



January 15, 2019

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street, NW Suite 1100
Washington, DC 20005

RE: MSRB Notice 2018-29

Dear Mr. Smith:

The National Association of Municipal Advisors (“NAMA”) appreciates the opportunity to comment on amendments to the 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (“Notice”). NAMA represents independent municipal advisory firms, and individual municipal advisors (“MA”) from around the country, and our members are interested in the guidance that the MSRB develops for regulated entities.

We appreciate the work that the MSRB has done in seeking a balance between curtailing the length of MSRB Rule G-17 underwriter disclosures to better meet the underpinning objectives and be provided in plain English, while attempting to enhance the effectiveness of those disclosures. The tenet for these changes should be what can be done to continue to “protect issuers” and ensuring that key information about a transaction is clearly and promptly provided so that the issuer can make fully informed decision(s) about key aspects of a transaction.

As discussed below there are many proposed changes in the Notice that are helpful to the marketplace as a whole. However, a key area of concern continues to be related to the types of underwriter disclosures that must be provided. In the Notice the MSRB has proposed setting a standard for underwriter disclosures based on a municipal advisor standard which does not adequately balance the differing duties of the underwriter. We oppose such action, and would note that the basis for which the G-42 recommendation standard for municipal advisors (professionals with a fiduciary duty to the issuer) is not an appropriate basis for the types of G-17 transaction specific disclosures that an underwriter should be providing to an issuer. The MSRB should work to ensure that transaction specific and actual conflicts of interest are provided clearly to issuers, without sacrificing delivery of key information to issuers about the risks of various aspects of a transaction and actual conflicts related to the underwriter.

Underwriter Disclosures

A major concern we have with the Notice, is that it could lead to important disclosures about transaction risks not being made to issuers. The revised Notice sets the standard of what underwriters must disclose regarding underwriter recommendations and sets that threshold as the same as a municipal advisor’s MSRB Rule G-42 recommendation standard.

We have two main concerns with the revised Notice:

1. Issuers may not receive key information. It appears as though the MSRB is recommending new language be included in the Interpretative Notice that could lead to key aspects of complex financing structures not being provided to an issuer even when recommended by an underwriter. Under Rule G-42, the recommendation standard for municipal advisors is set at whether the client should engage in a municipal securities transaction. If that threshold was applied to underwriter recommendations, key pieces of a transaction (e.g. interest rate modes, various types of credit enhancement, redemption provisions) would not result in disclosures from the underwriter, yet may be a significant enough of a term of a transaction that an issuer should be made aware of the risks. This new standard for disclosures regarding underwriter recommendations appears to be in opposition to MSRB's statutory mandate to protect issuers. We would oppose such action, and ask that the MSRB have underwriters disclose appropriate transaction information and risks for the client.

Although there are positive changes in the Notice that bifurcate standard disclosures from transaction specific disclosures, limiting the types of transition specific disclosures received by the issuer severely undercuts any positive advances made to make these disclosures more understandable to issuers.

2. The standard developed by the MSRB for a G-42 Recommendation by a municipal advisor is not the right standard for a G-17 disclosure standard for a broker-dealer. Amongst other things, it is important to note that making a G-42 Recommendation triggers the requirement for an MA to make a suitability determination as well as other requirements in the context of the already higher duties they owe to municipal entities and obligated persons. This same recommendation standard is inappropriate for a mere disclosure requirement by an underwriter with only a fair dealing obligation. Applying the G-42 recommendations standard to underwriter G-17 disclosures creates a false regulatory parity that is not appropriate given the MSRB's mission to protect issuers and the very different roles and duties that municipal advisors and underwriters have to issuers. The MSRB has already determined that, despite the higher duty they owe to their clients, if a municipal advisor goes so far as to make a G-42 Recommendation they must also determine that the transaction or product is suitable. But, for advice and recommendations that do not rise to the level of a G-42 Recommendation, a municipal advisor still must put the interests of the municipal advisor client ahead of its own and is still subject to a duty of care that requires it to, amongst other things, "make a reasonable inquiry as to the facts that are relevant to a client's determination as to whether to proceed with a course of action or that form the basis for any advice provided to the client." The MSRB imposed all of these requirements citing its statutory mandate to protect issuers. Now, the MSRB appears to be saying that an issuer is equally well-protected, including in cases where not represented by an MA (of note - 28% of transactions in 2018 were done without a municipal advisor¹) if an underwriter merely discloses risks associated with a G-42 recommendation. The underwriter does not have to determine that the transaction is suitable. The infrequent issuer receives no disclosures at all with respect to interest rate modes, credit enhancement or various other complex aspects of a transaction that an underwriter might recommend as long as the underwriter did not recommend the actual transaction. The MSRB comes to the illogical view that issuers need more protection from regulated persons that already owe them a fiduciary duty than they do from regulated persons with lesser obligations.

Bifurcating Standard Disclosures From Underwriter and Transaction Specific Disclosures

The MSRB is proposing to permit sole underwriters or syndicate managers (when there is a syndicate) to provide standard disclosures to an issuer one time and then to provide them subsequently by reference to and reconfirmation of those initial standard disclosures, in writing, unless the issuer requests that the standard disclosures be made on a transaction-by-transaction basis.

¹ Bloomberg data

NAMA supports separating standard disclosures from transaction specific disclosures as a way to highlight key items to clients. However, as noted above we are concerned with using the G-42 recommendation threshold as the determining factor as to what information would have to be disclosed. The transaction specific disclosures should be provided up-front and ahead of standard disclosures so that they are not diluted and receive the attention of the issuer.

Providing Disclosures to Issuers

Regarding the frequency of underwriter disclosures, NAMA opposes action that would not provide the disclosures for each transaction, and believes that the Notice should not allow underwriters to provide disclosures and then in future transactions reference those disclosures. There could be any number of changes both with the underwriter and with the issuer that warrant disclosures for each transaction, the least of which is to provide information to issuers to ensure their protection in every transaction.

Underwriters Deterring Use of Municipal Advisors

The Notice updates the language to help ensure that underwriters do not deter the use of MAs by issuers. Our members are aware of instances where both underwriters and bond counsel directly deter the use of a municipal advisor or bond counsel dictates who the municipal advisor should be.

Other Items

NAMA is pleased that the Notice: does not permit the posting of disclosures on EMMA as satisfying the G-17 requirement; does not permit issuers to opt-out of receiving disclosures; would continue to mandate a form of acknowledgement from issuers that the disclosures are received, even through an e-mail return receipt; and that underwriter disclosures are to be provided in "plain English."

Thank you for the opportunity to comment on these issues.

Sincerely,



Susan Gaffney
Executive Director