sifma

*Invested in America*

SIFMA's Model Clarifying Statements for Municipal Securities Underwriters (Revised November 2011)

Following the Dodd-Frank Wall Street Reform and Consumer Protection Act's amendments to Section 15B of the Securities Exchange Act of 1934 (the "Act"), many of SIFMA's member firms started inserting statements into their marketing and deal documents that establish and clarify the nature of the relationship between them and the issuer or conduit borrower. Specifically, these statements are intended make explicit that, in their capacities as underwriters, remarketing agents, swap counterparties and placement agents (and other capacities not subject to an explicit fiduciary duty under the Act), the member firms are involved in arm's length, commercial transactions and are not serving as a municipal advisor under the Act, a financial advisor or any other type of fiduciary.

Members suggested that it would be helpful to create model statements that member firms could use to clarify their roles and duties and to establish issuer expectations when working with municipal issuers and conduit borrowers. The proposed model statements and suggested context for their use are described below.

**Regulatory Disclosures.** Municipal securities broker dealers are regulated by a variety of regulators, including the Securities and Exchange Commission, Financial Industry Regulatory Authority, and the Municipal Securities Rulemaking Board ("MSRB"). In light of the changes to MSRB Rule G-23[1] that become effective for all new issues for which the time of formal award is after November 27, 2011, as well as proposed interpretive guidance for underwriters to MSRB Rule G-17, SIFMA's members feel it is best practices to deliver to a potential client, at the earliest possible time, certain regulatory disclosures. Keeping a record of the issuer official to whom the disclosure was delivered to, as well as the time and method of delivery is highly recommended. Such disclosure should contain statements similar to the following:

> Dear [Authorized Issuer Official],
> OPTION 1[2]: [We are writing to provide you with certain disclosures in accordance with regulatory guidance issued by the Municipal Securities Rulemaking Board.] OPTION 2: [We are writing to provide you with certain regulatory disclosures as required by the Municipal Securities Rulemaking Board.] As part of our services, [Name of Firm] may provide advice concerning the structure, timing, terms, and other similar matters concerning an issue of municipal securities that [Name of Firm] is underwriting or intends to underwrite. OPTION A[3]: However, [Name of

[1] It is important to note that Rule G-23 does not cover conduit obligors. Also, if the dealer in a competitive underwriting is merely providing a bid and is not providing advice on the structure, timing, terms or similar matters with respect to the bond issue, there would be no need for the dealer to provide these disclosures.

[2] Options 1 and 2 are different alternatives that can be used at the preference of the firm sending the disclosure.

[3] Options A and B present alternatives that may be preferable at different points in time.

Firm] is serving as an underwriter and not as a financial advisor in this transaction. The primary role of [Name of Firm], as an underwriter, is to purchase securities, for resale to investors, in an arm's-length commercial transaction between the [Issuer] and [Name of Firm]. [Name of Firm] has financial and other interests that differ from those of the [Issuer].
OPTION B: However, [Name of Firm] intends to underwrite and not serve as a financial advisor in this transaction. The primary role of [Name of Firm], as an underwriter, is to purchase securities, for resale to investors, in an arm's-length commercial transaction between the [Issuer] and [Name of Firm]. [Name of Firm] has financial and other interests that differ from those of the [Issuer]. If the [Issuer] would like a municipal advisor that has legal fiduciary duties to the [Issuer], then [Issuer] is free to engage a municipal advisor to serve in that capacity.

If the [Issuer] has any questions or concerns about these disclosures, then [Issuer] should make those questions or concerns known immediately to [Name of Firm]. In addition, [Issuer] should consult with its own financial and/or municipal, legal, accounting, tax and other advisors, as applicable, to the extent it deems appropriate.

**Pre-Engagement Marketing Materials**. Marketing materials and other documents that precede an official engagement, such as pitch books, responses to requests for proposals, term sheets, requested analyses and other materials used in the course of marketing or performing municipal bond banking services all may contain information that could be misconstrued as "advice" within the meaning of the Act. Accordingly, the documents noted above should contain a statement similar to the following:

[Name of Firm] is providing the information contained in this document for discussion purposes only in anticipation of serving as underwriter to the [Issuer] . The primary role of [Name of Firm], as an underwriter, is to purchase securities, for resale to investors, in an arm's-length commercial transaction between the [Issuer] and [Name of Firm] and that [Name of Firm] has financial and other interests that differ from those of the [Issuer]. [Name of Firm] is not acting as a municipal advisor, financial advisor or fiduciary to [Issuer] or any other person or entity. The information provided is not intended to be and should not be construed as "advice" within the meaning of Section 15B of the Securities Exchange Act of 1934. [Issuer] should consult with its own financial and/or municipal, legal, accounting, tax and other advisors, as applicable, to the extent it deems appropriate. If the [Issuer] would like a municipal advisor in this transaction that has legal fiduciary duties to the [Issuer], then the [Issuer] is free to engage a municipal advisor to serve in that capacity.

**Engagement Letters and Deal Documents**. A firm may enter into any of several documents in connection with a transaction including, but not limited to, engagement letters, bond purchase agreements, standby bond purchase agreements, remarketing agreements, placement agent agreements, commercial paper dealer agreements or credit agreements, as applicable. Notwithstanding that these operative documents establish the parameters of the relationship between the parties, given the regulatory uncertainty surrounding the amendments to Section 15B of the Act, member firms should add the following provision to these documents:

> No Advisory or Fiduciary Role. The [Issuer] acknowledges and agrees that: (i) the primary role of [Name of Firm], as an underwriter, is to purchase securities, for resale to investors, in an arm's-length commercial transaction between the [Issuer] and [Name of Firm] and that [Name of Firm] has financial and other interests that differ from those of the issuer.; (ii) [name of Firm] is not acting as a municipal advisor, financial advisor, or fiduciary to the [Issuer] and has not assumed any advisory or fiduciary responsibility to the [Issuer] with respect to the transaction contemplated hereby and the discussions, undertakings and procedures leading thereto [(irrespective of whether [Name of Firm] has provided other services or is currently providing other services to the [Issuer] on other matters)]; (iii) the only obligations [name of Firm] has to the [Issuer] with respect to the transaction contemplated hereby expressly are set forth in this [name of agreement]; and (iv) the [Issuer] has consulted its own financial and/or municipal, legal, accounting, tax and other advisors, as applicable, to the extent it deems appropriate. If the [Issuer] would like a municipal advisor in this transaction that has legal fiduciary duties to the [Issuer], then the [Issuer] is free to engage a municipal advisor to serve in that capacity.

**Talking Points**. In addition to serving as underwriters, many financial services firms have other arm's length relationships with issuers, such as remarketing agent, letter of credit provider and swap counterparty. These relationships do not have a specific exemption from the Rule and bear the risk that a conversation about a put of a variable rate demand bond, a renewal of the letter of credit or the status of a swap, as the case may be, can lead to giving "advice" about the issuance of municipal bonds. To prevent that, firms should remind their employees who engage with issuers (including municipal bond bankers) of the following:

- be clear to the issuer that you are not acting as its advisor, agent or fiduciary;
- if someone mistakenly refers to your firm as an advisor, correct the misunderstanding and clarify your actual role;
- handle the discussion as you would when dealing with a counter party in a principal to principal transaction; and
- encourage the issuer to speak with its legal, accounting, tax, financial and other advisors, as applicable, to the extent it deems appropriate.