

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82321; File No. SR–MSRB–2017–06]

### Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, Consisting of Proposed Amendments to MSRB Rule G–34, on CUSIP Numbers, New Issue, and Market Information Requirements

December 14, 2017.

#### I. Introduction

On August 30, 2017, the Municipal Securities Rulemaking Board (the “MSRB” or “Board”) filed with the Securities and Exchange Commission (the “SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”)<sup>1</sup> and Rule 19b–4 thereunder,<sup>2</sup> a proposed rule change consisting of proposed amendments to MSRB Rule G–34, on CUSIP numbers, new issue, and market information requirements, 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 and to apply for depository eligibility (the “proposed rule change”). The proposed rule change was published for comment in the *Federal Register* on September 18, 2017.<sup>3</sup>

The Commission received eleven comment letters on the proposed rule change.<sup>4</sup> On October 18, 2017, the

MSRB granted an extension of time for the Commission to act on the filing until December 15, 2017. On November 7, 2017, the MSRB responded to those comments<sup>5</sup> and filed Amendment No. 1 to the proposed rule change (“Amendment No. 1”).<sup>6</sup> The Commission published notice of Amendment No. 1 in the *Federal Register* on November 17, 2017.<sup>7</sup> In response to Amendment No. 1, the Commission received two comment letters.<sup>8</sup> On December 8, 2017, the MSRB submitted a response to comments received on Amendment No. 1.<sup>9</sup> This order approves the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

Co-President, and Kim W. Whelan, Co-President, Acacia Financial Group, Inc., dated October 10, 2017 (the “Acacia Letter”); Letter to Secretary, Commission, from Cristeena G. Naser, Vice President and Senior Counsel, American Bankers Association (“ABA”), dated October 10, 2017 (the “First ABA Letter”); Letter to Secretary, Commission, from Michael G. Sudsina, President, Sudsina & Associates, LLC, dated October 10, 2017 (the “Sudsina Letter”); Letter to Secretary, Commission, from Marianne F. Edmonds, Senior Managing Director, Public Resources Advisory Group (“PRAG”), dated October 10, 2017 (the “PRAG Letter”); Letter to Secretary, Commission, from Emily Swenson Brock, Director, Federal Liaison Center, Government Finance Officers Association (“GFOA”), dated October 10, 2017 (the “GFOA Letter”); Letter to Secretary, Commission, from Peter Warms, Senior Manager of Fixed Income, Entity, Regulatory Content and Symbology, Bloomberg L.P., dated October 10, 2017 (the “Bloomberg Letter”); Letter to Secretary, Commission, from Dennis Dix, Principal, DIXWORKS LLC, dated October 10, 2017 (the “DIXWORKS Letter”); Letter to Secretary, Commission, from Stephan Wolf, CEO, Global Legal Entity Identifier Foundation (“GLEIF”), dated October 9, 2017 (the “GLEIF Letter”). Staff from the Office of Municipal Securities discussed the proposed rule change with representatives from PFM Financial Advisors LLC and PFM Asset Management LLC on October 26, 2017.

<sup>5</sup> See Letter to Secretary, Commission, from Margaret R. Blake, Associate General Counsel, MSRB, dated November 7, 2017 (the “November Response Letter”), available at <https://www.sec.gov/comments/sr-msrb-2017-06/msrb201706-2674227-161458.pdf>.

<sup>6</sup> *Id.* Amendment No. 1 is available at <http://www.msrb.org/~media/Files/SEC-Filings/2017/MSRB-2017-06-A-1.ashx>.

<sup>7</sup> See Exchange Act Release No. 82053 (Nov. 13, 2017), 82 FR 54455 (Nov. 17, 2017) (the “Notice of Amendment No. 1”). The comment period closed on December 1, 2017.

<sup>8</sup> See Letter to Secretary, Commission, from Tab Stewart, Senior Counsel, ABA, dated November 30, 2017 (the “Second ABA Letter”); and Letter to Secretary, Commission, Leslie M. Norwood, Managing Director and Associate General Counsel, SIFMA, dated December 1, 2017 (the “Second SIFMA Letter”).

<sup>9</sup> See Letter to Secretary, Commission, from Margaret R. Blake, Associate General Counsel, MSRB, dated December 8, 2017 (the “December Response Letter” and, together with the November Response Letter, the “MSRB Response Letters”), available at <https://www.sec.gov/comments/sr-msrb-2017-06/msrb201706-2779641-161626.pdf>.

#### II. Description of Proposed Rule Change

As described more fully in the Notice of Filing and Amendment No.1, the MSRB stated that the purpose of the proposed rule change is to: Clarify the application of the CUSIP number requirements to dealers in private placements; apply the CUSIP number requirements to all municipal advisors advising on a competitive sale of municipal securities; provide an exception from the CUSIP number and depository eligibility requirements in certain circumstances; and make certain technical and non-substantive changes.<sup>10</sup>

The MSRB stated that proposed rule change would amend Rule G–34(a)(i)(A) to delete the definition of “underwriter” from the rule text and would add a new definition of “underwriter” in new section (e), on definitions. New subsection (e)(vii) of Rule G–34 would cross reference the term “underwriter” to the same term as it is defined in Exchange Act Rule 15c2–12(f)(8).<sup>11</sup> The MSRB stated that 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).<sup>12</sup>

The MSRB stated that paragraph (a)(i)(A) of Rule G–34 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.<sup>13</sup> The MSRB noted that, 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.<sup>14</sup> The MSRB stated that, from a policy standpoint, the market efficiencies served by the 1986 amendments also would be served by these amendments because a dealer no longer would be the first party to begin the process to obtain the CUSIP number where a non-dealer municipal advisor has been engaged.<sup>15</sup>

The proposed rule change would amend subparagraph (a)(i)(A)(3) of Rule G–34 which clarifies the timeframe within which municipal advisors

<sup>10</sup> See Notice of Filing and Amendment No. 1.

<sup>11</sup> See Notice of Filing.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b–4.

<sup>3</sup> Securities Exchange Act Release No. 81595 (September 13, 2017) (the “Notice of Filing”), 82 FR 43587 (September 18, 2017).

<sup>4</sup> See Letter to Secretary, Commission, from Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (“SIFMA”), dated October 10, 2017 (the “First SIFMA Letter”); Letter to Secretary, Commission, from Susan Gaffney, Executive Director, National Association of Municipal Advisors (“NAMA”), dated October 10, 2017 (the “NAMA Letter”); Letter to Secretary, Commission, from Steve Apfelbacher, President, Ehlers Inc., dated October 10, 2017 (the “Ehlers Letter”); Letter to Secretary, Commission, from Noreen P. White,

advising on a competitive sale must make application for a CUSIP number.<sup>16</sup> The MSRB stated that 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.<sup>17</sup> The proposed rule change would amend subparagraph (a)(i)(A)(3) of Rule G–34 to include “or other such request for bids.” The MSRB stated that the additional language added by the proposed rule change 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.<sup>18</sup>

The proposed rule change, as modified by Amendment No. 1, would amend Rule G–34(a)(i) to add paragraph (F), to add an exception from the CUSIP number requirement for situations where municipal securities are purchased directly by a bank,<sup>19</sup> 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 above, or by a municipal entity with funds that are, at least in part, proceeds of, or fully or partially secure or pay, the purchasing entity’s issue of municipal obligations (e.g., state revolving fund or bond bank), if the dealer or municipal advisor 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 or earlier redemption or mandatory tender.<sup>20</sup> The term “bank” in proposed new paragraph (F) would have the same meaning as set forth in Exchange Act Section 3(a)(6).<sup>21</sup> The MSRB stated that it believes 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.<sup>22</sup> The MSRB also stated that it 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.<sup>23</sup> Also, the MSRB stated that it believes that, where a municipal entity is purchasing municipal securities using funds that are at least in part proceeds of that purchasing entity’s issuance of other municipal obligations, or where the municipal securities being purchased are used to fully or partially secure or pay the purchasing entity’s issue of municipal obligations, there is a strong expectation that the underlying municipal securities purchased are intended to be held and not traded in the secondary market.<sup>24</sup> As with the exception for dealers (or municipal advisors in a competitive sale) engaging in direct purchase transactions of new issue municipal securities to banks, the MSRB believes that requiring a CUSIP number in these scenarios would not serve the purposes of Rule G–34 to, among other things, improve efficiencies in the processing, receiving, delivering and safekeeping of municipal securities.<sup>25</sup>

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.<sup>26</sup> 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 purchased directly by a bank, any entity directly or indirectly controlled by the bank or under common control with the bank, other than a broker, dealer or municipal securities dealer registered under the Exchange Act, or a consortium of such entities; or by a municipal entity with funds that are, at least in part, proceeds of, or fully or partially secure or pay, the purchasing entity’s issue of municipal obligations (e.g., state revolving fund or bond bank), from an issuer in which an underwriter reasonably believes (e.g., by obtaining a written representation) that the present intent of the purchasing entity or entities is to hold the municipal securities to maturity or earlier redemption or mandatory tender.<sup>27</sup> The MSRB stated that, 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 DTCC’s New Issue Information Dissemination Service only applies to an issue that has been made depository eligible.<sup>28</sup>

The MSRB stated that the proposed rule change also would make technical and non-substantive amendments as follows:<sup>29</sup>

- 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).”

- 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.

The MSRB requested that the proposed rule change be effective six months from the date of Commission approval and is requesting accelerated approval of Amendment No. 1.<sup>30</sup>

### III. Summary of Comments Received and MSRB’s Responses to Comments

As noted previously, the Commission received eleven comment letters in response to the Notice of Filing and two comment letters in response to Amendment No. 1. The MSRB responded to the comment letters on the Notice of Filing in its November Response Letter,<sup>31</sup> and the MSRB responded to the comment letters on

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> The MSRB noted 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 MSRB Rule G–1(a).

<sup>20</sup> See Notice of Filing and Amendment No. 1.

<sup>21</sup> See Notice of Filing.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See Amendment No. 1.

<sup>25</sup> *Id.*

<sup>26</sup> See Notice of Filing.

<sup>27</sup> See Notice of Filing and Amendment No. 1.

<sup>28</sup> See Notice of Filing.

<sup>29</sup> *Id.*

<sup>30</sup> See Notice of Filing and Amendment No. 1.

<sup>31</sup> See November Response Letter.

Amendment No. 1 in its December Response Letter.<sup>32</sup>

#### A. Application of CUSIP Number Requirements to All Municipal Advisors

In response to the Notice of Filing, six commenters opposed requiring municipal advisors in competitive sales to apply for CUSIP numbers, and instead suggested dealers, in all instances, should bear the responsibility of obtaining a CUSIP number for new issue municipal securities.<sup>33</sup> Commenters indicated that removing the obligation for the municipal advisor to obtain a CUSIP number would result in a more efficient process and consistent expectations because the CUSIP numbers would always be obtained by the dealer in all relevant transactions.<sup>34</sup> Some commenters indicated that imposing the CUSIP number requirement on non-dealer municipal advisors would not increase transparency or efficiencies or serve a useful purpose, and instead would pose an undue burden on independent municipal advisors.<sup>35</sup> One commenter stated that the costs to non-dealer municipal advisors to comply with the proposed rule change were not addressed in the MSRB's economic analysis.<sup>36</sup>

The MSRB stated that the policy reason for initially adopting a requirement for financial advisors to apply for CUSIP numbers in competitive sales of new issue municipal securities was meant to provide for assignment of a CUSIP number prior to the award date of the sale.<sup>37</sup> The MSRB noted that this policy reason continues to apply where a municipal advisor is retained because in such a scenario, the winning dealer would no longer be the first party to begin the process of obtaining a CUSIP number after the award has been made in a competitive sale.<sup>38</sup> Several commenters indicated their understanding that the practice of obtaining a CUSIP number in competitive sales only applies where a municipal advisor is engaged. Commenters noted that this practice would make municipal entities less likely to retain municipal advisors in such transactions and indicated that the MSRB should clarify who is responsible

for obtaining CUSIP numbers when a municipal advisor is not retained. The MSRB noted that Rule G-34(a)(i)(A)(2) requires underwriters in a competitive sale to obtain CUSIP numbers where no CUSIP number has been pre-assigned.<sup>39</sup> The MSRB further noted that because the CUSIP numbers would have been applied for earlier in the process, this facilitates the ability to trade in the new issue immediately upon award.<sup>40</sup>

The MSRB stated that while it appreciates commenters' views that the dealer, in all instances, should be required to apply for the CUSIP number, it believes this arrangement could have unintended results in the market.<sup>41</sup> The MSRB stated that under the current rule, where an issuer in a competitive sale of municipal securities engages a non-dealer municipal advisor and does not engage a dealer, there is no party responsible for applying for CUSIP numbers.<sup>42</sup> Similarly, the MSRB noted, if the responsibility to apply for CUSIP numbers were placed only on dealers, as commenters suggested, issuers choosing to engage only a municipal advisor in a competitive sale would find themselves in a situation where no party is responsible for applying for CUSIP numbers on the new issue.<sup>43</sup> The MSRB stated that across the market, there potentially would be a universe of new issue municipal securities being issued without CUSIP numbers assigned.<sup>44</sup> The MSRB stated that by requiring all municipal advisors in a competitive sale to apply for CUSIP numbers, and dealers in a competitive sale to apply for CUSIP numbers where none have been pre-assigned, Rule G-34 ensures that all new issue municipal securities in a competitive sale where a dealer or municipal advisor is engaged, other than those falling within the proposed principles-based exception, have CUSIP numbers assigned as early as possible in the issuance process.<sup>45</sup> The MSRB stated that it previously considered the impact of the new requirement on non-dealer municipal advisors and concluded that, while non-dealer municipal advisors are likely to incur up-front costs associated with development of regulatory compliance policies and procedures to address the new requirements, the costs would be justified by the likely aggregate benefits of the proposed rule change over time.<sup>46</sup>

The MSRB stated that it continues to believe that expanding the requirements of Rule G-34 to apply to all municipal advisors in competitive sales of new issue municipal securities will encourage uniformity and efficiency in competitive sales of municipal securities by ensuring that CUSIP numbers are obtained consistently and earlier in the process so as to allow for immediate trading upon award.<sup>47</sup>

#### B. Municipal Advisor Engaging in Broker-Dealer Activity

In response to the Notice of Filing, commenters noted their concern about the proposed requirement that a municipal advisor relying on the principles-based exception in a competitive transaction must have a reasonable belief as to the purchaser's present intent. These commenters indicated that when a municipal advisor interacts with investors, for example, to obtain their present intent, the municipal advisor may be viewed as engaging in broker-dealer activity.<sup>48</sup> One commenter indicated that requiring municipal advisors to apply for CUSIP numbers promotes violations of the Exchange Act by requiring municipal advisors to act in a manner that may be viewed as broker-dealer activity.<sup>49</sup>

The MSRB stated that it appreciates the commenters concerns and understands that determining whether an activity may be deemed broker-dealer in nature is a facts and circumstances analysis that must be closely considered.<sup>50</sup> The MSRB stated that, when drafting the proposed rule change, it purposefully proposed a principles-based exception to allow dealers and municipal advisors alike to establish policies and procedures consistent with their relevant business activities.<sup>51</sup> The MSRB stated that it is not suggesting that a municipal advisor engage in any activity that could be viewed as broker-dealer in nature, but rather that the municipal advisor develop a process for reaching a reasonable belief as to an investor's present intent consistent with the municipal advisor's allowable business activities.<sup>52</sup> Thus, the MSRB stated, in the proposed rule change, the MSRB suggested looking to a written representation from the purchaser as just one example for determining the purchaser's present intent.<sup>53</sup> The MSRB

<sup>32</sup> See December Response Letter.

<sup>33</sup> See Acacia Letter; DIXWORKS Letter, Ehlers Letter; NAMA Letter; PRAG Letter and Sudsina Letter.

<sup>34</sup> See Acacia Letter; Ehlers Letter; NAMA Letter; PRAG Letter; Sudsina Letter.

<sup>35</sup> See Acacia Letter; DIXWORKS Letter; NAMA Letter; PRAG Letter and Sudsina Letter.

<sup>36</sup> See NAMA Letter.

<sup>37</sup> See November Response Letter.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See Acacia Letter; DIXWORKS Letter; NAMA Letter and Sudsina Letter.

<sup>49</sup> See NAMA Letter.

<sup>50</sup> See November Response Letter.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

stated that it believes that by creating a principles-based exception, municipal advisors (and dealers) relying thereon are free to define the process by which they reach a reasonable belief regarding a purchaser's present intent.<sup>54</sup> The MSRB also noted that in addition to reviewing a written representation, this could include, for example, reviewing transaction documentation without interacting with the purchaser.<sup>55</sup> The MSRB also stated that the proposed rule change is not intended to require or encourage municipal advisors to engage in activity they deem outside the scope of their allowed activities.<sup>56</sup>

### C. Present Intent to Hold

In response to the Notice of Filing, several commenters indicated that the principles-based exception in the original proposed rule change did not accurately reflect the fundamental workings of the direct purchase market.<sup>57</sup> Specifically, according to commenters, the requirement in the principles-based exception that the dealer (or municipal advisor in a competitive sale) have a reasonable belief that the purchaser is purchasing the municipal securities with the "present intent to hold the securities to maturity" does not take into account those scenarios where the transaction documentation provides for an earlier call provision to permit a refinancing or other restructuring. Commenters suggested revising the proposed language to account for this common practice. In consideration of such commenters' suggestions, the MSRB filed Amendment No. 1, which makes amendments to Rule G-34(a)(i)(F) to reflect the suggested changes.<sup>58</sup> In particular, the MSRB stated that Amendment No. 1 would require the dealer (or municipal advisor in a competitive sale) relying on the principles-based exception to have a reasonable belief that the purchaser is purchasing the municipal securities with the "present intent to hold the securities to maturity or earlier redemption or mandatory tender."<sup>59</sup> The MSRB stated that it believes Amendment No. 1 more accurately reflects the terms of direct purchase transactions and as a result creates a more useful exception.<sup>60</sup> The MSRB also stated that, for consistency,

Amendment No. 1 would make the same amendment to the proposed principles-based exception for dealers from the depository eligibility requirements in Rule G-34(a)(ii)(A)(3).<sup>61</sup>

In response to the Notice of Filing, one commenter suggested that more clarity should be provided as to the documentation underwriters and municipal advisors may be required to produce during an examination and that sufficient documentation to reach the "reasonable belief" should include any reasonable indicia of an investor's present intent.<sup>62</sup> SIFMA suggested this should include an investor letter or other certification or a term sheet stating conditions of the transaction.<sup>63</sup> The MSRB stated that it had indicated in the proposed rule change and also in the proposed rule language that one example by which an underwriter or municipal advisor could arrive at a reasonable belief as to the purchaser's present intent would be by obtaining a written representation.<sup>64</sup> The MSRB stated that it agrees that there are other reasonable indicia that could be considered in order to reach a reasonable belief regarding the purchaser's present intent, but does not believe an amendment to the proposed rule change is necessary on this point. The MSRB also noted that it believes that the proposed rule language makes clear that obtaining a written representation is just one method by which a reasonable belief as to a purchaser's present intent could be met.<sup>65</sup>

In response to Amendment No. 1 and the November Response Letter, SIFMA reiterated its concerns about the proposed rule change, as modified by Amendment No.1, particularly the scope of the proposed principles-based exception in the proposed rule change as so modified, and urged the SEC to institute disapproval proceedings.<sup>66</sup> SIFMA focused its concern on the requirement that dealers (and municipal advisors in a competitive sale) relying on the principles-based exception are required to have a reasonable belief that the "present intent of the purchasing entity or entities is to hold the municipal securities to maturity or earlier redemption or mandatory tender."<sup>67</sup> SIFMA stated that investors are not always willing to make a representation as to the timeframe for

which they intend to hold a security, "other than setting forth their present intention to hold a security."<sup>68</sup> SIFMA stated that an investor may be hesitant to "make a statement currently required by the amendment . . . that may be second-guessed if they, e.g., many years later, determine to sell their securities."<sup>69</sup> SIFMA stated that other rules, such as Exchange Act Rule 15c2-12, do not require a specific time frame as to a purchaser's intention to hold securities, and thus questioned why such a requirement is necessary in Rule G-34.<sup>70</sup> In particular, SIFMA noted that it may be difficult for dealers or municipal advisors to obtain a representation from investors as to the timeframe for which they intend to hold a security.<sup>71</sup> Finally, SIFMA stated that the current principles-based exception is "unduly restrictive" and suggested that the exception should be refined to require the dealer or municipal advisor to have a "reasonable belief (e.g., by obtaining a written representation) that [the] purchasing entity or entities has no present intent to sell or distribute the municipal securities."<sup>72</sup>

The MSRB stated that it addressed most of SIFMA's concerns about the proposed principles-based exception in the November Response Letter and Amendment No. 1.<sup>73</sup> The MSRB stated that one method by which an underwriter or municipal advisor could arrive at a reasonable belief as to the purchaser's present intent would be by obtaining a written representation.<sup>74</sup> However, the MSRB stated that it agreed with commenters that there are other reasonable indicia that could be considered in order to reach a reasonable belief regarding the purchaser's present intent.<sup>75</sup> The MSRB noted, as an example, that another method of reaching a reasonable belief as to the investor's intention would be by reviewing transaction documentation.<sup>76</sup> The MSRB stated that it continues to believe there are multiple ways by which a dealer or municipal advisor could reach a reasonable belief regarding the purchaser's intent with respect to holding the securities in question.<sup>77</sup> The MSRB stated that it purposefully made the exception principles based so dealers and

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See December Response Letter.

<sup>74</sup> See November Response Letter, December Response Letter.

<sup>75</sup> See December Response Letter.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See First ABA Letter, NAMA Letter and First SIFMA Letter.

<sup>58</sup> See November Response Letter and Amendment No. 1.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> See First SIFMA Letter.

<sup>63</sup> *Id.*

<sup>64</sup> See November Response Letter.

<sup>65</sup> *Id.*

<sup>66</sup> See Second SIFMA Letter.

<sup>67</sup> *Id.*

municipal advisors could determine, based on their particular business activities, the most effective way of reaching a reasonable belief as to an investor's intent.<sup>78</sup> The MSRB noted that obtaining a written representation is merely one method for making such a determination.<sup>79</sup>

In the First SIFMA Letter, SIFMA stated that the proposed language in the principles-based exception was "unduly restrictive" because "[f]or a bond maturing in 20 or 30 years, it is typical to include a call or mandatory tender date at 5 to 10 years to permit a refinancing or other restructuring."<sup>80</sup> The MSRB responded that it agreed with SIFMA and other commenters and proposed in Amendment No. 1 to refine the language to more accurately reflect the terms of direct purchase transactions including the potential for earlier redemption or mandatory tender.<sup>81</sup> SIFMA noted that the language in Amendment No. 1 is still "unduly restrictive" and may make a purchasing entity uncomfortable to certify as to its present intent to hold the securities to a date certain.<sup>82</sup> SIFMA suggested alternative language that would require the dealer or municipal advisor to have a "reasonable belief (e.g., by obtaining a written representation) that [the] purchasing entity or entities has no present intent to sell or distribute the municipal securities."<sup>83</sup>

The MSRB noted that the principles-based exception requires that the dealer or municipal advisor reach a reasonable belief as to the purchaser's present intent regarding holding the municipal securities in question.<sup>84</sup> The MSRB stated that this language recognizes that, in those transactions included in the principles-based exception, the dealer or municipal advisor is not required to speculate as to a purchaser's future intent.<sup>85</sup> The MSRB stated that the rule language makes clear that it is solely the present intent of the purchaser that need be considered.<sup>86</sup> The MSRB noted that the purpose of the principles-based exception is to acknowledge those scenarios where a CUSIP number may not be necessary. The MSRB stated that, in particular, the exception addresses the direct purchase market, which, according to earlier comment letters, typically involves banks purchasing

municipal securities with the intention of holding them to maturity.<sup>87</sup> The MSRB stated that Amendment No. 1 merely recognizes that often there are early redemption provisions or mandatory tenders in such arrangements, and thus, the securities are not held to maturity in all instances.<sup>88</sup> The MSRB added that if a purchaser's present intent is to hold the securities today, but perhaps sell them tomorrow or sometime before maturity, redemption or tender, this is not the type of transaction the principles-based exception was created to address.<sup>89</sup> Further, the MSRB noted, the industry group representing many purchasers in direct purchase transactions supported the proposed rule change with Amendment No. 1, indicating that "the exception language in the proposed rule change and Amendment No. 1 to the proposed rule change appropriately recognizes the realities of the direct purchase market."<sup>90</sup>

#### *D. Sales of Municipal Securities to Other Municipal Entities*

In response to the Notice of Filing, several commenters stated that the principles-based exception from the CUSIP number requirements should be expanded to include private placements of municipal securities with other municipal entities, including state revolving funds.<sup>91</sup> According to commenters, in this sort of transaction, a state revolving fund issuance is secured by local government bonds which are held by the state issuer and not traded in the secondary market. Other commenters asked generally that all sales of municipal securities to another municipal entity be excepted from the requirements of Rule G-34.

The MSRB stated that, in consideration of comments received from commenters, it amended the proposed rule change, in Amendment No. 1, to expand the principles-based exception to include issuances of municipal securities purchased by a municipal entity with funds that are, at least in part, from the proceeds of, or used to fully or partially secure or pay, the purchasing entity's issue of municipal obligations, such as in the case of a state revolving fund or bond bank.<sup>92</sup> The MSRB stated that it believes these scenarios are, for purposes of this context, comparable to sales of

municipal securities to banks in direct purchase transactions in that the municipal securities being sold to the purchasing municipal entity are not intended to be sold in the secondary market.<sup>93</sup> In addition, the MSRB stated that, as with the principles-based exception for direct purchase transactions with a bank, in order to rely on the exception, a dealer (or municipal advisor in a competitive sale) must have a reasonable belief that the purchasing municipal entity has the present intent to hold the securities to maturity or earlier redemption or mandatory tender.<sup>94</sup>

The MSRB stated that it believes a dealer (or municipal advisor in a competitive sale) should apply for a CUSIP number in sales of municipal securities between municipal entities, other than in the scenarios discussed above.<sup>95</sup> The MSRB stated that it understands that municipal entities purchasing municipal securities for investment purposes may have a need for liquidity prior to the maturity of the issue and may want to sell the municipal securities into the secondary market.<sup>96</sup> In such a scenario, the MSRB stated, the purchasing entity may find it difficult to resell the municipal securities without a CUSIP number and, based on discussions with industry participants, the MSRB stated that it understands there is no existing process in place to obtain a CUSIP number later for secondary market trading.<sup>97</sup> The MSRB stated that it believes that applying for a CUSIP number at the time of the new issue will avoid this situation and will ensure the municipal securities are tradeable in the secondary market.<sup>98</sup>

#### *E. Use of Other Standard Identifiers*

In response to the Notice of Filing, one commenter suggested that the proposed rule change be amended to permit the use of "appropriate open-standard identifiers."<sup>99</sup> In particular, this commenter emphasized concerns that Rule G-34 is an endorsement of a commercial entity's product and is contradictory to SEC policy. The MSRB stated that it recognizes the commenter's concerns and is aware of efforts in the industry exploring a move towards an open-standard identifier environment.<sup>100</sup> However, the MSRB

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See First SIFMA Letter.

<sup>81</sup> See Amendment No. 1 and December Response Letter.

<sup>82</sup> See Second SIFMA Letter.

<sup>83</sup> *Id.*

<sup>84</sup> See December Response Letter.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> See Second ABA Letter and December Response Letter.

<sup>91</sup> See GFOA Letter, NAMA Letter and First SIFMA Letter.

<sup>92</sup> See November Response Letter.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> See Bloomberg Letter.

<sup>100</sup> See November Response Letter.

stated that it understands that the use of an identifier other than a CUSIP number extends well beyond the municipal securities market and a change to expand the universe of identifiers would require significant coordination between all market participants.<sup>101</sup> The MSRB stated that it believes that merely adding in language to Rule G–34 to allow the use of “other standard identifiers”, as the commenter suggested, without significant coordination among other market participants and consideration of how such a change would impact all aspects of the overall securities market could cause substantial confusion.<sup>102</sup> The MSRB stated that, along with other industry stakeholders, it will continue exploring the expansion of the universe of securities identifiers, but that it does not believe amending Rule G–34 at this time to include the use of other identifiers is appropriate without further information gathering and industry input.<sup>103</sup>

#### F. Use of Legal Entity Identifier

In response to the Notice of Filing, one commenter suggested that the SEC should require issuers of municipal securities to be identified by a legal entity identifier (“LEI”) as part of the proposed rule change.<sup>104</sup> The commenter suggested the SEC could use LEIs in its regulatory data collection framework to identify parties and market participants by a standard method. The MSRB stated that it recognizes the potential for LEIs to provide useful information on municipal issuers and is in the process of gathering industry input on the availability and value of obtaining this information in the market.<sup>105</sup> Specifically, the MSRB noted, in a concept proposal issued on September 14, 2017, the MSRB sought industry comment on whether issuers and obligors typically have LEIs and if so, whether that information should be collected by the MSRB on its Form G–32 and included in Rule G–34 to permit or require dealers to submit such information if available.<sup>106</sup> The MSRB stated that it will consider this issue further, once the results of the request for comment are received and fully evaluated.<sup>107</sup>

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> See GLEIF Letter.

<sup>105</sup> See November Response Letter.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

#### G. Other Comments

In response to the Notice of Amendment No. 1, the ABA stated that it maintains its support for the exception to the proposed rule requirement to obtain CUSIP numbers for dealers and municipal advisors in private placements of municipal obligations to a single bank, its affiliates (other than a registered broker-dealer), or a consortium of such entities if the intent of the purchasing entity or entities is to hold the municipal obligation until maturity.<sup>108</sup> The ABA stated that it supports the modification included in Amendment No. 1 and that it “appreciates the MSRB’s acknowledgment of the banking industry’s concerns about the impact of the CUSIP requirements on the direct purchase market.”<sup>109</sup> The ABA also stated that it believes that the modifications to the proposed rule change made by Amendment No. 1 “appropriately recognizes the realities of the direct purchase market.”<sup>110</sup>

#### IV. Discussion and Commission Findings

The Commission has carefully considered the proposed rule change, the comment letters received, the MSRB Response Letters, and Amendment No. 1. The Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the MSRB.

In particular, the proposed rule change, as modified by Amendment No. 1, is consistent with Section 15B(b)(2)(C) of the Act.<sup>111</sup> Section 15B(b)(2)(C) of the Act requires that the MSRB’s rules 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, in general, to protect investors, municipal entities, obligated persons, and the public interest.<sup>112</sup>

The Commission believes that the proposed rule change, as modified by Amendment No. 1, is consistent with

<sup>108</sup> See Second ABA Letter.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> 15 U.S.C. 78o–4(b)(2)(C).

<sup>112</sup> See 15 U.S.C. 78o–4(b)(2)(C).

the provisions of Section 15B(b)(2)(C)<sup>113</sup> of the Act because it would remove impediments to and perfect the mechanism for a free and open municipal securities market by codifying existing MSRB 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 Commission believes that the proposed rule change, as modified by Amendment No. 1, 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 appropriate identifier assigned in order to provide market participants with greater ability to receive, deliver, and safekeep such securities. The Commission believes that the availability of a limited 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 Commission believes that the proposed rule change, as modified by Amendment No. 1, 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.

In approving the proposed rule change, as modified by Amendment No. 1, the Commission also has considered the impact of the proposed rule change, as modified by Amendment No. 1, on efficiency, competition, and capital formation.<sup>114</sup> The Commission believes the proposed rule change, as modified by Amendment No. 1, would reduce regulatory uncertainty for underwriters and municipal advisors with regard to the requirement to apply for CUSIP numbers because dealers and municipal

<sup>113</sup> *Id.*

<sup>114</sup> 15 U.S.C. 78c(f).

advisors would know with greater certainty when application for a CUSIP number is required in private placement transactions. Similarly, the Commission believes that while in practice some non-dealer municipal advisors may be applying for CUSIP numbers in a competitive offering before the final award is made, the proposed rule change, as modified by Amendment No. 1, 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 Commission notes that the MSRB considered the impact of the proposed rule change on non-dealer municipal advisors and concluded that, while non-dealer municipal advisors are likely to incur up-front costs associated with compliance with the proposed rule change, the cost would be justified by the likely benefits of the proposed rule change over time.<sup>115</sup>

As noted above, the Commission received eleven comment letters on the Notice of Filing and two comment letters on Amendment No. 1. The Commission believes that the MSRB, through its responses and through Amendment No. 1, has addressed commenters' concerns.

For the reasons noted above, the Commission believes that the proposed rule change, as modified by Amendment No. 1, is consistent with the Act.

#### **VI. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1**

The Commission finds good cause for approving the proposed rule change, as modified by Amendment No. 1, prior to the 30th day after the date of publication of the Notice of Amendment No. 1 in the **Federal Register**. As discussed above, Amendment No. 1 modifies the proposed rule change by amending proposed paragraph Rule G-34(a)(i)(F) of the proposed rule change to require dealers (and municipal advisors in a competitive sale) seeking to rely on the principles-based exception to reasonably believe the purchaser's present intent is to hold the municipal securities to maturity "or earlier redemption or mandatory tender." Amendment No. 1 also would modify the proposed rule change to expand the principles-based exception in proposed paragraph Rule G-34(a)(i)(F) to include cases where a municipal entity purchases the municipal securities with funds that are at least in part proceeds of the purchasing entity's issue of municipal

obligations, or the municipal securities being purchased are used to fully or partially secure or pay the purchasing entity's issue of municipal obligations. For consistency, Amendment No. 1 also would apply the same amendments to the principles-based exception for dealers from the depository eligibility requirements of the rule set forth in subparagraph Rule G-34(a)(ii)(A)(3).<sup>116</sup>

The MSRB stated that the only substantive change made by Amendment No. 1 to the proposed rule change is responsive to commenters and that Amendment No. 1 expands the application of the previously proposed principles-based exception to include sales of new issue municipal securities to municipal entities that are purchasing the underlying municipal securities with funds that are at least in part proceeds of the purchasing entity's issue of municipal obligations, or the municipal securities being purchased are used to fully or partially secure or pay the purchasing entity's issue of municipal obligations.<sup>117</sup> The MSRB further noted that the other amendment to the proposed rule change made by Amendment No. 1 merely clarifies that in a direct purchase transaction there may be a redemption or mandatory tender that occurs prior to the municipal security's maturity.<sup>118</sup> Additionally, the MSRB stated that, in light of one of the purposes of the principles-based exception in the proposed rule change—to allow dealers and municipal advisors to provide services without inhibiting their issuer clients' access to certain financings—the revisions are consistent with the proposed rule change.<sup>119</sup>

For the foregoing reasons, the Commission finds good cause for approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.

#### **VIII. Conclusion**

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>120</sup> that the proposed rule change (SR-MSRB-2017-06), as modified by Amendment No. 1, be, and hereby is, approved on an accelerated basis.

<sup>116</sup> See Amendment No. 1.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> 15 U.S.C. 78s(b)(2).

<sup>121</sup> 17 CFR 200.30-3(a)(12).

For the Commission, pursuant to delegated authority.<sup>121</sup>

**Eduardo A. Aleman,**  
Assistant Secretary.

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-82326; File No. SR-GEMX-2017-56]

### **Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Primary Market Maker Obligations**

December 14, 2017.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 29, 2017, Nasdaq GEMX, LLC ("GEMX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. 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 Exchange proposes to amend Rule 701, entitled "Openings," to specify the obligations of a Primary Market Maker ("PMM") when entering Valid Width Quotes<sup>3</sup> during the Opening Process.

The text of the proposed rule change is available on the Exchange's website at <http://nasdaqgemx.cchwallstreet.com/>, at the principal office of the Exchange, 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 Exchange 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

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> A "Valid Width Quote" is a two-sided electronic quotation submitted by a Market Maker that consists of a bid/ask differential that is compliant with Rule 803(b)(4). See Rule 701(a)(8).

<sup>115</sup> See November Response Letter.