

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-81595; File No. SR-MSRB-2017-06)

September 13, 2017

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change to Amend MSRB Rule G-34, on CUSIP Numbers, New Issue, and Market Information Requirements

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Exchange Act” or “Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 30, 2017 the Municipal Securities Rulemaking Board (the “MSRB” or “Board”) filed with the Securities and Exchange Commission (the “SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The MSRB filed with the Commission a proposed rule change to amend MSRB Rule G-34, on CUSIP numbers, new issue, and market information requirements, (the “proposed rule change”) to more clearly express in the rule language the MSRB’s longstanding interpretation that brokers, dealers and municipal securities dealers (collectively, “dealers”) when acting as a placement agent in a private placement of municipal securities are subject to the CUSIP number requirements under Rule G-34(a); to expand the application of the rule to cover not only dealer municipal advisors but also non-dealer municipal advisors in competitive sales of municipal securities; and to provide a limited exception from the requirements to apply for CUSIP numbers

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

and to apply for depository eligibility. The MSRB requests that the proposed rule change be effective six months from the date of Commission approval.

The text of the proposed rule change is available on the MSRB's website at www.msrb.org/Rules-and-Interpretations/SEC-Filings/2017-Filings.aspx, at the MSRB's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the MSRB included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The MSRB has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

CUSIP Number Requirements Applicable to Dealers in Private Placements

In 1983, the SEC approved MSRB Rule G-34, on CUSIP numbers, new issue and market information requirements.³ The MSRB adopted Rule G-34 to improve efficiencies in the processing and clearance activities of the municipal securities industry, noting 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,

³ Exchange Act Release No. 19743 (May 9, 1983), 48 FR 21690-01 (May 13, 1983) (SR-MSRB-82-11).

delivering, and safekeeping” them.⁴ Rule G-34(a)(i) requires a dealer, whether acting as agent or principal, that acquires an issuer’s securities “for the purpose of distributing such new issue,” and a dealer acting as a financial advisor in a competitive sale of a new issue, to apply for a CUSIP number for the new issue by a particular point in time in the transaction process. The rule requires, among other things, that underwriters, and financial advisors in competitive sales, make application for a CUSIP number based on eight specified items of information about the new issue.⁵ Rule G-34(a)(i)(A)(5) addresses the obligations to update application information that has changed, for example, when the structure of an issuance changes after the CUSIP number has been assigned.

The MSRB has become aware of confusion over the application of Rule G-34(a)(i) among dealers in municipal securities. Some industry participants have questioned whether the obligation to apply for a CUSIP number pursuant to Rule G-34(a)(i) is conditioned on the

⁴ Exchange Act Release No. 18959 (Aug. 13, 1982), 47 FR 36737-03 (Aug. 23, 1982) (SR-MSRB-82-11).

⁵ These eight items are contained in current Rule G-34(a)(i)(A)(4)(a) through (h) and were part of CUSIP Service Bureau’s original standards for issuing CUSIP numbers. These items are:

- (a) complete name of issue and series designation, if any;
- (b) interest rate(s) and maturity date(s) (provided, however, that, if the interest rate is not established at the time of application, it may be provided at such time as it becomes available);
- (c) dated date;
- (d) type of issue (e.g., general obligation, limited tax or revenue);
- (e) type of revenue, if the issue is a revenue issue;
- (f) details of all redemption provisions;
- (g) the name of any company or other person in addition to the issuer obligated, directly or indirectly, with respect to the debt service on all or part of the issue (and, if part of the issue, an indication of which part); and
- (h) any distinction(s) in the security or source of payment of the debt service on the issue, and an indication of the part(s) of the issue to which such distinction(s) relate.

underwriter’s intent to conduct a distribution of the new issue, and therefore, applies only to public offerings and not private placements. The MSRB has publicly stated the view, however, that private placements of municipal securities “generally are eligible for CUSIP numbering and thus are subject to the requirements of [R]ule G-34.”⁶ Similarly, the MSRB has indicated that, unless otherwise noted, “references to ‘underwriter’ in the context of Rule G-34 are meant to include placement agents as well as dealers that purchase securities from the issuer as principal,”⁷ and that “references to ‘syndicate and selling group members’ in this context are meant to include managers of syndicates as well as sole underwriters or placement agents in non-syndicated offerings.”⁸

Despite the guidance, there have been questions in the industry regarding the application of Rule G-34(a)(i) to private placements of municipal securities, including direct purchase transactions in which a dealer acts as a placement agent.⁹ A contributing factor in the issue over

⁶ CUSIP Number Eligibility Standards and Requirements to Obtain CUSIP Numbers, MSRB Reports, Vol. 12, No. 2 (Jul. 1992) (emphasis in original). In this notice, the MSRB defined “private placement” to mean “any new issue of municipal securities that is ‘placed’ by a dealer, on an agency basis, with one or more investors.”

⁷ See Exchange Act Release No. 50773 (Dec. 1, 2004), 69 FR 70731-02 (Dec. 7, 2004) (SR-MSRB-2004-08).

⁸ Id. See also MSRB Notice 2008-28 (Jun. 27, 2008) (“Rule G-34 defines ‘underwriter’ very broadly to include a dealer acting as a placement agent . . .”). Note further that in MSRB Notice 2008-23 (May 9, 2008), the MSRB filed a proposed rule change to amend Rule G-34 to require underwriter registration and testing with DTCC’s New Issue Information Dissemination System (NIIDS). The proposed amendment required all dealers underwriting municipal securities with nine months or greater effective maturity to register to participate in NIIDS and required the dealers to successfully test NIIDS prior to acting as underwriter on a new issue of municipal securities. The MSRB noted that “underwriter” in this context was defined “very broadly to include a dealer acting as a placement agent”

⁹ When a dealer or municipal advisor works with a municipal securities issuer on a financial transaction to raise capital for the issuer, the regulated entity should have

the application of Rule G-34(a)(i) to private placements has been the definition of the term “underwriter” as it is used in the rule and the reference to “distributing” in that definition.¹⁰ Rule G-34(a)(i) defines “underwriter” as

each broker, dealer or municipal securities dealer who acquires, whether as principal or agent, a new issue of municipal securities from the issuer of such securities for the purpose of distributing such new issue.

However, other MSRB rules define underwriter by reference to Rule 15c2-12(f)(8) of the Securities Exchange Act of 1934 (“Exchange Act”),¹¹ which defines an underwriter as

reasonably designed policies and procedures in place to make a determination as to whether the transaction involves a municipal security that results in the application of MSRB rules. If the transaction is not an issuance of a municipal security (e.g., a commercial loan), there is no Rule G-34 requirement to apply for a CUSIP number. The draft amendments do not affect the necessity for this determination. The Supreme Court set forth the relevant guidance in Reves v. Ernst & Young, Inc., 494 U.S. 56 (1990), and the MSRB has reminded the industry of the requirement to conduct the appropriate analysis in an offering prior to applying for a CUSIP number. See MSRB Notice 2011-52 (Sept. 12, 2011) and MSRB Notice 2016-12 (Apr. 4, 2016) (noting that the placement of what might be referred to as a “bank loan” may, as a legal matter, involve a municipal security and therefore trigger the application of various federal securities laws, including MSRB rules such as Rule G-34).

¹⁰ The term “distributing” as used in the rule is not defined, and, based on general industry perception, market participants might interpret it to mean that the Rule G-34(a)(i) requirements apply only in public offerings and not to private placements. For example, the SEC in its explanatory comment to Rule 144 of the Securities Act of 1933, on persons deemed not to be engaged in a distribution and therefore not underwriters, noted that

A person satisfying the applicable conditions of the Rule 144 safe harbor is deemed not to be engaged in a distribution of the securities and therefore not an underwriter of the securities for purposes of [Securities Act of 1933] section 2(a)(11). Therefore, such a person is deemed not to be an underwriter when determining whether a sale is eligible for the [Securities Act of 1933] Section 4(1) exemption for ‘transactions by any person other than an issuer, underwriter, or dealer.’

Preliminary note to 17 CFR 230.144.

¹¹ 17 CFR 240.15c2-12(f)(8).

any person who has purchased from an issuer of municipal securities with a view to, or offers or sells for an issuer of municipal securities in connection with, the offering of any municipal security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; except, that such term shall not include a person whose interest is limited to a commission, concession, or allowance from an underwriter, broker, dealer, or municipal securities dealer not in excess of the usual and customary distributors' or sellers' commission, concession, or allowance.

It is well-understood that this definition of “underwriter” includes a dealer in both a public offering and a private placement of a municipal security and is therefore not limited to public distributions. Indeed, when adopting Rule 15c2-12, to ensure private placements of municipal securities were included, the SEC changed its originally proposed definition of “underwriter” to refer to “offerings” of municipal securities, as opposed to “distributions” of municipal securities. The SEC explained the reason for this change as follows:

Some commentators suggested that since the term ‘underwriter’ in the Proposed Rule was defined as a broker, dealer, or municipal securities dealer who participated in a ‘distribution’ the Commission had created an implicit private placement exception. Specifically, they noted that persons selling securities in an offering that did not involve a distribution would not be subject to the Rule. The word ‘distribution,’ which was used in the definition of “underwriter” in the Proposed Rule, has been replaced with the term ‘offering’. This change is intended to clarify that a broker, dealer or municipal securities dealer may be acting as underwriter, for purposes of the Rule, in connection with a private offering.¹²

CUSIP Number Requirements Applicable to Dealer Municipal Advisors in Competitive

Sales

¹² Exchange Act Release No. 26985 (Jun. 28, 1989), 54 FR 28799-01 (Jul. 10, 1989) (Final rule adopting Exchange Act Rule 15c2-12). The MSRB believes its prior interpretations of Rule G-34 regarding the need for CUSIP numbers in private placements of municipal securities are consistent with the SEC’s position. See e.g., CUSIP Number Eligibility Standards and Requirements to Obtain CUSIP Numbers, MSRB Reports, Vol. 12, No. 2 (Jul. 1992), Exchange Act Release No. 50773 (Dec. 1, 2004), 69 FR 70731-02 (Dec. 7, 2004) (SR-MSRB-2004-08) and MSRB Notice 2008-28 (Jun. 27, 2008).

In 1986, the MSRB amended Rule G-34(a) to require a dealer acting as a financial advisor (“dealer municipal advisor”) in a competitive sale of a new issue of municipal securities to apply for CUSIP numbers “in sufficient time to allow for assignment of a number prior to the date of award.”¹³ This application of the CUSIP number requirement only to dealer municipal advisors is largely the result of Rule G-34 pre-dating the municipal advisor regulatory regime mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act.¹⁴ Financial advisory activities are now generally defined also as municipal advisory activities, though a significant number of the now broadly defined municipal advisors are not dealers (“non-dealer municipal advisor”). As a result, non-dealer municipal advisors are not subject to the CUSIP number application requirements under the current rule, which creates the potential for regulatory inefficiencies where a non-dealer municipal advisor is retained in a competitive sale.

Proposed Amendments to Rule G-34

As set forth in more detail below, the proposed rule change would:

- Clarify the application of the CUSIP number requirements to dealers in private placements

As noted above, the MSRB is aware that, despite guidance issued in this area, there continues to be confusion and inconsistency in the application of the CUSIP number requirements under Rule G-34(a)(i). To alleviate these issues, the proposed rule change would amend paragraph (a)(i)(A) to delete the definition of “underwriter” from the rule text and would

¹³ Exchange Act Release No. 22730 (Dec. 19, 1985), 50 FR 53046-01 (Dec. 27, 1985) (SR-MSRB-85-20).

¹⁴ Pub. L. 111–203, H.R. 4173 (2010). The MSRB amended Rule G-34(a) in 1986 to apply the CUSIP requirements to dealers acting as financial advisors in competitive sales of a new issue. Exchange Act Release No. 22730 (Dec. 19, 1985), 50 FR 53046-01 (Dec. 27, 1985) (SR-MSRB-85-20).

add a new definition of “underwriter” in new section (e) on definitions. Subsection (e)(vii) would cross reference the term “underwriter” to the same term as it is defined in Exchange Act Rule 15c2-12(f)(8). This proposed rule change would codify existing interpretations and clarify in the text of the rule that dealers acting as placement agents in private placement transactions, including direct purchases of municipal securities, are subject to the CUSIP-related requirements set forth in Rule G-34(a).

- Apply the CUSIP number requirements to all municipal advisors advising on a competitive sale of municipal securities

Many non-dealer municipal advisors advise issuers with respect to competitive sales of new issues of municipal securities. As a result, Rule G-34(a)(i)(A), in its current form, may create inefficiencies in the market where a non-dealer municipal advisor is retained and yet not required to apply for a CUSIP number when advising on a competitive sale of a new issue of municipal securities. This leaves a dealer to make application only after the notification of award is given, potentially delaying related market activity.

Paragraph (a)(i)(A) would be amended to apply the CUSIP number requirements to all municipal advisors (whether dealers or non-dealers) advising on a competitive sale of a new issue of municipal securities. As noted above, in 1986, the MSRB amended Rule G-34(a)(i)(A) to require a dealer “acting as a financial advisor” in a competitive sale of a new issue to apply for CUSIP numbers so as to allow assignment of the number prior to the date of award.¹⁵ From a policy standpoint, the market efficiencies served by the 1986 amendments would also be served by these amendments because a dealer no longer would be the first party to begin the process to

¹⁵ Exchange Act Release No. 22730 (Dec. 19, 1985), 50 FR 53046-01 (Dec. 27, 1985) (SR-MSRB-85-20).

obtain the CUSIP number after the award in a competitive sale where a non-dealer municipal advisor has been engaged.

Subparagraph (a)(i)(A)(3) clarifies the timeframe within which municipal advisors advising on a competitive sale must make application for a CUSIP number. The current provision indicates that the financial advisor must make application by no later than one business day after dissemination of a notice of sale. The proposed rule change would amend that paragraph to include “or other such request for bids.” This additional language would ensure the timing of the application for a CUSIP number in those instances where a municipal advisor seeks bids in a competitive sale of municipal securities using documentation other than a traditional notice of sale.

- Provide an exception from the CUSIP number and depository eligibility requirements in certain circumstances

The MSRB understands that banks in direct purchase transactions are reluctant to engage in certain financing transactions if a CUSIP number is required. While a dealer may determine from its perspective that a transaction involves a municipal security for securities law purposes, the bank purchaser may consider the transaction to be a loan for certain banking or accounting purposes, thus making the bank less likely to engage in the financing where the new issue has a CUSIP number. As a result, dealers, on behalf of their municipal issuer clients, may be hindered in their ability to directly place municipal securities with banks and issuers may have fewer financing options or providers from which to choose.

In July 1992, the MSRB sought comment on possible exemptions from Rule G-34, including in sales of smaller issues, short-term issues and issues sold to a limited number of

customers (i.e., private placements).¹⁶ The MSRB noted that in many of these instances, CUSIP numbers are not obtained because the dealer or financial advisor believes the securities will not trade in the secondary market. While the MSRB sought comment on a possible exemption, it noted that, at the time, it “strongly believe[d] that whenever municipal securities are offered for sale in the market or must be processed through financial intermediaries, CUSIP numbers should be available to identify the securities accurately.”¹⁷

The MSRB continues to believe that obtaining CUSIP numbers is generally a necessary aspect of, for example, tracking the trading, recordkeeping, clearance and settlement, customer account transfers and safekeeping of municipal securities, including those issued in private placements. The MSRB also is of the view that the increase in the number of direct purchase transactions between municipal issuers and banks as an alternative to letters of credit and other similar types of financings supports a limited exception from the blanket requirement to apply for CUSIP numbers in all private placements.

The proposed rule change would amend Rule G-34(a)(i) to add paragraph (F). This paragraph would add an exception from the CUSIP number requirement for situations where municipal securities are purchased directly by a bank,¹⁸ any entity directly or indirectly controlled by the bank or under common control with the bank, other than a dealer registered under the Exchange Act (“non-dealer control affiliate”), or a consortium of the entities described

¹⁶ CUSIP Number Eligibility Standards and Requirements to Obtain CUSIP Numbers, MSRB Reports, Vol. 12, No. 2 (Jul. 1992).

¹⁷ Id.

¹⁸ The MSRB notes that a “bank” for purposes of the proposed exception would not include a “separately identifiable department or division” of a bank, within the meaning of Rule G-1(a).

above, and the dealer reasonably believes (based on, for example, a written representation from the purchaser) that the purchaser is purchasing the new issue of municipal securities with the present intent to hold the securities to maturity. The term “bank” in proposed new paragraph (F) would have the same meaning as set forth in Exchange Act Section 3(a)(6).¹⁹

The proposed rule change would clarify that the depository eligibility requirements of Rule G-34(a)(ii)(A) do not apply in the case of an exemption under Rule G-34(d), which exempts securities that are ineligible for CUSIP number assignment and municipal fund securities. Further, the proposed rule change would add subparagraph (a)(ii)(A)(3), providing an exception from the depository eligibility requirements in instances where the new issue is

¹⁹ MSRB Rule D-1 states:

Unless the context otherwise specifically requires, the terms used in the rules of the Municipal Securities Rulemaking Board shall have the respective meanings set forth in the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) and the rules and regulations of the Securities and Exchange Commission thereunder.

Exchange Act Section 3(a)(6) defines “bank” to mean

(A) a banking institution organized under the laws of the United States or a Federal savings association, as defined in section 2(5) of the Home Owners’ Loan Act, (B) a member bank of the Federal Reserve System, (C) any other banking institution or savings association, as defined in section 2(4) of the Home Owners’ Loan Act, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency pursuant to the first section of Public Law 87-722 (12 U.S.C. 92a), and which is supervised and examined by State or Federal authority having supervision over banks or savings associations, and which is not operated for the purpose of evading the provisions of this title, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph.

purchased directly by a bank,²⁰ a non-dealer control affiliate of a bank or a consortium thereof, and the underwriter reasonably believes, based on a written representation or otherwise, that the purchaser's present intent is to hold the municipal securities to maturity. For consistency, the proposed rule change would amend paragraph (a)(ii)(C), to clarify that the requirement to input information about a new issue into NIIDS only applies to an issue that has been made depository eligible.

- Make Technical and Non-Substantive Changes

The proposed rule change also would make technical and non-substantive amendments as follows:

- The proposed rule change would move definitions that apply generally throughout the rule into a new section (e) on definitions, and, as noted above, would add a new definition of “underwriter” in subsection (e)(vii). The terms moved into the new section (e) would be (i) auction agent; (ii) auction rate security; (iii) notification period; (iv) program dealer; (v) remarketing agent; (vi) SHORT system; (vii) underwriter; and (viii) variable rate demand obligation.
- The proposed rule change would amend the rule to make more specific references to the provision that describes information necessary for CUSIP number assignments.

Currently, the rule refers throughout to paragraph (a)(i)(A). The proposed rule change would amend these references to refer to subparagraph (a)(i)(A)(4). Similarly, references in the rule to the enumerated items to be included in a CUSIP number application would be changed from “(1) through (8)” to “(a) through (h).”

²⁰ See footnote 18, supra.

- Finally, the proposed rule change would change capitalized defined terms to lower case, as appropriate throughout the rule, and would amend references to sections, subsections, paragraphs and subparagraphs, as necessary, to be consistent with other MSRB rule formatting.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with the provisions of Section 15B(b)(2)(C) of the Act,²¹ which provides that the MSRB's rules shall:

be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act²² because the proposed rule change would remove impediments to and perfect the mechanism for a free and open municipal securities market by codifying existing interpretations and clarifying in the text of the rule that dealers acting as placement agents in private placement transactions, including direct purchases of municipal securities, are subject to the CUSIP-related requirements set forth in Rule G-34(a). In addition, the proposed rule change would help prevent fraudulent and manipulative practices, promote just and equitable principles of trade and protect investors, municipal entities, obligated persons and the public interest by ensuring that eligible municipal securities, including those issued in a private placement, have an

²¹ 15 U.S.C. 78o-4(b)(2)(C).

²² Id.

appropriate identifier assigned in order to provide market participants with greater ability to receive, deliver, and safekeep such securities. Through the MSRB's Electronic Municipal Market Access (EMMA®) System,²³ investors and other market participants would have access to initial information on their investments organized by the particular CUSIP number, as well as transparency as to transaction details if the securities do later trade in the secondary market. The availability of an exception to this requirement would eliminate impediments to and perfect the mechanism of a free and open market in municipal securities by allowing dealers and municipal advisors to provide services in certain direct purchase transactions without inhibiting their issuer clients' access to financings that otherwise might not be available if CUSIP numbers were required. In addition, the proposed rule change would remove impediments to a free and open market by requiring all municipal advisors to comply with the requirements of Rule G-34(a)(i)(A), thus encouraging consistency and efficiency in competitive sales of municipal securities and ensuring that CUSIP numbers are obtained by municipal advisors earlier in a competitive deal to allow for immediate trading upon award.

B. Self-Regulatory Organization's Statement on Burden on Competition

Section 15B(b)(2)(C) of the Exchange Act requires that MSRB rules not be designed to impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.²⁴ In accordance with the MSRB's policy on the use of economic analysis,²⁵ the MSRB has considered the economic impact associated with the proposed rule change to

²³ EMMA is a registered trademark of the MSRB.

²⁴ 15 U.S.C. 78o-4(b)(2)(C).

²⁵ Policy on the Use of Economic Analysis in MSRB Rulemaking, available at <http://msrb.org/Rules-and-Interpretations/Economic-Analysis-Policy.aspx>.

MSRB Rule G-34, including a comparison to reasonable alternative regulatory approaches, relative to the baseline.²⁶ For purposes of its analysis, the MSRB considers the baseline to be full compliance by dealers with the existing CUSIP requirement.²⁷ The MSRB does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The intent of the proposed rule change is to 1) clarify in rule text the MSRB's longstanding view that dealers acting as placement agents in private placements of municipal securities, including direct purchases, are underwriters and thus must apply for CUSIP numbers for new issues; and 2) apply the CUSIP number requirements to all municipal advisors advising on a competitive sale of municipal securities. In addition, the proposed rule change provides a principles-based exception for dealers and municipal advisors from the CUSIP number requirements and for dealers from the depository eligibility requirements in certain direct purchase transactions.

The MSRB believes the proposed rule change would reduce regulatory uncertainty for underwriters and municipal advisors with regard to the requirement to apply for CUSIP numbers. Pursuant to the proposed rule change, dealers would know with greater certainty when application for a CUSIP number is required in private placement transactions. Similarly, while in practice some non-dealer municipal advisors may be applying for CUSIP numbers in a

²⁶ As an alternative to the proposed rule change, the MSRB considered making no amendments, while its request for comment nevertheless served as a reminder of the MSRB's longstanding interpretation that dealers, when acting as a placement agent in a private placement, are required to apply for CUSIP numbers. See MSRB Regulatory Notice 2017-05.

²⁷ The MSRB is aware, however, that there is uncertainty among at least some market participants with regard to the application of the existing rule.

competitive offering before the final award is made,²⁸ the proposed rule change would ensure that this is the case, thus reducing the risk of delays in secondary market trading where a competitive offering is awarded but no CUSIP number has been assigned.

The MSRB believes that the principles-based exception from the CUSIP number requirements for dealers and municipal advisors may limit or reduce those instances where a dealer or municipal advisor may be required to apply for a CUSIP number in a direct purchase transaction. The MSRB believes that for dealers currently complying with the CUSIP number requirements in private placement transactions, the proposed rule change may lower their costs in those instances where they could rely on the proposed exception. Similarly, dealers may see a reduction in costs for municipal securities that currently are subject to the depository eligibility requirements but could now be excepted from the requirements under the proposed rule change.²⁹ As a result of the exception, there would no longer be a need to make such securities depository eligible and input information about the new issue into NIIDS.

The MSRB believes that in instances where dealers or municipal advisors can rely on the principles-based exception based on their reasonable belief that, at the time of a purchase, a purchaser intends to hold the new issue of municipal securities to maturity, there is a risk of reduced transparency if, in the future, the purchaser decides to resell the securities without a CUSIP number. This could result in information asymmetry and price dislocation with respect to the subsequent purchaser.

²⁸ By comparison, in a negotiated offering, underwriters are already established and CUSIP numbers can be assigned on a pre-trade basis before pricing.

²⁹ These municipal securities may no longer need a CUSIP number under the proposed CUSIP exception, and thus they may no longer fall under the depository eligibility requirement.

While non-dealer municipal advisors would now be required to apply for CUSIP numbers when advising in competitive sales of new issue municipal securities, the rule change per se does not necessarily impose on them the cost of applying for the CUSIP number. According to staff at CUSIP Global Services (“CUSIP Services”), typically only the winning bidder for a competitive deal is billed after the CUSIP numbers are assigned. Even though the request for a CUSIP number may have come from a municipal advisor, it is not mandatory for the party applying for the CUSIP number to be billed for the fees (unless the applicant for the CUSIP number asks to be billed).³⁰

The MSRB believes non-dealer municipal advisors, and to a much lesser extent, dealers, are likely to incur new up-front costs associated with the development of regulatory compliance policies and procedures. Some industry stakeholders³¹ provided an estimate on compliance costs in terms of the number of labor hours needed to create and apply policies and procedures to comply with the proposed rule change, including determining the applicability of proposed exceptions. The cost estimates ranged from eight to 15 hours initially to set up the policies and procedures, and up to three hours per transaction thereafter to evaluate, for example, whether the investor intended to hold the securities to maturity. The MSRB believes these estimates are high, as, for example, the determination of whether a transaction involves a municipal security should have already been made for various other purposes and is therefore part of the baseline. Even at

³⁰ According to its 2017 fee schedule, CUSIP Services charges \$173 for the first maturity, plus \$22 for each additional maturity or class per series in the same application/offering document. For example, an offering with the first maturity and ten additional maturities or classes would cost a total of \$393 (\$173 + (\$22 x 10)). See <https://www.cusip.com/pdf/2017FeesforCUSIPAssignment.pdf>.

³¹ See, infra, National Association of Municipal Advisors: Letter from Susan Gaffney, Executive Director, dated June 30, 2017 (“NAMA Letter II”); and Securities Industry and Financial Markets Association: Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, dated June 30, 2017 (“SIFMA Letter II”).

the upper bound of these estimates, these costs would be justified by the likely aggregate benefits of the proposed rule change over time, including reduced costs for some dealers who could elect not to apply for CUSIP numbers under the proposed exception.

Some industry stakeholders suggested that the MSRB should allow the use of other standard identifiers in addition to CUSIP numbers, as these commenters believed other identifiers may be easier and less costly to obtain.³² The MSRB understands commenters' concerns, but believes this issue should be considered separately from this proposed rule change. Allowing the use of other identifiers would have implications for many other MSRB rules that are beyond the scope of this particular proposal.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Summary of Comments Received in Response to the First Request for Comment

On March 1, 2017, the MSRB published a request for comment ("First RFC"), proposing draft amendments to Rule G-34.³³ The First RFC sought to 1) amend the definition of "underwriter" as it is used in Rule G-34 to clarify that dealers acting as placement agents in private placements of municipal securities, including direct purchase transactions, are "underwriters" for purposes of the rule and are required to apply for CUSIP numbers for such transactions; 2) expand the rule to require non-dealer municipal advisors also to be subject to the CUSIP number requirements when acting as an advisor in a competitive sale of a new issue; and

³² See, *infra*, Bloomberg, L.P.: Letter from Peter Warms, Senior Manager of Fixed Income, Entity, Regulatory Content and Symbology, undated ("Bloomberg Letter II").

³³ MSRB Notice 2017-05.

3) to make technical amendments as necessary. The MSRB received 20 comment letters,³⁴ most of which opposed the blanket requirement to apply for CUSIP numbers in private placements with many suggesting alternative approaches. Commenters were split on the desirability of expanding the rule to include non-dealer municipal advisors.

Clarification of the “Underwriter” Definition to Include Placement Agents

³⁴ Acacia Financial Group, Inc.: Letter from Noreen P. White, Co-President; Kim M. Whelan, Co-President, dated March 31, 2017 (“Acacia Letter I”); American Bankers Association: Letter from Cristeena G. Naser, Vice President and Senior Counsel, Center for Securities, Trust & Investment, dated March 24, 2017 (“ABA Letter I”); Bloomberg, L.P.: Letter from Peter Warms, Senior Manager of Fixed Income, Entity, Regulatory Content and Symbology, undated (“Bloomberg Letter I”); Bond Dealers of America: Letter from Mike Nicholas, Chief Executive Officer, dated March 31, 2017 (“BDA Letter I”); CUSIP Services: Letter from Scott J. Preiss, Managing Director, Global Head, dated March 30, 2017 (“CUSIP Services”); Dixworks LLC: E-mail from Dennis Dix, Jr., Principal, dated March 29, 2017 (“Dixworks”); First River Advisory L.L.C.: E-mail from Shelley Aronson, dated March 22, 2017 (“First River Advisory”); George K. Baum & Company: Letter from Guy E. Yandel, EVP & Co-Manager Public Finance; Dana L. Bjornson, EVP, CFO & Chief Compliance Officer; Andrew F. Sears, EVP & General Counsel, dated March 31, 2017 (“George K. Baum”); Government Finance Officers Association: Letter from Emily Brock, Director, Federal Liaison Center, dated March 31, 2017 (“GFOA Letter I”); National Association of Health and Educational Facilities Finance Authorities: Letter from Donna Murr, President; Martin Walke, Advocacy Committee Chair, dated March 31, 2017 (“NAHEFFA”); National Association of Municipal Advisors: Letter from Susan Gaffney, Executive Director, dated March 31, 2017 (“NAMA Letter I”); National Federation of Municipal Analysts: Letter from Julie Egan, NFMA Chair 2017; Lisa Washburn, NFMA Industry Practices and Procedures Chair, dated March 31, 2017 (“NFMA”); Opus Bank: E-mail from Dmitry Semenov, Senior Managing Director, Public Finance, dated March 15, 2017 (“Opus”); Phoenix Advisors, LLC: Letter from David B. Thompson, CEO, dated March 21, 2017 (“Phoenix Advisors”); Piper Jaffray & Co.: Letter from Frank Fairman, Managing Director, Head of Public Finance Services; Rebecca Lawrence, Managing Director, Associate General Counsel, Public Finance & Fixed Income, dated March 31, 2017 (“Piper Jaffray Letter I”); Public Financial Management, Inc. and PFM Financial Advisors: Letter from Cheryl Maddox, General Counsel; Leo Karwejna, Chief Compliance Officer, dated March 31, 2017 (“PFM Letter I”); E-mail from Rudy Salo, dated March 31, 2017; Securities Industry and Financial Markets Association: Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, dated March 31, 2017 (“SIFMA Letter I”); SMA: Email from Michael Cawley, dated March 21, 2017 (“SMA Letter I”); State of Florida, Division of Bond Finance: Letter from J. Ben Watkins III, Director, Division of Bond Finance, dated April 7, 2017 (“State of Florida”).

The majority of commenters to the First RFC opposed the MSRB’s draft amendment to Rule G-34(a)(i) that would clarify the requirement for dealers to apply for CUSIP numbers in private placements,³⁵ while one commenter explicitly supported the draft amendment.³⁶ Three commenters noted that, if the amendment to the definition of “underwriter” were adopted as proposed in the First RFC, other aspects of Rule G-34 would be implicated.³⁷ In particular, Rule G-34(a)(ii) regarding application for depository eligibility and dissemination of new issue information requires the underwriter to apply to a securities depository to make a new issue depository eligible and to communicate information about the new issue pursuant to the rule. These commenters noted that application of this part of the rule to private placements may not be appropriate. Specifically, the requirement that the underwriter apply to the Depository Trust and Clearing Corporation (“DTCC”) to make a new issue depository eligible and then input certain information into the NIIDS may not be appropriate or possible with respect to private placements. One commenter suggested that, if the MSRB adopts the revised definition of “underwriter,” it should clarify that any issuance that does not meet DTCC eligibility criteria or for which CUSIP numbers cannot or are not required to be obtained should be exempt from Rule G-34(a)(ii) requirements.³⁸

Nine commenters supported an exception from the CUSIP number requirement for private placements sold to a single purchaser or a limited number of purchasers.³⁹ One

³⁵ Acacia Letter I, ABA Letter I, BDA Letter I, First River Advisory, George K. Baum, GFOA Letter I, NAHEFFA, NAMA Letter I, Piper Jaffray Letter I, PFM Letter I, SIFMA Letter I, SMA Letter I, State of Florida.

³⁶ CUSIP Services.

³⁷ BDA Letter I, GFOA Letter I and SIFMA Letter I.

³⁸ SIFMA Letter I.

commenter noted that typical purchasers in a private placement are sophisticated financial institutions with knowledge and experience in financial matters,⁴⁰ while others noted that the draft amendment could put a damper on the bank loan and direct purchase markets and, as a result, increase costs to issuers.⁴¹

Two commenters objected to the proposed parenthetical in the draft amendment to Rule G-34(a), “. . . each broker, dealer or municipal securities dealer acting as an underwriter (which includes a placement agent) . . .” (emphasis added) and suggested it should be deleted,⁴² and four other commenters objected to the application of the CUSIP number requirement to placement agents, generally.⁴³

Some commenters stated that private placements, by their nature, should not have CUSIP numbers because they are private transactions, and others stated that not obtaining a CUSIP number ensures the municipal securities will not be resold.⁴⁴ Several commenters stated that requiring placement agents to obtain CUSIP numbers in private placements may discourage issuers from using placement agents at all.⁴⁵

³⁹ ABA Letter I, First River Advisory, George K. Baum, GFOA Letter I, NAHEFFA, NAMA Letter I, Piper Jaffray Letter I, Rudy Salo and SIFMA Letter I.

⁴⁰ George K. Baum.

⁴¹ ABA Letter I, George K. Baum, GFOA Letter I, NAHEFFA, NAMA Letter I, Piper Jaffray Letter I, Rudy Salo, SIFMA Letter I and State of Florida.

⁴² BDA Letter I and George K. Baum.

⁴³ BDA Letter I, GFOA Letter I, NAMA Letter I and NAHEFFA.

⁴⁴ BDA Letter I, First River Advisory and SIFMA Letter I.

⁴⁵ BDA Letter I, GFOA Letter I, NAMA Letter I and Piper Jaffray Letter I.

One commenter indicated that while it does not take a position on when CUSIP numbers should or should not be obtained, it would be concerned about the potential disclosure consequences in the EMMA system if the proposed amendments and clarifications would result in more bank loans, direct purchases and private placements requiring CUSIP numbers.⁴⁶ This commenter indicated that, if new CUSIP numbers are obtained for each private debt transaction of an issuer, it could result in fewer disclosure notices being posted or linked to the CUSIP numbers for affected publicly outstanding debt, thus reducing the information flow to investors. Similarly, another commenter believed private placement information should be posted on EMMA under the CUSIP numbers for an issuer's outstanding publicly-offered bonds, and not under a separate, distinct CUSIP number.⁴⁷ Other commenters noted that they would rather see enhancements to EMMA than additional requirements placed on market participants.⁴⁸

One commenter suggested that the MSRB use this opportunity to consider allowing the use of open standard identifiers for financial transactions and products in place of CUSIP numbers as a regulatory alternative to mandating that only CUSIP numbers be used.⁴⁹

Finally, two commenters urged the MSRB to make any amendment prospective, regardless of whether it is deemed a clarification to an existing rule.⁵⁰

Requirement that Non-Dealer Municipal Advisors Apply for CUSIP Numbers

⁴⁶ NFMA.

⁴⁷ First River Advisory.

⁴⁸ GFOA Letter I, NAHEFFA and State of Florida.

⁴⁹ Bloomberg Letter I.

⁵⁰ BDA Letter I and SIFMA Letter I.

Five commenters believed non-dealer municipal advisors should not be required to apply for CUSIP numbers in competitive new issues of municipal securities.⁵¹ Two commenters believed doing so would serve no useful purpose and would pose an undue burden on small municipal advisors.⁵² One commenter suggested that the better approach would be to eliminate the requirement that dealers acting as financial advisors obtain CUSIP numbers in competitive new issues and to instead require the underwriter who wins the bid to obtain the CUSIP numbers.⁵³

Four commenters supported the draft amendment to require non-dealer municipal advisors to be subject to the requirements of Rule G-34(a) with respect to competitive transactions.⁵⁴

Summary of Comments Received in Response to the Second Request for Comment

After carefully considering commenters' suggestions and concerns, on June 1, 2017, the MSRB published a second request for comment ("Second RFC").⁵⁵ The Second RFC sought further comment on the same three issues from the First RFC. However, the Second RFC also sought comment on draft amendments that would except from the CUSIP number requirements dealers and municipal advisors engaged in direct purchase transactions with a bank, its bank affiliates or a consortium of banks formed for the purpose of participating in the new issue, where the dealer or municipal advisor had a reasonable belief that the purchaser(s) of the new

⁵¹ Acacia Letter I, Dixworks, NAMA Letter I, PFM Letter I and SMA Letter I.

⁵² Dixworks and NAMA Letter I.

⁵³ Acacia Letter I.

⁵⁴ George K. Baum, GFOA Letter I, Piper Jaffray Letter I and SIFMA Letter I.

⁵⁵ MSRB Notice 2017-11 (June 1, 2017).

issue intended to hold the securities to maturity and would limit resales of the municipal securities to other banks, bank affiliates or a consortium thereof. The draft amendments in the Second RFC also sought comment on the application of this exception to the requirement for underwriters to make an application for depository eligibility under Rule G-34(a)(ii). The MSRB proposed to define “bank” as it is defined in the Exchange Act.⁵⁶ The MSRB received 16 comment letters in response to the Second RFC.⁵⁷

Limited Exception from the CUSIP Number Requirements

In response to commenters who opposed the clarification of the term “underwriter” that would result in a blanket requirement for dealers to apply for CUSIP numbers in all private placements, the MSRB proposed a limited exception from this requirement as noted above. Six

⁵⁶ See footnote 19, *supra*.

⁵⁷ Acacia Financial Group, Inc.: Letter from Noreen P. White, Co-President; Kim M. Whelan, Co-President, dated June 29, 2017 (“Acacia Letter II”); American Bankers Association: Letter from Cristeena G. Naser, Vice President and Senior Counsel, Center for Securities, Trust & Investment, dated June 30, 2017 (“ABA Letter II”); Bloomberg Letter II; Bond Dealers of America: Letter from Mike Nicholas, Chief Executive Officer, dated June 29, 2017 (“BDA Letter II”); Center for Municipal Finance: Letter from Marc D. Joffe, President, dated June 28, 2017 (“CMF”); Eastern Bank: Letter, undated (“Eastern Bank”); Fieldman Rolapp & Associates: Letter from Adam S. Bauer, Chief Executive Officer and President, dated June 30, 2017 (“Fieldman”); Government Capital Securities Corp: E-mail from Ted Christensen, dated June 1, 2017 (“GCSC”); Government Finance Officers Association: Letter from Emily Brock, Director, Federal Liaison Center, dated June 30, 2017 (“GFOA Letter II”); NAMA Letter II; New Jersey State League of Municipalities: Letter from Michael F. Cerra, Assistant Executive Director, dated June 27, 2017 (“NJLM”); Piper Jaffray & Co.: Letter from Frank Fairman, Managing Director, Head of Public Finance Services; Rebecca Lawrence, Managing Director, Associate General Counsel, Public Finance & Fixed Income, dated June 29, 2017 (“Piper Jaffray Letter II”); Public Financial Management, Inc. and PFM Financial Advisors LLC: Letter from Leo Karwejna, Chief Compliance Officer; Cheryl Maddox, General Counsel; Catherine Humphrey-Bennett, Municipal Advisory Compliance Officer, dated July 3, 2017 (“PFM Letter II”); SIFMA Letter II; Southern Municipal Advisors, Inc.: Letter from Michael C. Cawley, Senior Consultant, dated June 29, 2017 (“SMA Letter II”); Township of East Brunswick: E-mail from L. Mason Neely, dated June 2, 2017 (“East Brunswick”).

of the 16 commenters generally supported the MSRB's proposed exception.⁵⁸ GCSC specifically noted its belief that the exception would help keep issuance costs low for small issuers. GFOA noted that the exception is "a helpful step forward" but stated that without clear guidance, the draft rule will dampen the demand for bank loans and direct purchase financings and raise borrowing costs. Acacia, while supportive of the proposed exception, indicated its continued concern over the need for dealers and municipal advisors to establish policies and procedures to arrive at the "reasonable belief" conclusion.

Some commenters supported the exception but suggested an expansion of the types of purchasers that could fit within its parameters. In particular, four commenters suggested that in addition to banks, as defined in the Second RFC, the MSRB should expand the exception also to apply to local governments privately purchasing municipal securities.⁵⁹ Other commenters suggested that the exception be expanded to include non-dealer subsidiaries of banks or bank holding companies⁶⁰ or any entity directly or indirectly controlled by the purchasing bank or under common control with the bank, or a consortium of such entities, other than a broker-dealer registered with the SEC pursuant to the Exchange Act.⁶¹ In addition, the ABA suggested that the draft rule should require the purchasers of the municipal securities to represent that the securities are being purchased for their own account without an intention to resell them, while SIFMA proposed that the dealer or municipal advisor have a reasonable belief that this is the case. Both

⁵⁸ Acacia Letter II, ABA Letter II, BDA Letter II, GCSC; Piper Jaffray Letter II and SIFMA Letter II.

⁵⁹ GFOA Letter II, NAMA Letter II, NJLM and East Brunswick.

⁶⁰ Piper Jaffray Letter II.

⁶¹ ABA Letter II and SIFMA Letter II.

the ABA and SIFMA proposed that any resales would be limited to qualified institutional buyers as defined in Rule 144A of the Securities Act of 1933 (“Securities Act”) or an “accredited investor” as defined in Rule 501 of Regulation D under the Securities Act.

The ABA emphasized that many banks use bank holding company affiliates to provide municipal funding and the majority of these funding subsidiaries are non-bank entities. BDA similarly asked that further clarification be given to confirm that the exception would apply where a bank negotiates the purchase but the actual purchaser is a non-bank affiliate, and where there is more than one bank purchasing in a transaction.

Several commenters suggested that the principles-based exception needs further clarification. Specifically, three commenters believed additional language should be added to require the investor to represent its intention to hold the securities to maturity and limit resales.⁶² Similarly, SIFMA requested clarification of the type of documentation underwriters or municipal advisors would need to produce in an exam with FINRA or the SEC in order to show compliance with the rule.

Two commenters opposed the exception.⁶³ CMF noted that by requiring alternative debt instruments to have security identifiers, the MSRB is promoting public awareness that issuers are taking on additional obligations. However, according to CMF, allowing such an exception for instruments not expected to trade in the secondary market is inconsistent with this transparency objective. PFM opposed the draft rule change entirely, and noted that the proposed exception cannot be supported without much needed regulatory guidance. In particular, PFM believed regulatory guidance must be provided with respect to the “indicia of the required ‘reasonable

⁶² ABA Letter II, GFOA Letter II and NAMA Letter II.

⁶³ CMF and PFM Letter II.

belief” to include much more prescriptive detail. In addition, PFM believed the MSRB should withdraw any efforts to amend Rule G-34 until the SEC’s proposed amendments to Exchange Act Rule 15c2-12 are completed. PFM noted that changes to the disclosure requirements under Rule 15c2-12 would provide a foundation for any action the MSRB might take with respect to Rule G-34. Finally, GFOA indicated that, if certain clarifications cannot be made regarding compliance with the draft rule changes, the MSRB should continue investing in enhancing the EMMA system.

Upon consideration of the comments received in response to the Second RFC, the MSRB is proposing an expanded exception to include purchasers that are non-dealer control affiliates of a bank. Based on comments received, the MSRB understands that in many direct purchase transactions there may be business reasons to hold a new issue municipal security in an affiliated entity that is not a bank. The MSRB further agrees that the exception should not be available if the entity purchasing or holding the municipal security is a dealer affiliate. With respect to expanding the exception to include local governments purchasing municipal securities, the MSRB understands that in these scenarios the transactions are negotiated directly between the two parties, without the involvement of an underwriter. As a result, the CUSIP number requirements of Rule G-34(a)(i) would not apply and the need to expand the exception to include these scenarios is unnecessary.

In addition, the proposed exception would require the dealer to have a reasonable belief that the purchaser is purchasing with a present intent to hold the securities to maturity. Commenters asked for a more prescriptive requirement as to how one would show a reasonable belief. However, the MSRB believes dealers should determine the best way to make such a determination based on their particular business and practices. The determination could be made

based upon, for example, a representation from the purchaser, though obtaining a representation is not required. Indeed, as a general matter, the proposed rule would not dictate the way in which a dealer must arrive at the “reasonable belief.” In addition, the proposed rule would not include language in the exception that would require a dealer or municipal advisor to draw conclusions regarding the circumstances of the purchaser’s possible resales in the future, if the purchaser’s present intent were to change. The MSRB believes that the dealer’s reasonable belief as to the present intent of the purchaser is adequate and that the circumstances of any subsequent resales would be outside the scope of the dealer’s analysis surrounding the initial sale of the new issue securities.

Requirement that Non-Dealer Municipal Advisors Apply for CUSIP Numbers

In the Second RFC, the MSRB proposed draft amendments that generally would require all municipal advisors in competitive new issues to apply for CUSIP numbers. Reference to “competitive offering” was meant to refer to competitive offerings in a typical public distribution of municipal securities. However, the MSRB noted its understanding that there are direct purchase scenarios in which the municipal advisor arranges competitive bids from, for example, three banks competing for a direct purchase. In circumstances like those, the MSRB indicated that the security purchased by the winning direct purchaser may not require a CUSIP number if the municipal advisor, like the dealer placement agent described above in a direct purchase by a bank, could make a principled determination that trading is unlikely and, thus, CUSIP numbers are not necessary. The Second RFC proposed draft amendments that would allow a municipal advisor to rely on the exception from the CUSIP number requirement if the conditions were met.

Five commenters believed Rule G-34 should not apply to any municipal advisors and that the obligation to obtain a CUSIP number should rest solely with the underwriter.⁶⁴ Acacia and NAMA stated that while not every competitive sale has a municipal advisor, they each do have an underwriter and thus, for consistency, it makes sense that the underwriter would obtain the CUSIP number. In addition, NAMA stated that a municipal advisor does not have an interface with the investor prior to the completion of the competitive sale process and by making a determination regarding the investor's intentions to hold or sell a security, in addition to considering whether an instrument is in fact a security, the municipal advisor might be engaging in broker-dealer activity. According to NAMA, there is no benefit to municipal advisory clients or municipal advisors by requiring municipal advisors to obtain CUSIP numbers. Similarly, SMA stated that obtaining a CUSIP number is an underwriter's responsibility and the imbalance between dealer municipal advisors and non-dealer municipal advisors is justified by the differing roles they play in the market. PFM stated that applying for a CUSIP number is activity outside of the municipal advisor's responsibility and "epitomizes traditional broker-dealer type activity."

Two commenters indicated that the costs on non-dealer municipal advisors of complying with the proposed obligations, including creating and implementing policies and procedures, would be problematic and create a new regulatory burden.⁶⁵ Finally, one commenter noted concern that for a municipal advisor to obtain a CUSIP number in a competitive sale, it must make certain assumptions about the final bond structure or know the preferred structure of the eventual purchaser.⁶⁶

⁶⁴ Acacia Letter II, Fieldman, NAMA Letter II, PFM Letter II and SMA Letter II.

⁶⁵ Acacia Letter II and NAMA Letter II.

⁶⁶ Fieldman.

Three commenters supported the MSRB's efforts to address any potential regulatory inefficiencies between dealer and non-dealer municipal advisors.⁶⁷ SIFMA noted that, if there is a non-dealer municipal advisor assisting an issuer who is currently not required to obtain a CUSIP number, then each bidding dealer in a competitive sale must obtain a set of CUSIP numbers for the transaction, in case they are the winning bidder. Obtaining the CUSIP number before a dealer is selected is necessary, according to SIFMA, because of the subsequent timing requirements related to inputting information into NIIDS. SIFMA believed it is more efficient for a single municipal advisor to an issuer to obtain CUSIP numbers than for several dealers competing for a sale to obtain CUSIP numbers knowing that all but one dealer will need to cancel the request.

The MSRB believes the policy reasons to require dealer municipal advisors to apply for CUSIP numbers in competitive sales of new issue securities are just as applicable to non-dealer municipal advisors. Further, removing the municipal advisor (whether dealer or non-dealer) altogether from the requirement could result in trading delays where the winning dealer in a competitive transaction applies for the CUSIP number after the award is made. In the alternative, removal of dealer municipal advisors from the requirement could result in inefficiencies where multiple dealers apply for CUSIP numbers for the same transaction before the award is made and subsequently cancel them if they are not selected as the winning dealer. The proposed rule change therefore would require municipal advisors, both dealer and non-dealer alike, to apply for CUSIP numbers for new issue securities when advising on a competitive sale of such new issue securities. This ensures efficiencies in the market by requiring CUSIP numbers to be assigned prior to the award of the issue in a competitive sale where a municipal advisor is retained. Where

⁶⁷ BDA Letter II; Piper Jaffray Letter II and SIFMA Letter II.

the competitive sale might result in a direct purchase by a bank, its non-dealer control affiliates or a consortium thereof, the municipal advisor may determine not to obtain a CUSIP number if it reasonably believes the purchaser's present intent is to hold the municipal securities to maturity. If the structure of the transaction changes after a municipal advisor has applied for the CUSIP number, Rule G-34(a)(i)(A)(5) requires that the information provided in the CUSIP number application be updated as soon as it is known, but in any event, no later than a time sufficient to ensure CUSIP number assignment occurs prior to dissemination of the time of first execution. The MSRB would expect the regulated entity that originally applied for the CUSIP number to comply with Rule G-34(a)(i)(A)(5) to correct any CUSIP number information inconsistencies.⁶⁸

Other Comments

Three commenters expressed their view that the MSRB should not require the use of a proprietary, for-profit identifier such as CUSIP.⁶⁹ These commenters believed that the rule should include the ability of an underwriter or municipal advisor to use any identification number widely accepted in the municipal securities market. BDA stated that by specifically referring to CUSIP numbers, the MSRB is stifling competition in the area. Bloomberg suggested that the MSRB add "or other standard identifier" to the CUSIP number references in the rule.

The MSRB understands commenters' concerns with respect to this issue, but, because this issue arises in numerous other contexts, believes it should be considered separately from this initiative, which is focused on only one MSRB rule. The MSRB notes that it is currently monitoring or involved in various industry initiatives to modernize identifiers.

⁶⁸ See Exchange Act Release No. 57131 (January 11, 2008), 73 FR 3295 (January 17, 2008) (SR-MSRB-2007-08) and MSRB Notice 2007-10.

⁶⁹ Bloomberg Letter II; BDA Letter II and CMF.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period of up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove such proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-MSRB-2017-06 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

All submissions should refer to File Number SR-MSRB-2017-06. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of

the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 am and 3:00 pm. Copies of the filing also will be available for inspection and copying at the principal office of the MSRB. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MSRB-2017-06 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, pursuant to delegated authority.⁷⁰

Eduardo A. Aleman
Assistant Secretary

⁷⁰ 17 CFR 200.30-3(a)(12).