

Bond Case Briefs

Municipal Finance Law Since 1971

Dealers, Issuers, Advisors Call for Changes to CUSIP Proposal.

PHOENIX - Municipal market participants are asking the Securities and Exchange Commission to reject at least parts of a Municipal Securities Rulemaking Board proposal to codify that dealers are required to obtain CUSIP numbers for new issue securities sold in private placement transactions.

Trade groups representing dealers, municipal advisors, issuers, banks, and individual firms weighed in on the proposal in comment letters to the SEC this week.

CUSIP numbers are used to identify securities, and one is assigned to each maturity of a municipal issuance. The MSRB said when it proposed the change to its Rule G-34 that it has always considered it a requirement for dealers to acquire CUSIPS when acting as placement agents, and is trying to clarify that.

Dealers have contended that such a requirement is new.

The MSRB is also proposing to require that non-dealer municipal advisors be subject to the CUSIP requirement for new issue securities that are sold in a competitive offering. Although the MSRB made some tweaks to the proposal during its own comment process, commenters still told the SEC that they see serious problems with it.

The Securities Industry and Financial Markets Association asked the SEC not to approve the proposal, which SIFMA believes would expand G-34 beyond its intent, since dealers acting as placement agents do not “acquire” securities as underwriters do. Dealers have always interpreted G-34 as not requiring CUSIPS if a dealer does not acquire a new issue in a transaction that is not a distribution.

“SIFMA questions the expressed rationale for the MSRB’s proposed rulemaking, as the sole purpose for the original proposal to adopt Rule G-34 was merely to facilitate clearance and settlement of municipal securities; not to define the term ‘underwriter,’” wrote SIFMA managing director and associate general counsel Leslie Norwood.

Norwood also told the Bond Buyer that SIFMA would like the SEC to confirm that there would be no retroactive enforcement of this rule change for transactions that already occurred.

Some commenters told the SEC that they see problems with the proposal’s exception to the CUSIP requirement. Under the exception, CUSIP numbers are not needed for direct purchases by banks, their non-dealer control affiliates and consortiums, where the dealer or municipal advisor reasonably believes the purchaser’s intent is to hold the securities to maturity. SIFMA, the National Association of Municipal Advisors, Government Finance Officers Association, and American Bankers Association all characterized that language as impractical. Munis may have 20- or 30-year maturities commenters pointed out, and usually feature a much earlier call provision.

“We are concerned that the investor will not express present intent to hold the securities ‘until

maturity' as required by the proposal, and therefore will be deterred from purchasing the security," wrote Emily Brock, director of the GFOA's Federal Liaison Center.

"The terms 'reasonably believe' and 'is likely' are very open to different interpretations and should be further clarified within the rule to allow for MAs and underwriters to use the same standard in all transactions," wrote Susan Gaffney, executive director of NAMA.

Cristeena Naser, vice president and senior counsel at the American Bankers Association's Center for Securities, Trust & Investment, told the SEC it should consider an alternate wording to the exception language that the ABA had discussed with the MSRB.

"The language ABA proffered for the exception included a representation that the municipal securities are being purchased for the purchaser's own account, with no present intent to sell or distribute the municipal securities," wrote Naser. "This language reflects the realities of direct purchase transactions and, critically, that there is no intent that the securities will enter the public market."

The GFOA said in its letter that the SEC should heed the ABA's suggestion. Both the GFOA and SIFMA also commented that the SEC should expand the exception to include purchases by local governments and not just banks.

Muni advisors told the SEC that they object to being required to obtain CUSIPs, a task they view as outside the role of an MA.

"NAMA's position is that no MAs - broker/dealer or independent - should be responsible for securing CUSIPs in competitive deals," Gaffney wrote. "Rather, the underwriter should be the party responsible for obtaining CUSIPs, as they assist with the selling and trading of securities."

Steve Apfelbacher, president of muni advisory firm Ehlers and a former MSRB board member, told the SEC that the proposal would be asking MAs to act outside their roles, potentially inviting controversy as to whether they would be operating in some cases as unlicensed broker-dealers.

"Requiring the municipal advisor to have a conversation with the purchasing entity about the intent of the purchasing entity is a conversation that crosses the line and is an underwriter activity," Apfelbacher wrote. "Once that line is crossed, why are other transaction related conversations between the purchaser and municipal advisor not allowed?"

The SEC could choose to approve the MSRB proposal as written, or it could reject it. If the SEC does not approve the proposal, the MSRB could choose to make changes to it and re-submit it.

By Kyle Glazier

BY SOURCEMEDIA | MUNICIPAL | 10/12/17 07:25 PM EDT