



April 13, 2012

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street
Alexandria, VA 22314

Re: MSRB Notice 2012-13 (March 6, 2012): Request for Comment on Proposed Rule Amendments and Interpretive Notice on Retail Order Periods

Dear Mr. Smith:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment on the Municipal Securities Rulemaking Board’s (“MSRB”) Request for Comment on Proposed Rule Amendments and Interpretive Notice on Retail Order Periods (the “Proposal”)² which proposes amendments to MSRB Rules G-11 (on primary offering practices), G-8 (on books and records), and G-32 (on disclosures in connection with primary offerings), as well as an interpretive notice concerning the application of MSRB Rules G-17 and G-30 to retail order periods.

I. Executive Summary

SIFMA supports the historical practice of municipal securities issuers designating, if they so desire, that a specific amount or specific maturities of new bonds be placed with retail investors, resulting in bonds being offered and sold to retail investors prior to institutional investors. Our members also support the MSRB’s view that it is the responsibility of a municipal securities issuer to define what it means by

¹ SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA’s mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

² MSRB Notice 2012-13 (March 6, 2012).

“retail investor”. While we believe that the concerns raised in Notice 2012-13 could be addressed through the enforcement of existing principles based rules, or a clarifying regulatory notice, we support the proposed rule changes to the extent they would protect dealers that follow issuers’ instructions, clarify issuer terms and conditions, and require timely notice of retail order period terms and conditions (and any amendments thereto) to all syndicate and selling group members. We recommend that the proposed interpretive notice clarify that a safe harbor exists for senior syndicate managers, in satisfying their own fair dealing obligation to the issuer, when the senior manager relies on representations made to them by co-managers or selling group members, that any order submitted were indeed qualified retail orders.

II. Terminology

Prior to the Proposal, neither “retail order period” nor “going away order” were defined under MSRB rules. However, the MRSB Glossary³ includes the following definitions:

ORDER PERIOD –[sic] In some offerings, a “retail order period” may be designated during which orders will be accepted solely for [retail customers](#) (or, in some cases, small orders for any type of customers). See: [PRIORITY PROVISIONS](#); [RETAIL CUSTOMER](#).

RETAIL CUSTOMER – Any customer other than an [institutional customer](#). Retail customers generally include individual investors and small organizations. Compare: [INSTITUTIONAL CUSTOMER](#).

INSTITUTIONAL CUSTOMER – A term that generally refers to banks, financial institutions, [bond funds](#), insurance companies or other business organizations that possess or control considerable assets for large scale investing. Compare: [INSTITUTIONAL ACCOUNT](#); [RETAIL CUSTOMER](#).

INSTITUTIONAL ACCOUNT – For purposes of [MSRB](#) rules, the account of (i) a bank, savings and loan association, insurance company, or registered investment company; (ii) an investment adviser registered either with the [SEC](#) under the Investment Advisers Act of 1940 or with a state securities commission (or any agency or office performing like functions); or (iii) any other entity (whether a natural person, corporation, partnership, trust, or otherwise) with total assets of at least \$50 million. The term is sometimes used more generally to refer to an [institutional customer](#).⁴ Compare: [INSTITUTIONAL CUSTOMER](#).

³ MSRB Glossary of Municipal Securities Terms (Second Edition 2004) available at <http://msrb.org/msrb1/glossary/default.asp>.

⁴ See also MSRB Rule G-8 (a)(xi). MSRB Rule G-8(a)(xi) defines institutional account as “the account of (i) a bank, savings and loan association, insurance company, or registered investment company; (ii) an investment adviser registered either with the Commission under Section 203 of the Investment Advisers Act of 1940 or with a state securities commission (or any agency or office performing like functions); or (iii) any other entity (whether a natural person, corporation, partnership, trust, or otherwise) with total assets of at least \$50 million.”

GOING AWAY – An indication that an order for [securities](#) (usually [new issue municipal securities](#)) is from an investor, rather than from a [broker-dealer](#) seeking to purchase the securities for trading inventory.

With “retail customer” being defined in the MSRB Glossary as broadly as “any customer other than an institutional customer”, SIFMA believes that continuing clarification by issuers of their definition of “retail” on each transaction would be beneficial to all market participants.

III. Market Practice

a. Public Policy Supporting Retail Order Periods

Retail order periods developed as a means for issuers to provide individual retail investors, and in particular citizens residing within the issuer’s jurisdiction, the opportunity to participate in the offering of the issuer’s bonds. The mechanism generally allows individuals to place orders in advance of institutional investors and to get priority in allotments. Over time the manner in which individuals invest in municipal securities has evolved to include a variety of entities purchasing bonds on behalf of individuals. These entities are sometimes described as “professional retail” or “institutional retail” because the purchasing entities are typically purchasing in block size and then allocating bonds in smaller amounts to separately managed accounts (“SMAs”) that are held by individual investors. Issuers do not employ a uniform definition of retail, the result of which is that certain “professional retail” orders may or may not be eligible for a specific issue’s retail order period.

While there is no single source from which to calculate holdings of municipal bonds by individual investors, it has been estimated that “professional retail” or “institutional retail” separately managed accounts (“SMAs”) holding of municipal bonds has increased from \$170 billion at the end of 2008 to \$210 billion at the end of 2009 and \$250 billion at the end of 2010.⁵ At year end 2010, individual (non-SMA Households) holdings of municipal bonds were estimated to be \$1.5 trillion.^{6 7}

⁵ See Citigroup Global Markets *Municipal Market Comment*, June 3, 2011.

⁶ See Citigroup Global Markets *Municipal Market Comment*, June 3, 2011.

⁷ While the Federal Reserve does not further breakdown the “Household sector”, it estimates the Household sector owned \$1.95 trillion of municipal securities at year end 2010 and \$1.87 trillion at year end 2011. Mutual Funds’ holdings of municipal bonds at year end 2011 were estimated to be \$542.8 billion. See Flow of Funds Accounts of the United States (March 8, 2012) available at <http://www.federalreserve.gov/releases/z1/current/>. See also Flow of Funds Accounts of the United States (December 8, 2011) (due to a change in data source revising upwards the estimate of household holdings of municipal securities and loans by about \$840 billion, on average, from 2004 forward) available at <http://www.federalreserve.gov/releases/z1/20111208/z1r-1.pdf>.

b. RFP Process Emphasizes Retail Distribution

For negotiated underwritings, issuers commonly request proposals for underwriting services from various dealers. These Request for Proposals (“RFPs”), specify the selection criteria that form the basis of evaluating the proposal. Among other things, an RFP often requests information on the firm's experience with underwriting the type of issue being considered, resumes of key personnel and their time commitment for the proposed issuance, management fees and estimated expenses, list of anticipated services, and preliminary ideas about the structure of the deals. Additionally, issuers frequently ask for a description of the firm’s retail distribution capabilities; the number of registered representatives and local offices in the issuers’ jurisdiction or state; details of retail order fulfillment on past primary offerings; as well as a description of the firm’s marketing strategy to meet retail and institutional demand. Issuers are indicating through these questions that a firm’s retail distribution capabilities are taken into account in issuers’ evaluation of proposals which puts pressure on firms seeking current or future business with those issuers to increase their retail participation.

IV. Proposed Rule Changes

a. Rule G-11: Primary offering Practices

SIFMA generally supports the proposed changes to Rule G-11, including defining “retail order period” as “an order period during which orders will be solicited solely from customers that meet the issuer’s definition of ‘retail’”⁸. Our members support an issuer’s prerogative to determine whether there should be a retail order period and to define, on a transaction by transaction basis, what types of purchasers qualify for placing an order, as well as to set the economics for each priority of orders. Some of our members are also concerned that leaving the definitions of the different types of accounts that might together constitute “retail” entirely up to each issuer would make it difficult to comply with the MSRB’s requirements to ensure that only qualifying orders are placed and to maintain adequate records.

With respect to the proposed definition of a “going away order”, we are aware of at least three different definitions of “going away” with differing nuances:

- 1) Current Rule Proposal: “an order for which a customer is already conditionally committed.”⁹

⁸ MSRB Rule D-9 defines customer as “Except as otherwise specifically provided by rule of the Board, the term “customer” shall mean any person other than a broker, dealer, or municipal securities dealer acting in its capacity as such or an issuer in transactions involving the sale by the issuer of a new issue of its securities.”

⁹ MSRB Notice 2012-13 (March 6, 2012), Text of Proposed Amendment to Rule G-11(a)(xii).

- 2) MSRB Glossary: “an order for securities (usually new issue municipal securities) [that] is from an investor, rather than from a broker-dealer seeking to purchase the securities for trading inventory.”¹⁰
- 3) *The Municipal Bond Handbook*: “the sale of bonds to long-term investors who plan to hold the bonds rather than trade them quickly for a short-term profit”.¹¹

We request the MSRB clarify the type of conduct it intended to define in this section of the proposed rule amendment, and perhaps harmonize the current rule proposal definition with the MSRB Glossary definition of “going away”. The current rule proposal is similar, but not identical, to the MSRB Glossary definition to the extent a customer or potential customer has been identified to purchase the new issue. Regarding *The Municipal Bond Handbook* definition of “going away”, dealers have no control over future trading activity of its customers, and accordingly, it should be beyond the scope of the conduct the MSRB is seeking to define (and have dealers or selling group members represent) as “going away” in this manner. SIFMA believes the conduct covered by *The Municipal Handbook’s* definition of “going away” is outside the scope of the Proposal. We believe the intent of the MSRB’s proposed definition of “going away” orders is to have dealers or selling group members only submit *bona fide* customer orders.

Additionally, as for the proposed definition of “selling group”¹², we are concerned that this definition is overly broad, and arguably would apply to every dealer that assisted in the distribution of a new issue of municipal securities for the issuer but was not members of the syndicate. SIFMA suggests that the definition of “selling group” be limited to those dealers that sign a selling group agreement¹³, or substantially similar agreements, for a particular new issue of municipal securities.

We are also supportive of the proposed amendments to Rule G-11(f), requiring the syndicate manager, prior to the first offer of any securities by a syndicate, to furnish in writing to the other members of the syndicate and to members of the selling group, if any, a written statements of all terms and conditions required by the issuer – including any retail order requirements. This would necessarily include the issuer’s definition of “retail”, any limitations, as well as the time parameters for which the retail order period will be conducted. The dissemination and receipt of timely and adequate is a critical

¹⁰ See MSRB Glossary, *supra* note 3.

¹¹ See Fabozzi, Fedstein, Pollack, and Zarb *The Municipal Bond Handbook* (1983) at 200.

¹² MSRB Notice 2012-13 (March 6, 2012), Text of Proposed Amendment to Rule G-11(a)(xiii).

¹³ See SIFMA’s Model Selling Group Agreement available at <http://www.sifma.org/services/standard-forms-and-documentation/municipal-securities-markets/>.

underpinning of fair dealing.¹⁴ This is especially important to dealers contacting customers with non-discretionary accounts that might be interested in purchasing some of the new issue, which necessarily results in taking more time to submit an order.

Finally, with regard to proposed Rule G-11(k) Retail Order Period Representations and Required Disclosures, our members feel strongly that the representation that an order meets the issuer's definition of "retail" is more appropriate for the Master Agreement Among Underwriters¹⁵ and that it is not necessary for the representation to be made separately for each order submitted during a retail order period. This change would also clarify that such disclosures are to be made by co-managers to the senior manager of the syndicate. With respect to requiring dealers that submit an order during the retail order period to provide in writing, presumably to the senior manager of the syndicate, the proposed representations in proposed Rule G-11(k)(ii) – (vi), we suggest that this new requirement is a duplication of order detail record keeping requirements that are currently maintained by co-managers and selling group members. It is more appropriate (and should be sufficient for record keeping and enforcement purposes) for these customer order details to remain with the dealer with the customer relationships – the dealer with the duty of care and confidentiality to the customer. If co-managers and selling group members are required to provide such information to the senior syndicate manager, proposed Rule G-11(k)(iv) should also specify that any identifying information required by the issuer may not include customer account numbers, names or Taxpayer Identification numbers.

b. Rule G-8: Books and Records

As discussed above, since SIFMA believes it is not warranted to require co-managers and selling group members to share customer specific information with the syndicate managers (information that the co-manager or selling group member is required to maintain), SIFMA further believes that the proposed amendments to Rule G-8 (requiring the syndicate manager to keep such records) are not warranted as they would be duplicative of record keeping requirements already imposed upon dealers and selling group members.

¹⁴ The proposed Interpretive Notice accompanying this proposed rule change also obligates the senior syndicate manager to disseminate any subsequent changes to those conditions in a timely manner. The senior syndicate manager, depending on the facts and circumstances, may violate Rule, G-17, if they "withhold information regarding retail order periods to provide an advantage to themselves or their customers, or to disadvantage other dealers r their customers."

¹⁵ See SIMFA's Master Agreement Among Underwriters (2002), available at <http://www.sifma.org/services/standard-forms-and-documentation/municipal-securities-markets/>

c. Rule G-32: Disclosures in Connection with Primary Offerings

SIFMA supports the proposed amendments to Rule G-32 which would require a managing underwriter to report to the MSRB's Electronic Municipal Market Access (EMMA) system whether a primary offering of securities included a retail order period and when the retail order period was conducted.

V. Proposed Interpretive Notice

SIFMA generally supports of the text of the proposed interpretive notice as it is primarily a restatement of prior guidance to underwriters regarding Rule G-17 fair practice obligations of underwriters to issuers when conducting retail order periods. The proposed notice would recognize that in some cases issuers also allow dealers that are not underwriters (i.e. selling group members) to submit orders during retail order periods and would extend the fair practice obligations of dealers placing orders in retail order periods to other dealers. A dealer that places an order framed as a qualifying retail order during a retail order period that it knows does not meet the terms and conditions for the order period established by the issuer would violate Rule G-17. In the same vein, SIFMA believes that senior managers should be able to rely on representations made by co-managers that such co-manager (or selling group member) has made to them pursuant to proposed Rule G-11(k) to satisfy their own fair dealing obligation to the issuer. Accordingly, we suggest that the proposed interpretive notice be revised to explicitly reflect such a safe harbor.

VI. Conclusion

SIFMA sincerely appreciates this opportunity to comment upon the Proposal. Subject to the proposed refinements suggested above, SIFMA supports the proposed rule changes as they would protect dealers that follow issuers' instructions, clarify issuer terms and conditions, and require timely notice of retail order period terms and conditions to all syndicate and selling group members.

Please do not hesitate to contact me with any questions at (212) 313-1265.

Sincerely yours,



David L. Cohen
Managing Director
Associate General Counsel

Mr. Ronald W. Smith
Municipal Securities Rulemaking Board
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cc:

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