April 17, 2023

VIA ELECTRONIC SUBMISSION

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

Re: MSRB Notice 2023-02 – Request for Comment Regarding a Retrospective Review of the MSRB's Time of Trade Disclosure Rule and Draft Amendments to MSRB Rule D-15, On Sophisticated Municipal Market Professionals

Dear Mr. Smith,

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates this opportunity to provide input on the Municipal Securities Rulemaking Board's ("MSRB's") Request for Comment Regarding a Retrospective Review of the MSRB's Time of Trade Disclosure Rule and Draft Amendments to MSRB Rule D-15, On Sophisticated Municipal Market Professionals (the "Notice").[2] SIFMA applauds the MSRB's goal to modernize the rules while continuing to provide appropriate issuer and investor protections without placing undue compliance burdens on regulated entities. In furtherance of this goal:

- MSRB rules should be harmonized with the Investment Advisers Act rules.
- All RIAs should be exempt from attestation requirement.
- Supplemental Material .01 (d) is outdated and should be retired, as security information is now readily available.
- The scope of time of trade disclosures should be clear and not increase; MSRB should clarify that rules should not be construed to require broker dealers to give tax advice.

[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).

[2] MSRB Notice 2023-02 (February 16, 2023).

- Time of trade disclosures for 529 savings plans should be covered in a separate rule.

I. MSRB Rules Should be Harmonized with the Investment Advisers Act Rules,

It is important that the rules be consistent with rules adopted under the Investment Advisers Act of 1940 (the "Advisers Act"). RIAs registered with the SEC are subject to the requirements of the Advisers Act and the rules thereunder, including a robust fiduciary duty extending to all services undertaken on behalf of clients. The investor protections provided by the regulatory regime under the Advisers Act obviate the need for the similar investor protections provided by time-of-trade disclosure, customer-specific suitability, best execution and the other obligations required by MSRB rules but modified under Rule G-48. If the RIA does not comply with such obligations, they are arguably not fulfilling their fiduciary duties, so the MSRB should not need to layer on additional investor protections for municipals.

The MSRB should codify the guidance related to transactions in managed accounts as it relates to Rule G-47. It is important to make clear that a dealer trading with an RIA is not required to provide the time-of-trade disclosures required by MSRB Rule G-47 to the ultimate investor, who is the account holder (i.e., the RIA's client). The MSRB has appropriately recognized that, a dealer trading with an RIA is not required to obtain a customer affirmation from the ultimate investor for purposes of qualifying the person, separately, as an SMMP under MSRB Rule D-15, on transactions with SMMPs, if the RIA is itself an SMMP.[3] In other words, for purposes of Rule D-15 the RIA is the customer. The logic that led to this interpretation applies equally with respect to time-of-trade disclosure, so for the purposes of MSRB Rule G-47, the MSRB should consider the RIA, and not the underlying investors, to be the dealer's customer. For example, when an independent investment adviser (including an RIA) purchases securities from one dealer and instructs that dealer to make delivery of the securities to other dealers where the investment adviser's clients have accounts, the identities of individual account holders often are not given to the delivering dealer. Therefore, the investment adviser is the customer of the dealer and must be treated as such for recordkeeping and other regulatory purposes. Accordingly, in these scenarios, the dealer does not have any customer obligations to the underlying investors. When an investor has granted an RIA full discretion to act on the investor's behalf for all transactions in an account, the RIA has effectively become that investor for purposes of the application of Rule G-48 when engaging in transactions with the dealer.

II. All RIAs Should be Exempt from Attestation Requirement

SIFMA strongly agrees that all SEC registered investment advisers should be exempt from the Rule D-15 attestation requirement. This exemption should also be extended to state registered investment advisers, who have essentially the same duties as federally registered investment advisers but a smaller amount of assets under management. RIAs typically are given discretion to trade on behalf of their clients, who may not want to be informed of the details of each trade

[3] *See,* Application of MSRB Rules to Transactions in Managed Accounts (December 1, 2016), https://www.msrb.org/Application-MSRB-Rules-Transactions-Managed-Accounts.

or may be forbidden from knowing the details of trades in their account.[4] Investment advisers are fiduciaries, subject to state or federal law and oversight, and are charged with making independent investment decisions on behalf of their clients.

III. Supplemental Material .01 (d) Is Outdated and Should Be Retired, as Security Information is Now Readily Available

The draft amendments to Supplementary Material .01(d) attempt to codify certain language from existing interpretive guidance reminding purchasing dealers to obtain information about limited information bonds. The original 1986 guidance states:

> Customers are not subject to the Board's rules, and no specific disclosure rules would apply to customers beyond the application of the anti-fraud provisions of the federal securities laws. I note, however, that a municipal securities professional buying securities from a customer should obtain sufficient information about the securities so that it can accurately describe these securities when the dealer reintroduces them into the market.[5]

The original guidance does not state that the dealer is to obtain information from the customer, however, merely that the dealer must obtain the information prior to reintroducing the security to the market. Regardless, this guidance is outdated and should be retired instead of codified. The information environment in the municipal securities market is fundamentally different today than when the original guidance was published, thanks in large measure to the work of the MSRB and its EMMA website.

Furthermore, the language in the Notice codifying this 1986 guidance is unclear and misleading. This provision should have been a mere reminder that a dealer must understand the securities they are selling, and that one source of the information could be to obtain information from the selling customer. However, the language in the Notice sets a new standard beyond what is required by Rule G-47. It is important to make clear that a dealer does not have a duty to obtain information about a security from a customer in all cases, and security information need not be obtained from the selling customer. For these reasons, this guidance should be retired, as codifying the language as proposed in the Notice will merely create confusion and potentially the perception that an information inquiry must be made of all customers.

IV. The Scope of Time of Trade Disclosures Should Be Clear and Not Increase; MSRB Should Clarify that Rules Should Not Be Construed to Require Broker Dealers to Give Tax Advice

SIFMA is concerned about the proposed increase in scope of time of trade disclosures. Requiring time of trade disclosures about factor bonds, zero coupon bonds, stepped coupon bonds, the availability of an official statement, and yield to worst calculations adds compliance

[4] Examples of investors being forbidden from knowing the details of trading in their account include members of Congress, persons in financial services with access to material non-public information, etc.

[5] *See,* Rule G-17 interpretive guidance (April 30, 1986), https://msrb.org/Description-Provided-or-Prior-Time-Trade.

risks and burdens. Further, SIFMA is concerned that information that is widely available and obvious will be required to be disclosed (as well as documented and subject to supervisory policies and procedures). Time of trade disclosure of obvious information, on the contrary, obfuscates material information.

Currently firms likely do have access to non-public information, including information in data rooms, that should not be required to be disclosed. SIFMA appreciates the MSRB retaining the clarification that it is not the MSRB's intent to require dealers to violate dealer processes that have been established to facilitate compliance with another obligation in order to comply with Rule G-47.

SIFMA is further concerned about the discount disclosures and feels strongly that it should be made clear that broker dealers neither give tax advice nor should they be perceived to be giving tax advice. We believe that the original guidance should be preserved,[6] which merely requires notification of the existence of a discount. Dealers have a growing concern about examination inquiries into discount disclosures to clients that may force dealers to move closer to the line of giving tax advice, as some FINRA examiners have been requiring dealers to disclose the de minimis cutoff price. SIFMA requests that the MSRB clarifies that dealers are merely obligated to indicate where there may be tax implications but make clear the rules should not be construed to require dealers to give tax advice.

In conclusion, the list of time of trade disclosures has become over-broad and unnecessarily increases risks to broker dealers without providing material benefit to issuers and investors. SIFMA urges the MSRB to reconsider the changes that add these additional time of trade disclosures.

V. Time of Trade Disclosures for 529 Savings Plans Should be Covered in a Separate Rule.

529 savings plans are more similar to mutual fund investments than state and local government bond debt, and SIFMA has long felt that there were areas in the MSRB ruleset that should be amended to more effectively regulate these plans. Like mutual funds, 529 savings plans have offering documents or circulars that are updated as necessary. The rules governing 529 savings plans should be more closely harmonized with those governing mutual funds, and an exemption from the dealer time of trade disclosure obligations is appropriate for transactions in 529 savings plans. A new standalone rule covering obligations for sales of 529 savings plans is warranted. As part of that effort, the MSRB should review the existing Rule G-17 interpretive guidance addressing out-of-state disclosure obligations before such a standalone rule is codified. As stated above, SIFMA members would like the MSRB to clarify that dealers are merely obligated to indicate where there may be tax implications but make clear the rules should not be construed to require dealers to give tax advice.

* * *

[6] The archived guidance is still helpful. SIFMA requests that archived guidance be easier to find on the MSRB's website.

Thank you for considering SIFMA's comments. SIFMA greatly appreciates the MSRB's review of the rules regarding time of trade disclosures and the SMMP affirmation requirements. 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
Head of Municipal Securities

cc: ***Municipal Securities Rulemaking Board***
Saliha Olgun, Interim Chief Regulatory Officer
Gail Marshall, Senior Advisor to Chief Executive Officer
Justin Kramer, Assistant Director, Market Regulation

APPENDIX A

QUESTIONS

Rule G-47

1. Are there any other aspects of guidance that relate to Rule G-47 that the MSRB has not proposed to codify, but that should be codified? Are there any other time of trade disclosures that are not specifically discussed in Rule G-47, MSRB guidance or this Request for Comment that the MSRB should consider adding to the list of disclosures under Rule G-47 Supplementary Material .03?

SIFMA members feel that the MSRB should codify the guidance related to transactions in managed accounts, as it relates to Rule G-47. It is important to make clear that a dealer trading with an RIA is not required to provide the time-of-trade disclosures required by MSRB Rule G-47 to the ultimate investor, who is the account holder (i.e., the RIA's client). Also, a dealer trading with an RIA is not required to obtain a customer affirmation from the ultimate investor for purposes of qualifying the person, separately, as an SMMP under MSRB Rule D-15, on transactions with SMMPs, if the RIA is itself an SMMP.[7] For the purposes of MSRB Rule G-47, the MSRB must legally consider the RIA, and not the underlying investors, to be the dealer's customer. When an independent investment adviser (including an RIA) purchases securities from one dealer and instructs that dealer to make delivery of the securities to other dealers where the investment adviser's clients have accounts, the identities of individual account holders often are not given to the delivering dealer. Therefore, the investment adviser is the customer of the dealer and must be treated as such for recordkeeping and other regulatory purposes. Accordingly, in these scenarios, the dealer does not have any customer obligations to the underlying investors. When an investor has granted an RIA full discretion to act on the investor's behalf for all transactions in an account, the RIA has effectively become that investor for purposes of the application of Rule G-48 when engaging in transactions with the dealer.

RIAs registered with the SEC are subject to the Investment Advisers Act of 1940 and the rules thereunder, including a robust fiduciary duty extending to all services undertaken on behalf of clients. The investor protections provided by the regulatory regime under the Advisers Act reduce the need for the similar investor protections provided by time-of-trade disclosure, customer-specific suitability, best execution and the other obligations required by MSRB rules but modified under Rule G-48.

Other than as noted above, there are no other aspects of guidance that relate to Rule G-47 that the MSRB has not proposed to codify, but that should be codified. There are no other time of trade disclosures that are not specifically discussed in Rule G-47, MSRB guidance or this Request for Comment that the MSRB should consider adding to the list of disclosures under Rule G-47 Supplementary Material .03. On the contrary, SIFMA members feel the list of disclosures has grown to be unnecessarily long.

[7] *See*, Application of MSRB Rules to Transactions in Managed Accounts (December 1, 2016), https://www.msrb.org/Application-MSRB-Rules-Transactions-Managed-Accounts.

2. Is there any other guidance pertaining to a dealer's time of trade disclosure obligations in connection with inter-dealer transactions that should be incorporated into the consolidated notice on this topic?

There is no other guidance pertaining to a dealer's time of trade disclosure obligations in connection with inter-dealer transactions that should be incorporated into the consolidated notice on this topic.

3. Are there situations where continuing disclosures are not available to customers that dealers would not reasonably be aware of?

There are no situations where continuing disclosures are not available to customers that dealers would not reasonably be aware of.

4. Are the technical clarifications set forth above helpful and do they alleviate potential sources of confusion?

The technical clarifications set forth above are largely helpful and do alleviate potential sources of confusion. Additionally, we do suggest retirement of Supplemental Material .01(d).

5. Are the draft amendments regarding specified time of trade disclosure obligations reasonably accessible to the market?

The information required to be disclosed pursuant to the draft amendments regarding specified time of trade disclosure obligations is reasonably accessible to the market.

6. Do commenters agree that evidence of insurance generally is not required to be attached to a security for effective transfer?

SIFMA agrees that evidence of insurance generally is not required to be attached to a security for effective transfer.

7. Are there any aspects of the guidance that the MSRB proposes to retire that should be retained in any way (e.g., through codification, consolidation or by retaining such guidance in its current form)? If so, please specify.

There are no aspects of the guidance that the MSRB proposes to retire that should be retained in any way (e.g., through codification, consolidation or by retaining such guidance in its current form).

Burdens and Impact

8. Would the obligations specified in the newly proposed draft supplementary material result in a disproportionate and/or undue burden for small dealers? If so, do commenters have any specific recommendations to alleviate these burdens while still promoting the objectives of the draft amendments? Please offer suggestions.

The obligations specified in the newly proposed draft supplementary material do not result in a disproportionate and/or undue burden for small dealers but impose an equal burden on all dealers.

9. Are any of these burdens unique to minority and women-owned business enterprise ("MWBE"), veteran-owned business enterprise ("VBE") or other special designation firms? If so, do commenters have any specific recommendations to alleviate these burdens while still promoting the objectives of Rule G-47? Please offer suggestions.

These burdens are not unique to MWBE, VBE, or other special designation firms.

10. Would the obligations proposed in connection with Rule G-47 result in an undue impact to access to business opportunities for small dealers? If so, do commenters have any specific recommendations to alleviate these burdens while still promoting the objectives of Rule G-47? Please offer suggestions.

The obligations proposed in connection with Rule G-47 do not result in an undue impact to access to business opportunities specifically for small dealers, but instead impact all dealers similarly.

11. Would the obligations proposed in connection with Rule G-47 result in an undue impact to access to business opportunities for MWBE, VBE or other special designation firms? If so, do commenters have any specific recommendations to alleviate these impacts while still promoting the objectives of Rule G-47? Please offer suggestions.

The obligations proposed in connection with Rule G-47 are unlikely to result in an undue impact to access to business opportunities for MWBE, VBE or other special designation firms.

Time of Trade Disclosure Obligations Regarding 529 Savings Plans

1. Should the MSRB consider amending Rule G-47 or creating a separate standalone rule to expressly clarify and define dealer's time of trade disclosure obligations regarding 529 savings plans? If proposing a new standalone rule, should the MSRB codify existing Rule G-17 interpretive guidance addressing out-of-state disclosure obligations, as part of that effort?

As 529 savings plans are more similar to mutual fund investments than state and local government bond debt, a new standalone rule would be more appropriate. As part of that effort, SIFMA believes that the MSRB should review the existing Rule G-17 interpretive guidance addressing out-of-state disclosure obligations before such a standalone rule is codified.[8] SIFMA members would like the MSRB to clarify that dealers are merely obligated to indicate where

[8] *See,* MSRB Rule G-17 Interpretive Guidance, "Customer Protection Obligations Relating to the Marketing of 529 College Savings Plans," dated August 07, 2006, available at: https://www.msrb.org/Customer-Protection-Obligations-Relating-Marketing-529-College-Savings-Plans.

there may be tax implications but make clear the rules should not be construed to require dealers to give tax advice.

2. Explain how the current business practices (i.e., check and paper application process or omnibus platform) support or hinder dealers in meeting their time of trade compliance obligations during the various points of the lifecycle of trades related to 529 savings plans (such as at account opening, contribution, withdrawal, and rollover, etc.).

Other than at account opening, investors may engage in self-directed activity (contributions, withdrawal, rollover, etc.) regarding 529 savings plans, some or all of which may be automated to occur once or on a recurring basis. These types of transactions hinder dealers in meeting their time of trade compliance obligations related to 529 savings plans. Again, SIFMA members propose that regulation of 529 savings plans be harmonized with those governing mutual fund investment vehicles.

3. What supervisory systems are in place and what are the tools used by dealers to support their supervisory review of time of trade disclosures that are made orally or are in writing during the various points of the lifecycle of a trade related to 529 savings plans, as noted above?

SIFMA member firms have a variety of supervisory systems and tools in place to support their supervisory review of time of trade disclosures that are made orally or in writing during the various points of the lifecycle of a trade related to 529 savings plans.

4. Are there any known business practices unique to the sale of 529 savings plans that the MSRB should be mindful of that could warrant an exception/exemption to time of trade disclosure obligations for dealers?

As 529 savings plans are more similar to mutual fund investments than state and local government bond debt, they have offering documents or circulars that are updated as necessary. SIFMA members do believe that an exemption from the dealer time of trade disclosure obligations would be appropriate for transactions in 529 savings plans, as these instruments are more similar to mutual fund investments than state and local government bond debt, and the rules governing 529 savings plans should be more closely harmonized with those governing mutual funds.

Rule D-15

1. Do commenters agree with the MSRB's proposal to exempt SEC registered investment advisers from the Rule D-15 attestation requirement? Should this exemption also extend to state registered investment advisers? Why or why not?

SIFMA strongly agrees that SEC registered investment advisers should be exempt from the Rule D-15 attestation requirement. SIFMA members believe this exemption should also be extended to state registered investment advisers, who have essentially the same duties as federally registered investment advisers but a smaller amount of assets under management. Registered

investment advisers typically are given discretion to trade on behalf of their clients, who may not want to be informed of the details of each trade or may be forbidden from knowing the details of trades in their account.[9] Investment advisers are fiduciaries, subject to state or federal law and oversight, and are charged with making independent investment decisions on behalf of their clients.

2. Does the proposal to exempt SEC-registered investment advisers from the Rule D-15 attestation requirement remove any unnecessary burdens for dealers while still striking the right balance of protection for issuers and investors?

Exempting SEC-registered investment advisers from the Rule D-15 attestation requirement removes unnecessary burdens for dealers, while still providing appropriate protection for issuers and investors. SIFMA members feel that all registered investment advisers should be exempt from the attestation requirement.

3. Would the proposal to exempt SEC-registered investment advisers from the Rule D-15 attestation requirement result in any disproportionate or unique burdens with respect to small dealers, MWBE, VBE or other special designation firms? What about access to business opportunities? Would it alleviate any such disproportionate or unique burdens or provide greater access to business opportunities for small dealers?

The proposal to exempt SEC-registered investment advisers from the Rule D-15 attestation requirement does not result in any disproportionate or unique burdens with respect to small dealers, MWBE, VBE or other special designation firms. On the contrary, such an exemption would alleviate an unnecessary burden on all dealers.

4. Prior to 2012, assets of at least $100 million (specifically invested in municipal securities in the aggregate in a customer's portfolio and/or under management) were required for a customer to be treated as an SMMP. This $100 million threshold was subsequently lowered to $50 million in assets. Are there any considerations that support, or weigh against, increasing or otherwise modifying the current threshold of $50 million in assets for certain categories of customers? For example, unlike customers who are natural persons, many municipal entities likely would meet the threshold of $50 million in assets. Given the role that municipal entities play in the municipal securities market and beyond, should the asset threshold be modified to potentially extend the protections afforded by Rule G-47 to more municipal entities (e.g., $50 million specifically invested in municipal securities)?

SIFMA believes that the current threshold of $50 million in assets is appropriate as a baseline requirement for any customer to be treated as an SMMP. Customers are not required to opt-in to be treated as SMMPs, and there is no requirement that customers provide the attestations to be treated as an SMMP. The vast majority of customers with $50 million in assets will be sophisticated enough to evaluate bonds in which they invest. To the extent a customer does not

[9] Examples of investors being forbidden from knowing the details of trading in their account include members of Congress, persons in financial services with access to material non-public information, etc.

have this level of sophistication, it could simply decline to provide the affirmation. The customer affirmation requirement is designed to ensure that SMMPs have affirmatively and knowingly agreed to forgo certain protections under MSRB rules.

5. The required affirmations under Rule D-15 aligns with FINRA's under FINRA Rule 2111 related to suitability, but also provides clear disclosure to SMMPs of the other modified dealer obligations under MSRB rules to provide clear disclosures to SMMPs and to obtain affirmative statements from SMMPs that they can, for example, exercise independent judgement in performing the evaluations related to fair pricing, suitability and the other modified dealer obligations. Do commenters feel that the content of the customer affirmation requirement described in Rule D-15(c) is appropriately harmonized with the content of customer affirmations referenced in the rules of other regulators (e.g., FINRA Rule 2111(b)) given the differences between the markets and respective rule sets?

SIFMA feels that the content of the customer affirmation requirement described in Rule D-15(c) is appropriately harmonized with the content of customer affirmations referenced in the rules of other regulators (e.g., FINRA Rule 2111(b)) given the differences between the markets and respective rule sets.

Other

1. While the MSRB proposes to retire the guidance above related to secondary market insurance, would there be value in an educational resource for market participants regarding such bonds? For example, continuing disclosures may not be provided for some bonds that are secondarily insured if, for example, a new CUSIP is obtained on such bonds and the issuer/obligated person is unaware of the new CUSIP number.

SIFMA believes that there would be value in an educational resource for market participants regarding secondary market insurance, and the potential impact on continuing disclosure if and when a new CUSIP is obtained on bonds insured in the secondary market.

2. Are there specific enhancements to EMMA that the MSRB could consider to help investors identify continuing disclosure information that may be relevant to secondarily insured bonds? If so, please describe them and identify any challenges of which the MSRB should be aware.

Currently on EMMA, when a bond issuance has a maturity that is secondarily insured, a new CUSIP number may be assigned to that maturity. Investors would need to know, or need to know how to find, the original uninsured CUSIP for that bond to access the continuing disclosure information for the issue. Some investors may not know how to find the original uninsured CUSIP, when necessary. If an investor researches the new CUSIP number for that bond on EMMA, the continuing disclosure information for the issue may not be linked. To assist an investor in finding the continuing disclosure information on the entire issuance with only the CUSIP number for the secondarily insured bond, the MSRB itself should link the secondarily insured CUSIP directly to the issuer's EMMA page for the original issuance of bonds, or, link the new secondarily insured CUSIP directly to the uninsured CUSIP in EMMA.

3. A dealer is not obligated to provide an SMMP relevant Rule G-47 disclosures, which includes disclosure regarding securities sold below the minimum denominations and the potential adverse effect on liquidity of a position below the minimum denomination. Would it provide greater certainty if a dealer's modified obligations under Rule G-48 specifically identified the obligation under subparagraph (f), on minimum denominations under Rule G-15, on confirmation, clearance, settlement and other uniform practice requirements with respect to transactions with customers?

SIFMA does not believe it is necessary for a dealer's modified obligations under Rule G-48 to specifically identify the obligation under subparagraph (f), on minimum denominations under Rule G-15, on confirmation, clearance, settlement and other uniform practice requirements with respect to transactions with customers. SMMPs are knowledgeable regarding potential adverse effects on liquidity of securities sold below the minimum denomination.