



MSRB Continues to Work toward Better Industry Understanding

By Emily S. Brock

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Throughout 2017, the Municipal Securities Rulemaking Board (MSRB) has remained focused on a new mandate facilitating industry understanding of and compliance with MSRB rules. According to MSRB Chair Lucy Hooper, the MSRB “is committed to developing resources that assist and support regulated entities’ ability to comply with new and existing standards of conduct.” In so doing, the MSRB has introduced a series of rules, advisories, and concept proposals that may indirectly affect the issuer community.

As a representative in the MSRB’s industry roundtable, GFOA provides public comment regularly throughout the iterative development or revision of the rules. This article outlines the most recent MSRB activity on which the GFOA provided comments: G-34 CUSIPs for Private Placements; Market Advisories on Selective Disclosure and Selection of Underwriters Counsel; and Primary Offering Practices Concept Release.

G-34: CUSIPS FOR PRIVATE PLACEMENTS

MSRB requested comments on initial draft rule amendments to Rule G-34 that would require a dealer to obtain Committee on Uniform Security Identification Procedures (CUSIP) numbers for new issue securities sold in private placement transactions, and also require municipal advisors that are not dealers to be subject to the CUSIP

requirement. In comments submitted on March 31, 2017, GFOA emphasized a major and overriding concern “that the proposed rulemaking could dampen the bank loan and direct purchase markets, putting issuers in the unfavorable position of either not using a financing structure that is in their best interest, or having to pay more for those financings.” Instead, GFOA suggested that the MSRB spend effort and resources enhancing the MSRB’s Electronic Municipal Market Access (EMMA) system with regard to bank loan information and continue working GFOA and other market participants to identify EMMA improvements that would accommodate the transactions being listed on an issuer’s home page when Form G-32 is filed.

On June 30, GFOA filed comments requested by the MSRB on a second draft of its amendments to Rule G-34. In its comments, GFOA once again emphasized a major and overriding concern: “Without clear language on how this exception can be easily met, the proposed amendment will dampen demand for bank loan and direct purchase financings entered into by state and local governments and authorities and therefore raise borrowing costs.” To help clarify the exception, GFOA referred the American Bankers Association’s suggestion to refine the language to “investor representation” of holding the securities to maturity. GFOA also directed the MSRB to the common practice of state and local government

bonds purchased by other state and local governments with no intention to resell and urged the MSRB to add this to the exception. Finally, GFOA encouraged the MSRB to consider certain types of transactions such as competitive sales where obtaining CUSIPs could deter the potential bid of a private placement.

On November 2, the MSRB filed a proposal with the Securities and Exchange Commission (SEC) to amend its Rule G-34 to require placement agents to obtain CUSIPs, just like underwriters are already required to do. CUSIPs would not be required in the case of placements with banks or bank affiliates if the placement agent reasonably believed that the bank or bank affiliate had the present intent to hold the municipal securities to maturity or earlier redemption or mandatory tender. The proposal includes an amendment made at the request of GFOA. Under the amendment, CUSIPs would not be required for placements with state revolving funds or bond banks. Finally, the proposal would also require all municipal advisors to obtain CUSIPs for competitive issues. Currently, only dealer municipal advisors are required to obtain CUSIPs for competitive issues. The SEC has until December 15 to act on the MSRB proposal, which would be effective six months after SEC approval.

Market Advisories: In 2017, the MSRB issued a number of market advisories and compliance advisories. These advisories do not benefit from a public comment process, as noted in a joint letter to the MSRB from GFOA, the Securities Industry Management Association, the Bond Dealers of America, the American Bankers Association, and the National Asset Management Agency.

Selective Disclosure. This discusses situations in which some investors have information that other investors lack. Examples provided are road shows, investor conferences, and one-on-one investor calls or meetings. Selective disclosure can occur in the primary and secondary markets.

Issuer Designation of Underwriter's Counsel. This discusses conflicts of interest associated with this practice and the possibility that designated counsel may not have the requisite degree of expertise and experience. The MSRB cited a GFOA best practice, (*The Issuer's Role in Selection of Underwriter's Counsel*), in which GFOA recommends that issuers minimize their involvement in the selection of underwriter's counsel.

GFOA President Pat McCoy communicated to the MSRB's executive director in an October 25 letter noting that "the Government Finance Officers Association, representing issuers of various types and sizes, is concerned with recent publications and respectfully requests that the MSRB engage in a dialogue with issuers and other groups about the appropriate role and scope of advisories, ensuring they are directly within and germane to the MSRB's authority, and allow for public comment on the publications so that they are as helpful as possible." Further, McCoy noted that the market advisories are promoting, advising, and guiding suggested behavior for parties outside the stated authority, scope and mission of the MSRB, stating that "indeed, advisories and guidance of this nature call into question MSRB's intentions."

PRIMARY OFFERING PRACTICES CONCEPT RELEASE

The MSRB requested comment on a concept release on possible rulemak-

ing on primary offering practices. Much of the release addresses whether rule-making is desirable to supplement current contractual practices (e.g., bond purchase agreements and agreements among underwriters). Possible topics include: 1) requirement to make a bona fide public offering; 2) free-to-trade wires; 3) requirement to provide issuers with information about allocations, designations, and how take-down is directed to syndicate members; 4) priority of retail orders; and 5) submission of preliminary official statements to EMMA.

GFOA submitted a comment letter supporting: 1) improved communications between senior managers and other syndicate members; 2) issuer approval of allocations and priority of orders; 3) voluntary posting of preliminary official statements on EMMA; and 4) coordination of MSRB rulemaking in this area with the Internal Revenue Service issue price rules.

CONCLUSIONS

Provided the new mandate of the MSRB to educate the industry on the existing rules, rather than create more rules, GFOA will continue to provide comment to the MSRB in order to communicate any impact, either direct or indirect, these education efforts will have on issuers. GFOA's Federal Liaison Center also participates regularly in the MSRB's biannual roundtable with other market participants, where it engages in dialogue and provides input to the MSRB as it works to serve the integrity of the municipal bond market. |

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