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Invested in America

July 31, 2012

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street
Suite 600
Alexandria, VA 22314

Re: MSRB Notice 2012-28: Request for Comment on Concept Proposal to Provide for Public Disclosure of Financial Incentives Paid or Received by Dealers and Municipal Advisors Representing Potential Conflicts of Interest

Dear Mr. Smith:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates this opportunity to respond to Notice 2012-28[2] (the "Notice") issued by the Municipal Securities Rulemaking Board (the "MSRB") in which the MSRB is requesting comment on the concept proposal to provide public disclosure of financial incentives paid or received by dealers and municipal advisors representing potential conflicts of interest. SIFMA is generally a proponent of transparency and the disclosure of potential conflicts of interest in the financial markets. SIFMA, however, does have some serious concerns and comments on this concept release which are detailed below.

[1] The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.

[2] MSRB Notice 2012-28 (May 31, 2012).

I. Municipal Advisor Rules are Premature

This Notice proposes disclosure rules that would apply to both underwriters and municipal advisors. SIFMA feels strongly that uniform rules for underwriters and municipal advisors, when possible, are critical to ensuring a level playing field for market participants. However, the Securities and Exchange Commission ("SEC") has not yet finalized its municipal advisor definition.[3] As it is not clear what parties and what types of activities will be covered by the SEC's municipal advisor definition, SIFMA feels strongly that any rules governing municipal advisors and their activities is premature**.**

II. Questionable Rationale for this Notice

The MSRB references, as its rationale for this Notice, certain state and federal proceedings regarding undisclosed third-party payments in connection with new issues of municipal securities or closely-related transactions. These proceedings on fraudulent activities in the municipal securities market have been civil and criminal in nature. The mere fact these proceedings were instituted, some of which have resulted in criminal convictions, should be clear enough evidence that there are currently statutes and regulations in place to prohibit the kind of fraudulent activity and illegal payments being targeted. If parties are intent on violating those existing laws, layering on yet another level of disclosure regulation will not halt them. Requiring that parties to a fraud announce the impending fraud is redundant and unrealistic. However, layering yet another broad, time-consuming regulation on all underwriters and municipal advisors will only serve to add administrative and transaction costs and hamper those regulated parties that seek to

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[3] *See* SEC Release No. 34-66020 (December 21, 2011); 76 FR 80733 (December 27, 2011). For instance, there is a concern that if the term "municipal advisor" is defined by the SEC broadly, then this Notice may require such municipal advisors to disclose their roles as investment advisors and record keepers to governmental retirement plans for which they receive financial incentives. A significant majority of such recordkeepers to governmental retirement plans are already required to provide certain prescribed disclosures pursuant to Department of Labor Regulations under ERISA, and have recently implemented such disclosures at great legal, operational and systems costs. (The DOL regulation is available at http://www.dol.gov/ebsa/pdf/2012-02262-PI1.pdf. The associated DOL Field Assistance Bulletin is available at http://www.dol.gov/ebsa/regs/fab2012-2.html.). The ERISA disclosure requirements could be adopted as a safe harbor or mirrored by the MSRB if it were to require disclosures by recordkeepers with respect to governmental plans (which are statutorily exempt from ERISA). This approach would result in efficiencies within the MSRB and a significant cost savings to recordkeepers to governmental plans by eliminating duplicative disclosure paradigms that are potentially inconsistent with each other. There are also concerns about disclosures relating to brokerage accounts that the issuer may have with the underwriter or financial advisor that are unrelated to the transaction at hand.

comply with the regulations as written without providing a material benefit to any party.

III. Payments in the Ordinary Course of Business Should Not be Included

The MSRB has proposed to treat all payments made by underwriters and municipal advisors to third-party recipients the same. If the goal of this Notice is to highlight potentially material conflicts of interest, the proposal is significantly overbroad and should be limited to payments to parties that are not providing advice or a service related to a transaction. In a typical municipal bond transaction, there are many payments made by the underwriters in the ordinary course of business, for which the underwriter is typically repaid from the proceeds of the transaction. The Notice mentions third-party service providers (e.g., copy, analytic, design printing, electronic publishing or other services), suppliers (e.g., office supplies, equipment or other goods) and other enterprises performing bona fide standard functions at commercially reasonable rates. Other types of third party payments might include rating agency fees, advertising costs, CUSIP fees and certain DTCC fees. None of these fees is out of the ordinary or should be a concern to the issuer, obligor, investor or the public. As such, SIFMA feels disclosure of any of these payments, and any other reasonable payments related to the execution of a municipal securities transaction are immaterial, unnecessary and potentially obscures more relevant disclosures by the underwriter and the issuer.

IV. Payments Made Per the Direction of the Issuer Should Be Exempt

Issuers sometimes specifically detail what expenses are the responsibility of the underwriter in a public competitive bid notice of sale, and such expenses can include not only the above-referenced expenses to service providers and suppliers, but also potentially the cost of the financial advisor, bond counsel, trustees and underwriter's counsel. Also, it is not uncommon for financial advisors to make certain third-party payments on behalf of the issuer in the ordinary course of business, and receive reimbursement when the transaction closes in the form of expense reimbursement or as part of their general compensation amount. These payments made by underwriters and financial advisors are made at the direction of the issuer, and as such, disclosure back to the issuer of such payments merely institutes a reporting obligation on financial advisors and underwriters without any actual or perceived benefit. If disclosure of such payments on behalf of issuers to third-parties is required, then underwriters may be more likely to refuse to act as an intermediary for these transaction costs, which would cause issuers to incur additional administrative expenses for handling these costs directly. Furthermore, the MSRB has already issued guidance that should preclude the reimbursement

from bond proceeds of lavish expenses (e.g., for rating agency trips).[4] That guidance should preclude the types of expenditures that might legitimately be of concern to the public and, especially, residents of the issuer's jurisdiction.

V. Disclosures Should Relate to a Transaction

The Notice posits that not all disclosures contemplated by the concept proposal would relate to new issue underwritings for which a reporting regime exists through the MSRB's Electronic Municipal Market Access ("EMMA") website, and that some disclosures would relate to transactions involving municipal financial products or non-transaction based on-going municipal advisory business. SIFMA's members feel that if such disclosures will be required to be made, disclosures in connection with new issues should be made as such issues go to market through the existing EMMA submission process. It is important that underwriters have sufficient time after a transaction closes to capture and collect all necessary bills and expenses, and to attribute them to the transaction at hand. Some bills, such as those from outside counsel, may only arrive weeks after the transaction closes, after which the payment information may no longer be relevant to any investors making investment decisions or to members of the public seeking to weigh in on the issuer's decision to incur the debt. Quarterly reporting of any such payments, instead of transaction based reporting, creates greater and unnecessary compliance and administrative obligations for the reporting entity.

VI. Amount of Payment Not Necessary

In the Notice, the MSRB queries whether disclosures of payments should be limited solely to the identity of the payor or payee and the purpose of such payment, or whether the amounts of such payments should be required. SIFMA believes that disclosure of the amount of the payment is unnecessary, and that the identity of the payor or payee and the purpose of such payment is sufficient for a number of reasons. SIFMA has concerns that in-kind or quid-pro-quo payments would be challenging to report and translate into a dollar value. Additionally, some fee arrangements may be confidential in nature for competitive reasons. Finally, SIFMA notes that the MSRB expressly determined not to require the disclosure of the amount of certain comparable payments in its interpretive notice concerning the

[4] MSRB Rule G-20 Interpretation on "Dealer Payments in Connection with the Municipal Securities Issuance Process" (January 29, 2007). *See also* MSRB Notice 2012-38 (July 18, 2012).

obligations of underwriters to state and local government issuers.[5] Accordingly, this concept release is inconsistent with that notice.

VII. Analysis of Benefits Versus Costs Is Unfavorable

SIFMA feels strongly that the benefits of any new regulation should be weighed against the costs to the regulated entities of implementation of that new regulation. The recently adopted MSRB G-17 Interpretive Notice[6], that becomes effective on August 2, 2012, was only the most recent time-consuming and costly change to disclosure required for municipal securities underwriters, and one in which dealers are still in the process of addressing compliance regimes as it has not even gone into effect yet. The next most recent in this constant stream of significant changes was the MSRB's amendments to MSRB Rule G-23 which also added substantive disclosure requirements upon underwriters.

SIFMA queries as to what party is protected by this Notice. This Notice does not appear to be for the protection of issuers, as certain such third-party payments are already prohibited under MSRB Rule G-37 and G-38, and many of the suggested material disclosures are already required to be made by underwriters to issuers under MSRB Rule G-23 and the MSRB Rule G-17 Interpretive Notice. For instance, the MSRB Rule G-17 Interpretive Notice requires disclosure by the underwriter of potential and actual conflicts of interest that are not in the normal course of business, and specifically includes disclosures to the issuer of any compensation from a third party in exchange for recommending that third party's services or product to an issuer, including business related to municipal securities derivative transactions.[7] Also, any material payments are required to be disclosed in the official statement for the financing.

SIFMA believes the disclosures in the MSRB Rule G-17 Interpretive Notice are more than sufficient to inform the issuer of any potential material conflicts of interest, and that the issuer is the critical party to receive such information before a decision is made to enter into a transaction. SIFMA believes that the disclosures in this Notice are not only potentially much broader in scope, but are unlikely to change the decisions of

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5 MSRB Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (August 2, 2012) (the "MSRB Rule G-17 Interpretive Notice"). SR-MSRB-2011-09 (August 22, 2011), Amendment No. 2 (November 10, 2011) at p. 9.

6 *See* MSRB Rule G-17 Interpretive Notice.

7 *Id. See also* MSRB Notice 2012-38 (July 18, 2012).

other parties, such as obligors, investors[8] and the public. Since such disclosures are for the primary benefit of issuers, issuers have the power to require, and some already have required (see Section IX below) the disclosure to them of certain items as they see fit as a condition to being considered as a potential underwriter. Therefore, the proposed MSRB concept becomes expensive and redundant with no additional protection to the parties most affected.

VIII. Alternative and More Narrowly Tailored Disclosure Options

SIFMA feels that alternative methods of disclosure for third-party payments to issuers already exists in the form of the MSRB Rule G-23 disclosures and the required disclosures under the MSRB Rule G-17 Interpretive Notice. Also as noted in the Notice, Rule G-32 already requires disclosure through EMMA of the underwriting spread and any fee received by the underwriter as agent for the issuer for negotiated offerings. If the goal of the MSRB is to have more detailed information about transaction expenses be transparent to obligors, investors and members of the public, then there are other more narrowly tailored solutions with which to achieve this goal. One option may be to require disclosure in the underwriter section of the official statement of any third-party expense over a certain dollar amount or percentage of the proceeds of the transaction.

If the MSRB feels strongly that obligors, investors and the public could have access to the disclosures that underwriters are sending to issuers under the MSRB Rule G-17 Interpretive Notice, then SIFMA encourages the MSRB to have issuers post those disclosures publicly on EMMA. Instituting yet another time-consuming, costly obligation rule on underwriters requiring a similar, yet different, set of disclosures to be posted on EMMA appears to be redundant at best.

IX. Voluntary Disclosure by Issuers Should Be Permitted

The MSRB notes in the Notice that a number of states (e.g., California, Florida, New Jersey and Texas) already require the submission of detailed information by issuers about the fees and other costs associated with in-state securities offerings. EMMA has developed into the central repository for issuer disclosures. Voluntary disclosures by issuers, particularly of any otherwise required state filings by issuers about transaction fees and costs, should be permitted.

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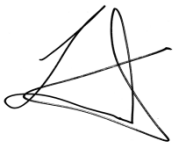
[8] Investors typically purchase debt based on the yield they are to receive relative to the credit-worthiness of the borrower.

We wish to applaud the MSRB for its efforts to improve transparency and the disclosure of potential conflicts of interest in the municipal securities market, and for the opportunity to comment on this Notice, but again need to voice our concerns regarding the over breadth of this concept release. We would be pleased to discuss any of these comments in greater detail, or to provide any other assistance that would be helpful. If you have any questions, please do not hesitate to contact the undersigned at (212) 313-1130.

Sincerely yours,



Leslie M. Norwood
Managing Director and
Associate General Counsel

cc: ***Municipal Securities Rulemaking Board***
Lynnette Kelly, Executive Director
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