



March 31, 2017

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

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

Dear Mr. Smith:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates this opportunity to respond to Notice 2017-05² (the “Notice”) issued by the Municipal Securities Rulemaking Board (the “MSRB”) in which the MSRB is seeking comment on draft amendments to MSRB Rule G-34 (“Rule G-34”), relating to obtaining CUSIP numbers for municipal securities, new issue and market information requirements, clarifying existing application of Rule G-34 for certain additional industry participants, and making definitional and technical changes. SIFMA and its members do not agree with some of the proposed changes, including requiring placement agents of municipal securities to obtain CUSIP numbers in all instances.

Specifically, SIFMA and its members feel that there should be an exemption from the requirement to obtain a CUSIP number under Rule G-34 for private

¹ SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over \$2.5 trillion for businesses and municipalities in the U.S., serving clients with over \$18.5 trillion in assets and managing more than \$67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² MSRB Notice 2017-05 (Mar. 1, 2017).

placements, including direct purchases, of municipal securities made to a bank, its subsidiaries or affiliates, or consortium thereof. Additionally, we feel the MSRB should clarify that CUSIP numbers are not required for a loan that is privately placed. SIFMA supports the proposed amendment to level the regulatory playing field between dealer municipal advisors and non-dealer municipal advisors by making all municipal advisors obtain CUSIP numbers for competitive sales of new issue municipal securities. We also have concerns about the potential effect of the regulatory incentives and disincentives in connection with the amendments.

Finally, we feel strongly that the clarifications proposed are akin to new rulemaking, and should be enforced only prospectively.

I. Any Clarification or Rule Change Should Be Prospective Only

As a fairness matter, we strongly urge the MSRB to clearly state that the changes to Rule G-34 related to this Notice shall only be applied prospectively. Specifically, as the MSRB recognizes and understands, the application of Rule G-34(a) to private placements, including direct purchase transactions has been uneven.³ SIFMA and its members believe that Rule G-34, under a fair reading of the current language, exempts transactions that are not distributed.⁴

While we understand that the focus of the MSRB in the Notice is to provide transparency in the municipal securities market generally, we do not believe that retroactive applicability of the changes to Rule G-34 are necessary or appropriate given the private nature of the transactions and the current wording of Rule G-34. Also, while not dispositive, we would note that the Securities and Exchange Commission (“Commission”) proposed changes to Rule 15c2-12 (“Rule 15c2-12”) of the Securities Exchange Act of 1934, as amended, would also only be applied prospectively after the effective date of any such amendments.⁵

Furthermore, many private placement transactions, including direct purchases, were placed with a bank or affiliated entity where the purchaser specifically requested the placement agent not to obtain a CUSIP number. Whether or not such transactions were viewed as purchases of municipal securities or loans

³ See the Notice, at FN 12.

⁴ The language of current Rule G-34(a)(i) refers to a broker, dealer, or municipal securities dealer (“dealers”) and others who “acquire” a new issue of municipal securities as principal or agent, “for the purpose of a distribution.” In contrast, in a private placement, the instrument is typically acquired directly by the bank or other purchaser.

⁵ Proposed Amendments to Municipal Securities Disclosure, 82 Fed. Reg. 13928 (Mar. 15, 2017).

by the related purchaser for U.S. accounting or U.S. securities law purposes, the facilitation of a direct placement to a bank or related purchaser who, among other things, has represented in writing that they presently intended to hold the debt and/or had significant transfer restrictions was fairly viewed as not constituting a distribution under the customary U.S. securities law understanding of the term. Therefore, we believe those transactions were reasonably viewed as exempt from the CUSIP requirement under current Rule G-34.

As such, we believe that prospective application is appropriate in connection with any changes to Rule G-34. Any changes to Rule G-34 should not affect outstanding transactions completed under the current language of Rule G-34.

II. Application of Proposed Rule G-34(a) to Private Placements

a. Definition of Underwriter

The MSRB has proposed to amend the definition of “underwriter” in Rule G-34 to cross-reference the definition set forth in Rule 15c2-12(f)(8) promulgated under the Securities Exchange Act of 1934, as amended. SIFMA and its members feel that the proposed amendments largely clarify that CUSIP numbers are needed in public offerings and private placements, including direct purchases, of municipal securities. However, SIFMA and its members do not agree that this is an appropriate amendment to Rule G-34.

It is worthy to note that if the change in the definition of underwriter, as proposed in the Notice, has implications for any other MSRB rule, SIFMA and its members believe that a separate guidance and rulemaking process is appropriate and should be conducted separately.

b. DTCC Eligibility and NIIDS Submission

The proposed clarification impacts the existing obligations on the broadened group of underwriters under Rule G-34(a)(ii) regarding application for depository eligibility and dissemination of new issue information. If an issuance of municipal securities is expected to be deposited into the Depository Trust and Clearing Corporation (“DTCC”) and is believed to meet DTCC eligibility, placement agents will be required to apply for depository eligibility and submit information to the DTCC’s New Issue Information Dissemination Service (“NIIDS”) for such municipal securities. The genesis of DTCC eligibility is to facilitate a security being held in DTCC’s nominee name Cede & Co., and for the purpose of facilitating the trading and the safekeeping of securities, the payment of principal and interest through DTCC, and corporate actions.

If a placement agent does not take title to the municipal securities in connection with a private placement, no position in the municipal securities is intended to be held in the name of the placement agent, and the municipal securities are not expected to be credited to the placement agent's account at DTCC, then it is not appropriate for DTCC to make these securities DTCC-eligible. Additionally, it is not clear such municipal securities are DTCC-eligible if transfer restrictions exist.⁶ If the municipal securities are not DTCC-eligible, then the municipal securities are exempt from Rule G-34(a)(ii). DTCC currently has no means to facilitate a NIIDS submission for a security that is not DTCC-eligible.

It should be noted that there are special situations which lend themselves to different treatment under the rule, as there are a number of obligations that do not meet DTCC eligibility guidelines,⁷ and there exist certain small notes issuances for which CUSIP numbers cannot be pre-applied for ahead of a competitive sale.⁸ We feel that Rule G-34 should continue to make clear that any obligations that do not meet DTCC eligibility guidelines, or for which CUSIP numbers cannot or are not required to be obtained, should be exempt from Rule G-34(a)(ii).

Draft Rule G-34 (a)(i)(A), inserts the language "which includes a placement agent" in a parenthetical after the term "underwriter." SIFMA and its members feel this language is confusing given the change to the definition of "underwriter" and should therefore be removed.

At any rate, SIFMA notes that although "underwriter" is defined in Rule G-34(e), there is no definition of "placement agent" in that section. SIFMA queries whether the term "placement agent" in this context is meant to be equivalent to a dealer in the context of Rule 144A promulgated under the Securities Act of 1933, as amended ("Securities Act"), where the placement agent/dealer acquires the bonds then transfers them to the purchaser. In this instance, the placement agent would have the information and ability to apply for DTCC eligibility and provide the required information to the NIIDS platform. This scenario is most similar to a limited offering of municipal securities.

⁶ See Depository Trust Company Operational Arrangements available at: www.dtcc.com/~media/Files/Downloads/Settlement.../operational-arrangements.pdf.

⁷ For instance, instruments with transfer restrictions, as mentioned above, and statutory installment bonds issued pursuant to Chapter 33-a of the Consolidated Laws of the New York (also referred to as the "Local Finance Law").

⁸ It may be necessary to petition the CUSIP Bureau to permit dealers and municipal advisors to request CUSIP numbers for certain small issues of notes ahead of a competitive sale.

Alternatively, if “placement agent” means placement agent akin to how that term is used in transactions under Section 4(a)(2) of the Securities Act, whereby the placement agent typically would not run the transaction through their books or otherwise take title to the instrument, then it is likely impossible for the placement agent to apply for DTCC eligibility or submit the necessary information to the NIIDS platform.

III. Exemption Necessary for Certain Private Placements of Municipal Securities

SIFMA and its members strongly urge the MSRB to provide a clear exemption from the requirements of Rule G-34 for dealers and municipal advisors in private placements, including direct purchases, of municipal securities to a bank, its affiliates or subsidiaries, or any consortium thereof. Although such an exception would not alleviate all of our concerns, it would address a discrete group of transactions for which SIFMA feels there is a clear rationale for an exemption and eliminate the need to determine for Rule G-34 purposes whether the transaction involves a security.

The MSRB states it “adopted Rule G-34 to improve efficiencies in the processing and clearance activities of the municipal securities industry, being of the view that ‘if all eligible municipal securities have CUSIP numbers assigned to and printed on them, dealers will be able to place greater reliance on the CUSIP identification of these securities in receiving, delivering, and safekeeping’ them”.

While we believe that market transparency is an important goal, it is not clear that CUSIP numbers are an appropriate solution in the private placement context. Indeed, as noted above, the Commission has proposed rules on changes to Rule 15c2-12 that would support the MSRB’s transparency goals with respect to these private placement transactions without the necessity of a CUSIP. This is especially true in the context of a private placement without a CUSIP number, which by its nature, is generally meant to be held physically and not traded.

Private placements are intended to be private transactions. Requiring placement agents to obtain CUSIP numbers for these obligations merely adds costs to the issuer with no clear benefit to the purchaser. SIFMA and its members recognize that there are benefits to obtaining CUSIP numbers for municipal securities generally, including facilitation of trading and settlement, as well as regulatory oversight and market transparency. In a private placement, it is not clear the rationale holds.

IV. Clarify Private Placements of Loans Are Exempt from CUSIP Requirement

SIFMA and its members request that the MSRB clarify that CUSIP numbers would not be required in connection with the private placement of an issuance that are loans to a municipal entity – whether or not the exemption described in Section III above was satisfied.⁹ Specifically, SIFMA and, more particularly, many of its members view obtaining a CUSIP number as inapposite to the appropriate approach when making a loan.¹⁰ Some members believe a CUSIP number is a proxy for seeking flexibility in whether or not to re-sell or at least to facilitate sale of the instrument. Thus, although the assigning of a CUSIP number to an instrument is not determinative as to whether or not an instrument is a loan or a security, the lack of a CUSIP number is seen by many market participants as bolstering loan treatment because distribution would only be possible through physical transfer of the relevant instrument.¹¹

Each dealer conducts due diligence and analysis to determine whether an obligation is a loan or a security. Dealers do not always arrive at consistent results across the industry with respect to their analysis of an obligation. The lack of specificity in the Reves¹² test, in addition to the regulatory incentives discussed below in Section VI(b), continues to lead to a lack of consistency in the categorization of obligations as loans or securities. An exemption in Rule G-34 for private placements of securities of the kind noted above avoids any issues regarding categorization of these obligations in this context.

There are a number of reasons that purchasers do not want CUSIP numbers assigned, particularly to ensure consistent accounting treatment of their loan portfolios. Purchasers apply accounting standards when determining the

⁹ E.g., in connection with a placement of a loan to a bank, its affiliates or subsidiaries, or a consortium thereof.

¹⁰ Indeed, as described below, banks and other purchasers directly purchasing an obligation from an issuer often specifically request that dealers not obtain a CUSIP number for the transaction, or cancel CUSIP numbers that are obtained for the transaction.

¹¹ We would note that it is customary for the issuer and dealer to obtain assurances from the purchaser that the purchaser has no present intent to resell the purchased instrument.

¹² Reves v. Ernst & Young, Inc., 494 U.S. 56 (1990).

appropriate treatment of debt on their books and the standards they apply, and, though generally consistent with, are not strictly based on, the Reves test.¹³

As such, SIFMA feels that the MSRB should clarify that CUSIPs are not required for private placement transactions that are loans.¹⁴

V. Requirement to Obtain New CUSIP Numbers for Secondary Market Municipal Securities

SIFMA feels that Rule G-34(b) clearly indicates when dealers must obtain a new CUSIP number with respect to secondary market municipal securities, and that further clarification is not needed. We feel that it is clearly understood in the market that mode changes in a remarketing do not require a new CUSIP number as long as the entire maturity of a particular CUSIP number changes in the same way.

SIFMA and its members do not believe further clarification is necessary of those instances when a new CUSIP number would not be required under Rule G-34(b). The eight specific information items listed in Rule G-34(a)(i)(A)(4)(a)-(h) are the appropriate items to evaluate for fungibility. Instruments in public finance have not changed such that the items to be considered should be different than those set out in Rule G-34(a)(i)(A)(4)(a)-(h).

VI. Leveling the Regulatory Playing Field for Municipal Advisors in Competitive Sales of New Issue Municipal Securities

a. Obtaining CUSIP Numbers in a Competitive Sale

Rule G-34(a) currently applies to a dealer acting as a financial advisor in a competitive sale of a new issue of municipal securities, but non-dealer municipal advisors are not subject to the requirement. As described below, SIFMA and its members see no reason for this distinction to continue. The Notice sets forth some of the efficiencies that served as the rationale for the 1986 amendments requiring

¹³ We would further note that clarification in revised Rule G-34 guidance that a transaction reasonably viewed as a loan need not obtain a CUSIP number does not specifically aid dealers or the market generally on the loan versus security analysis under Reves, but at least generally clarifies the point versus the Rule G-34 CUSIP requirement. *See also*, letter from Cristeena Naser, Vice President and Senior Counsel, American Bankers Association, to Ronald W. Smith, Corporate Secretary, MSRB, dated March 24, 2017, available at: <http://www.msrb.org/RFC/2017-05/naser1.pdf>.

¹⁴ We believe the Commission changes to Rule 15c2-12 will provide the transparency for such transactions and that a CUSIP number is therefore unnecessary to achieve such transparency in the context of a private placement.

financial advisors in a competitive sale of a new issue of municipal securities to obtain CUSIPS for the issue, primarily related to time deadlines.

Cost and efficiency are also significant factors that must be considered. Currently, if there is a dealer municipal advisor/financial advisor, then one set of CUSIP numbers are applied for, and the bidding dealers do not need to apply for their own CUSIP numbers for the issue. However, if there is a non-dealer municipal advisor assisting the issuer who is currently not required to obtain CUSIP numbers, then each bidding dealer must obtain a set of CUSIP numbers for the transaction, in case they are the winning bidder.¹⁵ Under the draft amendments, the municipal advisor for a competitive transaction, regardless of whether they are a dealer or non-dealer municipal advisor, would apply for CUSIP numbers for the issue; in this case, one set of CUSIP numbers would have been obtained for the issue. It is clear that there is a regulatory imbalance between dealer municipal advisors and non-dealer municipal advisors because non-dealer municipal advisors are not currently subject to Rule G-34(a). We do not believe there is another way to achieve the desired requirements of the draft amendments without including non-dealer municipal advisors.¹⁶

b. Regulatory Incentives

Outside of the competitive sale context, the proposed amendments implicate a combination of potential undesirable regulatory incentives and disincentives. Dealer placement agents may have a regulatory incentive to categorize obligations as municipal securities, including obtaining a CUSIP number in connection with a relevant transaction. This conservative posture would seek to avoid the regulatory risk that FINRA may view an obligation that is understood as a loan by the placement agent as a security for which the placement agent failed to comply with relevant MSRB rules.

¹⁵ A dealer who wins a competitive bid must send all of the required information to NIIDS within 2 hours of the award of the municipal securities. There is insufficient time in between the announcement of the winning bidder and the requirement to input new issue information into the DTCC's NIIDS platform to obtain CUSIP numbers for the issue. Therefore, bidding dealers need to apply for and obtain a CUSIP number or numbers prior to bidding on the transaction. There may be one bidder in a competitive transaction, or more than a dozen. The current process only increases fees for dealers with no benefit to the municipal securities market. For information on CUSIP fees, see: <https://www.cusip.com/pdf/2017FeesforCUSIPAssignment.pdf>.

¹⁶ We do note, however, that another place in the MSRB rules that distinction also exists is with respect to Rule G-32(c), which addresses the preparation and distribution of the official statement by a financial advisor. This provision should be amended to also include non-dealer advisors.

Conversely, there may be a regulatory and business incentive for non-dealer municipal advisors to view transactions as loans to avoid the risk that they may be seen as having conducted unregistered activity as a broker dealer.¹⁷

Issuers or purchasers desiring to avoid obtaining CUSIP numbers for a private placement currently might forgo working with a conscientious dealer placement agent and instead work with a non-dealer municipal advisor. This combination of incentives and disincentives may, in effect, steer private placements to non-dealer municipal advisors to avoid having to obtain a CUSIP. We feel this has an unfair effect on competition for an arbitrary and capricious reason.

VII. Conclusion

Again, SIFMA and its members agree that the clarifications and amendments clarify Rule G-34, but question the rationale for requiring placement agents to obtain CUSIP numbers. SIFMA and its members feel that there should be an exemption to Rule G-34 for private placements of municipal securities sold to a bank, its affiliates or subsidiaries, or a consortium thereof. SIFMA and its members also seek clarification from the MSRB that private placements, including direct purchases, of loans are not required to obtain CUSIP numbers.

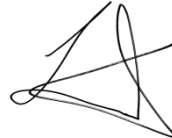
Additionally, SIFMA supports the proposed amendment that would level the regulatory playing field between dealer municipal advisors and non-dealer municipal advisors, by making all municipal advisors obtain CUSIP numbers for competitive sales of new issue municipal securities. We would be pleased to discuss any of these comments in greater detail, or to provide any other assistance that

¹⁷ See Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, SIFMA, to Mary Jo White, Chair, SEC, dated March 12, 2015 (regarding the placement agent activities of municipal advisors (the “SIFMA Placement Agent Letter”)), available at: <http://www.sifma.org/issues/item.aspx?id=8589953647>.

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
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would be helpful. If you have any questions, please do not hesitate to contact the undersigned at (212) 313-1130.

Sincerely yours,

A handwritten signature in black ink, appearing to be 'L. Norwood', written in a cursive style.

Leslie M. Norwood
Managing Director and
Associate General Counsel

cc: ***Municipal Securities Rulemaking Board***
Robert Fippinger, Chief Legal Officer
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