



November 2, 2012

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

Re: MSRB Notice 2012-50 (October 2, 2012): Request for Comment on Revised Draft Rule Amendments and a Revised Draft Interpretive Notice on Retail Order Periods

Dear Mr. Smith:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment on the Municipal Securities Rulemaking Board’s (“MSRB”) Request for Comment on Revised Draft Rule Amendments and Revised Draft Interpretive Notice on Retail Order Periods (the “Proposal”)² which proposes amendments to MSRB Rules G-11 (on primary offering practices), G-8 (on books and records), and G-32 (on disclosures in connection with primary offerings), as well as an interpretive notice concerning the application of MSRB Rules G-17 and G-30 to retail order periods. This letter expands upon comments previously submitted³ by SIFMA to the MSRB in response to MSRB Notice 2012-13 (March 6, 2012).

¹ 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).

² MSRB Notice 2012-50 (October 2, 2012).

³ See Letter from David Cohen, SIFMA, to Ronald Smith, MSRB, dated April 13, 2012, available at <http://www.sifma.org/issues/item.aspx?id=8589938319>

I. Executive Summary

SIFMA supports the historical practice of municipal securities issuers in negotiated underwritings designating, if they so desire, that a specific amount or specific maturities of new bonds be placed with retail investors, resulting in bonds being offered and sold to retail investors prior to institutional investors. Our members also support the MSRB's view that it is the responsibility of a municipal securities issuer to define what it means by "retail investor". After all it is the issuers who are responsible for selecting and determining the composition of negotiated underwriting syndicates and determining the distribution channels through which they would like to have their bonds distributed. While SIFMA believes that the concerns raised in Notices 2012-13 and 2012-50 have now been addressed through a clarifying regulatory notice⁴, which should ease the enforcement of existing MSRB rules and fair dealing obligations, we support the proposed rule changes to the extent they would protect dealers that follow issuers' instructions, clarify issuer terms and conditions, and require timely notice of retail order period terms and conditions (and any amendments thereto) to all syndicate and selling group members.

II. August 2, 2012 Interpretive Notice

SIFMA's members believe that the conduct the MSRB is trying to regulate through the Proposal, in furtherance of its efforts to protect issuers and investors, is more than sufficiently covered in its August 2, 2012 Interpretive Notice regarding the application of MSRB Rule G-17 to underwriters of municipal securities. Regarding retail order periods the Notice states:

Rule G-17 requires an underwriter that has agreed to underwrite a transaction with a retail order period to, in fact, honor such agreement. A dealer that wishes to allocate securities in a manner that is inconsistent with an issuer's requirements must not do so without the issuer's consent. In addition, Rule G-17 requires an underwriter that has agreed to underwrite a transaction with a retail order period to take reasonable measures to ensure that retail clients are bona fide. An underwriter that knowingly accepts an order that has been framed as a retail order when it is not (*e.g.*, a number of small orders placed by an institutional investor that would otherwise not qualify as a retail customer) would violate Rule G-17 if its actions are inconsistent with the issuer's expectations regarding retail orders. In addition, a dealer that places an order that is framed as a qualifying retail order but in fact represents an order that does not meet the qualification requirements to be treated as a retail order (*e.g.*, an order by a retail dealer without

⁴ See MSRB Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (August 2, 2012) (the "August 2, 2012 Notice"), available at http://msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-17.aspx?tab=2#_D54ECA7F-2CE6-4ED9-BB05-3C9B32FB7BF4

“going away” orders from retail customers, when such orders are not within the issuer’s definition of “retail”) violates its Rule G-17 duty of fair dealing. The MSRB will continue to review activities relating to retail order periods to ensure that they are conducted in a fair and orderly manner consistent with the intent of the issuer and the MSRB’s investor protection mandate.

The Proposal does not expand upon these explicit fair dealing obligations, nor does it propose to cover any activity regarding a retail order period that does not fall within the “four corners” of this Notice.

III. Proposed Rule Changes

a. Rule G-11: Primary Offering Practices

i. Definitions

SIFMA generally supports the proposed changes to Rule G-11, including defining “retail order period” as “an order period during which orders will be solicited solely from customers that meet the issuer’s definition of ‘retail’”⁵ and that definition is reduced to writing prior to the commencement of the retail order period. Our members support an issuer’s prerogative to determine whether there should be a retail order period and to define, on a transaction by transaction basis, what types of purchasers qualify for placing an order, as well as to set the economics for each priority of orders⁶.

With respect to the proposed definition of a “going away order”, see our discussion in Section III. a. ii., below, proposing an alternative construct obviating the need to define a “going away order”.

As for the proposed definition of “selling group”, we are concerned that this definition continues to be overly broad. SIFMA suggests that the definition of “selling

⁵ MSRB Rule D-9 defines customer as “Except as otherwise specifically provided by rule of the Board, the term “customer” shall mean any person other than a broker, dealer, or municipal securities dealer acting in its capacity as such or an issuer in transactions involving the sale by the issuer of a new issue of its securities.”

⁶ Some of our members are concerned that leaving the definitions of the different types of *accounts* that might together constitute “retail” entirely up to each issuer would make it difficult to comply with the MSRB’s requirements to ensure that only qualifying orders are placed and to maintain adequate records. Examples of different types of accounts include but are not limited to: individual, joint, trust, custodial, conservator, estate, family office, partnership, corporate, other non-corporate entities, and tax advantaged accounts.

group” be limited to those dealers that sign a selling group agreement⁷, or substantially similar written agreement, for a particular new issue of municipal securities.

We are also supportive of the proposed amendments to Rule G-11(f), requiring the syndicate manager, prior to the first offer of any securities by a syndicate, to furnish in writing to the other members of the syndicate and to members of the selling group, if any, a written statement of all terms and conditions required by the issuer – including any retail order requirements. This would necessarily include the issuer’s definition of “retail”, any limitations, as well as the time parameters for which the retail order period will be conducted. The dissemination and receipt of timely information about the retail order period is a critical underpinning of fair dealing. This is especially important to dealers contacting customers with non-discretionary accounts who might be interested in purchasing some of the new issue, which process necessarily requires more time to submitting an order than for a discretionary account.

ii. Representations and Disclosures

With regard to proposed Rule G-11(l) Retail Order Period Representations and Required Disclosures, we suggest an alternative construct for this part of the proposed Rule regarding representations to be made (i), (ii), and (iii); and disclosures (iv) and (v). As for representations, we believe that the Rule should be constructed in a way so that by virtue of submitting an order during the retail order period, the submitting dealer would represent that: 1) such order meets the issuer’s definition of “retail”; 2) such order is a *bona fide*⁸ customer order; and 3) such order is not duplicative. In addition, such representation could be made in either the Master Agreement Among Underwriters⁹ or the Selling Group Agreement and therefore is not necessary for these representations to be made separately for each order submitted during a retail order period.

We appreciate the MSRB including in the Proposal a safe harbor for senior managers that rely on representations made by co-managers that such co-manager (or

⁷ See SIFMA’s Model Selling Group Agreement available at <http://www.sifma.org/services/standard-forms-and-documentation/municipal-securities-markets/>.

⁸ SIFMA’s members continue to believe that what qualifies as a “going away order”, however defined, is confusing and that the policy goal of this requirement is to make clear that only the submission of *bona fide* customer orders are permissible. Accordingly, we suggest deleting proposed Rule G-11 (a)(xii).

⁹ See SIFMA’s Master Agreement Among Underwriters (2002), available at <http://www.sifma.org/services/standard-forms-and-documentation/municipal-securities-markets/>

selling group member) has made to them pursuant to proposed Rule G-11(l) to satisfy their own fair dealing obligation to the issuer.

b. Rule G-32: Disclosures in Connection with Primary Offerings

SIFMA supports the proposed amendments to Rule G-32 which would require a managing underwriter to report to the MSRB's Electronic Municipal Market Access (EMMA) system whether a primary offering of securities included a retail order period and when the retail order period was conducted. We suggest that the information furnished to EMMA include the date(s) and time of the retail order period.

IV. Proposed Interpretive Notice

SIFMA supports limiting the interpretive notice accompanying the proposed rule changes to retail order pricing and notes most of this language is not new: it is consolidated from prior Notices¹⁰. With respect to the final paragraph of the proposed interpretive notice, we suggest the following revisions to include additional examples of characteristics that may result in different prices, as well as clarifying language that such specific examples are not exhaustive of characteristics that may result in different prices (additions underlined, deletions ~~struck through~~):

Some of ~~Among~~ the different characteristics of securities that may fairly result in different prices are, but not limited to, different coupons (e.g., institutional customers may prefer to purchase bonds at a premium), as well as different call features or sinking fund redemptions. As a general rule, the MSRB does not consider that there is a Rule G-30 violation simply if the yield to call is the same for both securities sold to retail and institutional customers, even though the yields to maturity on the securities are different. In addition, some legitimate pricing differences may result from different market conditions particularly in the case of retail order submissions one or two days prior to the institutional order period, as well as an intra-day shift in interest rates.

V. Conclusion

SIFMA sincerely appreciates this opportunity to comment upon the Proposal. Subject to the proposed refinements suggested above, SIFMA supports the proposed rule

¹⁰ See Guidance on Disclosure and Other Sales Practice Obligations to Individual and Other Retail Investors in Municipal Securities (July 14, 2009), available at http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-17.aspx?tab=2#_DA15225F-907A-43CC-A319-26F55EFFDECE. See also *supra* Note 4, the August 2, 2012 Notice.

Mr. Ronald W. Smith
Municipal Securities Rulemaking Board
Page 6 of 6

changes as they would protect dealers that follow issuers' instructions, clarify issuer terms and conditions, and require timely notice of retail order period terms and conditions to all syndicate and selling group members.

Please do not hesitate to contact me with any questions at (212) 313-1265.

Sincerely yours,

A handwritten signature in blue ink that reads "D.L. Cohen". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

David L. Cohen
Managing Director
Associate General Counsel

cc:

Municipal Securities Rulemaking Board
Lynnette Kelly, Executive Director
Ernesto Lanza, Deputy Executive Director
Gary L. Goldsholle, General Counsel
Kathleen Miles, Associate General Counsel