March 8, 2022

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

Re: MSRB Notice 2021-17 – Request for Information on Environmental, Social and Governance (ESG) Practices in the Municipal Securities Market

Dear Mr. Smith,

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates this opportunity to comment on Municipal Securities Rulemaking Board ("MSRB") Notice 2021-17 (the "Notice")[2] requesting public input on environmental, social and governance ("ESG") practices in the municipal securities market. We understand that the request does not correspond with any rule making and only seeks to further the MSRB's mandate of enhancing issuer and investor protection and furthering the overall fairness and efficiency of the municipal securities market. SIFMA appreciates this type of request by the MSRB, which allows for preliminary discussion of items of interest to the MSRB before any rulemaking has commenced and initial viewpoints are potentially set. We acknowledge the attention these issues have been receiving from other regulators and market participants, as well as society at large.

In light of the preliminary nature of the request, SIFMA's comments are high-level and represent SIFMA's initial thinking on the delineated topics. SIFMA urges that if the MSRB desires to take action on ESG disclosures, a formal rulemaking process should be followed, allowing for appropriate public notice and comment periods for any proposals. SIFMA remains available to assist the MSRB and will provide additional comments in response to any specific regulatory proposals. SIFMA does, however, have some initial concerns about the issues in the Notice, as set forth below.

[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 for 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). SIFMA's members underwrite over 90% of new issues of municipal securities by volume.

[2] MSRB Notice 2021-17 (Dec. 8, 2021).

I. MSRB Is Not the Appropriate Regulatory Authority

First and foremost, SIFMA believes that the Securities and Exchange Commission ("SEC"), not the MSRB, is the appropriate regulatory authority to promulgate rulemaking regarding the content of issuer or obligor disclosures. To the extent the SEC has authority over issuer and obligor disclosures, any substantive regulation of issuer disclosure content should be left to the SEC in its pursuit of investor protection.[3] Similarly, the MSRB is not the appropriate regulatory authority to determine materiality; that authority lies squarely with the SEC. With that being said, we acknowledge it may be helpful for the MSRB to examine ESG issues in the municipal securities market and determine if there are any unique factors in this market that should be kept in mind for future discussions with the SEC and other regulators.

II. Encouraging the Developing ESG Sector with Caution

SIFMA members acknowledge that there are societal benefits to encouraging investment in ESG projects. They also recognize that ESG investing is a nascent, yet rapidly developing sector. As ESG products are evolving, the standards for what constitutes an ESG asset, ESG investment directive, or a preferred form of ESG disclosure are also evolving. If the SEC does proceed with regulation of the ESG sector, factors relevant for this purpose include, allowing time for innovation and development of market practices, collaborating with stakeholders on the development of this new market, and proceeding with care and caution.[4] In the long-term, rule sets should be as uniform and standard as possible across all domestic and international markets and products. Premature regulatory action in markets still in their infancy, such as the ESG market, may unintentionally impede their growth.

Issuers should consider what information, including disclosure on how the proceeds will be, or were, spent may be material to an ESG investor. SIFMA believes that, when possible, ESG disclosures should focus on measurable and objective metrics. These disclosures can focus on specific metrics relevant to a given project, including green buildings, carbon emissions, water conservation, recycling initiatives, jobs created, affordable housing, etc. Alternatively, ESG disclosures may focus more on the ESG nature of an organization, including goals for sustainability, diversity and community engagement. There are a wide range of ESG-friendly projects and issuers in the municipal market.

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[3] SIFMA has responded to the SEC request for comment on ESG issues. *See* Letter from Melissa MacGregor (SIFMA) to SEC, June 10, 2021; and Letter from Timothy W. Cameron, Esq. (SIFMA AMG) to SEC, June 10, 2021.

[4] In the recent SEC Office of Credit Ratings Staff Report on Nationally Recognized Statistical Rating Organizations, the SEC acknowledges the rapid development in ESG products has led staff to identify some areas of potential risk. *See*: https://www.sec.gov/news/press-release/2022-15.

Investor confidence is critical in the development and operation of markets. Care should be taken by the issuer to avoid the appearance of overstating any ESG benefits, which would create reputational risk not just for the issuer, but also for the underwriter and municipal advisor.[5] Investors should perform their own diligence on any ESG investments to determine whether or not the product meets their own definition of ESG. The application of ESG principles to municipal securities can be challenging, however as all tax-exempt municipal securities are issued for a public purpose, some of the designations are relatively obvious.

III. ESG-Labeled Bonds and Issuer Self-Designations

The most critical issuer information is full disclosure of the facts about the project and use of proceeds, from which an investor could determine whether a particular security meets their investment criteria. Neither the issuer nor the underwriter is in a position to determine whether the issuer's ESG-related factual disclosures are sufficient for the bonds to be ESG-labeled bonds under any specific investor's criteria.

While best practices for an issuer could include the external review of an ESG designation by a credible party, such designations can be financially burdensome, time consuming, and potentially unnecessary in certain instances. External review of designations typically carries a fixed cost which is not dependent on the overall size of the issuance, thus disadvantaging smaller issuers. The cost of any licensing fees related to ESG designations that market participants may be required to bear should also be considered. Municipal securities issuers are very price sensitive, and many are not likely to pay for a costly external review without the certainty that it will add significant value to the transaction.

While external review of a designation may be beneficial, self-designation should still be viewed as credible for ESG consideration as long as the issuer discloses a detailed rationale for their self-designation that is consistent with a widely accepted framework, including a clear breakdown of the planned use of proceeds. A fulsome description of the relevant criteria and metrics used are vital to an investor's analysis. In these early days, self-designations should not be viewed as inferior. Standardization can be beneficial and best practices from outside organizations could potentially be considered as a long-term industry goal, but there should be no singular labeling standard or requirement at this time.[6] To encourage growth and development in ESG products, SIFMA members feel it is important to permit issuers to self-designate as to their bonds' ESG

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[5] *See*, World's biggest firms seen exaggerating their climate actions (cnbc.com) available at: https://www.cnbc.com/2022/02/07/study-worlds-biggest-firms-seen-exaggerating-their-climate-actions.html.

[6] As noted in the Notice, there are multiple independent parties, including the International Capital Market Association (ICMA), that supply standards by which bonds could be judged. "The [ICMA] Green Bond Principles (GBP), the Social Bond Principles (SBP), the Sustainability Bond Guidelines (SBG) and the Sustainability-Linked Bond Principles (SLBP) referred to as the "Principles" have become the leading framework globally for the issuance of sustainable bonds." *See*: https://www.icmagroup.org/sustainable-finance/.

status. Not permitting issuer self-designation as to the ESG status of bonds would impede growth in this sector.

Issuers should make clear that any issuer designation is neither a promise nor a guarantee, and any self-designations should have a safe harbor similar to that of forward-looking statements. Any designation or recitation of facts about the project and use of proceeds should be meaningful and not misleading.

IV. ESG Risk Disclosures and Labeling Should Be Distinct

The MSRB's Notice recognizes the disclosure of information regarding ESG-related risk factors as distinct from the labeling and marketing of municipal securities with ESG designations or labels. Addressing both issues in the Notice, however, may potentially cause confusion among some market participants. SIFMA believes that the categories of ESG risk disclosures and ESG labeling should be dealt with exclusive of one another by the SEC. The issues presented by each category are unique and implicate the need for differing expert input or review. We believe that both categories are important and deserve independent development and thought.

As the SEC reviews potential regulation in this market, we note that while standardized disclosure of every ESG-related risk factor is not feasible, more specific risk ESG disclosures on ESG products would be helpful. State and local governments and obligors can and should have bespoke material risk disclosures for ESG-related matters. Any such material risks should already be disclosed under current law. Examples of such material risks could include the identification of material assets in a flood zone or in areas prone to wildfire. The material risk of other natural disasters should be considered, as well as the known material risks of infrastructure adaptation to a changing climate. Issuers and obligors should also already be considering if climate change is or is reasonably expected to materially affect its revenue. Any steps taken to mitigate such risks may also be material.

V. Issuers Prioritizing ESG Investors in New Issues of Municipal Securities

Pursuant to MSRB Rule G-11, underwriters must honor an issuer's priority of orders in a new issuance of municipal securities.[7] The underwriter's obligation is to conduct an orderly distribution of securities. Issuers are free to structure the priority of orders in any manner that they see fit in light of their goals and objectives, including potentially prioritizing ESG or other types of investors. To ensure an issuer's goals and objectives are met, any necessary definitions and criteria used in their priority of orders should be clearly set forth. Classifying investors and altering any priority of orders to give an order preference to certain investors based on their investment strategies could potentially increase an underwriter's compliance risks. However, if an issuer has prioritized ESG investors, an underwriter should be able to rely upon a

[7] MSRB Rule G-11; *See also*, https://www.msrb.org/msrb1/pdfs/Establishing-Priority-of-Orders.pdf

representation from the investor related to the investor's eligibility or characterization as an ESG investor. The ability of an underwriter to rely on an investor's statements, without further examination and review, would be necessary to mitigate compliance risks.

VI. EMMA Improvements and Clarity of Information

We recognize that the MSRB recently incorporated an ESG indicator from IHS Markit into the new issue calendar shown on the EMMA website. SIFMA and its members believe that this indicator is potentially problematic and confusing, as there is no clear definition of what this ESG indicator substantively means for each specific issuance. We do not believe that this ESG indicator on the EMMA website enhances accurate market transparency regarding these ESG-designated bonds.[8] At this time, we do not believe it is of value to investors, who need to make their own determination about whether any particular bonds fit within their investment criteria.

Any such designation does not necessarily add value or mean that such bond fits within any particular investment criteria. Diligence on any such designated bond issue would not be practicable for determining or validating the issuer's subjective designation.

Improvements to the EMMA website could include clarifying any issuer self-designations, adding in specifics regarding any external review, removing any confusing labels, and focusing on objective and standardized ESG-labels. Again, any such designations should include risk disclosures regarding differing investor criteria to avoid underwriter liability regarding a bond's classification at initial offering or throughout the time it is outstanding.

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Thank you for considering SIFMA's comments. Overall, SIFMA appreciates the MSRB's review of these timely issues and the opportunity to comment about its concerns regarding this request for information. As stated above, our largest concerns relate to the need for investor protection, prevention of investor confusion, increased burdens on issuers, and increased risks and liability to underwriters. We look forward to working with the SEC and the MSRB on these

[8] In a press release from October 25, 2021, the MSRB itself conceded that "***. . . there is no universally accepted ESG standard or definition on labeling an ESG security in the municipal market . . ..***" (emphasis added)

issues as the ESG market develops. If a fuller discussion of our comments would be helpful, I can be reached at (212) 313-1130 or lnorwood@sifma.org.

Sincerely,

Leslie M. Norwood
Managing Director
and Associate General Counsel

cc: ***Municipal Securities Rulemaking Board***
Gail Marshall, Chief Regulatory Officer

Securities Exchange Commission
Ernesto Lanza, Acting Director, Office of Municipal Securities