



December 13, 2011

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

**Re: MSRB Notice 2011-63 (November 8, 2011): Request for
Comment on Restated Sophisticated Municipal Market
Professional Notice**

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 Restated Sophisticated Municipal Market Professional Notice (the “Proposal”).

I. Executive Summary

SIFMA commends the MSRB for proposing a revised and expanded definition of Sophisticated Municipal Market Professional (“SMMP”) as the quality and availability of information concerning municipal securities has greatly improved since 2002². SIFMA has long championed creating a class of sophisticated investors, such as SMMP investors, which has led to the development of online trading platforms and improved liquidity and transparency in the municipal market. Additionally, SIFMA agrees with the MSRB that having special rules for such a class of sophisticated investors is “desirable from the standpoint of reducing the cost of dealer compliance to maintain consistency with [Financial Industry Regulatory Authority] rules, absent clear reasons for treating

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 Interpretive Notice Regarding the Application of MSRB Rules to Transactions with Sophisticated Municipal Market Professionals (April 30, 2002).

transactions in municipal securities differently.”³ Accordingly, we suggest several ways in which the SMMP standard could be made even better. To the greatest extent possible, the SMMP standard should be harmonized with Financial Industry Regulatory Authority (“FINRA”) Rule 2111 as it applies to institutional customers. SIFMA feels that all institutional accounts under FINRA’s jurisdiction should be treated the same way: there is no reason why both qualifications and compliance obligations can’t be the same under both rules. In the alternative, the proposed “safe harbor”, while welcomed, is too narrowly defined in two respects and should be broadened. First, the requisite assets required to be held or have under management should not be limited to municipal securities. Additionally, a presumption should exist that certain types of institutional customers are capable of evaluating, barring knowledge of a material change in the investor’s circumstances, the investment risk and market value of the municipal securities at issue – thereby obviating the need for dealers to obtain an attestation from them to these elements.

II. Revised Definition of SMMP

SIFMA supports the proposed revised definition of SMMP so that it is harmonized with FINRA’s revised suitability rule as it applies to institutional customers. Accordingly, dealers will be able to treat as an SMMP an institutional customer⁴ that: (1) the dealer has a reasonable basis to believe is capable of evaluating investment risks and market value independently, both in general and with regard to particular transactions in municipal securities, and (2) affirmatively attests that it is exercising independent judgment in evaluating the recommendations of the dealer. Individuals, corporations, partnerships and trusts with total assets of at least \$50 million may qualify to be an SMMP.

III. Harmonization with FINRA Rule 2111

SIFMA supports the revised definition of SMMP so that it is consistent with FINRA Rule 2111’s suitability obligations for institutional accounts. It appears based upon FINRA Rule 2111 that no product specific product

³ MSRB NOTICE 2011-63.

⁴ “Institutional customer” is defined as a customer with an institutional account (as defined under 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.”

specialization is required to satisfy this definition. SIFMA's members are concerned with the requirement that the proposed SMMP safe harbor contains a product specific investment requirement which could lead to significant confusion among institutional customers due to the varied standards. Additionally, investing in municipal securities generally suggests an appetite for lower credit risk tolerance than other securities as the default rates for municipal securities are generally significantly lower than in other debt asset classes. Continuing with an SMMP standard that is more stringent than FINRA Rule 2111, where institutional customers can invest in products with greater risks, but no product specific experience, is contradictory. Further, there should be a harmonized compliance regime to allow an institutional customer to complete a single affirmation to satisfy FINRA Rule 2111 for all products, including the MSRB's requirements for SMMP status.

IV. Unique SMMP Requirements

Should the MSRB choose not to harmonize the Proposal with FINRA Rule 2111, we suggest the following as an alternative:

A. Safe Harbor

As detailed in the Proposal, the MSRB has proposed there be a safe harbor which will allow a dealer to satisfy the "reasonable basis" requirement of clause (1) of the SMMP definition, if: (i) the institutional customer has total assets of at least \$50 million invested in municipal securities in the aggregate in its portfolio and/or under management, and (ii) the institutional customer attests that it is capable of evaluating investment risks and market value independently, both in general and with regard to particular transactions in municipal securities. While a safe harbor is always welcome, this proposed safe harbor is too narrow to be useful in two respects: the specific asset class limitation needed to satisfy the \$50 million threshold; and requiring an attestation from all institutional customers.

i. Assets to Qualify for Safe Harbor

One component of the proposed safe harbor would require that the institutional customer have total assets of at least \$50 million invested in municipal securities in the aggregate in its portfolio and/or under management. We feel the \$50 million threshold is unnecessarily high if the MSRB proceeds with a product specific investment requirement to qualify for the safe harbor, unlike FINRA Rule 2111 which only has portfolio level requirements, we believe this dollar threshold should be reduced to \$25 million. Having assets of at least \$25 million in municipal securities demonstrates a customer's: 1) high level of general level of experience in municipal securities markets; 2) ability to understand the economic features of a municipal security; and 3) ability to independently evaluate how market developments would affect municipal

securities. Additionally, this would allow institutional customer “crossover” buyers having a substantial investment in municipal securities (i.e. \$25 million) as well as \$25 million invested in other assets classes to be afforded the safe harbor.

ii. Customer Attestation

Under FINRA Rule 2111, the exemption from determining security-specific suitability for such institutional investors permits dealers to receive an affirmation (not an attestation) of each such customer’s desire to exercise independent judgment in selecting investments when transacting in FINRA regulated securities. To suggest a different affirmation by SMMPs under the MSRB rules, with differing terms and subtle distinctions, will be a costly exercise for our industry and its sophisticated buy-side clients with little incremental benefit. We believe that the affirmation by an institutional investor of its desire to exercise independent judgment, coupled with a more realistic threshold for municipal assets or assets under management, will more than adequately protect such investors while ensuring that they are sophisticated with regard to municipal securities. A municipal dealer that has checked a client’s status as an institutional investor and determined that the client holds or manages an adequate amount of municipal securities should be afforded a presumption that it has fulfilled its regulatory duties in classifying such customer as an SMMP under the rules for the municipal securities market.

SIFMA supports the need for certain institutional customers to provide an affirmation that they are capable of evaluating investment risk and market value of the securities at issue. However, SIFMA does not support having the following institutional customers provide such an affirmation to qualify for the safe harbor: 1) banks, savings and loan associations, insurance companies, or registered investment companies; and 2) investment advisers registered either with the Securities and Exchange 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). These categories of institutional investors are already recognized by other market regulators as being sophisticated participants in the financial markets capable of assessing the risks and benefits of investments, and are subject to significant capital adequacy, assets, or assets-under-management thresholds as defined under their relevant regulatory schemes.

B. Non-Safe Harbor SMMPs

We also believe that certain institutional investors who are new entrants to the market for municipal securities (for instance, a bond mutual fund manager seeking taxable municipals to distribute credit risk) should also be afforded SMMP status. An institutional customer having total assets of at least \$50 million (with no minimum amount of municipal securities) could still qualify as an SMMP if (1) the dealer has a reasonable basis to believe the customer is capable

of evaluating municipal investment risks and municipal market values independently, both in general and with regard to particular transactions in municipal securities, and (2) the customer affirms that it is exercising independent judgment in evaluating the recommendations of the dealer. SIFMA supports these elements of the Proposal, but believes that an affirmation made by an institutional customer under FINRA Rule 2111 should be sufficient and result in greater compliance efficiencies. Requiring an additional SMMP affirmation is not warranted. As mentioned above, having a separate affirmation by SMMPs, with differing terms and subtle distinctions, will be a costly exercise for our industry and its sophisticated buy-side clients with little incremental benefit.

V. Conclusion

SIFMA sincerely appreciates this opportunity to comment upon the Proposal. SIFMA commends the MSRB for proposing a revised and expanded definition of SMMP and has suggested, above, several ways in which we believe the SMMP standard could be made even better which would result in additional developments in the online market and improving liquidity throughout the municipal market. To the greatest extent possible, the SMMP standard should be harmonized with the institutional customer exemption contained in FINRA Rule 2111, absent clear reasons for treating transactions in municipal securities differently.

Please do not hesitate to contact me with any questions at (212) 313-1265. SIFMA welcomes the opportunity to discuss all aspects of this Proposal with the MSRB.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "D. L. Cohen", with a stylized flourish at the end.

David L. Cohen
Managing Director
Associate General Counsel

cc:

Municipal Securities Rulemaking Board

Lynnette Kelly Hotchkiss, Executive Director
Ernesto Lanza, Deputy Executive Director and General Counsel
Peg Henry, General Counsel, Market Regulation