Advisors that are no longer appropriate or necessary, and that best reflect legislation and rulemaking that define municipal advisory duties. Rule G-32(c) is no longer appropriate or necessary because the process by which an underwriter obtains an Official Statement is covered in SEC Rule 15c2-12. Rule 15c2-12 already allows the issuer the flexibility to provide an Official Statement to the underwriter or have their designated agent do so – we see no value in requiring an issuer to utilize one specific designated agent to perform that task particularly when they may have valid reasons not to want a Municipal Advisor to perform the task or may already have an agent to perform the task.***

The MSRB is seeking to apply rulemaking developed at least two decades ago in a manner that does not account for the statutory definition of the term “Municipal Advisor” that is now part of the *Exchange Act*, per the *Dodd-Frank Act*, as further clarified by the SEC in their adopting release (“Final Municipal Advisor Rule”).<sup>5</sup> The MSRB wrote the G-32 language for broker/dealer Municipal Advisors at a time when the role of Municipal Advisor was not statutorily defined and when underwriters and Municipal Advisors often practiced in ways that are no longer permitted. At the time of the development of broker/dealer Municipal Advisor responsibilities in G-32, a broker/dealer could act as both Municipal Advisor and underwriter on the same transaction (former Rule G-23). Similar to comments we made regarding the MSRB’s recently proposed Rule G-34, we would be interested in understanding the regulatory history as to why broker/dealer Municipal Advisors were handed various responsibilities at that time, and whether that had more to do with technological hurdles related to the distribution of official statements to their broker/dealer activities rather than their municipal advisor activities. Rule G-32(c) was developed when physical distribution of Official Statements was the market norm, and that is no longer the case.

SEC Rule 15c2-12(b)(1) and (3) requires an underwriter to obtain and review the Official Statement and contract with the issuer to receive a final Official Statement. That contractual provision is a standard part of any bond purchase agreement. We are unaware of situations where underwriters are not receiving such Official Statements as part of what is now a routine contractual provision. We do not see the value of a mandate to interpose a Municipal Advisor into that routine contractual process particularly when we are not aware of any issues with issuers and underwriters complying with this routine SEC requirement. Additionally, if a Municipal Advisor is to have this responsibility, then Rule 15c2-12 (b)(3) would need to be amended, and the definition of Municipal Advisor in the *Exchange Act* and in the Final Municipal Advisor Rule, might also need to be revised.

For these reasons, we do not believe that any Municipal Advisor, including broker/dealer Municipal Advisors should bear any responsibility to interject themselves in the distribution of the Official Statement from issuers to underwriters. We suggest that if the MSRB seeks to make changes to Rule G-32, section (c) of the Rule should be deleted altogether. *[(c) Preparation of Official Statements By Financial Advisors. A broker, dealer or municipal securities dealer that, acting as financial advisor, prepares an official statement on behalf of an issuer with respect to a primary offering of municipal securities shall make the official statement available to the managing underwriter or sole underwriter in a designated electronic format promptly after the issuer approves its distribution.]*

<sup>5</sup> See, Registration of Municipal Advisors, Release No. 34-70462 (September 20, 2013), 78 FR 67467 (November 12, 2013), available at <http://www.sec.gov/rules/final/2013/34-70462.pdf>. (“Final Municipal Advisor Rule”).

Section (b)(1)(B) of Rule G-32 already contains sufficient language related to the underwriter's responsibilities regarding OS submission. Further, as discussed previously, deleting section (c) of Rule G-32 is also appropriate to best reflect the statutorily defined duties of a Municipal Advisor.

**Whether the MSRB Should Auto-Populate into Form G-32 Certain Information that is Submitted to NIIDS but is Not Currently Required to be Provided on Form G-32**

Although this proposal does not impact Municipal Advisors, we note that this is exactly the type of review and modernization that the MSRB should be undertaking. The MSRB should be seeking to auto-populate many of its forms based on information that regulated entities are already required to provide or have previously provided, such as with respect to Rule G-37. The MSRB has existing resources that could be committed to reducing the compliance burden on regulated entities by reducing the need for time to be spent duplicating entries in standard forms.

**Whether the MSRB Should Request Additional Information on Form G-32 that is Not Provided in NIIDS, and If So, What Data**

***No opposition to additional fields in Form G-32***

The MSRB suggests numerous new data points be included on Form G-32. We do not object to these additional fields, and believe that additional information for the benefit of issuers and the marketplace (especially TIC, yield to maturity, etc.) are useful. We would comment, however, that this useful information and Form G-32 should be more easily and readily available within the EMMA system.

The reporting of Municipal Advisor fees may be more problematic because of the variety of ways in which Municipal Advisors are paid. Unlike underwriter fees which are all quoted on a per bond basis, Municipal Advisor fees are determined in a variety of ways, which would make uniform field entry difficult. Some fees are calculated per transaction but others are part of ongoing contracts that may have no specific cost component for individual transactions. Additionally, some fees may not be decided upon or charged until after the deal has closed and the defined scope of work from transaction to transaction can vary significantly.

We are concerned if the MSRB seeks to identify Municipal Advisor fees in a dollar per bond manner, as it would not be representative of the fees assessed, would be inconsistently reported, and it would not take into consideration the different work the Municipal Advisors do in each transaction. Reporting Municipal Advisor fees in such a manner would not provide issuers and the market with valid information and may, in certain circumstances, make it appear as if the Municipal Advisor is receiving transaction-based or excessive compensation. Reporting Municipal Advisor fees in such a manner may also be inconsistent with some state statutes that prohibit Municipal Advisors from using a fee based on percentage or dollar per bond.

Again, this appears to be an area where the MSRB is conflating the roles of underwriters and Municipal Advisors. Underwriters and their fees are defined by their relationship to a particular transaction<sup>6</sup> but the work of a Municipal Advisor may not be so narrowly defined. While we support fee transparency, we are unclear how Form G-32 and ultimately the EMMA system would be able to correctly reflect the numerous variables that are part of Municipal Advisor fee structures, and whether the needed infrastructure investment into EMMA to allow for this would be beneficial, as many states already require fee disclosure and investors and issuer clients have access to that disclosure.

If there is interest to look further into Municipal Advisor fee disclosures, we ask that the MSRB work with the Municipal Advisor community to ensure that this data field is reflective of actual market practices and not a simple form field derived from the role and pricing practices of an underwriter. The MSRB should also be mindful of whether this fee disclosure is duplicative of state laws, and thus may carry an unnecessary administrative burden.

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<sup>6</sup> See, Final Municipal Advisor Rule at n. 591 and accompanying text.

## **Other Primary Offering Practices That the MSRB Should Consider In Its Review**

As we discussed in our letter, the Concept Proposal does not account for the statutory definition of Municipal Advisor in its questions about whether non-dealer Municipal Advisors should have the same responsibilities as current dealer Municipal Advisors. We believe that the MSRB should look to ensure that all Dealer-Municipal Advisor, Municipal Advisor and financial advisor references in the Rulebook correctly reflect the actual duties and responsibilities of Municipal Advisors that are stated in the *Exchange Act* and the Final Municipal Advisor Rule.

### **Small Municipal Advisory Firms**

***MSRB should address impact of rulemaking on small municipal advisory firms***

To date, including in this Concept Proposal, the MSRB has not demonstrated that they are complying with Section (b)(2)(L)(iv) of the *Exchange Act*.

### **Conclusion**

NAMA appreciates the opportunity to comment on the important issues raised in the Concept Proposal, and MSRB's efforts to critically review and modernize its rules for the benefit of investors and issuers in a way that does not impose unnecessary compliance burdens.

With respect to the portions of the Concept Proposal on which we have commented, we caution the MSRB against moving forward with proposals that exceed the MSRB's authority related to disclosure matters, as well as placing responsibilities on Municipal Advisors that are outside the bounds of their statutory duty to serve at the will of their issuer clients and within the scope of services for which the client has engaged municipal advisory services.

The MSRB should be looking to address primary offering practices and other areas of its rules to ensure they reflect the current state of the *Exchange Act*, since the passage of the *Dodd-Frank Act*, which most importantly includes a statutory definition of Municipal Advisors. The Final Municipal Advisor Rule took great pains to differentiate the roles of underwriters and Municipal Advisors and this proposal appears to blur those roles.

The MSRB should also consider if significant market benefits can be derived from these proposals, through further market participant input and quantitative analysis.

NAMA supports regulation of Municipal Advisors and believes in the MSRB's mission to act within the scope of authority granted to it under the *Exchange Act* to develop appropriate rules for broker/dealers and Municipal Advisors that protect issuers and investors. We appreciate the opportunity to comment on this and other MSRB rulemaking efforts.

Sincerely,



Susan Gaffney  
Executive Director