



August 6, 2018

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street NW
Suite 1000
Washington, DC 20005

**Re: MSRB Notice 2018-10: Request for Comment: Retrospective
Review of 2012 Interpretive Notice Concerning the Application
of MSRB Rule G-17 to Underwriters of Municipal Securities**

Dear Mr. Smith:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates this opportunity to respond to Notice 2018-10 (the “Notice”)² issued by the Municipal Securities Rulemaking Board (the “MSRB”) in which the MSRB is requesting comment in connection with its retrospective review of its Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities, which became effective on August 2, 2012 (the “2012 Guidance”).³ The

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s nearly 1 million employees, we advocate on legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² MSRB Notice 2018-10 (June 5, 2018).

³ Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (Aug. 2, 2012), available at <http://msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-17.aspx?tab=2> and originally published in MSRB Notice 2012-25 (May 7, 2012). The 2012 Guidance was approved by the Securities and Exchange Commission (the “SEC”) in Release No. 34-66927 (File No. SR-MSRB-2011-09) (May 4, 2012), 77 FR 27509 (May 10, 2012).

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
Page 2 of 22

2012 Guidance established a series of mostly new duties owed by underwriters⁴ to issuers under MSRB Rule G-17 applicable solely to negotiated issues except where explicitly made applicable to competitive offerings.

The MSRB adopted the 2012 Guidance in the wake of the financial crisis and the significant changes brought to the regulatory landscape by the Dodd-Frank Wall Street Reform and Consumer Protection Act, which among other things introduced for the first time a federal fiduciary duty and a regulatory regime for the newly created category of municipal advisors.

In that context, the 2012 Guidance served to reinforce the fair dealing obligations of underwriters to issuers under MSRB Rule G-17, to expand upon those obligations by ensuring that issuers understood the financing structures that underwriters might recommend and any conflicts of interest that might exist on the part of underwriters, and to provide much needed clarity regarding the role of underwriters, as compared to municipal advisors, in connection with new issue offerings.⁵

SIFMA and its members believe that the 2012 Guidance served as an important and timely tool in the successful transformation to today's municipal marketplace. We offer below our comments on the 2012 Guidance as part of the MSRB's retrospective review process and in response to the specific questions posed by the MSRB with the goal of strengthening the effectiveness of the 2012 Guidance in light of today's more mature regulatory context.

I. Support for Retrospective Review

SIFMA and its members are pleased that the MSRB is engaged in this review of the 2012 Guidance as part of its broader commitment to engaging in retrospective review of its rules to assure that they are responsive to changes in the municipal

⁴ The 2012 Guidance also applies to placement agents in private placements, subject to certain adjustments due to differences in the nature of the placement agent role as compared to the underwriter role, as described in the Implementation Guidance discussed below. Except as otherwise noted in this letter, our use of the term underwriter includes placement agent to the extent applicable under the 2012 Guidance. *See* footnote 11 *infra*.

⁵ With regard to the role of underwriter as compared to municipal advisor, the MSRB also took the important step of amending Rule G-23 to more fully address the conflict that arises from serving in both roles on the same transaction and adopting its Guidance on the Prohibition on Underwriting Issues of Municipal Securities for Which a Financial Advisory Relationship Exists Under Rule G-23 (Nov. 27, 2011), available at <http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-23.aspx?tab=2> and originally published in MSRB Notice 2011-29 (May 31, 2011) (the "Rule G-23 Interpretation").

securities market and in the policymaking, economic, stakeholder and technological environment.⁶ A retrospective review process with the full participation of market participants is critical in understanding the intended and unintended effects of the MSRB's existing rules and should represent the beginning of a conversation about whether rulemaking or additional guidance is called for in order to make existing rules more effective and efficient in support of a free and open market and the protection of investors, municipal entities, obligated persons and the public interest. As such, SIFMA understands that the Notice does not represent a formal rulemaking proposal and that any rule proposals would be subject to an MSRB exposure draft seeking comment on specific rule or interpretative language prior to the formal submission of such proposal with the SEC.

The MSRB's Retrospective Review Process recognizes that there are many means to retrospective review, acknowledging that an effective review process should extend beyond formal written responses to also include meetings with relevant stakeholders. SIFMA urges the MSRB to engage in face-to-face discussions with SIFMA members and other market participants affected by the 2012 Guidance as a critical element of the retrospective review.

II. 2012 Guidance and Related MSRB Guidance

In recognition that much of the 2012 Guidance represented significant new requirements on underwriters and to assist them in implementing the 2012 Guidance, the MSRB published Guidance on Implementation of Interpretive Notice of Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (the "Implementation Guidance") shortly before the 2012 Guidance became effective⁷ and Frequently Asked Questions (FAQs) Regarding an Underwriter's Disclosure Obligations to State and Local Government Issuers Under Rule G-17 (the "FAQs") a short time after the 2012 Guidance had become effective.⁸ The Implementation Guidance provides a deeper understanding of the 2012 Guidance by including statements made by the MSRB in its filings with the SEC and its formal responses to comments that were included in the rulemaking record generated during the extended rulemaking process for the 2012 Guidance, as well as including additional "practical considerations" akin to staff guidance on how the 2012 Guidance was

⁶ The MSRB's process for undertaking retrospective reviews is set out at <http://www.msrb.org/About-MSRB/Programs/Market-Regulation/Retrospective-Rule-Review> (the "Retrospective Review Process").

⁷ MSRB Notice 2012-38 (July 18, 2012).

⁸ MSRB Notice 2013-08 (Mar. 25, 2013).

intended to be implemented.⁹ The FAQs provided additional staff guidance responsive to questions raised by underwriters based on their experience with initial implementation of the 2012 Guidance.¹⁰ If the MSRB were to ultimately make any changes through a formal rulemaking process to the 2012 Guidance, SIFMA and its members believe that it would be critical to incorporate or otherwise preserve the guidance included in the Implementation Guidance and FAQs, with any modifications appropriate in light of the changes to the 2012 Guidance.

III. Summary of SIFMA's Views on 2012 Guidance

As a general matter, SIFMA and its members believe that significant portions of the 2012 Guidance have been beneficial to the marketplace and to the protection of issuers. As noted in the Implementation Guidance, the 2012 Guidance can be divided into three broad categories: prohibitions on misrepresentations, fairness of financial aspects of an underwriting, and required disclosures to issuers. SIFMA and its members believe that the aspects of the 2012 Guidance relating to prohibitions on misrepresentations (including the prohibition on discouraging the use of a municipal advisor) and the fairness of financial aspects of an underwriting (including the prohibitions on excessive compensation, guidance on fairness of new issue pricing, guidance on profit sharing arrangements, and prohibition on treating excessive or lavish personal expenses as expenses of a new issue) should be preserved. Given that the 2012 Guidance may often be associated solely with its disclosure requirements, the marketplace would benefit from the MSRB ensuring that these other aspects of 2012 Guidance are well understood.

SIFMA and its members also support the appropriateness of providing the types of disclosures required under the 2012 Guidance. These disclosures consist of disclosure of the underwriter's role, disclosure of conflicts of interests, and transaction disclosure. Except with respect to potential refinement of the nature of conflicts required to be disclosed as described below, SIFMA and its members generally support the content of the disclosures required to be made under the 2012 Guidance. While we

⁹ SIFMA notes that the MSRB included in the Implementation Guidance extensive guidance regarding transitioning to the 2012 Guidance for financings in process on the effective date. SIFMA commends the inclusion of such formal transition guidance and believes that similar transition guidance should be provided as a standard practice in connection with the MSRB's future rulemaking.

¹⁰ SIFMA commends the MSRB for having provided such additional guidance shortly after the effective date to respond to practical issues that arose as underwriters first implemented the 2012 Guidance. We believe that guidance responsive to implementation issues published shortly after the effective date of future rule changes, in instances where the MSRB is made aware of implementation issues, should also be included as a standard practice in connection with the MSRB's future rulemaking.

support these disclosures, the MSRB should be cognizant of the substantial compliance burden on underwriters and complaints expressed by some issuers regarding excessive documentation resulting from the 2012 Guidance, and any efforts to more precisely define the content of and the process for providing the disclosures required by the 2012 Guidance would be highly beneficial to the marketplace. Thus, SIFMA and its members believe that certain changes with respect to the timing and manner of providing disclosures, as well as circumstances where certain disclosures may not be required, should be made, as described more fully below.

SIFMA provides below its specific comments and recommendations with regard to the 2012 Guidance, followed by answers to the specific questions posed by the MSRB in the Notice.

IV. Guidance on Prohibitions on Misrepresentations

The 2012 Guidance provides that an underwriter must not misrepresent or omit the facts, risks, potential benefits, or other material information about municipal securities activities undertaken with an issuer, and that an underwriter must not recommend that an issuer not retain a municipal advisor. The 2012 Guidance provides specific examples, including but not limited to with respect to representations in issue price certificates, information provided to an issuer for use in the official statement, information included in a response to a request for proposals, representations during negotiation of a new issue (such as representations regarding the price negotiated and the nature of orders or investor demand), and representations regarding investors (such as whether they meet the issuer's definition of retail or other representations relating to retail order periods). Further, the Implementation Guidance lays out certain practical considerations in implementing these prohibitions. SIFMA and its members believe that this portion of the 2012 Guidance has been beneficial to the marketplace and to the protection of issuers and therefore should be preserved.

V. Guidance on Fairness of Financial Aspects of an Underwriting

The 2012 Guidance prohibits underwriters from charging or collecting excessive compensation (including certain separate but related payments from the issuer or third parties), provides guidance on fairness of new issue pricing for both negotiated and competitive offerings,¹¹ notes that profit sharing arrangements between

¹¹ SIFMA observes that the MSRB recently adopted amendments to Rule G-34 relating to duties of municipal advisors to obtain CUSIP numbers for competitive sales. With respect to that rule change, the MSRB has been providing informal guidance to the marketplace regarding what constitutes a competitive sale for purposes of the new municipal advisor obligation that is not consistent with how the notion of competitive

underwriters and new issue investors may violate Rule G-17 depending on the facts and circumstances, and reminds underwriters of prior interpretive guidance prohibiting the treatment of excessive or lavish personal expenses as expenses of a new issue. SIFMA and its members believe that this portion of the 2012 Guidance has been beneficial to the marketplace and to the protection of issuers and therefore should be preserved.

VI. Required Disclosures

A. Content of Role Disclosure

The 2012 Guidance requires the underwriter in a negotiated offering to make a series of disclosures to the issuer about the role and duties of an underwriter, with the MSRB having provided a sample disclosure document in the FAQs.¹² We note that some or all of these role disclosures required under the 2012 Guidance are intertwined with other regulatory guidance provided by the MSRB in the Rule G-23 Interpretation¹³ and guidance provided by SEC staff under SEC Rule 15Ba1-1.¹⁴

sale has been defined and generally otherwise understood under MSRB rules, including Rules G-17, G-32 and G-37, as well as in Rule G-34 itself prior to such amendments. With respect to the 2012 Guidance, the Implementation Guidance (referring to MSRB statements in the rulemaking record) treats private placements as negotiated sales subject to the 2012 Guidance but with certain disclosure obligations not being applicable due to the agency status of the placement agent. SIFMA and its members agree that the treatment of placements in the 2012 Guidance is appropriate and that they should not, absent highly unusual circumstances, be characterized as competitive sales.

¹² The role disclosures relate to the fair dealing duty of underwriters, the arm's-length nature of the underwriter-issuer relationship, the lack of a fiduciary duty, the duty to balance pricing between the interests of the issuer and investors, and the underwriter's duty with respect to the official statement.

¹³ The arm's-length nature of the underwriter-issuer relationship is a component of the Rule G-23 Interpretation. *See* footnote 5 *supra*.

¹⁴ The arm's-length nature of the underwriter-issuer relationship is a component of the SEC staff's Question 1.2: Treatment of Business Promotional Materials Provided By Potential Underwriters Under the General Information Exclusion from Advice, Registration of Municipal Advisors, Frequently Asked Questions, Office of Municipal Securities (last updated Sept. 20, 2017), available at <https://www.sec.gov/info/municipal/mun-advisors-faqs.shtml> (the "SEC Staff FAQs"), while the full set of role disclosures is a component of Question 5.1: Engagement to Serve as Underwriter, SEC Staff FAQs. Note that the underwriter exclusion under Exchange Act Section 15B(e)(4)(C) does not require such disclosure; rather, SEC staff reads into the exclusion, as a basic component, the role disclosures required under Rule G-17, effectively viewing the underwriter's compliance with its obligations under Rule G-17 as an underwriter as evidence of the requisite relationship with the issuer with respect to a particular issue of municipal securities for purposes of the underwriter exclusion.

As noted above, SIFMA and its members believe that, during the early stages of the new municipal advisor regulatory structure being constructed at the time the 2012 Guidance was adopted, the role disclosures provided much needed clarity regarding the role of underwriters, as compared to municipal advisors, in connection with new issue offerings. In that context, even the most seasoned issuers benefited from being reminded of the distinction in the roles of underwriters and municipal advisors. It can fairly be argued that at this juncture, issuers generally have come to understand the different natures of these roles. Nonetheless, while repeated provision to issuers of these unchanging role disclosures is increasingly becoming less relevant given that the marketplace has adjusted to the new municipal advisor regulatory regime, we believe that, subject to the suggestions below in Section VI(F) of this letter, such disclosure requirement should not be changed, at least not without coordinated changes to the comparable requirements under the Rule G-23 Interpretation or the SEC Staff FAQs.

B. Content of Conflicts of Interest Disclosure

The 2012 Guidance requires the underwriter in a negotiated offering to make a series of disclosures to the issuer about potential or actual material conflicts of interest, including but not limited to those relating to contingent compensation, certain payments to or from third parties, third-party marketing arrangements, certain profit-sharing arrangements with investors, certain credit default swap activities, and incentives to recommend a complex municipal securities financing.

While SIFMA and its members believe that meaningful disclosures to issuers of conflicts of interest on the part of underwriters is appropriate, we also believe that issuers in many cases are receiving excessive amounts of disclosures of potential and often remote conflicts that are of little or no practical relevance to issuers or the particular issuances and would benefit from more focused disclosure on conflicts that actually matter to them. Thus, we believe that the disclosure requirement should be limited to actual, and not merely potential, material conflicts of interest on the part of the underwriter.¹⁵ We believe this change could reduce substantially the volume of ordinary course or “boilerplate” conflicts disclosures received by issuers and therefore

¹⁵ We also note that, in some cases, it appears that regulators conflate conflicts of interest that might exist on the part of other parties to a financing, including in particular conflicts on the part of issuer personnel, with conflicts on the part of the underwriter, and therefore regulators appear to expect that the conflicts disclosure under the 2012 Guidance should include these conflicts of other parties. SIFMA and its members request that the MSRB clarify that the 2012 Guidance does not require the underwriter to disclose conflicts on the part of parties other than the underwriter.

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
Page 8 of 22

ensure that issuers do not inadvertently overlook meaningful disclosures of actual material conflicts.

Furthermore, we believe that certain categories of potential conflicts identified in the 2012 Guidance do not merit being specifically called out for disclosure. For example, given the effectively universal practice – and often the necessity – of underwriting compensation being contingent in nature, we see no benefit to issuers in receiving repeated disclosure of the conflict that can be presented by contingent compensation. Instead, the MSRB can instead provide educational materials emphasizing this and any other similar conflicts that make up the bulk of boilerplate conflicts disclosure through its Electronic Municipal Market Access (EMMA) website or its Education Center webpage. SIFMA believes such an approach would strengthen this aspect of the 2012 Guidance.

While issuers may want to be made aware of third-party marketing arrangements in connection with their new issues, we do not believe that the conflicts disclosure requirement under the 2012 Guidance is the appropriate mechanism for ensuring that issuers understand the participation of such third-parties. For example, the existence of selling group members is not typically disclosed in this way. Currently, such information is most effectively conveyed through the syndicate formation process,¹⁶ or could be part of any changes to syndicate formation practices under new MSRB rulemaking, and market practice has evolved to include disclosure in the official statement of such distribution/marketing relationships. The use of retail distribution agreements is not an activity involving suspicious payments to a third party and does not increase costs to issuers; rather, it simply passes on a discounted rate to a motivated dealer, which is commonly available to dealers after the bonds have become free to trade in any event, notwithstanding any agreement. If the MSRB believes that it is important to continue to require disclosure of these agreements, we request that the MSRB explain why such arrangements are seen as a material conflict of interest and why the requirement does not apply to selling group arrangements. Eliminating this disclosure would greatly reduce the need for disclosure letters under the 2012 Guidance by co-managers in large syndicates because the existence of third party distribution agreements is typically the only catalyst for co-manager disclosure under the 2012 Guidance.

In addition, the required disclosure regarding credit default swaps was included in the 2012 Guidance based on limited pre-financial crisis and pre-Dodd-Frank Act activities affecting a vanishingly small number of municipal issuers. The level of credit

¹⁶ See, *e.g.*, MSRB Rule G-11(f); MSRB Rule G-14 RTRS Procedures Section (d)(vii) and (viii).

default swap activity in the marketplace today is significantly smaller, calling into question whether this provision focused on a single type of financial product will become increasingly archaic. We believe this specific reference to credit default swaps should be deleted from the 2012 Guidance, acknowledging that such deletion does not mean that practices in connection with credit default swaps could never constitute a disclosable conflict, such as where an actual material conflict may arise from serving as underwriter to an issuer while also engaging in credit default swap activities related to such issuer.

C. Content of Transaction Disclosure

The 2012 Guidance requires the underwriter in a negotiated offering that recommends to the issuer a so-called “complex municipal securities financing” to disclose the material financial characteristics of the financing, as well as the known or reasonably foreseeable material financial risks of the financing. The 2012 Guidance provides certain examples of complex municipal securities financings, such as variable rate demand obligation offerings or financings involving derivatives, and the types of matters disclosable with respect thereto. In addition, under certain circumstances, the 2012 Guidance also requires disclosure of the material aspects of the financing structure for financings that are routine and do not constitute complex municipal securities financings.

While SIFMA and its members would defer to the issuer community on the ultimate usefulness of the required transaction disclosures, we generally believe that the content of these transaction disclosures as described in the 2012 Guidance is appropriate and does not need to be changed, subject to the suggestions below in Section VI(F) of this letter. We note that the MSRB recently provided guidance on the meaning of recommendation under Rule G-42 with respect to municipal advisory activities, describing a two-prong analysis for determining whether advice is a recommendation for purposes of the rule.¹⁷ SIFMA and its members request guidance as to whether this same two-prong analysis would apply for determining whether an underwriter has recommended a complex municipal securities financing.

D. Timing for Disclosures

The 2012 Guidance establishes three distinct timeframes for delivering different portions of the required disclosure: for disclosure of the arm’s-length nature

¹⁷ FAQs Regarding MSRB Rule G-42 and Making Recommendations (June 2018); MSRB Notice 2018-12 (June 20, 2018).

of the underwriter-issuer relationship, the earliest stages of the relationship (*e.g.*, in a response to a request for proposals or in promotional materials provided to an issuer); for other role disclosures and conflicts disclosures, when the underwriter is engaged to perform underwriting services (*e.g.*, in an engagement letter, not solely in a bond purchase agreement); and for transaction disclosure, in sufficient time before the execution of a contract with the underwriter to allow the issuer to evaluate the recommendation.¹⁸ In the context of the establishment of an initial underwriter-issuer relationship, SIFMA believes that, subject to the suggestions below in Section VI(F) of this letter, these timeframes are generally appropriate, with the understanding that the notion of a formal engagement to serve as underwriter for an offering does not match the normal process by which underwriters are brought on to underwrite most issuers' offerings and therefore underwriters often use the communication by issuer personnel that they will participate in an offering as indicative of the timing for such disclosures.

SIFMA and its members wish to note their appreciation for the MSRB's recognition in the Implementation Guidance that not all transactions proceed on the same timeline or pathway so that sometimes precise compliance with the timeframes may be infeasible, and the MSRB's statement that such timeframes are not intended to establish hair-trigger tripwires resulting in technical rule violations so long as underwriters act in substantial compliance with the timeframes and have met the key objectives for providing the disclosures. We urge the MSRB to reconfirm this guidance, as well as to provide further recognition of alternative timeframes for meeting these obligations as suggested below.

In connection with underwriters that engage in one or more negotiated underwritings with a particular issuer, we believe that repeated identical disclosures provided in each transaction by the same underwriter to the same issuer may often only serve to inundate the issuer with useless information. SIFMA and its members recommend that an underwriter engaged in a negotiated offering with an issuer be permitted by the MSRB to fulfill its disclosure requirements under the 2012 Guidance with respect to such offering by reference to, or by reconfirming to the issuer, its disclosures provided within the preceding twelve (12) month period (*e.g.*, disclosures provided in connection with a prior offering during such period or provided on an annual basis in anticipation of serving as underwriter on offerings during the next twelve (12) months). Such reference or reconfirmation must be provided by no later

¹⁸ While the timing requirements include three distinct deadlines, the MSRB should make clear that underwriters can collapse the fulfillment of these requirements without awaiting each applicable deadline. For example, the inclusion of role disclosures, conflicts disclosures and/or transaction disclosures in a response to a request for proposals should be viewed as satisfying the applicable disclosure requirements so long as the content is complete and no subsequent changes occur.

than execution of the bond purchase agreement and could be fulfilled in a representation contained in the bond purchase agreement. If during the course of such subsequent offering new or different disclosures become applicable (*e.g.*, if a new conflict of interest arises, or if the structure of a complex municipal securities transaction materially changes in a manner not previously disclosed), the underwriter would be required to provide such new or additional disclosures as contemplated by the 2012 Guidance – that is, in sufficient time before the execution of the bond purchase agreement to allow the issuer to evaluate the new disclosure. This or a similar alternative to transaction-by-transaction disclosure would be consistent with the more flexible approach permitted by the Commodity Futures Trading Commission (the “CFTC”) in connection with disclosures required by a swap dealer to a counterparty in counterparty relationship documentation or in an otherwise agreed upon writing.¹⁹ Of course, an underwriter could still choose to provide its disclosures on a transaction-by-transaction basis as currently required under the 2012 Guidance.

E. Trigger for Transaction Disclosures

Under the 2012 Guidance, transaction disclosure for a routine financing (*i.e.*, not a complex municipal securities financing) is required only if the underwriter reasonably believes that issuer personnel lack knowledge or experience with such routine financing structure that the underwriter has recommended. In contrast, transaction disclosure for a complex municipal securities financing recommended by the underwriter is always required regardless of issuer personnel’s knowledge, expertise or experience in such complex municipal securities financing, although the level of disclosure required may vary according to the issuer’s knowledge or experience with the proposed financing structure or similar structures, capability of evaluating the risks of the recommended financing, and financial ability to bear the risks of the recommended financing.

SIFMA and its members believe that all transaction disclosures should be triggered based on the standard for triggering disclosures regarding routine financings, subject to the suggestions below in Section VI(F) of this letter. Thus, disclosures regarding a recommended financing would be required if the underwriter believes that issuer personnel lack knowledge or experience with the financing structure recommended by the underwriter. The underwriter’s belief would be based on the same factors described in the 2012 Guidance for determining the level of disclosure required, so that the trigger for providing transaction disclosure, and the level of disclosure required to be provided, would be based on personnel’s knowledge or experience with

¹⁹ See CFTC Rule 23.402(e) and (f). See also CFTC Rule 23.431.

the proposed financing structure or similar structures, capability of evaluating the risks of the recommended financing, and financial ability of the issuer to bear the risks of the recommended financing.

F. Disclosure Opt-In and Opt-Out

Except with respect to the more targeted disclosures of actual material conflicts we recommend in this letter, which we believe should be delivered in all transactions (subject to our recommendations in the last paragraph of Section VI(D) above), SIFMA and its members believe that the invocation by an underwriter of the exemption under SEC Rule 15Ba1-1(d)(3)(vi) for an independent registered municipal advisor (“IRMA”) wherein the issuer would be relying on the advice of its IRMA in connection with the transaction should be deemed to satisfy any remaining disclosures under the 2012 Guidance due on or after the date the IRMA exemption is invoked. Thus, if an underwriter invokes the IRMA exemption in the earliest stages of a financing, such underwriter’s role disclosures and any otherwise required transaction disclosure would not be required,²⁰ unless the issuer opts in to receiving such disclosures notwithstanding its engagement of an IRMA to advise it.²¹

Furthermore, we believe that an issuer should be able to opt out of receiving the disclosures required under the 2012 Guidance, other than the conflicts disclosures, in a written election based on its knowledge, expertise, experience and financial ability, upon which the underwriter should be permitted to conclusively rely. Alternatively, the issuer could elect to provide its written opt-out to such disclosures without affirmatively stating the basis for such opt-out, provided that if (i) the underwriter has reason to believe that issuer personnel lack knowledge or experience with the structure of a recommended financing²² and (ii) the issuer does not employ a municipal advisor

²⁰ To the extent the role disclosures are fulfilled by invocation of the IRMA exemption, the MSRB should deem such disclosures as having been provided for purposes of Rule G-23 Interpretation. *See* footnote 13 *supra*. The invocation of the IRMA exemption would obviate the need to address the disclosures described in Questions 1.2 and 5.1 of the SEC Staff FAQs. *See* footnote 14 *supra*.

²¹ For example, an issuer that posts an IRMA notice on its website could include in such notice opt-in language stating that it wishes to receive role disclosures and/or transaction disclosures notwithstanding the issuer’s engagement of an IRMA. The issuer’s opt-in could also be provided in a separate writing.

²² The underwriter should be permitted to rely on issuer personnel’s prior experience with the same or similar financing structure in establishing that it does not have reason to believe that such personnel lacks the requisite knowledge or experience.

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
Page 13 of 22

for such financing,²³ the underwriter must nonetheless provide the required transaction disclosure.

G. Manner of Providing Disclosures and Seeking Acknowledgement

SIFMA and its members find that the manner for providing required disclosures to the issuer under the 2012 Guidance is generally workable, even though the division of responsibility among syndicate members has contributed to the large amounts of disclosures issuers receive on new issues. We believe that our proposed modifications as described elsewhere in this letter will substantially reduce the volume of such disclosures overall and therefore also reduce the pressure to find additional means of consolidating disclosures by the various members of underwriting syndicates.

However, we believe the requirement for the underwriter to attempt to receive issuer acknowledgement and the efforts to document cases where the issuer does not provide such acknowledgement create a significant degree of non-productive work on the part of underwriter personnel and provide no value to the issuer, but often produce unwanted follow-up inquiries from the underwriter. The MSRB should eliminate the acknowledgement requirement and should instead rely on the same principles for delivery of notices otherwise applied to its other rules. More specifically, underwriters should be permitted to provide the disclosures in a manner consistent with the delivery of other documentation during the course of the transaction, and receipt of an e-mail return receipt should be conclusive proof of delivery if other transaction documentation has also been provided to the same e-mail address.

VII. Responses to Questions Posed in the Notice

SIFMA provides below its answers to the specific questions posed by the MSRB in the Notice.

(1) What is the typical process, as implemented as a practical matter, for a dealer to provide the disclosures to issuers as required by the 2012 Guidance?

In broad strokes, the disclosure aspects of the 2012 Guidance involve the making of disclosures at three stages, each of which triggers a series of activities relating to preparation of the required disclosures, identifying the appropriate issuer

²³ For this purpose, the underwriter need not formally invoke the IRMA exemption so long as the issuer in fact is using a municipal advisor for the financing.

personnel to receive each disclosure, providing the disclosure to such personnel, obtaining (or seeking to obtain) such personnel's acknowledgement of receipt, monitoring and providing any supplemental disclosures that may be required during the course of the financing, and properly documenting all of these activities, in each case for financings that may present different circumstances and different groupings of syndicate members. As such, there is no single process followed by underwriters throughout the market that can reasonably be described as typical. In connection with the adoption of the 2012 Guidance, a SIFMA committee drafted model disclosure documents designed to serve as a starting point for underwriters in preparing their disclosures concerning the underwriter's role, compensation, and conflicts, as well as regarding the material financial characteristics and risks inherent in certain complex transactions commonly recommended by underwriters.²⁴ Any underwriter using the model documents makes such modifications as it deems appropriate, and other underwriters have produced their own versions of disclosure documents.

(2) The 2012 Guidance allows for syndicate managers to make the disclosures concerning the role of the underwriter and the underwriter's compensation on behalf of other syndicate members, as long as the other syndicate members make the other conflicts disclosures that are particular to them.

a. How often do syndicates utilize this option for making the disclosures? If it has been infrequent, please explain why.

We believe that there are many cases where the syndicate manager may make the disclosures concerning the role of the underwriter on behalf of other members of the syndicate, but there are also many cases where some or all syndicate members will also provide these disclosures to the issuer themselves. One reason this may be the case is that each syndicate member is obligated to provide its own disclosure of actual or potential conflicts of interest, and it is often procedurally easier to combine role disclosures and conflicts disclosures into a single document. Another reason may be that a particular underwriter has determined not to rely on another firm's actions to meet the underwriter's own regulatory obligations, or only permits such reliance upon confirmation that the syndicate manager has provided the required disclosure and has found that providing its own disclosure may be administratively easier than obtaining confirmation of the syndicate manager's disclosure.

²⁴ SIFMA model documents for the municipal securities market, including model disclosure documents under the 2012 Guidance, are available at <https://www.sifma.org/resources/general/municipal-securities-markets>.

Note that, because the disclosure regarding the arm's-length nature of the issuer-underwriter relationship must be provided at the earliest stage of the relationship and serves purposes beyond just the 2012 Guidance, many underwriting firms have included this disclosure (and in many cases the other role disclosures) on a wide range of communications with potential issuers that might be viewed as constituting an initial contact with such potential issuers as a prophylactic approach to avoiding inadvertently violating the 2012 Guidance or inadvertently being deemed a municipal advisor. Thus, while this particular disclosure may also be included in the set of role disclosures provided by a syndicate manager or individual syndicate members, in many cases that wider set of disclosures will occur later than the deadline for providing the disclosure on the arm's-length relationship.

b. To the extent it has been used, has this option been effective? If not, how could it be improved?

While this option may, in a subset of offerings, be effective in partially reducing the amount of duplicative disclosures that would otherwise have been provided, it is unlikely that this option could result in significant further reduction in duplicative disclosures without instituting modifications of the type suggested above, including in particular the narrowing of the scope of conflicts disclosure as described in Section VI(B) above and the rationalization of the frequency of disclosures for multiple underwritings with a particular issuer as described in Section VI(D) above.

c. Does the senior manager or any other dealer explain the disclosures to the issuer client or are they simply provided without any further discussion?

Practices in regard to any explanation of role disclosures likely vary considerably depending on the particular underwriter, the particular issuer and the prior experience between the issuer and the underwriter. It should be noted that the statements that make up the role disclosures (as well as whether compensation is contingent) are not difficult to understand on their face and normally are well understood by issuer personnel without further explanation or were well understood before the 2012 Guidance became effective.

(3)²⁵ Do dealers typically provide disclosures to both conduit issuers and conduit borrowers?

The 2012 Guidance by its terms does not require disclosures to conduit borrowers. However, it is common (although perhaps not universal) for underwriters to provide to a conduit borrower a copy of the disclosures provided to the issuer.

(4) Has the 2012 Guidance, particularly relating to required disclosures, achieved its intended purpose of promoting fair dealing by underwriters with issuers? If no, what are the problems?

SIFMA and its members believe that the 2012 Guidance has been, for the most part, successful at achieving its purpose of promoting fair dealing by underwriters with issuers. Certain weaknesses undermining the effectiveness of the disclosure aspects of the 2012 Guidance and potential modifications that could achieve meaningful improvements to the 2012 are discussed above in this letter and in our further responses below.

a. Are the disclosures too boilerplate and/or too voluminous? If so, what are the consequences?

SIFMA and its members believe that some aspects of the required disclosures have become boilerplate and too voluminous, which creates additional burdens to underwriters with no countervailing benefit, serve to obscure particularized disclosures that are material and should be well understood, and create confusion, frustration and unnecessary administrative activities for underwriters and many issuers.

b. Are issuers overly burdened?

While we defer to issuers on the question of whether they are overly burdened by the disclosures required under the 2012 Guidance, we do believe that excessive meaningless disclosures could not reasonably be viewed as beneficial to issuers and, as noted above, creates confusion, frustration and unnecessary administrative activities for many issuers.

c. Are any problems with the 2012 Guidance the same or different for issuers of different sizes?

²⁵ This and the following questions have been renumbered for continuity.

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
Page 17 of 22

While size of issuer may have some indirect bearing on any problems with the 2012 Guidance, it is more appropriate to focus on the knowledge, expertise and experience of issuer personnel, as well as the issuer's access to the advice of a municipal advisor, as the basis for determining whether more or less disclosure is appropriate in regard to an offering with such issuer.

d. Are the disclosures required to be provided at appropriate points in time in the course of the transaction?

SIFMA and its members believe that the points in time during the course of a particular transaction for the delivery of disclosures as provided in the 2012 Guidance are generally appropriate, subject to the observations and suggestions described in Section VI(D) above.

e. Is the issuer's acknowledgment of receipt of the disclosures necessary and meaningful?

For the reasons described in Section VI(G) above, SIFMA and its members strongly believe that the issuer's acknowledgement of receipt of disclosures do not provide any benefit, create significant burdens and should be eliminated. Underwriters should be permitted to provide the disclosures in a manner consistent with the delivery of other documentation during the course of the transaction, and receipt of an e-mail return receipt should be conclusive proof of delivery if other transaction documentation has also been provided to the same e-mail address.

(5) Should the MSRB amend the 2012 Guidance? If so, what are alternative approaches that could better achieve the intended purpose?

SIFMA and its members outline above in this letter certain limited modifications to the 2012 Guidance that the MSRB should make that would greatly enhance the effectiveness of the disclosure aspects of the 2012 Guidance while significantly reducing the burden on compliance.

a. Should the requirements be reduced or otherwise modified for different classes of issuers?

i. If so, how should those classes be defined?

1. Based on size?

As noted above, while size of issuer may have some indirect bearing on any problems with the 2012 Guidance, it is more appropriate to focus on the knowledge,

expertise and experience of issuer personnel, as well as the issuer's access to the advice of a municipal advisor, as the basis for determining whether more or less disclosure is appropriate in regard to an offering with such issuer.

2. Based on frequency in the market?

As described in Section VI(D) above, we believe that frequent issuers would greatly benefit from the 2012 Guidance being modified to allow underwriters that participate in multiple offerings for such issuers to rationalize their disclosures by making an initial set of full disclosures and thereafter disclosing any material changes that may occur during the course of subsequent offerings.

3. Relative to whether the issuer has an independent registered municipal advisor that is advising the issuer on the transaction?

As described in Section VI(F) above, we believe that, the requirement to provide role and transaction disclosures should be deemed satisfied if the underwriter has invoked the IRMA exemption, with certain exceptions described above, and can otherwise be affected if the issuer engages a municipal advisor.

4. Based on the presence of dedicated issuer staff for debt management?

As described in Section VI(E) above, SIFMA and its members believe that the 2012 Guidance should focus on the knowledge, expertise and experience of such dedicated issuer staff for debt management as the basis for determining whether disclosure, and what level of such required disclosure, is appropriate in regard to an offering by such issuer.

ii. If so, how should the requirements be modified? Should issuers of any particularly defined class be able to opt out of receiving the disclosures?

As described in Section VI(F) above, we believe that an issuer should be able to opt out of receiving role disclosures and transaction disclosures, subject to certain conditions described therein.

b. Should all issuers be able to opt out of receiving the disclosures?

While SIFMA and its members believe that all issuers could presumably be able to opt out of receiving role disclosures and transaction disclosures, transaction disclosures may still be required under certain circumstances described in Section VI(F) above.²⁶ We further believe that issuers should not be able to opt out of receiving disclosures of the more targeted universe of actual material conflicts, as described in Sections VI(B) and VI(F) above.

c. Should the frequency of making the disclosures to issuers be reduced? If so, how (e.g., once per year unless there are material changes to any of the information provided and/or other new information requiring additional disclosure)?

As described in Section VI(D) above, where an underwriter engages in one or more negotiated underwritings with a particular issuer, the underwriter should be permitted to fulfill its disclosure requirements with respect to an offering by reference to, or by reconfirming to the issuer, its disclosures provided within the preceding twelve (12) month period (*e.g.*, disclosures provided in connection with a prior offering during such period or provided on an annual basis in anticipation of serving as underwriter on offerings during the next twelve (12) months). Such reference or reconfirmation must be provided by no later than execution of the bond purchase agreement and could be fulfilled in a representation contained in the bond purchase agreement. If during the course of such subsequent offering new or different disclosures become applicable (*e.g.*, if a new conflict of interest arises, or if the structure of a complex municipal securities transaction materially changes in a manner not previously disclosed), the underwriter would be required to provide such new or additional disclosures as contemplated by the 2012 Guidance – that is, in sufficient time before the execution of the bond purchase agreement to allow the issuer to evaluate the new disclosure.²⁷ An underwriter could, alternatively, still choose to provide its disclosures on a transaction-by-transaction basis as currently required under the 2012 Guidance.

d. Could or should EMMA be a tool to improve the utility of disclosures and the process for providing them to issuers (e.g., use EMMA to display

²⁶ As described above in Section VI(F), role disclosures and transaction disclosures for any issuer, regardless of type or size, should be deemed satisfied if the IRMA exemption is invoked, unless the issuer has opted-in to receive such disclosures.

²⁷ This approach would be consistent with the more flexible approach permitted by the CFTC in connection with swap disclosures under CFTC Rule 23.402(e) and (f) and Rule 23.431. *See* footnote 19 *supra*.

more general disclosures but continue to require client- and deal-specific disclosures be provided directly to issuers by the dealers)?

As described in Section VI (B) above, we believe that certain categories of potential conflicts of interest do not merit being specifically called out for disclosure to issuers on a transaction-by-transaction basis. Since many potential conflicts (as opposed to actual conflicts) apply broadly to the marketplace, we believe that such information would most effectively and efficiently be made available to issuers through educational materials provided by the MSRB through the EMMA website or on the MSRB's Education Center webpage.

e. Has the level of detail provided by the MSRB in the disclosure requirements been useful in promoting compliance?

i. If so, would greater prescription for any of the requirements be beneficial?

ii. If not, should that prescription be modified? If so, how?

Subject to suggested changes described in this letter, we believe that the 2012 Guidance, together with the Implementation Guidance and the FAQs, generally provides the level of detail needed to promote compliance. As described in Section II above, if the MSRB were to ultimately make any changes through a formal rulemaking process to the 2012 Guidance, SIFMA and its members believe that it would be critical to incorporate or otherwise preserve the guidance included in the Implementation Guidance and FAQs, with any modifications appropriate in light of the changes to the 2012 Guidance.

f. Have the sample disclosures provided by the MSRB in Exhibit A to MSRB Notice 2013-08 been useful in facilitating compliance, and to what extent has the sample been adopted? Should it be revised?

We believe that the sample disclosure provided in Exhibit A to the FAQs has been useful in facilitating compliance and is used by many underwriters.

(6) What have been the costs or burdens, direct, indirect or inadvertent, of complying with the 2012 Guidance? Are there data or other evidence, including studies or research, that support commenters' cost or burden estimates?

SIFMA has not calculated the costs or burdens of complying with the 2012 Guidance, and is not aware of any such calculation by any other party. Nonetheless, it

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
Page 21 of 22

is clear that such costs or burdens are substantial and reasonable efforts to curtail them, as described in this letter, would be appropriate.

(7) Aside from the disclosure requirements, are there any other requirements addressed in the 2012 Guidance that should be modified or removed or new requirements that should be added?

As described in Sections IV and V above, SIFMA and its members believe that the portions of the 2012 Guidance relating to prohibitions on misrepresentations and the fairness of financial aspects of an underwriting have been beneficial to the marketplace and to the protection of issuers and therefore should be preserved.

VIII. Conclusion

SIFMA and its members appreciate the MSRB's commitment to retrospective review of the 2012 Guidance. We believe that, as a general matter, significant portions of the 2012 Guidance have been beneficial to the marketplace and to the protection of issuers and that the disclosure aspects of the 2012 Guidance would be enhanced by focusing the range of required conflicts disclosures. We also believe that certain changes with respect to the timing and manner of providing disclosures, as well as circumstances where certain disclosures may not be required, would be appropriate and would improve the effectiveness of the 2012 Guidance. We would be pleased to discuss any of these comments in greater detail, or to provide any other assistance that

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
Page 22 of 22

would be helpful. If you have any questions, please do not hesitate to contact the undersigned at (212) 313-1130.

Sincerely yours,

A handwritten signature in black ink, appearing to be 'L. Norwood', written over a faint, stylized triangular graphic.

Leslie M. Norwood
Managing Director and Associate
General Counsel

cc: ***Municipal Securities Rulemaking Board***
 Lynnette Kelly, President and Chief Executive Officer
 Lanny Schwartz, Chief Regulatory Officer
 Michael Post, General Counsel
 Carl Tugberk, Assistant General Counsel