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Invested in America

March 31, 2016

BY ELECTRONIC MAIL

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

Re: MSRB Regulatory Notice 2016-07,
Request for Comment on Draft Amendments to MSRB Rule G-30 to Provide Guidance on Prevailing Market Price

Dear Mr. Smith:

The Securities Industry and Financial Markets Association[1] ("SIFMA") appreciates this opportunity to comment on the Municipal Securities Rulemaking Board's ("MSRB's") Regulatory Notice 2016-07 (the "Proposal"), in which the MSRB requests comment on draft interpretive guidance on prevailing market price, amending MSRB Rule G-30. SIFMA submits this letter as a supplement to its submission of June 7, 2010 regarding MSRB Notice 2010-10, in which the MSRB proposed similar interpretive guidance, and we incorporate by reference our prior comment in this proceeding.[2]

[1] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $20 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. 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] Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, SIFMA, to Ernesto Lanza, General Counsel, MSRB, regarding MSRB Notice 2010-10 (June 7, 2010), *available at* http://www.msrb.org/~/media/Files/RFC/2010/2010-10/SIFMACommentLetter.ashx?la=en.

SIFMA understands that the MSRB's draft guidance is designed to harmonize the manner in which the "prevailing market price" for municipal securities is determined with the manner established by FINRA for purposes of other types of fixed income securities, thereby supporting the development of a possible future mark-up disclosure requirement.[3] We strongly support the MSRB's objective to enhance bond market price transparency for retail investors. To this end, we have urged both the MSRB and FINRA to adopt a uniform approach to confirmation disclosure and have asked for additional guidance from both the MSRB and FINRA on how to ascertain prevailing market price with the necessary specificity to support a mark-up disclosure proposal. We greatly appreciate the engagement with our members by both the MSRB and FINRA regarding this issue, and thank the MSRB for its efforts to consider some of the specific concerns that we have raised in its Proposal.

Although a prevailing market price standard has been used historically to ensure fair and reasonable pricing to customers, firms have never been required to delineate an exact prevailing market price on a customer confirmation. In this regard, the MSRB should recognize in the text of any rule or guidance that, although the core waterfall methodology can serve as a reasonable starting point of factors to consider, it cannot be applied in a mechanical fashion and is not necessarily determinative of an exact prevailing market price calculation.

Within the goal of achieving relative consistency in approach, regulators must acknowledge that the determination of prevailing market price is not an exact science. Accordingly, SIFMA believes that it should be reasonable and understood that firms may calculate different prevailing market prices with the same set of facts, and any anticipated disclosure regime should account for this acceptable variance. In particular, regulators should permit firms to rely on reasonably designed policies and procedures to determine, in a routine and potentially automated fashion, an estimated prevailing market price for the purpose of confirmation disclosure. This calculation and the factors behind the disclosure should indeed be reasonably determined and in good faith, however, the prevailing market price used for any confirmation disclosure requirement should be largely delinked from the regulatory evaluation of the end price to the customer and the requisite fair pricing and mark-up policy requirements. The practicalities of generating the disclosure may necessitate policies and procedures outside, in whole or in part, the direct control of the trader or broker making the determination of the end price to the customer and as such the two requirements (*i.e.*, disclosure and fair pricing) should remain distinct.

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[3] We focus this letter on the MSRB's draft interpretive guidance on prevailing market price, with the understanding that such guidance may be used to support a possible future mark-up disclosure requirement. For the reasons we have emphasized in prior comment letters, we continue to believe such a requirement would impose unjustified costs and burdens and that investors would be better served by alternatives that focus on increasing usage of the abundance of market data and investor tools already available on EMMA and TRACE.

Should some version of a prevailing market price disclosure framework proceed, we urge the MSRB and FINRA to coordinate and provide consistent guidance to address this issue. As this effort proceeds, we would welcome the opportunity to engage further with both the MSRB and FINRA regarding how to achieve our shared objective to provide retail investors with greater insight into their transactions.

With this overarching concern in mind, SIFMA generally supports the MSRB's efforts to harmonize its guidance on prevailing market price with that of FINRA, subject to our comments below. Given the broader context of this effort as well as the unique characteristics of the municipal bond market, we request that the MSRB clarify or alter several aspects of its proposed guidance to ensure greater consistency in approach across firms, and strongly urge both the MSRB and FINRA to coordinate a consistent standard for confirmation disclosure.

DISCUSSION

I. THE MSRB AND FINRA SHOULD ACKNOWLEDGE THAT THERE IS INHERENT VARIABILITY IN THE DETERMINATION OF A PREVAILING MARKET PRICE AND PERMIT FIRMS TO RELY ON REASONABLY DESIGNED POLICIES AND PROCEDURES FOR THE PURPOSE OF CONFIRMATION DISCLOSURE.

One of the primary regulatory objectives associated with requiring enhanced price disclosure on retail customer confirmations is to allow investors to understand and compare their transaction costs across dealers.[4] In light of this objective, regulators should provide specific guidance to ensure increased consistency in approach across the industry such that any potential prevailing market price disclosure is relatively comparable across firms, with enough flexibility to incorporate the understanding that prevailing market price is ultimately a subjective determination with some level of inherent variability. Furthermore, regulators should clarify that estimating a prevailing market price in a short timeframe for the purpose of confirmation disclosure is not necessarily determinative of the prevailing market price for the purpose of scrutinizing a fair and reasonable mark-up.

In its Proposal, the MSRB emphasizes that firms "currently have in place policies, procedures and systems necessary to exercise diligence in determining the

[4] *See* MSRB Regulatory Notice 2015-16 at 15 (suggesting that "if an investor believes that a disclosed mark-up is higher than he or she might have received from another dealer, the investor may be incentivized to seek out other dealers offering lower transaction costs for future trades"); *see also* FINRA Regulatory Notice 15-36 at 6 (stating that "investors in fixed income securities currently are limited in their ability to understand and compare transaction costs associated with their purchases and sales").

prevailing market price of a security and assure that their mark-ups charged are reasonable when effecting a transaction," however, the MSRB does not acknowledge that this standard has never required firms to print an exact prevailing market price on a customer confirmation.[5] As the Securities and Exchange Commission ("SEC") has noted, "determining the prevailing market price for municipal securities, particularly those that are illiquid, can be a complex task."[6] In particular, the "specific degree of accuracy, as well as the specific actions that a dealer may need to take to assess market value, will vary with the facts and circumstances."[7] This complexity is heightened, in particular, for firms that carry inventory.

Accordingly, regulators should acknowledge that two firms looking at the same set of facts may reasonably come to two different determinations of the prevailing market price for a particular security given the variety of factors that may inform such a determination. Given the significance of Rule 10b-10 confirmation disclosure, firms need explicit assurance that a reasonable and good faith calculation of a prevailing market price for the purpose of confirmation disclosure, based on the information available at the time of a transaction and guided by reasonable policies and procedures, will not be deemed incorrect by regulators in hindsight in the absence of clear error.

As a practical matter, should a prevailing market price disclosure proposal proceed, some level of automation in measuring prevailing market price and generating a corresponding confirmation in a timely manner will be necessary, particularly for firms that engage in a high volume of trades. As an alternative to contemporaneous cost or proceeds, firms should be permitted to adopt policies and procedures that are reasonably designed to generate an estimated prevailing market price for the purpose of confirmation disclosure. For example, regulators should provide guidance that would permit firms to rely on the use of third-party pricing vendors to calculate prevailing market price for the purpose of confirmation disclosures, if firms reasonably determine that such vendors' calculations are sufficiently accurate for this purpose. Nevertheless, there will be an inherent subjectivity involved in reaching an exact prevailing market price determination.

In this regard, both the MSRB and FINRA should provide clear guidance to permit, for the purpose of confirmation disclosure, firms to reach a determination of prevailing market price based on information available at the time of the transaction that is guided by policies and procedures reasonably designed to inform such a calculation. To avoid the risk of misleading investors, firms should be permitted to describe any prevailing market price on a customer confirmation as an "estimated" measure or to otherwise provide a brief disclaimer explaining that prevailing market

[5] MSRB Regulatory Notice 2016-07 at 12.

[6] U.S. Securities and Exchange Commission, Report on the Municipal Securities Market, 148 (July 31, 2012) [hereinafter SEC Municipal Report].

[7] SEC Municipal Report at 129.

price is a subjective measure with some inherent level of variability across firms. In addition, to minimize investor confusion, firms should be permitted to state on customer confirmations that the difference between the price to the customer and the prevailing market price does not necessarily reflect the firm's exact commission, profit, or mark-up on the transaction.

In sum, firms should be permitted to adopt and rely on policies, procedures, and systems reasonably designed to reach a prevailing market price determination. If a firm applies reasonably designed policies, procedures, and systems in good faith in order to generate a prevailing market price, there should be a rebuttable presumption that the dealer has complied with its confirmation disclosure requirement. Nevertheless, an estimated prevailing market price generated for the purpose of confirmation disclosure should not be considered determinative for the purpose of scrutinizing fair and reasonable mark-ups. Regulators should acknowledge that the operational reality of automating a prevailing market price disclosure on a customer confirmation may in some cases overwhelm the theoretical considerations involved in evaluating a fair and reasonable mark-up, where some level of flexibility in interpretation may be required in hindsight. Although there are factors unique to the municipal and corporate bond markets, firms will face similar subjective determinations, as well as system and operational challenges, in the context of any confirmation disclosure requirement. Accordingly, SIFMA strongly urges the MSRB and FINRA, to the greatest extent possible, to adopt harmonized guidance in this regard.

To assist firms with the creation of such policies and procedures and to encourage greater consistency in approach across firms in determining prevailing market price, the MSRB should clarify or revise several aspects of its Proposal as described below. We further suggest that FINRA issue guidance to clarify many of the same interpretative issues that arise from FINRA Rule 2121.

II. TO ENSURE GREATER CONSISTENCY IN APPROACH ACROSS FIRMS, THE MSRB SHOULD CLARIFY OR REVISE SEVERAL ASPECTS OF ITS PROPOSED GUIDANCE.

A. The Definition Of "Contemporaneous" Cost Or Proceeds Should Be Clarified

As a preliminary matter, the MSRB should confirm that, absent other market prices, contemporaneous cost is the first and most representative piece of evidence to prevailing market price, however, contemporaneous cost is not and should not necessarily be considered equal to prevailing market price. Under the draft guidance, "the prevailing market price for a municipal security is established by referring to the

dealer's contemporaneous cost as incurred, or contemporaneous proceeds as obtained."[8] The MSRB should clarify that prevailing market price is not "established" by referring to the dealer's contemporaneous cost or proceeds; rather, contemporaneous cost is the *most representative* evidence of prevailing market price.

Rather than imposing a rigid standard, the MSRB should allow firms to adopt and rely on a more flexible approach in determining prevailing market price, guided by reasonable policies and procedures that recognize that pricing is based on a myriad of factors. In this context, the MSRB should recognize in the text of any rule or guidance that the waterfall serves as a descriptive list of factors to consider, and is not in all cases controlling or determinative in calculating an exact prevailing market price.

In addition, the MSRB should clarify the meaning of the term "contemporaneous." The Proposal states that a dealer's cost is (or proceeds are) "considered contemporaneous if the transaction occurs close enough in time to the subject transaction that it would reasonably be expected to reflect the current market price for the municipal security."[9] In other words, a "contemporaneous" transaction is one that occurs "close enough in time" to the subject transaction. This definition is circular and is difficult for dealers to apply in practice with any degree of consistency. Moreover, this definition implies that the passage of time is the only factor in determining whether or not a prior trade is considered contemporaneous with a subject trade. The MSRB needs to clarify that timing is a factor and the amount of time it believes is sufficiently long so that a trade would not be deemed contemporaneous. At a minimum, the MSRB should confirm that trades that do not occur on the same day will not be considered contemporaneous.

The MSRB should clarify that the "most recent" transaction is not necessarily the most representative evidence of the "prevailing market," even if that transaction is deemed by the MSRB or as applied by FINRA as "contemporaneous" for purposes of the traditional waterfall analysis. For example, if the most recent transaction is 20 days ago, changes to the facilities or operations that support the security, or changes in a municipal issuer's financial condition, may make the old, but "most recent," transaction inappropriate for determining the prevailing market for a security.[10] Similarly, in a highly volatile market (*e.g.*, the trading on October 15, 2014), the "most recent" transaction may not be the most representative evidence of the prevailing market. Accordingly, the MSRB should recognize that firms will have to implement policies and procedures reasonably designed to determine the most representative evidence of the prevailing market even when the "most recent" transaction is not the most representative evidence of the prevailing market.

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[8] MSRB Regulatory Notice 2016-07 at 17.

[9] MSRB Regulatory Notice 2016-07 at 17.

[10] As we have noted, we urge the MSRB to confirm that trades that do not occur on the same day will not be considered contemporaneous.

B. Firms Should Be Permitted To Consider The Size Of Transactions And Side Of The Market As Relevant Factors In Determining Prevailing Market Price

Under the draft guidance, a dealer may be able to show that its contemporaneous cost or proceeds are not indicative of the prevailing market price in instances where: "(A) interest rates changed after the dealer's contemporaneous transaction to a degree that such change would reasonably cause a change in municipal securities pricing; (B) the credit quality of the municipal security changed significantly after the dealer's contemporaneous transaction; or (C) news was issued or otherwise distributed and known to the marketplace that had an effect on the perceived value of the municipal security after the dealer's contemporaneous transaction."[11]

Nevertheless, the draft guidance does not address the size of a transaction as a relevant factor in determining prevailing market price. As we noted in our 2010 comment letter, given the economic reality that market values and spreads can differ widely for small trades and institutional-size trades, transaction size is a critical factor in determining prevailing market price of a particular security. SIFMA is concerned that, under the Proposal, dealers will be required to use the prices resulting from institutional-size trades as the prevailing market price from which they would be required to compute mark-ups on subsequent small bond trades. Absent further clarity, the Proposal may have the unintended consequence of impairing liquidity for retail investors.

Accordingly, the MSRB should revise its draft guidance to acknowledge the differences in market values and spreads between small trades and institutional-size trades. In particular, the MSRB should permit transaction size to be taken into account and allow dealers to adjust to account for, for the purposes of determining prevailing market price, the discount or premium inherent in pricing small or institutional-size transactions.

In addition, the MSRB should provide more explicit guidance permitting firms to adjust to account for the side of the market (*i.e.*, bid or offer) in reaching a prevailing market price determination. The Proposal suggests that "whether the dealer in the comparison transaction was on the same side of the market as the dealer in the subject transaction" may impact the consideration of comparison transactions, but does not explicitly state that the MSRB expects dealers to adjust for this factor.[12] Similarly, FINRA rules recognize that, although the interdealer market is the natural point of reference for calculating prevailing market price, the side of the market is also a

[11] MSRB Regulatory Notice 2016-07 at 17-18.

[12] MSRB Regulatory Notice 2016-07 at 19.

relevant factor in the analysis.[13] It follows that the prevailing market price should be adjusted from any price reference point to reflect any differences between the characteristics of the transactions, including side of the market, whether the transaction involves an interdealer or customer trade, and size of the transaction. For example, when an observed interdealer offer is the only available price reference and the dealer needs to determine the prevailing market price for a bid in that same security, it would be reasonable for the dealer to adjust the observed interdealer offer by a commercially-acceptable spread to determine the dealer bid prevailing market price, from which it then determines its final price inclusive of any mark-down. Similarly, if the only price reference available is a dealer's contemporaneous cost from its round lot purchase in an interdealer transaction, the dealer should be able to adjust its prevailing market price by a commercially-acceptable spread to reflect an interdealer odd lot bid in the same security, and then, in turn, determine its final price inclusive of any mark-down. To ensure greater consistency across firms, the MSRB should provide explicit guidance clarifying that these sorts of market price adjustments are anticipated in evaluating the various factors of the waterfall.

C. The Definition Of "Similar" Securities Should Be Clarified

The MSRB should provide greater clarity regarding the meaning of "similar," confirming that it is ultimately a subjective determination. Under the MSRB's draft guidance, dealers may often need to consult factors further down the waterfall, such as trades related to "similar" municipal securities, as indicia of prevailing market price. According to the Proposal, a "similar" municipal security "should be sufficiently similar to the subject security that it would serve as a reasonable alternative investment to the investor."[14] The draft guidance instructs dealers to take into account measures including credit quality, spread, general structural characteristics, technical factors, and federal and/or state tax treatment, but leaves the direction regarding how each of these factors should be assessed or weighed against one another to the dealers.

The MSRB should explicitly recognize that firms will assess these and other factors based on the facts and circumstances, market conditions, and securities involved in a particular transaction and accordingly may weigh these factors differently in different cases.

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[13] FINRA Rule 2121, Supplementary Material .07 (explaining that the relative weight of certain pricing information for the purpose of calculating prevailing market price "depends on the facts and circumstances of the comparison transaction or quotation (*i.e.*, such as whether the dealer in the comparison transaction was on the same side of the market as the dealer is in the subject transaction and timeliness of the information)").

[14] MSRB Regulatory Notice 2016-07 at 19.

D. The Terms "Isolated Transactions" And "Isolated Quotations" Should Be Defined

The Proposal states that "isolated transactions or isolated quotations generally will have little or no weight or relevance in establishing prevailing market price," however, the terms "isolated transactions" and "isolated quotations" are not defined.[15] The MSRB notes that its treatment of "isolated transactions and quotations" is intended to track existing FINRA guidance, while acknowledging that "in the municipal securities market, the existence of only isolated transactions or quotations may be a more frequent occurrence than in other fixed income securities markets."[16]

SIFMA requests further guidance from the MSRB regarding its view of "isolated transactions and quotations." In particular, we note that "isolated" should not imply a strictly temporal consideration; for example, a trade that was not at market should be treated as an "isolated" transaction. Determining whether or not a transaction or quote is "isolated" will require firms to undertake a facts and circumstances analysis and the MSRB should delineate some of the factors to consider in making such a determination. Consistent with any such further guidance, firms should be permitted to rely on policies and procedures reasonably designed to identify such isolated transactions and isolated quotations for the purpose of a prevailing market price calculation.

E. The Proposed Guidance Should Be Applied Solely In The Context Of The Proposed Retail Disclosure Requirement Or Otherwise Limited Solely To Retail Investors

We commend both the MSRB and FINRA for their proposals to limit any future confirmation disclosure requirement to retail customer accounts, requiring disclosure on confirmations for non-institutional accounts only.[17] Specifically, under the MSRB's most recent proposal, disclosure would be limited to transactions for an account other than an "institutional account," as defined in MSRB Rule G-8(a)(xi).[18]

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[15] MSRB Regulatory Notice 2016-07 at 19.

[16] MSRB Regulatory Notice 2016-07 at 8.

[17] MSRB Regulatory Notice 2015-16; FINRA Regulatory Notice 15-36.

[18] MSRB Regulatory Notice 2015-16 at 9. Rule G-8(a)(xi) defines the term "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

Similarly, FINRA's most recent proposal would exclude transactions that involve an institutional account, as defined in FINRA Rule 4512(c).[19] In drawing a clear retail/institutional distinction, the MSRB noted that the SEC Municipal Report showed that "retail municipal securities investors pay higher transaction costs than institutional investors or investors in other asset classes, and attributing these differences, in part, to a lack of information, support the potential benefit of additional disclosure."[20] FINRA noted that limiting the disclosure requirement to non-institutional accounts "may lessen some of the costs and complexity associated with [confirmation disclosure] by allowing firms to use an existing distinction that already is integrated into their operations."[21] In that regard, it is clear that this draft MSRB guidance has originated as a necessary technical clarification solely in the context of the proposed retail disclosure requirement. Accordingly, the draft guidance should be adopted solely as part of the proposed retail disclosure requirement rather than as general guidance under Rule G-30. The fair pricing provisions under Rule G-30 have served as the underpinning or foundation to pricing in municipal securities for over 35 years and have generally been an effective means to define a dealer's obligations given the particular structure of the municipal marketplace. We do not believe that the guidance is necessary or constructive with respect to the broader fair pricing obligations and provides no regulatory benefit while increasing operational complexity, especially in relation to institutional clients. In any event, should the MSRB proceed to adopt any prevailing market price guidance under Rule G-30, we believe that institutional accounts should be excluded from the definition of customer in the guidance to limit the scope to transactions with retail clients.

F. As A General Matter, The MSRB Should Provide Specific Examples Regarding How To Determine And Disclose A Prevailing Market Price In Various Scenarios

In MSRB Notice 2010-10, the MSRB offered a number of examples intended to clarify its expectations regarding how to determine the prevailing market price in a variety of scenarios. Although SIFMA requested clarifications regarding some of

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entity (whether a natural person, corporation, partnership, trust, or otherwise) with total assets of at least $50 million."

[19] FINRA Regulatory Notice 15-36 at 3. FINRA Rule 4512(c) defines "institutional account" as "the account of (1) a bank, savings and loan association, insurance company or registered investment company; (2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state securities commission (or any agency or office performing like functions); or (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million."

[20] MSRB Regulatory Notice 2015-16 at 14.

[21] FINRA Regulatory Notice 15-36 at 10.

these examples in our 2010 comment letter, overall we found the examples helpful to understanding the MSRB's expectations more clearly.

For this reason, we urge the MSRB to provide additional examples and explanations regarding how to calculate prevailing market price in various complex scenarios under its latest draft guidance. In particular, we request specific examples regarding how and when a prevailing market price calculation should appear on customer confirmations. As we have emphasized, firms should be afforded a level of flexibility in calculating a prevailing market price given the inherent subjectivity involved in reaching such a determination. Nevertheless, we believe that clear examples would provide invaluable guidance on how the MSRB expects firms to reach and disclose on customer confirmations their prevailing market price determinations.

To this end, we have provided below four relatively straightforward examples designed to illustrate how some firms may approach a confirmation disclosure requirement under various scenarios. We would appreciate the MSRB's views on these initial examples and request that the MSRB provide additional examples reflective of a wide range of market conditions and complex scenarios. We have offered only a few examples due to the time constraints of the comment period, however, we would emphasize that there are clearly more complex scenarios that will require firms to make difficult judgments about how to evaluate the information available to them in the context of the waterfall (*e.g.*, where a firm buys a large block and sells in considerably smaller pieces throughout the day, or if the market moves significantly during the day and there are trades before, during, and after the market movement). We would welcome the opportunity to discuss our concerns in greater detail with the MSRB and to submit additional examples at a later date.

Illustration 1. A common market scenario involves a retail customer who wishes to sell a municipal security. A dealer working with the customer uses an alternative trading system ("ATS") and/or the services of a broker's broker to solicit bids for the securities.[22] After receiving information on the bids received through the ATS or by the broker's broker, the dealer ascertains the best bid available to it. If the customer wishes to proceed with the transaction, the customer's order is taken and the dealer executes simultaneous or near-simultaneous principal transactions with the customer and the ATS/broker's broker.[23] The dealer's price on the ATS/broker's broker transaction must be used as the prevailing market price for the purpose of

[22] Although we refer to use of an ATS for the purpose of this and other examples, we note as a general matter that dealers may determine there are better ways to establish price for a particular trade depending on market conditions.

[23] *See generally* MSRB, Report on Secondary Market Trading in the Municipal Securities Market (July 2014) at 24 (Figure III.F) (noting that the vast majority of all trades that were followed by another trade in the same municipal security on the same day had the second trade occur within 15 minutes).

calculating the mark-down. The dealer's price would be disclosed on the customer confirmation as the prevailing market price, along with the mark-down.

Illustration 2. In this scenario, a dealer is working with a retail customer who wishes to buy municipal securities of a particular type, quantity, and price. The dealer locates securities meeting the customer's requirements via an ATS or among posted inter-dealer offerings or "bid-wanted lists." After obtaining the customer's commitment to effect a transaction in one of the securities located, the dealer takes the customer's order and effects simultaneous or near-simultaneous principal transactions in which the securities are purchased in the market and sold to the customer. The dealer's purchase price must be used as the prevailing market price for the purpose of calculating the mark-up. The dealer's price would be disclosed on the customer confirmation as the prevailing market price, along with the mark-up.

Illustration 3. A dealer acquires a position in a municipal security through a single transaction with another dealer early in the trading day without having any existing customer orders for the security. The dealer immediately reoffers the security and shortly thereafter receives a customer order for the security and sells the entire position in a single sale to the customer. Absent countervailing evidence, the inter-dealer purchase transaction would be considered a contemporaneous transaction with respect to the sale transaction to the customer.

While the dealer's purchase price would be considered the contemporaneous cost pursuant to the proposed guidance and should be considered the most representative evidence of the prevailing market price for the purposes of determining the price for any same day customer sale, unlike the transaction described in Illustration 2 above, the sale price to the customer would not be the same price (dealer cost) at which the dealer purchased the security earlier in the day. Instead, the re-offer price would be adjusted from the dealer's purchase transaction to account for the different sides of the market.[24] The dealer's re-offer price must be used as the prevailing market price for the purpose of calculating the mark-up. The dealer's re-offer price would be disclosed on the customer confirmation as the prevailing market price, along with the mark-up.[25]

Illustration 4. A retail customer (Customer A) wishes to sell a particular security. The dealer solicits bids for the security via an ATS and also submits their own bid. After collecting and reviewing several external bids, it is determined that the dealer's own bid resulted in the best price for customer A. The security is purchased

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[24] *See supra* Part II.B regarding the need to consider side of the market as a relevant factor in determining prevailing market price.

[25] To continue this example, we would welcome the MSRB's guidance regarding how it would expect firms to approach confirmation disclosure operationally should a second purchase transaction in the same security occur later that same day at a different price.

from Customer A at the best bid less the dealer mark-down. The dealer's bid price must be used as the prevailing market price for the purpose of calculating the mark-down. The dealer's bid price would be disclosed on the customer confirmation as the prevailing market price, along with the mark-down.

Similar to Illustration 3 above, the dealer immediately reoffers the security and shortly thereafter receives a customer order for the security and sells the entire position in a single sale to the customer (Customer B). Absent countervailing evidence, the dealer's purchase transaction from Customer A would be considered a contemporaneous transaction with respect to the sale transaction to Customer B.

While the dealer's purchase price from Customer A would be considered the contemporaneous cost pursuant to the proposed guidance and should be considered the most representative evidence of the prevailing market price for the purposes of determining the price for any same-day customer sale, unlike the transaction described in Illustration 2 above, the prevailing market price to Customer B would not be the same price (dealer cost) at which the dealer purchased the security earlier in the day from Customer A. Instead, the re-offer price would be adjusted from the dealer's purchase transaction to account for the different sides of the market. The dealer's re-offer price must be used as the prevailing market price for the purpose of calculating the mark-up. The dealer's re-offer price would be disclosed on the customer confirmation as the prevailing market price, along with the mark-up.

III. THE MSRB SHOULD COORDINATE THE ADOPTION OF ANY FUTURE PREVAILING MARKET PRICE CALCULATION AND DISCLOSURE REQUIREMENTS AND PROVIDE, AT MINIMUM, A SYNCHRONIZED IMPLEMENTATION PERIOD OF THREE YEARS.

The MSRB should coordinate the adoption and implementation of any guidance on establishing prevailing market price with that of any confirmation disclosure requirement. Imposing new requirements relating to the calculation of prevailing market price in the short-term, followed by a longer timeline for the adoption and implementation of any future confirmation disclosure requirement, would present overlapping challenges and unnecessary costs. Accordingly, the MSRB should adopt such requirements at the same time and should provide, at minimum, a synchronized three year implementation period. This approach would be most consistent with the MSRB's desire to "reduce dealer implementation and compliance costs," particularly "with respect to a possible future mark-up disclosure requirement."[26]

[26] MSRB Regulatory Notice 2016-07 at 4-5.

As noted above, firms already have policies and procedures in place designed to ensure compliance with their obligation to provide fair and reasonable prices under current MSRB Rule G-30, however, firms have never been required to calculate an exact prevailing market price for every retail customer transaction, in a short timeframe, for the purpose of confirmation disclosure. Requiring firms to estimate a prevailing market price to an exact decimal point and to print this calculation on all retail customer confirmations would introduce substantial operational complexity and new programming challenges for all impacted firms.

Programming firm systems for this type of disclosure will be extraordinarily complex. To enable programmers to build the proper controls, firms will be required to make certain assumptions about their disclosure obligations across a variety of fact patterns and market conditions. To the extent the MSRB provides additional guidance regarding how to implement prevailing market price confirmation disclosure in the manner we have described above, firms will be more readily able to code for and implement such a regime.

As we emphasized in our comment letter regarding MSRB Regulatory Notice 2015-16 and FINRA Regulatory Notice 15-36, the same technology and operational experts working to implement a two-day settlement cycle (T+2) and other major regulatory objectives will be necessary to any effort to implement a new confirmation disclosure requirement. Accordingly, given the substantial technical and programming challenges to implementation and the multiple regulatory demands firms must address, the MSRB should provide, at minimum, three years to program, test, and implement such a complex technology project.

For these reasons, any guidance on establishing prevailing market price should be coordinated with the adoption of any confirmation disclosure requirement.

IV. THE MSRB MUST CONDUCT A ROBUST COST-BENEFIT ANALYSIS THAT DEMONSTRATES THAT ITS PROPOSAL IS NEEDED, THAT THE COSTS ASSOCIATED WITH IT ARE NECESSARY, AND THAT NO OTHER LESS BURDENSOME ALTERNATIVE WOULD MEET THE OBJECTIVE.

The MSRB must conduct a robust cost-benefit analysis that demonstrates that its Proposal is needed, that the costs associated with it is necessary, and that no other less burdensome alternative would meet its regulatory objective. As we have emphasized in the context of any future confirmation disclosure requirement, the costs and burdens associated with implementation and ongoing compliance are substantial. With respect to confirmation disclosure, our initial estimates suggest that technology costs for introducing firms would range from $500,000 for smaller firms to as much as $2.5 million for large diverse organizations, not including any of the significant ongoing costs related to additional surveillance, personnel, and system maintenance, or any of the substantial implementation and ongoing legal and compliance costs associated with such a requirement. In addition, we note that the risks of a small

reduction in retail bond market liquidity could easily injure investors far more seriously than any benefit to be gained by the implementation of a prevailing market price confirmation disclosure requirement. We continue to believe that the MSRB and FINRA have not addressed the significant costs that a confirmation disclosure requirement would impose on introducing firms, clearing firms, and front-end vendors, and we urge both the MSRB and FINRA to undertake meaningful and rigorous economic analyses in order to justify their rulemaking.[27]

CONCLUSION

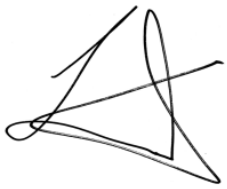
SIFMA thanks the MSRB for the opportunity to comment on this draft interpretive guidance. We appreciate the MSRB's efforts to address the concerns that we have raised regarding a prevailing market price disclosure requirement.

Should a prevailing market price disclosure framework proceed, we urge the MSRB and FINRA to coordinate to the greatest extent possible to resolve the concerns we have raised in this letter and to adopt a clear and consistent standard. In particular, regulators should acknowledge that there is an inherent variability in the determination of a prevailing market price and permit firms to rely on reasonable policies and procedures for the purpose of confirmation disclosure. Regulators should also recognize that estimating a prevailing market price in a short timeframe based on information available at the time of the transaction for the purpose of confirmation disclosure is not necessarily determinative of the prevailing market price for the purpose of scrutinizing a fair and reasonable mark-up.

[27] While we recognize the differences inherent in SEC and SRO rulemaking, we think it is important that the MSRB justify its rulemaking with the same level of rigorous cost-benefit analysis. We note that, in recent years, some members of the Commission have questioned openly whether SROs "have the resources – and, just as importantly, the willingness – to perform sufficiently rigorous analyses to support their rulemaking" and have emphasized that "SROs must be committed to ensuring that the rules they send to the Commission for approval are the result of the same degree of rigorous analysis as the Commission applies to its own rules." *See* Daniel M. Gallagher, Commissioner, SEC, "Market 2012: Time for a Fresh Look at Equity Market Structure and Self-Regulation" (Oct 4, 2012).

Should you have any questions, please do not hesitate to contact the undersigned or Brandon Becker and Bruce Newman, SIFMA's outside counsel at Wilmer Cutler Pickering Hale and Dorr LLP, at (202) 663-6000.

Respectfully submitted,



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