MEMORANDUM

TO: File No. S7-45-10

FROM: Jessica Kane
Office of Municipal Securities

DATE: March 25, 2013

RE: Meeting with Representatives of the Securities Industry and Financial Markets Association ("SIFMA")

On March 22, 2013, John J. Cross III, Director; Mary Simpkins, Senior Special Counsel; and Jessica Kane, Senior Special Counsel to the Director, from the Office of Municipal Securities, met with the following representatives from SIFMA: Ben Juergens, Executive Director, Morgan Stanley; Lanny Schwartz, Partner, Davis Polk & Wardwell LLP; and Leslie M. Norwood, Managing Director and Associate General Counsel, SIFMA. The participants discussed the Commission's proposed rules for the registration of municipal advisors.

The attached materials were provided.

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MUNICIPAL ADVISOR REGULATION: INSTITUTIONAL/INVESTMENT BANKING ISSUES SUMMARY[1]

SIFMA supports the goals of the Dodd Frank municipal advisor legislation to create a regulatory scheme for unregulated entities and protect municipal entities. However, in drafting regulations and reviewing MSRB rules to implement this statute, it is critical that the SEC carefully consider the costs and burdens for market participants and the benefits to and impact on municipal issuers.

- **The proposed municipal advisor rules will harm municipal entities.** The proposed municipal advisor rules, as applied to entities that are already regulated, will harm municipal entities without providing meaningful regulatory benefits. Firms may be forced to curtail many services that benefit issuers (including issuer-requested and uncompensated services) due to the rule's expansive interpretations, which exceed the statutory requirements and subject firms to as-of-yet undefined fiduciary obligations and restrictions.

- **Focus on previously unregulated entities.** The legislative purpose behind Section 975 was primarily to regulate the previously unregulated municipal financial advisors. The Commission should refrain from expanding the requirements for regulated dealers and advisers and should give full effect to the statutory exemptions.

- **Define advice.** The Commission should clearly define what constitutes advice, provide a safe harbor similar to that proposed for security-based swap dealers, and provide that a municipal advisory relationship only exists where there is a written contract to provide advice.

- **Rely on statutory definition of investment strategies.** Congress directed a limited definition of "investment strategies," and the Commission should not expand it to all activities touching any municipal assets.

- **Strengthen the statutory underwriter exception.** The Commission should make clear that the statutory underwriter exception covers (i) underwriters' ancillary advice regarding structuring and related issues, (ii) activities of prospective underwriters, and (iii) private placements and remarketing of municipal securities.

  Concerning ancillary advice by an underwriter or prospective underwriter, the Commission should incorporate the process that it sanctioned when approving the MSRB's recent interpretation of underwriters' Rule G-17 duty to deal fairly with municipal entities. Under that interpretation, a potential underwriter must clearly disclose its non-advisory "arm's-length" role in any potential transaction at the inception of the underwriter's relationship with the issuer concerning an issue. The Commission should apply this same "underwriter versus advisor" distinction in connection with the underwriter exception. Ancillary advice by an underwriter that complies with its G-17 obligations by providing the required disclosure would be fully covered by the underwriter exception, and the underwriter would not be at risk of being deemed a municipal advisor by virtue of incidental advice or communications.

- **Clarify appropriately the application of registration requirements to registered investment advisers and solicitation activities for fund vehicles.** The Commission should clarify that (i) the investment adviser exemption applies even if the advice alone would not trigger Advisers Act registration (e.g., advice concerning instruments other than securities) or the advisor is otherwise exempt from registration (e.g., banks), and (ii) solicitation of investment in a fund is not solicitation for the fund's adviser.

- **Limit the paperwork burdens of registration.** The Commission should not require firms that are otherwise registered with the Commission as broker-dealers or investment advisers to complete an entirely separate registration form. Similarly, where a firm registers as a municipal advisor, its employees should not be required to separately register as individuals.

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[1] *Please note that this summary does not include retail brokerage or banking issues. SIFMA would welcome the opportunity to address these matters separately.*

sifma RELATED SIFMA COMMENT LETTERS

TOPIC	DATE	AVAILABLE AT
SEC Interim Temporary Rule on Registration of Municipal Advisors	November 15, 2010	http://www.sec.gov/comments/s7-19-10/s71910-10.pdf
SEC Municipal Advisor Permanent Registration Proposal	February 22, 2011	http://sec.gov/comments/s7-45-10/s74510-587.pdf
SEC Municipal Advisor Permanent Registration Proposal (Pay-to-Play)	February 25, 2011	http://www.sec.gov/comments/s7-45-10/s74510-657.pdf
MSRB Proposed Rule G 36 Regarding Fiduciary Duties of a Municipal Advisor (MSRB Request for Comment)	April 11, 2011	http://msrb.org/Rules-and-Interpretations/Regulatory-Notices/2011/~/media/Files/RFC/2011/2011-14/SIFMA.ashx
MSRB Proposed Interpretation of Rule G 17 With Respect to Municipal Advisors (MSRB Request for Comment)	April 11, 2011	http://msrb.org/Rules-and-Interpretations/Regulatory-Notices/2011/~/media/Files/RFC/2011/2011-13/SIFMA.ashx
MSRB Proposed Interpretation of Rule G 17 With Respect to Underwriters of Municipal Securities (MSRB Request for Comment)	April 11, 2011	http://msrb.org/Rules-and-Interpretations/Regulatory-Notices/2011/~/media/Files/RFC/2011/2011-12/SIFMA.ashx
MSRB Proposed Interpretation of Rule G 17 With Respect to Underwriters of Municipal Securities (Initial MSRB Rule Filing)	September 30, 2011	http://sec.gov/comments/sr-msrb-2011-09/msrb201109-4.pdf
MSRB Proposed Interpretation of Rule G 17 With Respect to Underwriters of Municipal Securities (Amendment 2 to MSRB Rule Filing)	November 30, 2011	http://sec.gov/comments/sr-msrb-2011-09/msrb201109-10.pdf
SEC Order Instituting Proceedings to Determine Whether to Disapprove Proposed Interpretation to G 17, as Amended	January 27, 2012	http://www.sec.gov/comments/sr-msrb-2011-09/msrb201109-18.pdf

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Invested in America

February 22, 2011

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number S7-45-10 – Registration of Municipal Advisors, Exchange Act Release No. 63576, 76 *Fed. Reg.* 824 (Jan. 6, 2011)

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("**SIFMA**")[1] appreciates the opportunity to comment on the proposal by the Securities and Exchange Commission ("**SEC**") to establish a permanent registration program for municipal advisors under Section 975 ("**Section 975**") of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "**Dodd-Frank Act**").[2]

I. Executive Summary

SIFMA supports the principle that advisors to municipal entities and obligated persons should operate in a fair, transparent and well-regulated manner. However, SIFMA believes that the SEC's proposed rules and proposed interpretative positions regarding municipal advisory activities are overly broad in

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[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] Section 975 amended Section 15B of the Securities Exchange Act of 1934 (the "**Exchange Act**").

light of both the text of Section 975 and Congressional intent; may ultimately result in more limited and costly services provided by fewer financial institutions to municipal entities and obligated persons; and will subject many currently regulated entities to burdensome, overlapping, duplicative and unnecessary requirements and potential liabilities. In particular, the SEC's proposed definition of "investment strategies" and limited guidance on the term "advice" raise concerns regarding the breadth of the SEC's interpretation of the scope of Section 975.

The legislative intent behind Section 975 indicates that it was primarily aimed at regulating *unregulated* persons that render advice with respect to an enumerated list of activities and financial products (*i.e.*, advice with respect to municipal derivatives or guaranteed investment contracts; plans or programs for the investment of the proceeds of municipal securities; municipal escrow investments; and the issuance of municipal securities).[3] The text of Section 975 itself suggests that it is intended to regulate previously unregulated persons. Specifically, the definition of "municipal advisor" enumerates categories of entities covered by the definition, and none of the listed categories by their terms are regulated entities.[4]

By proposing expansive interpretations, the SEC risks transforming Section 975 into a wide-ranging program of duplicative regulation that will impact large portions of the banking, brokerage and investment advisory industries. There is no evidence of legislative intent to broadly expand the regulation of the banking, brokerage and investment advisory communities through Section 975, or to create new responsibilities for banks, brokers and investment advisers with regard to municipal entities or obligated persons. Congress could have chosen to write a statute that broadly reclassified all government-facing business into a new regulatory scheme and created a new

[3] *See Enhancing Investor Protection and the Regulation of Securities Markets—Part II: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. 71 (2009) (statement of Ronald Stack, Chair, Municipal Securities Rulemaking Board ("**MSRB**")) ("[S]ome of the problems . . . that [the MSRB has] encountered are that there are many participants in [the municipal securities] market who right now are *unregulated*: financial advisors, swap advisors, investment advisors. *They are not registered with the SEC*, and we have no power to regulate them.") (emphasis added); *id.* at 175-76; *id.* at 178-79 ("Firms that offer . . . investment advice to issuers are *not*, for the most part, regulated. . . . At a minimum, given the investment advice they provide to clients, these firms should be registered as investment advisors with the SEC.") (emphasis added).

[4] Exchange Act § 15B(e)(4) (providing that the term "municipal advisor" includes "financial advisors, placement agents, solicitors, finders, and swap advisors").

standard of care depending on the type of client being served. Had that been Congress' intent, then there would have been significant debate and discussion about such a major overhaul and Congress would have sought the input of the banking, brokerage and investment advisory communities in the drafting of Section 975.[5]

By expanding the scope of who is a municipal advisor, the SEC proposal could have the unintended consequence of causing highly regulated banks, trust companies, broker-dealers and investment advisers, on whom municipal entities and obligated persons rely for financial services, to curtail their services provided to municipal entities and obligated persons; in fact, anecdotal evidence suggests such a withdrawal from the marketplace is already occurring. For example, because the as-yet undefined fiduciary standard under Section 975 could potentially restrict principal transactions with a municipal entity to whom a municipal advisor owes a fiduciary duty, such interpretations could effectively limit or even prohibit sales of fixed income and other products to municipal entities and obligated persons as principal. This would ultimately reduce competition and raise the cost of services to municipal entities and obligated persons with little corresponding regulatory benefit.

Furthermore, the proposed registration process for municipal advisors and their associated persons is unnecessarily burdensome and duplicative for registered and otherwise regulated entities. Banks and trust companies in particular would be subject to extensive new costs to register their associated persons. In addition, the registration as municipal advisors of individuals who are associated persons of municipal advisors would be very costly and challenging with little apparent benefit. The SEC's proposal does not appear to adequately consider the costs of the rule, both in terms of costs of implementation and likely costs to be incurred by municipal entities and obligated persons as a result of increases in service prices.

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[5] The fact that there is an absence of legislative intent to broadly overhaul the regulatory programs already applicable to such regulated persons as banks, broker-dealers, and investment advisers is evidenced by the section-by-section summary of the Dodd-Frank Act, released by the Senate Committee on Banking, Housing, and Urban Affairs in March 2010. In that summary, the only statement regarding municipal advisor regulation and Section 975 is that Section 975 "provides for the regulation of municipal advisors under the Securities Exchange Act of 1934."). S. Comm. on Banking, Housing, and Urban Affairs, *Section-by-Section Summary of the Restoring American Financial Stability Act of 2010*, 51 (Mar. 16, 2010). Notably absent from the summary is any mention that Section 975 would recraft or redirect the regulatory program applicable to broker-dealers under the Exchange Act, let alone the regulatory program applicable to banks, trust companies and investment advisers.

Therefore, to avoid disrupting and raising the cost of services provided to municipal entities and obligated persons, the SEC should take a deliberative approach: first, the SEC should adopt a rule that addresses the activities of municipal advisors that are unregulated today; second, after the SEC has had time to adequately consider the interaction between existing regulatory frameworks and potential municipal advisor regulation, the SEC could adopt any additional regulations that are necessary to address the activities of regulated entities, such as broker-dealers, investment advisers, banks and trust companies.

In addition, when the SEC considers the impact of its proposed municipal advisor rules on regulated entities, SIFMA believes that the SEC should, among other things:

- issue interpretations that narrow the scope of regulated municipal advisor activities;
- provide additional guidance regarding what it means to provide "advice" and the contours of the definition of "investment strategies";
- clarify that the underwriter exception extends to activities closely related to the underwriting or private placement of securities issued by a municipal entity or obligated person, or remarketing activity;
- provide broad-based exceptions for banks and trust companies with respect to their traditional banking, advisory, fiduciary and trust activities;
- clarify that a person acting as a placement agent for a pooled investment vehicle does not engage in "solicitation" for purposes of Section 975; and
- significantly reduce the size and scope of the proposed registration structure, including providing for alternative mechanisms for persons already registered with the SEC to register for municipal advisory activities and eliminating the separate registration process for individuals, such as employees.

SIFMA also believes that the SEC should clarify that a municipal advisor has a fiduciary duty to its municipal entity clients only, and not to obligated persons or persons who are not clients of the entity that is a municipal advisor. Moreover, the SEC should consider guiding principles when it drafts rules and interpretative guidance, and evaluates MSRB rule proposals concerning the fiduciary duty of municipal advisors (*i.e.*, the fiduciary duty should be clearly defined, apply only to municipal advisory activities and be consistent with other standards of care imposed, or to be imposed, on service providers).

The SEC should recognize that many persons that are also municipal advisors already provide non-municipal advisory services to their municipal entity clients, and are subject to a fiduciary duty, other similar obligation or are otherwise subject to regulation with respect to such services. Drafting rules and interpretative guidance in light of the guiding principles outlined below will allow municipal entities to continue to receive the full range of municipal and non-municipal advisory services on which they have come to rely, while providing the protections sought by Section 975.

Finally, the SEC should reconsider the scope of information required of applicants and eliminate the proposed requirement to register individuals separately on Form MA-I, in light of the burdens that its proposed registration structure would place on the industry versus the incremental regulatory benefit, if any, of its extensive registration proposal.

II. Municipal Advisor: Definitional and Interpretative Issues

Under Section 975, a municipal advisor is a person that either provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms and other similar matters concerning such financial products or issues, or undertakes a solicitation of a municipal entity or obligated person.[6]

Section 975 regulates municipal *advisors*. SIFMA believes that a person should be considered a municipal advisor under the "advice" prong of the municipal advisor definition only when it actually advises a municipal entity or obligated person with respect to the activities or products enumerated in Section 975 (*i.e.*, advice with respect to municipal derivatives or guaranteed investment contracts; plans or programs for the investment of the proceeds of municipal securities; municipal escrow investments; and the issuance of municipal

[6] Exchange Act § 15B(e)(4). Municipal financial products are municipal derivatives, guaranteed investment contracts and investment strategies, the latter of which "includes plans or programs for the investment of the proceeds of municipal securities that are not municipal derivatives, guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments." *Id.* § 15B(e)(3) and (5).

securities), and not when the municipal entity or obligated person happens to have a bank, trust or brokerage account that contains some proceeds of municipal securities, let alone when this account contains public funds in general.

Indeed, because municipal entities and obligated persons have a wide range of advisory relationships with financial and non-financial entities, it is imperative that the SEC provide clear guidance as to what it means to provide "advice" to a municipal entity or obligated person for purposes of Section 975 and what exactly constitutes a municipal financial product, and, in particular, what will be considered an "investment strategy." In addition, the SEC should clarify the meaning of other terms, and applicable exceptions, related to the definition of "municipal advisor," as set forth in the following discussion.

A. The SEC Should Clarify What It Means To Provide "Advice"

The touchstone for determining whether a person is a municipal advisor is whether the person is providing "advice" to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities.

1. The SEC Should Clarify What Types of Communications Constitute the Provision of "Advice"

The SEC should clarify the types of investment-related communications with a municipal entity or obligated person that constitute "advice" for purposes of Section 975, and in particular that not every discussion of a financial instrument or the services available from a financial institution constitutes "advice."

The SEC should, at a minimum, provide in its rules or guidance that a person will not be considered a municipal advisor to a municipal entity or obligated person if such municipal entity or obligated person is or will be represented by an independent advisor that is itself registered as a municipal advisor (or eligible for an applicable exception, such as an investment adviser providing investment advice) and any relevant documentation states that the person is not acting as an "advisor" and the municipal entity or obligated person is not relying on any advisory communications from such person.

Further, the SEC should provide, by rule, that a person will be considered a "municipal advisor" only where such person:

- provides advice that relates directly to the issuance of municipal securities or the specific municipal financial products enumerated in Section 975 to a municipal entity or obligated person

- pursuant to a mutual written agreement:

    - that the advice will serve as a primary basis for the municipal entity or obligated person's decisions with respect to municipal financial products or the issuance of municipal securities and

    - that the advice will be individualized based on the particular needs of the municipal entity or obligated person, and

- the person is not otherwise subject to a fiduciary duty with regard to its actions.

Under this standard, a person that makes a recommendation or otherwise engages in communications in the context of a particular transaction would not be considered a municipal advisor absent the presence of all of the other above-listed factors. By ensuring that a person will only be a municipal advisor when there is a mutual written agreement pursuant to which it has undertaken to provide particularized advice, the SEC will provide potential municipal advisors with practical criteria by which they can conduct their affairs and determine exactly when they need to register as municipal advisors and implement programs to ensure that their municipal entity clients receive the benefits of Section 975's fiduciary duty.[7]

The above-written standard would provide a person engaging in activities with a municipal entity or obligated person with the clearest guidance as to when it is a municipal advisor. However, if the SEC determines not to limit municipal advisor regulation to only those instances where there is written evidence of a formal advisory engagement and include other communications, outside of a

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[7] SIFMA notes that proposed MSRB interpretations contemplate that municipal advisors will enter into written agreements with municipal entities and obligated persons. *See* MSRB Notice 2011-14, *Request for Comment on Draft MSRB Rule G-36 (On Fiduciary Duty of Municipal Advisors) and Draft Interpretive Notice* (Feb. 14, 2011) (proposing an interpretation providing that municipal entities and obligated persons may consent to conflicts of interest "that are clearly described in [a municipal advisor's] engagement letter or other written contract with the municipal advisor").

formal engagement, as constituting "advice" for purposes of Section 975, the SEC should clarify that a communication should constitute advice only when it is provided with respect to and directly relates to an enumerated municipal financial product or the issuance of municipal securities, and it is a recommendation that is particularized to the needs and circumstances of the recipient such that, under the prevailing facts and circumstances, a municipal entity or obligated person would reasonably expect that it could rely and take action, without further input, based upon such communication.

In the absence of documentation or other agreement as to whether a person is providing advice, a municipal entity or obligated person's reasonable expectations could be determined by examination of other factors. These factors include a municipal entity or obligated person's retention of an independent municipal advisor (or person excepted from registration, such as an investment adviser providing investment advice), or its acknowledgement that the supposed municipal advisor is not acting as its advisor or fiduciary. Such factors also include a supposed municipal advisor's explicit statement, whether in a document or orally, that it is not acting as a municipal advisor or acting as a fiduciary to the municipal entity or obligated person. Moreover, when the documentation agreed to by the parties explicitly states that the person is not acting as a municipal advisor to the municipal entity or obligated person, then the presence of such a factor should be dispositive of the fact that there is no municipal advisory relationship between the parties.

In addition, the SEC should clarify that the following communications and activities are illustrative of situations that would not generally be regarded as providing advice in the absence of an agreement between the parties:

- Responding to a request for proposals or qualifications from a municipal entity or obligated person regarding investment products.

- Providing terms on which a financial institution or other entity is generally prepared to enter into a transaction (*e.g.*, in the form of a term sheet).

- Presenting multiple options available from a financial institution for the short-term investment of excess cash (*e.g.*, interest-bearing accounts and overnight or other periodic investment sweeps and local government investment pools) and negotiating the terms of such an investment.

- Providing the terms upon which a financial institution or other entity would purchase as principal (including as a dealer), for its own account, securities issued by the municipal entity or obligated person, such as bond anticipation notes, tax anticipation notes or revenue anticipation notes, or purchasing such securities as principal.

- Providing a presentation containing various municipal derivative alternatives that a municipal entity or obligated person could consider entering into with a financial institution as counterparty without recommending any specific alternative to the municipal entity or obligated person (regardless of whether the parties subsequently enter into a municipal derivative transaction) or entering into a municipal derivative with a municipal entity or obligated person.

- Presenting multiple securities meeting specified criteria, but without making a recommendation as to the merits of any investment particularized to a municipal entity or obligated person's specific circumstances or investment objectives, and regardless of whether the options for investment are sent to a particular municipal entity or obligated person or group of municipal entities or obligated persons.

- Providing price quotations with respect to particular municipal derivatives or securities.

- Directing or executing purchases and sales of municipal derivatives, securities or other instruments in a trust or other fiduciary account in accordance with predetermined investment criteria or guidelines, including on a discretionary basis.

- Providing, or the recommendation of, non-advisory services, such as administrative, custody or transfer agency services to a municipal entity or obligated person.

- Providing research information and generic trade ideas or commentary that do not purport to meet the needs or objectives of specific clients, and are provided to a municipal entity or obligated person as part of a financial institution's ongoing ordinary communications with the public or its clients.

- Providing suggestions, opinions or even recommendations regarding general financial or market information, or information regarding investments or instruments, that are not particularized to the needs or circumstances of the municipal entity or obligated person.

- Conducting a preliminary cash-flow analysis (*e.g.*, analyzing refunding savings) at the request of a municipal entity or obligated person.

If these activities and communications are not clearly excepted from the definition of "advice," then the unintended consequence of uncertainty regarding the scope of covered advice will be to deprive municipal entities and obligated persons of the services on which they have come to rely, or increase the cost of those services as financial institutions are correspondingly subjected to greatly increased costs, burdens and potential liabilities.

2. Uncompensated Advice Should Not Trigger Municipal Advisor Status

In addition, the SEC should reconsider its position that providing uncompensated advice to a municipal entity or obligated person is equally subject to regulation as providing advice for compensation.[8] This position will deprive municipal entities of a source of necessary input that is unlikely to result in the abuses at which Section 975 is directed. This advice is likely to be given as a client service by a financial institution that is providing other unrelated compensated services to the municipal entity. This is distinguishable from advice that is incidental to an investment service such as brokerage, and unlikely to be confused by a municipal entity with the type of advice provided under a more formal relationship. Without an exception for uncompensated advice, entities such as banks, trust companies and broker-dealers from which municipal entities or obligated persons seek limited, uncompensated advice (*e.g.*, conducting cash flow analyses, post-offering services and rating agency guidance, all at the request of an issuer), without intending to establish a more formal advisory relationship, may simply stop providing this type of advice. This would cause a disservice to municipal entities and obligated persons, which often do not have the research resources or budget and personnel to analyze fully the issues for which they request uncompensated advice.

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[8] Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 832 (Jan. 6, 2011).

3. The SEC Should Coordinate the Definition of "Advice" With Other Regulators

Persons that will be considered municipal advisors will often be engaged in business activities other than providing advice to or on behalf of a municipal entity or obligated person. These business lines include, among others, serving as a broker-dealer, investment adviser, commodity trading advisor, bank or trust company or swap dealer. Under Section 975 and the SEC's proposed rules, SEC-registered investment advisers and commodity trading advisors registered with the Commodity Futures Trading Commission ("**CFTC**") are excepted from registration and regulation as municipal advisors to the extent that they provide investment advice (in the case of investment advisers) and advice with respect to swaps (in the case of commodity trading advisors).

However, other regulated persons, such as swap dealers, that may also provide advice to a municipal entity or obligated person in connection with their business as swap dealers, would not be excepted from the definition of "municipal advisor." In such a case, a person that provides advice in connection with its other business activity may be subject to regulation by its primary regulator for that other business activity (*e.g.*, the CFTC in the case of a swap dealer) and, absent an applicable exception, become subject to additional regulation by the SEC as a municipal advisor.

Although it would be best to avoid the burdens of dual or multiple regulation by excepting any advice that is related to, or given in connection with, another regulated activity, the SEC should coordinate the definition of "advice" for purposes of municipal advisor registration and regulation with that of other regulatory programs to ensure that the communications and activities listed above are not viewed as "advice" for non-municipal advisor regulatory regimes, such as swap dealer regulation. Thus, market participants would have consistent guidance as to when a given communication constitutes and does not constitute advice. This would make it easier for them to determine whether the communication triggers obligations under all potentially applicable regulatory programs or no such program, with no gray zone in which there may be obligations under one or more, but not all, such programs.[9]

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[9] For example, because a swap dealer (that is not otherwise registered as a commodity trading advisor) is not excepted from the definition of "municipal advisor" in any capacity, it could be required to register as a municipal advisor and be regulated as such when it provides advice with respect to municipal derivatives to or on behalf of an obligated person or municipal entity. However, the triggering point at which a communication constitutes advice for both a (...continued)

4. The SEC Should Adopt a *De Minimis* Exception

Under Section 975, the provision of *any* advice would, absent an applicable exception, require a person engaging in such advisory activity to register as a municipal advisor, even if it engages in advisory activities on an infrequent or one-off basis not in the ordinary course of its business. Therefore, the SEC should adopt a *de minimis* advisory threshold, both in terms of the number of times that a person provides advice and the amount of funds with respect to which it provides advice. Failing to adopt such an exception would lead to a tremendous over-registration of municipal advisory firms and, more significantly, individuals (should the SEC retain its proposed requirement for individual registration) who have infrequent contact with municipal entities and obligated persons but fear that they may inadvertently violate regulations applicable to municipal advisors.

For example, the SEC could clarify that a person that advises no more than a specified number of municipal entities or obligated persons per year; initiates contact with all municipal entities or obligated persons in aggregate no more than a specified number of times per year; provides advice with respect to funds that do not exceed a specified dollar amount per advisory engagement; or provides advice with respect to aggregate funds of no more than a specified dollar amount at a given time would not be considered a municipal advisor under the "advice" prong of the definition of "municipal advisor."[10]

(continued...)

municipal advisor and a swap dealer should be the same. *See* CFTC Proposed Rule 23.440(a), 75 *Fed. Reg.* 80638, 80659 (Dec. 22, 2010) (proposing, under new Section 4s(h)(4) of the Commodity Exchange Act, that a swap dealer "acts as an advisor to a Special Entity," which would include certain municipal entities and obligated persons, when it, subject to certain enumerated exceptions, "recommends a swap or trading strategy that involves the use of swaps to a Special Entity"); *see also* Exchange Act Proposed Rule 15Ba1-1(f), 76 *Fed. Reg.* 824, 882 (Jan. 6, 2011) (defining the term "municipal derivatives," for purposes of Section 975, as any "swap" or "security-based swap" to which a "municipal entity is a counterparty, or to which an obligated person, acting in its capacity as an obligated person, is a counterparty"). Municipal entities/Special Entities would also be better served and more likely to receive the protections of both the CFTC and SEC's regulatory programs were there a uniform definition of "advice." To this end, they would be able to uniformly determine when they are owed duties under both regulatory programs. They would not have to consider whether they are being given advice for the purposes of one, but not both, programs, and determine under which program, if any, they are entitled to protection.

[10] The SEC should also adopt a similar *de minimis* exception for solicitation activities under Section 975, both in terms of the number and size of investments solicited. Such an
(...continued)

5. The SEC Should Clarify That an Advisor to a Municipal Advisor Is Not Itself a Municipal Advisor

The SEC should clarify that a person that provides advice to a municipal advisor (or a person excepted from the definition of "municipal advisor") in connection with the latter's provision of advice to a municipal entity or obligated person would generally not be considered to be advising the municipal entity or obligated person within the scope of Section 975. Absent some sort of direct contact with the municipal entity or obligated person, such a person would not itself be required to register as a municipal advisor. In this regard, the SEC should also clarify that the phrase "on behalf of" in the "advice" prong of the definition of "municipal advisor" is interpreted to cover advice provided to participant-directed investment programs or plans such as 529, 403(b) and 457 plans that hold the funds of retail clients but are managed for municipal entities, and is not interpreted to cover a situation in which a person provides advice to a municipal advisor (or a person excluded from such definition).[11]

B. The Definition of "Investment Strategies"

The SEC's proposed rule would define the term "investment strategies" to also "include[] plans, programs or pools of assets that invest funds held by or on behalf of a municipal entity."[12] The proposed expanded definition of "investment strategies" is not required or even implied by the text of Section 975[13] and would subject a vast swath of activity—which was not intended to be, and need not be, further regulated—to additional regulation. Therefore, the SEC should retain only the statutory definition of "investment strategies."

(continued...)

exception would likely provide relief from municipal advisor registration to a substantial number of persons that either engage in solicitation on an infrequent or one-off basis not in the ordinary course of business.

[11] *See* Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 829 (Jan. 6, 2011).

[12] Proposed Rule 15Ba1-1(b), 76 *Fed. Reg.* 824, 881 (Jan. 6, 2011).

[13] Section 975 only enumerates "plans or programs for the investment of the proceeds of municipal securities that are not municipal derivatives, guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments." Exchange Act § 15B(e)(3).

Separately, within the statutory framework, the SEC should clarify the definition of "investment strategies" to provide market participants with clearer guidance as to when their activities constitute those of a municipal advisor.

1. The SEC Should Retain the Statutory Definition of "Investment Strategies"

The SEC should retain the statutory definition of "investment strategies," which applies to the two activities specifically enumerated in the statute, *i.e., advice with respect to* (i) the investment of the proceeds of municipal securities and (ii) the recommendation of and brokerage of municipal escrow investments. It should not encompass all assets of a municipal entity that may be used for investment, as the SEC effectively proposes. The SEC has stated that "it does not believe that it was Congress' intent to limit the requirement to register as a municipal advisor only to those persons that provide advice with respect to plans or programs for the investment of proceeds from municipal securities"—referencing the expansive statutory definition of "municipal entity" as support for its proposed interpretation.[14] However, Congress' intent is more clearly evidenced by the fact that it had the opportunity to define "investment strategies" as broadly as it desired when it drafted Section 975. Instead, Congress chose to more narrowly limit the term to the proceeds of municipal securities and municipal escrow investments—areas and products that Congress presumed had been the subject of, or are particularly susceptible to, abuse. Advice with respect to these types of activities and financial products should be the only advisory activity that triggers a person's being considered a municipal advisor by virtue of advising on an investment strategy.

In addition to going beyond the plain language of the statutory text (and in that light Congress' intent for the scope of investment strategies as may be inferred from the language of Section 975), the SEC's proposed definition of "investment strategies" would have the effect of subjecting even more persons and activities, many of which are already regulated, to the additional burden of municipal advisor regulation than is required by Section 975. In particular, as the SEC acknowledges, it also potentially creates a situation where all advice regarding a municipal entity's bank or trust accounts, including cash and deposit management, or local government investment pools, triggers municipal advisor registration.[15] This in turn necessitates, as is discussed in Section III below, the

[14] Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 832 (Jan. 6, 2011).

[15] *See id.* at 830 ("[B]ecause every bank account of a municipal entity is comprised of funds 'held by or on behalf of a municipal entity,' money managers providing advice to municipal (...continued)

need for exceptions for various activities, such as traditional banking and trust company relationships with municipal entities that are already subject to regulation, in order to ensure that municipal entities continue to have access to the full range of products currently offered to them by as many financial institutions that are currently willing to offer such products to such entities. Absent such an exception, imposing the SEC's broad definition of "investment strategies" will reduce product offerings available to municipal entities, provide them with fewer points of contact at financial institutions and increase costs in the face of reduced competition for the provision of such services to municipal entities.

2. The SEC Should Provide Further Clarification as to What Is an "Investment Strategy"

In addition to limiting the definition of "investment strategies" to the statutory definition of that term, the SEC should clarify that:

- a "plan or program" is a series of specified investment-related actions or activities that would generally be akin to a financial plan, not merely advice incidental to a particular trade or investment;[16]

- a person would not be considered to provide advice with respect to an investment strategy if the person reasonably believes that the funds for the investment strategy on which the person is advising are from an account of the municipal entity or obligated person other than an account specifically for the proceeds of municipal securities issuances, unless the municipal entity or obligated

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entities with respect to their bank accounts could be municipal advisors."); *id.* at 830 n.98 ("To the extent that the pooled investment vehicle is a [local government investment pool], the pooled investment vehicle would be considered funds 'held by or on behalf of' a municipal entity and, therefore, a person providing advice with respect to a [local government investment pool] would have to register as a municipal advisor.").

[16] SIFMA notes that Section 202(a)(11)(C) of the Investment Advisers Act recognizes that a broker-dealer, by providing advice solely incidental to a broker-dealer transaction, does not become an investment adviser. Similarly, the SEC should clarify that, for purposes of Section 975, "advice" does not include broker-dealer advice that is solely incidental to a transaction. In addition, broker-dealers providing advice that is solely incidental to a transaction should be excluded from the definition of municipal advisor for the same reason that registered investment advisers are excluded (in some instances): they are already regulated. Indeed, in the case of dual registrants, they are already subject to two regulatory schemes.

person communicates to the person that the investment strategy in question is specifically for the investment of the initial proceeds of municipal securities (this "reasonably believes" standard could be satisfied by a client certification as to the facts with respect to the funds);

- funds would not be considered proceeds of municipal securities once they are commingled with other public funds and that subsequent investments of funds that were initially proceeds of municipal securities or revenues derived from the initial investment will not be considered "proceeds of municipal securities" unless the subsequent investment is part of the plan or program applicable to such proceeds that was developed at the time of, and in connection with, the initial investment; and

- municipal escrow investments are investments of funds in a segregated escrow account that was established by a municipal entity or obligated person to hold funds that have been allocated for satisfying a specific and identified obligation of the municipal entity or obligated person and maintained by an escrow agent for the municipal entity or obligated person.

Adopting each of the above-outlined positions would provide municipal entities and obligated persons with added protection when they participate in the municipal securities market, while also maintaining a robust marketplace for municipal entities. Indeed, there is no evidence that investment or other activities that municipal entities may currently engage in with commercial banks is the source of any of the regulatory concerns that Section 975 is intended to address. The language of Section 975 does not, and was not intended to, capture every use of funds for which a municipal entity or obligated person is provided advice. Instead, it was intended to provide municipal entities and obligated persons with added protection in the areas that are likely to have significant impacts on their finances and for which they were previously provided specialized types of advice by *unregulated* financial advisors—such as when they commit funds to a series of investments for the initial proceeds of municipal securities. The decisions that a municipal entity or obligated person makes at this point, and how it is advised with respect to those decisions, will have the greatest impact on its ability to, within appropriate risk limits, support its obligations under the municipal securities.

Congress clearly intended for a fiduciary relationship to apply to advice in these specific investment situations (presumably because the context of a municipal security offering in which such advice is given is significantly more complex than when advice is given in connection with ordinary banking, trust and brokerage activity). The SEC's proposal would apply a fiduciary relationship to all advice to municipal entities, whether or not part of an advisory program or relationship, or drawing upon funds that were intended for investment. All advice to municipal entities that could be effectuated with funds from a pool holding some funds for investment would be under a fiduciary duty. There is no indication that Congress intended this result. Indeed, there is no legislative record to support the idea that Congress wanted to alter the applicable duty of care owed by a broker-dealer based solely on the type of client involved, *i.e.*, that Congress wanted a higher duty of care to apply when a broker-dealer sells a T-bill to a highly sophisticated state pension fund, but a lower suitability standard to apply when the same broker sells a T-bill to a retail investor. Moreover, in a far more appealing setting—personalized advice to retail investors—Congress required an SEC study before the SEC could apply a fiduciary standard to broker-dealers. It is highly improbable that Congress intended the result reached by the SEC's proposal. And, the upshot is that it will reduce the availability of services to municipal entities and the availability of providers willing to make such services available to such entities.

Moreover, from a practical standpoint, the SEC's proposed investment strategies definition lacks clarity. Service providers need to be able to deliver their services efficiently without having to guess whether—or worse, assume that—the funds with which they are presented would result in their advising on an investment strategy.

Providing the suggested clarifications would reduce uncertainty as to when a person's activities constitute those of a municipal advisor. This guidance would, in turn, greatly assist firms in structuring their operations without undermining the policies underlying Section 975 to ensure compliance with the municipal advisor regulatory requirements as necessitated by Section 975, while also preserving a municipal entity or obligated person's efficient access to other financial services.

3. The SEC Should Clarify That an Investment Strategy Is Implicated Only When a Person Provides Advice Regarding the "Investment Of" Funds

Even if the SEC adopts its expanded definition of "investment strategies," the SEC should nonetheless clarify that the trigger for determining whether a person is a municipal advisor by virtue of its providing advice with respect to "funds held by or on behalf of a municipal entity" is whether the person is providing advice regarding the "investment of" those funds, and not advice regarding other expenditure or use of those funds for non-investment purposes.[17] In addition, the SEC should clarify that the types of investments about which a person must provide advice in order to be considered a municipal advisor are limited, as applicable, to investments in financial instruments and products (such as those identified or discussed throughout this letter). In particular, the SEC should clarify that the term, in any case, does not include local government investment pools, purchases of real estate or expenditures for, among others, infrastructure, equipment and personnel, which often are described as "infrastructure investments."

Limiting investment strategies to activities with respect to financial instruments or products is consistent with the text of Section 975. Indeed, in Section 975, Congress generally referred to "municipal financial products," which include municipal derivatives, guaranteed investment contracts, municipal escrow investments and proceeds of municipal securities—all of which are either financial instruments or products, or connote the same. Nowhere in the statutory text did Congress refer to other types of "investments." The SEC, by rule, should not expand the scope of activities covered by municipal advisor regulation beyond those specified by the text of Section 975.

4. The SEC Should Reiterate That an Adviser to a Pooled Investment Vehicle Is Not a Municipal Advisor

The SEC should reiterate in its final rules that, consistent with long-held interpretations under the Investment Advisers Act, an adviser to a pooled investment vehicle (such as a private equity fund, hedge fund, local government

[17] The SEC's proposed rule further defining "investment strategies" states that that term "includes plans, programs or pools of assets *that invest* funds held by or on behalf of a municipal entity." By contrast, the statutory definition of that term states that it "includes plans or programs for the *investment of* the proceeds of municipal securities . . . and the recommendation of and brokerage of municipal escrow investments." Implicit within the statutory definition, by use of the words "investment of," is the notion that a person that is a municipal advisor by virtue of providing advice with respect to investment strategies, as defined only by statute, must provide advice with respect to the *investment of* the funds enumerated in the statute. However, the SEC's proposed definition does not contain this investment advice requirement. Instead, the SEC's proposed definition could be read to mean that a person who merely provides *advice*—but not necessarily investment advice—with respect to plans, programs or pools of assets of a municipal entity that are used in part for investment would also be required to register as a municipal advisor. *See* Exchange Act § 15B(e)(3) (defining, by statute, the term "investment strategies"); Proposed Rule 15Ba1-1(b), 76 *Fed. Reg.* 824, 881 (Jan. 6, 2011) (proposing to further define, by rule, the term "investment strategies").

investment pool or even a mutual fund) in which a municipal entity or obligated person invests is not a municipal advisor by virtue of providing advice to such a vehicle, and that purchasing an interest in a vehicle does not create an advisory engagement between the investor and the vehicle's adviser.[18] Moreover, so as not to create confusion as to when an adviser to a pooled investment vehicle may or may not be a municipal advisor, this position should not be dependent on the percentage of investment by municipal entities or obligated persons in the vehicle, unless there is evidence of a sham. Thus, so long as there is at least one *bona fide* investor that is not a municipal entity or obligated person, the adviser to the vehicle should not be a municipal advisor.

Moreover, even if the vehicle consists entirely of investors that are municipal entities or obligated persons, the adviser should only be considered a municipal advisor if, consistent with the discussion above, the funds invested are proceeds of municipal securities issuances and the adviser knows of their identity as such, unless there is evidence of a sham. The SEC should also clarify that, in any case, an adviser would still not be considered a municipal advisor to the extent that its activities qualify for the investment adviser exception to the definition of "municipal advisor." Absent these exceptions, if an adviser to a pooled investment vehicle would be considered a municipal advisor, then fewer pooled investment vehicles would be offered to municipal entities (particularly public pension plans) and obligated persons, which would disserve municipal entities and obligated persons by limiting their access to important vehicles for the long-term investment of their funds.[19] In addition, SIFMA notes that local

[18] Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 830 (Jan. 6, 2011); *see e.g.*, *Goldstein v. SEC*, 451 F. 3d 873, 879-80 (D.C. Cir. 2006) ("[The Investment Advisers Act] define[s] 'investment adviser' as 'any person who, for compensation, engages in the business of advising others, either *directly* or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities.' An investor in a private fund may benefit from the adviser's advice (or he may suffer from it) but he does not receive the advice *directly*. He invests a portion of his assets in the fund. The fund manager—the adviser—controls the disposition of the pool of capital in the fund. The adviser does not tell the *investor* how to spend his money; the investor made that decision when he invested in the fund. Having bought into the fund, the investor fades into the background; his role is completely passive. If the person or entity controlling the fund is not an "investment adviser" to each individual investor, then *a fortiori* each investor cannot be a "client" of that person or entity. These are just two sides of the same coin.") (citations omitted).

[19] SIFMA notes that the MSRB has proposed an interpretation of its "fair dealing" rule that would impose specific disclosure requirements on municipal advisors engaged in solicitation activities, such as the requirement to disclose the amount of compensation being received and product-specific disclosures. *See* MSRB Notice 2011-13, *Request for Comment on Draft Interpretive Notice Concerning the Application of MSRB Rule G-17 to Municipal Advisors* (Feb.
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government investment pools are often the only available option for the short-term investment of operating funds and are subject to state laws, which often include a fiduciary duty. The SEC's proposal likely would reduce the number of local government investment pool options available to municipalities.

C. The Definition of "Obligated Person": The SEC Should Clarify When a Person Will Be Considered To Be Engaging With an Obligated Person

The SEC should clarify that an "obligated person" is a person that is "committed by contract or other arrangement to support the payment of all or part of the obligations on the municipal securities *to be* sold in an offering of municipal securities,"[20] which means that such person must be the *initial* obligor under such securities. A person should not be deemed an obligated person if it is not the *initial* obligor and comes to support the payment of obligations on municipal securities after the offering, through an assumption or other arrangement. For example, if a broker-dealer advises a private company that purchases a municipal asset and agrees to assume the obligation to pay outstanding municipal securities in connection with such transaction, the party assuming the debt should not be considered an obligated person and the broker-dealer should not be considered a municipal advisor.

In addition, the SEC should clarify that a person will be considered to provide advice to or on behalf of an obligated person or to undertake a solicitation of an obligated person only when such person has actual knowledge that it is advising or soliciting an obligated person, acting in a capacity as an obligated person, and has actual knowledge that it is advising or engaging in solicitation with respect to the issuance of municipal securities or that the funds with respect to which it is advising or engaging in solicitation are proceeds of municipal securities. Such person must also be rendering services with respect to the types of activities or instruments, as applicable, that make one a municipal advisor (*i.e.*, municipal derivatives or guaranteed investment contracts; plans or programs

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14, 2011). These requirements would be particularly awkward if solicitation on behalf of a pooled investment vehicle triggered municipal advisor status, because the disclosure would be required with respect to an issuer of securities by a party (the solicitor) that is not necessarily in the best position to make such disclosures (*e.g.*, the issuer would obviously be in a better position to make product specific disclosures).

[20] Exchange Act § 15B(e)(10) (emphasis added).

for the investment of the proceeds of municipal securities; municipal escrow investments; and the issuance of municipal securities).

Moreover, a person engaging in activities with respect to a potential obligated person does not need to inquire affirmatively as to such person's status or the status of its funds. Anything to the contrary would have significant negative implications for the manner by which all financial firms conduct business and establish relationships with clients. Moreover, the SEC should clarify that in no event would its proposed expanded definition of "investment strategies" be applicable to engagements with obligated persons, as an obligated person's funds are not held in plans, programs or pools of assets that invest funds held by or on behalf of a municipal entity.

The SEC should also clarify that a person that becomes an obligated person does not remain so indefinitely and is not an obligated person with respect to unrelated matters. To that end, the SEC should also clarify that any relationship between such person and its advisor will only be considered a municipal advisory relationship to the extent that it directly involves a transaction with respect to which the person is an obligated person. For example, if advisor A provides advice to for-profit corporation FPC with respect to the issuance of a recovery zone facility bond ("**RZFB**") under which FPC will be obligated to support the payment of all or part of the obligations, a derivative (related to the RZFB) to which FPC will be a counterparty and a plan or program for the investment of the proceeds of the offering, then A could only be a municipal advisor to FPC with respect to the RZFB, related municipal derivative and the investment strategy, and not with respect to any other unrelated transaction or assignment. If A, either concurrently or at any point in the future, also advised FPC on its own issuance of non-municipal, taxable bonds, a derivative related to such issuance and the investment of the proceeds of such issuance, then A would not be a municipal advisor to FPC with respect to any of the foregoing.

A similar circumstance exists where a person provides advice to a private corporation that is considering a public-private partnership in which it may purchase some public assets. Here, the advisor may not know whether private activity bonds or other municipal securities will be involved in the ultimate transaction, which would thereby make its client an obligated person. The advisor should not be considered a municipal advisor for any period of the engagement prior to when a decision is made to pursue a municipal offering and the advisor begins to advise its client—only now a potential obligated person—with respect to the particular offering that will make the client an obligated person.

These clarifications are particularly important because of the different—and arguably flawed—regulatory structure applicable to persons that provide services, which may be considered municipal advisory activities, solely to obligated persons (*e.g.*, a private company that may engage in a tax-exempt conduit transaction from time to time).[21] Because Section 975 does not impose a fiduciary duty on a person that provides services to an obligated person, it is at least questionable whether any such service provider should be subject to as extensive a regulatory program (if any program at all) as that which would apply to persons that provide similar services to municipal entities—the type of entities for which the protection and benefits of the municipal advisor regulatory program are primarily intended.

D. The Definition of "Municipal Derivatives"

The SEC should also clarify how a person engaging in a transaction or assignment with respect to a "municipal derivative" determines that the counterparty is "an obligated person, acting in its capacity as an obligated person." In accordance with the discussion in Section II.C above, the SEC should clarify that the person must have actual knowledge that the counterparty is an obligated person, acting as such, and have actual knowledge that the municipal derivative implicates or is related to the underlying transaction or funds that make such person an obligated person. In addition, a person need not affirmatively inquire as to the counterparty's status as an "obligated person" or the status of its funds. Anything to the contrary would have significant negative implications for the manner by which all financial firms conduct business and establish relationships with clients.

[21] If the service provider provides services directly to the municipal entity involved in the transaction, it would be subject to regulation pursuant to these provisions irrespective of whether it also provides services to the obligated person.

E. The Definition of "Solicitation of a Municipal Entity or Obligated Person"

1. The SEC Should Clarify That a Placement Agent for a Pooled Investment Vehicle Does Not Engage in Solicitation for Purposes of Section 975

As SIFMA stated in comments to the SEC dated October 5, 2009 in response to proposed Investment Adviser Act Rule 206(4)-5,[22] SIFMA supports pay-to-play restrictions and regulation of the placement agent industry. Indeed, the industry welcomes a pay-to-play rule to remedy reputational damage caused by a few bad actors but suffered by legitimate broker-dealers involved in the placement of limited partnership interests. However, SIFMA respectfully submits that classifying a placement agent as a "municipal advisor" is not the way to accomplish such a policy goal. The SEC should not adopt its proposed interpretation that "a broker-dealer acting as a placement agent for a private equity fund that solicits a municipal entity or obligated person to invest in the private equity fund would be a municipal advisor with respect to that activity."[23] Section 975 does not define the term "solicitation" to include a solicitation of a municipal entity or obligated person by a placement agent for a pooled investment vehicle, such as a private equity fund, hedge fund, local government investment pool, or even a mutual fund, all of which involve the sale of securities (not services) by registered broker-dealers.

In drafting Section 975, Congress narrowly defined a municipal advisor's solicitation activities as limited types of communications on behalf of five enumerated categories of unaffiliated persons—a broker, dealer, municipal securities dealer, municipal advisor or investment adviser.[24] A pooled investment vehicle, such as a private equity fund, hedge fund, local government investment pool, or mutual fund, is not among the specific categories of unaffiliated persons enumerated in the definition of "solicitation of a municipal entity or obligated

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[22] Letter from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, to Elizabeth Murphy, Secretary, SEC (Oct. 5, 2009), *available at* http://www.sec.gov/comments/s7-18-09/s71809-166.pdf.

[23] Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 830 (Jan. 6, 2011).

[24] Exchange Act § 15B(e) (defining "solicitation of a municipal entity or obligated person").

person."[25] Placement agents that are acting as investment bankers in the sale of securities, are not involved in selling the "services" of any of the above noted types of entities. Critically, a placement agent for a pooled investment vehicle should be viewed as engaging in solicitation on behalf of the vehicle only and not on behalf of the adviser to the vehicle.

Excluding solicitations on behalf of a pooled investment vehicle parallels the SEC's own interpretation that an adviser to a pooled investment vehicle would generally not be considered a municipal advisor. Consistent with long-held interpretations under the Investment Advisers Act and its own logic, the SEC should also clarify that a person that acts as a placement agent for a pooled investment vehicle is not thereby considered to be soliciting for the provision of investment advisory services. There clearly is a distinct difference between an agent who promotes (for a fee) the retention of a particular investment adviser to manage a municipal entity's assets and a placement agent who assists in the placement of securities, such as limited partnership interests in a private placement. Indeed, in the latter case, even if the solicitor is successful and the investor purchases an interest in the vehicle, no investment advisory relationship will be created between the adviser to the vehicle and the investor.[26] In other

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[25] In any event, the "solicitation" prong of the municipal advisor definition is only triggered by activities on behalf of persons not under common control with the solicitor entity. In this regard, the SEC should clarify that an SEC-registered investment adviser engaging in solicitation activities would only be required to register as a municipal advisor to the extent that it solicits on behalf of unaffiliated persons, such as an unaffiliated municipal advisor. *See* Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 833 (Jan. 6, 2011) (stating that an investment adviser engaging in solicitation activities would not be eligible for the investment adviser exception to the definition of "municipal advisor"). It should further be clarified that the exception for investment advisers should cover solicitation activities of investment adviser employees on behalf of their employer.

[26] See note 18 and accompanying text. As explained in the *Goldstein* case, "[t]he adviser owes fiduciary duties only to the fund, not to the fund's investors. . . . If the investors are owed a fiduciary duty and the entity is also owed a fiduciary duty, then the adviser will inevitably face conflicts of interest. . . . For the same reason, we do not ordinarily deem the shareholders in a corporation the "clients" of the corporation's lawyers or accountants. . . . While the shareholders may benefit from the professionals' counsel indirectly, their individual interests easily can be drawn into conflict with the interests of the entity. It simply cannot be the case that investment advisers are the servants of two masters in this way." 451 F.3d at 881.

If the adviser would have a conflict in representing both limited partnership investors and the fund itself then surely it would be a conflict for the placement agent placing the limited partnership interests—an agent of the investment adviser forming the fund—to have a fiduciary duty to the investors. As with the corporate attorney example, the investors in the pooled
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words, if investing in a pooled investment vehicle does not result in an investment advisory relationship with the vehicle's adviser, then likewise the placement of an interest in such a vehicle does not constitute the solicitation of an investment advisory relationship.

To the extent that the SEC seeks to classify broker-dealers acting as placement agents that solicit municipal entities or obligated persons as municipal advisors in order to subject them to the pay-to-play rule (which SIFMA favors),[27] the SEC's objectives could be accomplished in a significantly less burdensome manner. The Financial Industry Regulatory Authority ("**FINRA**"), as broker-dealers' primary self-regulatory organization, already has the jurisdiction to promulgate a pay-to-play rule for broker-dealers.[28] Moreover, FINRA would be able to apply such a rule directly to broker-dealers, without subjecting them to the additional registration costs and regulatory burdens associated with registration as a municipal advisor.[29] Such an approach would be far preferable to the SEC's proposed classification of broker-dealers acting as placement agents for pooled investment vehicles as municipal advisors, with attendant duplication in registration and regulatory programs, in order to impose such a rule.[30] Given the

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investment vehicles are benefitted by the placement agent's involvement and expertise, but that does not result in such an agent being deemed an advisor to the investors.

[27] See note 65 and accompanying text.

[28] *See, e.g.*, Letter from Richard G. Ketchum, Chairman and Chief Executive Officer, FINRA to Andrew J. Donohue, Director, Division of Investment Management, SEC (Mar. 15, 2010) (stating that FINRA is "in a position to promulgate" rules that would apply to broker-dealer members of FINRA and "allow such members to act as regulated placement agents in soliciting government entities on behalf of certain investment advisers if they complied with requirements prohibiting pay to play activities by those placement agents on their own behalf or on behalf of the investment advisers in respect of whom they act as placement agent.").

[29] SIFMA notes that under the SEC's pay-to-play rule, investment advisers will not be able to utilize broker-dealers as solicitors after September 13, 2011 unless such broker-dealers are subject to a pay-to-play regime. *See* Investment Advisers Act Release No. 3043, 75 *Fed. Reg.* 41018, 41042 (July 14, 2010). SIFMA's proposed solution—under which FINRA would promulgate a pay-to-play rule for broker-dealers—would allow this deadline to be met, but without requiring broker-dealers to register "voluntarily" as municipal advisors and thus subject themselves to unnecessary and potentially duplicative and onerous registration requirements and regulation.

[30] Letter from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, to Elizabeth Murphy, Secretary, SEC (Jan. 24, 2011), *available at* http://www.sec.gov/comments/s7-36-10/s73610-34.pdf ("SIFMA continues to strongly support the

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fiduciary duty and other requirements attendant with the municipal advisor classification, the SEC risks imposing a burden on placement agents akin to the ban on certain placement activities that the SEC already rejected.[31]

If the SEC does not clarify that the mere placement of an interest in a pooled investment vehicle, such as a private equity fund, hedge fund, local government investment pool, or mutual fund, is not solicitation, then many placement agents will likely substantially curtail their placement of non-affiliated funds to municipal entities and obligated persons. This would be detrimental to municipal entities and obligated persons that seek to invest in these instruments.

2. The SEC Should Reconsider Requiring Investment Advisers To Use Municipal Advisors Under the Investment Adviser Pay-To-Play Rule

Proposed amendments to the SEC's pay-to-play rule under the Investment Advisers Act would make it unlawful for an investment adviser to "provide or agree to provide, directly or indirectly, payment to any person to solicit a government entity for investment advisory services on behalf of such investment adviser unless such person is[, among others,] a regulated municipal advisor."[32] This prohibition would also apply to the use of *affiliated* solicitors, a category of persons that is not required to register as municipal advisors.[33] To accommodate

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SEC's goal of eliminating 'pay-to-play' practices from the selection of investment advisers by government entities.").

[31] In response to proposed Rule 206(4)-5 under the Investment Advisers Act, the SEC acknowledged that numerous commenters believed "that it would also harm public pension plans to ban payments to third parties because it would decrease competition by reducing the number of advisers competing for government business and limit the universe of investment opportunities presented to public pension funds." *See* Investment Advisers Act Release No. 3043, 75 *Fed. Reg.* 41018, 41060 (July 14, 2010). Accordingly, the SEC concluded: "We believe our decision to modify the proposed rule to permit advisers to make payments to certain 'regulated persons' to solicit government clients on their behalf . . . should alleviate many of these concerns, including those from private equity and venture capital managers on capital formation." *Id.*

[32] Investment Advisers Act Proposed Rule 206(4)-5(a)(2), 75 *Fed. Reg.* 77052, 77100 (Dec. 10, 2010); *see also* Letter from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, to Elizabeth Murphy, Secretary, SEC (Jan. 24, 2011), *available at* http://www.sec.gov/comments/s7-36-10/s73610-34.pdf.

[33] See note 24.

the proposed amendment to the investment adviser pay-to-play rule, the SEC is proposing to allow entities to register voluntarily as municipal advisors.[34]

Congress expressly determined that affiliated solicitors do not need to register or become subject to the MSRB's pay-to-play rule. The SEC should not attempt to overrule this decision through its investment adviser rules. To the extent that the SEC believes that affiliated solicitors should be subject to pay-to-play rules, it should require that investment advisers condition use of affiliated solicitors on their compliance with the investment adviser or comparable pay-to-play rule. This would achieve the SEC's goal directly and avoid forcing affiliated solicitors to undertake the full municipal advisor regulatory requirements.

The SEC should also delay any further action on the proposed investment adviser pay-to-play rule until such time that the municipal advisor registration and regulatory program is finalized. At that time, the SEC will have a more concrete basis for assessing the appropriateness of the obligations that it would impose on affiliated solicitors. Moreover, only at that time will interested parties be able to fully comment as to the utility of imposing municipal advisor requirements on affiliated solicitors.

In any case, the SEC should clarify that persons engaging in solicitation under the investment adviser pay-to-play rule, especially those registering voluntarily with the SEC, will not have a fiduciary duty, under Section 975, to any municipal entity or obligated person that they solicit. This would be consistent with the MSRB's position that the statutory fiduciary duty applicable to municipal advisors does not apply in the context of their solicitation activities under Section 975.[35]

3. The SEC Should Clarify That Solicitation for Principal Investments Does Not Constitute Solicitation for Purposes of Section 975

The SEC should clarify that solicitation does not include situations where a person approaches a municipal entity or obligated person on behalf of an unaffiliated person for the purpose of such unaffiliated person's making an

[34] Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 832 n.104 (Jan. 6, 2011).

[35] *See* note 65 and accompanying text. *See also* MSRB Notice 2011-13, *Request for Comment on Draft Interpretive Notice Concerning the Application of MSRB Rule G-17 to Municipal Advisors* (Feb. 14, 2011) (stating that "municipal advisors are not required to exercise a fiduciary duty when soliciting municipal entities on behalf of third parties").

investment as principal in municipal securities to be issued by the municipal entity or obligated person. In this case, even if the prospective investor were one of the five enumerated categories of persons under the definition of "solicitation of a municipal entity or obligated person," such as a broker-dealer, the solicitation would not be for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person of the person for or in connection with the issuance of municipal securities.[36] This is because the solicitor would not be looking to advise or otherwise enter into a relationship with the municipal entity or obligated person. Instead, the person would be contacting the municipal entity through the solicitor for the purpose of purchasing the securities to be issued by the municipal entity or obligated person.

F. The Underwriter Exception

The SEC's proposed new definition of "municipal advisor" excludes a broker, dealer or municipal securities dealer serving as an "underwriter . . . on behalf of a municipal entity or obligated person, unless the broker, dealer or municipal securities dealer engages in municipal advisory activities while acting in a capacity other than as an underwriter on behalf of a municipal entity or obligated person."[37] This proposed exception is overly narrow, and would severely limit the activities in which an underwriter may engage without having to register as a municipal advisor.

1. The Underwriter Exception Should Extend to the Full Range of Underwriting Activity

Persons serving as underwriters—who are already subject to regulation as such—do more than just distribute securities in connection with an underwriting assignment. The SEC should recognize that the various discrete transactions and communications involved in a securities offering are interconnected and, in order to provide a meaningful exception to underwriters, clarify that the underwriter

[36] Of course, in some circumstances, the soliciting person could also be acting as an advisor to the municipal entity or obligated person (and therefore be held to be a municipal advisor, unless otherwise excepted) under the "advice" prong of the definition of "municipal advisor."

[37] Proposed Rule 15Ba1-1(d)(2)(i), 76 *Fed. Reg.* 824, 881 (Jan. 6, 2011) (further defining the "underwriter exception" to the definition of "municipal advisor").

exception also extends to the full range of activities involved in an underwriting,[38] such as:

- Advice regarding the issuance of municipal securities, municipal financial products or any other securities in the context of an underwriting. Such activities would include providing structuring alternatives or information or analysis regarding market conditions, practices, trends or timing, or terms or other similar matters, and communications with rating agencies on behalf of the municipal entity or obligated person, but would not include activities where the broker-dealer or municipal securities dealer has otherwise agreed to act as a municipal advisor with respect to the underwriting.

- Advice on the advisability of a municipal derivative (including entering into a new derivative, or amending or terminating an existing derivative) in connection with an underwriting. Even where a municipal entity or obligated person is being advised by an independent financial advisor, the municipal entity or obligated person will still ask its underwriter for its view on the advisability of entering into a swap in connection with the offering or how it should invest the proceeds of an issuance of municipal securities. If underwriters were to be considered municipal advisors by virtue of providing this advice to municipal entities or obligated persons, then they would simply stop providing such advice and limit their role to distributing the securities for the municipal entity or obligated person. Given the interconnected nature of the various discrete transactions and communications involved in a securities offering, this would be a disservice to municipal entities and obligated persons, as they would lose the input of the very underwriters that are in the unique position to provide expert views as to how they should structure their offerings and investments.

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[38] SIFMA notes that the MSRB has recently stated that "a financial advisory relationship shall not be deemed to exist when, in the course of acting as an underwriter, a dealer renders advice to an issuer, including advice with respect to the structure, timing, terms, and other similar matters concerning the issuance of municipal securities." MSRB Notice 2011-10, *Proposed Rule Amendments and Interpretive Notice Regarding Rule G-23 on Activities of Financial Advisors* (Feb. 9, 2011).

- Advice in the capacity of a member of the municipal entity or obligated person's underwriting pool, even if not in the context of a particular deal; or providing other services after the closing of an issuance of municipal securities but which relate to the issuance for which the underwriter acted as an underwriter. For example, a municipal entity may request particularized cash flows or other computational work post-offering from one of the underwriters, making the provision of these services an integral part of the underwriting services expected, and often required, by the municipal entity or obligated person. An underwriter is generally not compensated for providing these types of services. If these activities are considered to fall outside of the underwriter exception, prospective and former underwriters will curtail them to the detriment of the municipal entity or obligated person. As a result, the municipal entity will either have to forgo receiving this advice or service, or be forced to compensate the underwriter or another advisor.

- Communications and analyses that are part of an effort or presentation to obtain business from the municipal entity or obligated person, or otherwise part of seeking to serve as an underwriter on future transactions. These communications and activities should be covered by the underwriter exception even if the municipal entity or obligated person does not ultimately provide the person engaging in such communications or activities with an underwriting mandate.

- Assistance on related transactions and related tranches of the offering.

- Service as a dealer-manager on a related tender or exchange offer for outstanding securities.

All these activities are customarily part of an underwriting engagement. Absent this interpretation of the scope of the underwriter exception, broker-dealers and municipal securities dealers would likely limit many services that they traditionally provide in connection with underwriting activities, rather than to assume registration and fiduciary and other obligations.

2. The SEC Should Also Clarify That the Underwriter Exception Extends to Private Placement and Remarketing Agents, as well as Registered Municipal Finance Professionals

The SEC should also clarify that the underwriter exception extends to a private placement agent offering securities issued by a municipal entity or obligated person, on a private placement basis under the Securities Act of 1933, even if the private placement agent is not technically serving as an "underwriter," as that term is defined in Section 2(a)(11) of the Securities Act.[39] The activities in which a person that is serving as an underwriter or private placement agent in the context of an underwriting or private placement engagement with a municipal entity or obligated person are very similar. In addition, there is no conceptual or policy justification for excepting a person that assists a municipal entity or obligated person to sell its securities to the public at-large in an underwritten distribution from the definition of "municipal advisor," while potentially requiring a person that assists a municipal entity or obligated person to sell its securities on a limited basis in a private placement to register as a municipal advisor. Moreover, the range of activities discussed previously for underwriters would also apply to private placement agents.

The SEC should also clarify that the underwriter exception extends to a remarketing agent that resells to new investors securities previously issued by a municipal entity or obligated person (such as variable rate demand obligations and other tender option bonds that have been tendered for purchase by their owner), or is responsible for resetting the interest rate for a variable rate issue or acts as tender agent. In the context of repricing and reselling an issuance in the secondary market, remarketing agents may provide advice to issuers with respect to such instruments, including ongoing advice with respect to rate setting.[40] When engaging in remarketing activities, a broker-dealer does not necessarily

[39] Securities Act § 2(a)(11) ("The term 'underwriter' means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security . . . ."). The term "distribution" for these purposes is generally understood to mean a public offering of securities, as opposed to a private placement. *See, e.g., Neuwirth Inv. Fund, Ltd. v. Swanton*, 422 F. Supp. 1187, 1194-95 (S.D.N.Y. 1975); *The Value Line Fund, Inc. v. Marcus*, CCH Fed. Sec. L. Reg. P 91,523 (S.D.N.Y. 1965)).

[40] SIFMA does not believe that the activities of a remarketing agent generally constitute "advisory" activities for purposes of Section 975 and requests that the SEC clarify that, in most cases, a remarketing agent, acting as such, would not be considered to provide advice to a municipal entity or obligated person and therefore would not be a municipal advisor.

engage formally in a distribution as an underwriter under Section 2(a)(11) of the Securities Act. However, any activities in which a remarketing agent engages when it resells an issuance in the secondary market are similar to those of an underwriter of a primary issuance by a municipal entity or obligated person. In addition, as is the case with private placement agents, there is no conceptual or policy justification for excepting a person that assists a municipal entity or obligated person to sell its securities in the primary market in an underwritten distribution from the definition of "municipal advisor," while potentially requiring a person (or even the same person) that assists a purchaser of securities from the primary market to resell its securities in the secondary market to register as a municipal advisor. Moreover, the range of activities discussed previously for underwriters would, as relevant, also apply to remarketing agents.

The underwriter exception should also apply to employees of affiliated entities (*e.g.*, banks) that are registered municipal finance professionals. These employees are often registered as municipal finance professionals because current MSRB "solicitation" interpretations would otherwise prohibit them from being present when registered representatives of an affiliated broker-dealer discuss potential municipal securities business with a municipal entity or obligated person. These persons should not be subject to an additional regulatory program by virtue of engaging in such minimal municipal advisory activity.

G. The Investment Adviser Exception

1. The SEC's Proposed Investment Adviser Exception Is Unduly Restrictive

The SEC's proposed new definition of "municipal advisor" excludes an SEC-registered investment adviser (and its associated persons) "unless the registered investment adviser . . . engages in municipal advisory activities other than providing investment advice that would subject such adviser . . . to the Investment Advisers Act of 1940."[41] The use of the phrase "subject such adviser . . . to the Investment Advisers Act" itself raises ambiguities regarding the scope of the covered investment advice. Portions of the Investment Advisers Act, such as the anti-fraud provisions, may apply to advice that itself does not require an adviser to register. However, read narrowly to mean advice that would subject the adviser to registration requirements, the proposed exception is unduly restrictive and goes beyond the statutory definition of "municipal advisor," which

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[41] Proposed Rule 15Ba1-1(d)(2)(ii), 76 *Fed. Reg.* 824, 882 (Jan. 6, 2011) (further defining the "investment adviser exception" to the definition of "municipal advisor").

excepts any SEC-registered investment adviser that is, without qualification, "providing investment advice." The SEC should be mindful that not all "investment advice" subjects a person to registration under the Investment Advisers Act, such as when an investment adviser provides advice regarding investments in instruments that are not securities.[42] The effect of this proposed narrowing of the statutory exception would mean that, without an apparent reason or policy justification, an SEC-registered investment adviser would be excepted from municipal advisor registration for only some, but not all, of its investment advisory activities—an arbitrary result.

The SEC's proposed narrowing of the statutory investment adviser exception does not recognize that the nature of the investment advice that an investment adviser may give with respect to the investment of the proceeds of municipal securities issuances could depend on how an offering of municipal securities is structured or issued. For example, an investment adviser may recommend that the municipal entity or obligated person change the terms of a proposed bond offering so that it is required to pay a lower interest rate on the securities and thereby be able to invest the proceeds in less risky investment vehicles, while still receiving the same net return on its investment.

In this light, the SEC should state that an investment adviser is not a municipal advisor when it advises a municipal entity or obligated person on the structuring or issuance of municipal securities and when such advice is provided in the context of the investment adviser's provision of investment advice to the municipal entity or obligated person. SIFMA notes that investment advisers are already subject to regulation and a fiduciary duty. Thus, they should be able to provide a municipal entity or obligated person with a particularized recommendation regarding the structuring or issuance of municipal securities in the context of providing it with investment advisory services, without being required to register as a municipal advisor.

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[42] *See* Investment Advisers Act § 202(a)(11) (defining an "investment adviser" as "any person who . . . engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who . . . issues or promulgates analyses or reports concerning securities").

2. The Investment Adviser Exception Should Also Extend to Any Regulated Person That Provides Investment Advice

The investment adviser exception should also extend to any person to the extent that such person provides advice that otherwise would be subject to the Investment Advisers Act, but for the operation of a prohibition to, or exemption from, SEC registration, including banks and trust companies and state-registered investment advisers.

These regulated persons should be eligible for the investment adviser exception. Although they are not subject to SEC regulation, they are providing investment advice that Congress has already determined is subject to sufficient regulation to not require these persons to be registered with or regulated by the SEC with respect to the provision of such advice.

Requiring these persons to register as municipal advisors when they are providing investment advice to municipal entities or obligated persons would undermine the purpose of existing prohibitions to or exemptions from SEC registration. In order to preserve symmetry among the Congressionally mandated regulatory programs, because these advisers are not subject to SEC regulation as investment advisers when they engage in their predicate investment advisory activities, they should not be subject to registration and regulation as municipal advisors when they provide investment advice to municipal entities or obligated persons. This is particularly compelling in the case of banks and trust companies, whose investment advisory activities are comprehensively regulated.

The SEC has the authority to extend the investment adviser exception to cover banks and trust companies and state-registered investment advisers in order to provide these persons with an exemption from the definition of "municipal advisor" and the application of the SEC's registration and regulatory program. Under Section 36(a) of the Exchange Act, the SEC has general authority to exempt, among others, any person or class or classes of persons from any provision of Exchange Act if such exemption is in the public interest and consistent with the protection of investors.[43] The SEC also has authority provided

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[43] Exchange Act § 36(a)(1) ("[T]he [SEC], by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors."); *see also id.* §§ 36(b) and (c) (...continued)

by Section 975 to provide exemptive relief with respect to any class of municipal advisors.[44]

Banks and trust companies and state-registered investment advisers are already subject to significant regulation by federal or state regulators, including fiduciary obligations with respect to trust and investment management activities. As discussed throughout this letter, imposing an additional layer of regulation on these persons would not provide an appreciable regulatory benefit or increase the protection of municipal entities or obligated persons. Similarly, exempting such persons from regulation as municipal advisors would not disserve the public interest or reduce the protection of municipal entities and obligated persons, as these persons are already subject to regulation. Municipal entities and obligated persons can rely on existing regulatory structures to protect their interests with respect to the banks and trust companies and state-registered investment advisors providing them with investment advice. Moreover, by granting these exemptions, the SEC would serve the public interest by ensuring that municipal entities and obligated persons, within the existing system created for their protection, continue to receive investment advisory services from banks and trust companies and state-registered investment advisors.

H. The Municipal Employee Exception Should Extend to Non-Elected Board Members of a Municipal Entity

The SEC's proposed interpretation of the exception from the definition of "municipal advisor" for employees of a municipal entity would include any person serving as an *elected* member of the governing body of the municipal entity and appointed members of a governing body to the extent that such appointed members are *ex officio* members of the governing body by virtue of holding an elective office. The interpretation would not, however, exclude appointed members of a governing body of a municipal entity that are not elected *ex officio* members (*e.g.*, volunteers) from the definition of "municipal advisor."[45] Failing to exclude from the municipal entity definition non-elected members of a governing body could have a substantial impact on the composition of a

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(providing limitations, inapplicable to Section 15B of the Exchange Act and municipal advisor regulation, to the SEC's general exemptive authority).

[44] *Id.* § 15B(a)(4).

[45] Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 834 (Jan. 6, 2011).

municipal entity's governing body or the willingness of appointed board members to share their relevant financial experience with the board, for the benefit of the municipal entity. SIFMA supports the views of the municipal issuer community that the SEC should clarify that the exception from the definition of "municipal advisor" for employees of a municipal entity extends to non-elected board members of a municipal entity, including non-employee directors of local government investment pools.[46]

III. Bank- and Trust Company-Specific Issues: Traditional Banking and Trust Activities Should Not Be Investment Strategies

The SEC's proposed definition of "investment strategies," as discussed in Section II.A above, is so broad as to potentially capture bank and trust accounts holding any funds of a municipal entity that may be used for investment, regardless of whether they are proceeds of municipal securities.[47] This broad definition would pick up traditional banking and trust services involving advice, which need not even involve advice on securities investments. These banking and trust activities are already subject to comprehensive oversight by banking regulators, and need not also be regulated as municipal advisory activities any more than underwriting or investment adviser activities regulated by the SEC. Moreover, failing to except traditional banking and trust activities from the definition of "municipal advisor" may cause banks and trust companies, in the face of additional registration and regulatory burdens or a new or different fiduciary duty, to stop offering their full range of banking and trust products to municipal entities and instead provide municipal entities with limited offerings, such as deposit accounts, or even cease providing products and services to municipal entities.

SIFMA believes, generally, that any activity (whether a solicitation or recommendation or provision of advice) in which a bank or trust company (and

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[46] The SEC has received numerous letters from municipal entities, their representative associations and their appointed board members commenting on the SEC's proposal to make non-elected board members ineligible for the municipal employee exception to the definition of "municipal advisor." These include comment letters from Robert O. Lenna, Executive Director, Maine Municipal Bond Bank, Maine Health and Higher Educational Facilities Authority and Maine Governmental Facilities Authority (Feb. 4, 2011); Bill Longley, Texas Municipal League, Austin, Texas (Jan. 30, 2011); Stephen Walsh, California Municipal Finance Authority, Oakland, California (Jan. 28, 2011); William G. Dressel, Jr., Executive Director, New Jersey League of Municipalities (Jan. 27, 2011); and Ted Wheeler, Oregon State Treasurer (Jan. 26, 2011).

[47] See note 15 and accompanying text.

their personnel) currently engages that does not require it to register as either a broker-dealer, investment adviser or municipal securities dealer should not require registration with the SEC as a municipal advisor, including, for example:

- Providing advice concerning (or soliciting) transactions that involve a "deposit" at an "insured depositary institution," as defined in Section 3(c)(2) of the Federal Deposit Insurance Act, including advice with respect to insured checking and savings accounts and certificates of deposit.

- Directing or executing purchases and sales of securities or other instruments in a trust, fiduciary or investment management account in accordance with predetermined investment criteria or guidelines, including on a discretionary basis.

- Providing other services to municipal entities, such as acting as trustees with respect to governmental pension plans and other similar capacities.

- Providing advice concerning (or soliciting) transactions that are subject to an exemption under Regulation R of the Exchange Act or otherwise excluded from the definition of broker-dealer activities under the Exchange Act, including bank broker-dealer exceptions relating to third-party networking arrangements, trust and fiduciary activities, deposit "sweep" activities, custody and safekeeping activities and certain securities lending transactions.

- Serving as trustee to a pooled investment vehicle.

Banks and trust companies with which a municipal entity or obligated person may open an account are already subject to strict federal regulation (*e.g.*, by the Office of the Comptroller of the Currency ("**OCC**")) and owe a fiduciary duty to such clients.[48] Subjecting banks and trust companies to an

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[48] *See, e.g.*, Part 9, OCC Regulations (governing the activities of national banks acting in a fiduciary capacity and when a bank may exercise fiduciary powers, who is permitted to manage or direct the exercise of those powers and how a bank may invest and exercise discretion over fiduciary funds, as well as providing requirements for policies and procedures, recordkeeping and audit of fiduciary activities). Under Part 9.2(e) "fiduciary capacity" is defined as "trustee, executor, administrator, registrar of stocks and bonds, transfer agent, guardian, assignee, receiver, or custodian under a uniform gifts to minors act; investment adviser, if the bank receives a fee for its investment advice; any capacity in which the bank possesses investment discretion on behalf of another; or any other similar capacity that the OCC authorizes pursuant to 12 U.S.C. 92a."

additional layer of regulation would not materially strengthen the high level of protection already afforded to a bank or trust company's municipal entity or obligated person clients. Rather, imposing the municipal advisor regulatory requirements and fiduciary duty on banks and trust companies would lead to unnecessary burden and expense. There is nothing special or particular about the provision of municipal advisory services that warrants duplicative registration and regulation requirements for such activities that are already excepted from duplicative registration and regulation in the broker-dealer and investment adviser contexts.

The SEC should also be mindful that banks and trust companies do not generally maintain information regarding the disciplinary history of their personnel who are not otherwise registered with a broker-dealer, investment adviser or municipal securities dealer. It would be particularly burdensome and expensive—particularly if there were no exception for the banking and trust activities discussed above—for a bank or trust company to gather (and update as required) the disciplinary history of such individual associated persons, even if limited to disciplinary history for only persons "primarily engaged" in municipal advisory activities, as discussed in Section IV.B.2 below.[49]

As discussed previously, because banks and trust companies are already comprehensively regulated by federal and state regulators when they engage in traditional banking and trust activities, imposing an additional layer of regulation on banks and trust companies would not increase the protection of municipal entities or obligated persons. Similarly, excepting them from regulation as municipal advisors would not disserve the public interest or reduce the protection of municipal entities and obligated persons, who may rely instead on existing

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[49] SIFMA notes that the SEC is considering whether to permit a separately identifiable department or division ("**SID**") of a bank to register, to the extent required, as a municipal advisor instead of the entire banking entity. Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 838 (Jan. 6, 2011). SIFMA strongly encourages the SEC to permit SIDs to register as municipal advisors instead of the entire banking entity. However, the SEC should recognize that, absent providing banks with the exceptions discussed above, for some banks the attractiveness of using a SID to more effectively and efficiently register a bank municipal advisor would be severely limited. This is because the resulting categories of municipal advisory activities triggering registration would be so intertwined and integrated into other traditional banking functions, and potentially spread among so many disparate geographic and operational areas of any large bank. As such, it would be neither practical nor feasible for a bank to attempt to segregate or extract all of the personnel and related records pertaining to such activities and put them into a segregated operational unit of the bank in order to qualify as a SID. At the very least, a large banking organization would incur significant burden and expense in identifying which of its individual associated persons are required to be part of the SID.

regulatory structures to protect their interests with respect to the banks and trust companies that provide services to them. Moreover, by granting these exceptions, the SEC would serve the public interest by ensuring that municipal entities and obligated persons, within the existing system created for their protection, continue to receive traditional banking and trust services.

Absent an exception, bank and trust companies that are not currently subject to SEC regulation would bear disproportionate costs and burdens in complying with the municipal advisor registration and regulatory programs, especially banks and trust companies that act as integrated multi-service organizations. These costs and burdens would be exacerbated if the SEC retained its broadly proposed rules and guidance. This would in turn cause banks and trust companies to reduce their services to municipal entities and obligated persons and increase costs, with little to no regulatory benefit.

IV. The SEC's Registration Process for Municipal Advisors

A. The Proposed Registration Process Requests Duplicative Information and Unnecessarily Imposes a Significant Administrative Burden

The information that the SEC is currently proposing to collect on Forms MA and MA-I is duplicative of information already gathered by the SEC through other registration programs, such as SEC forms for broker-dealer, investment adviser and municipal securities dealer registration. To reduce the duplicative requests for information and potentially significant costs and burden of registration—especially in light of the fact that Section 975 does not specify the manner of registration and was not intended to capture persons already subject to regulation—the SEC should consider alternative registration programs for persons that are already registered with the SEC as broker-dealers, investment advisers or municipal securities dealers. These alternatives would include allowing these registrants to check an additional box on their primary registration forms already filed with the SEC or providing them with a short-form registration process. Should the SEC still insist that persons that are already registered in another capacity complete Form MA, then it should allow such persons to incorporate by reference on Form MA any information that is included on another registration form. Moreover, whatever the form of the final registration program, the SEC should provide municipal advisors with a sufficient phase-in period to register as such.[50]

In addition, as noted below, individual registration by employees presents significant burdens with little corresponding benefit and should be eliminated from a final rule.

1. Alternative Registration Programs for Registered Broker-Dealers, Investment Advisers and Municipal Securities Dealers

To reduce the duplicative requests for information and potentially significant burden of registration, the SEC should allow registered broker-dealers, investment advisers and municipal securities dealers to check a box on Forms BD, ADV and MSD to indicate that they are engaged in municipal advisory activities. This would significantly reduce costs and the burdens of registration for both registered entities and the SEC, as no new forms would be required to register as municipal advisors for any persons that are already registered with the SEC in another capacity.

As another alternative, the SEC could provide a short-form registration process for persons that are already registered with the SEC as broker-dealers, investment advisers or municipal securities dealers. This type of registration program would essentially require applicants to complete a short form similar to that used by the MSRB for municipal advisor registration under MSRB Rule G-40 and refer to their registrations (and those of their associated persons) already on file and available through the CRD or IARD system. Short-form registration would reduce the duplicative burdens of re-registering as municipal advisor persons already registered with the SEC, without reducing the quality of the information that the SEC would receive. The SEC could request limited additional disclosure on the short form where such information is not already disclosed on Form BD, ADV, MSD or U4 and is necessary to the proper regulation of municipal advisors.

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[50] SIFMA also notes that it does not believe EDGAR is the best system through which registration should be accomplished. EDGAR was designed for the electronic filing of registration statements and other periodic reports, and has no history of registering individuals, limited history of registering entities for regulatory purposes, and limited search capabilities. Other systems, such as BrokerCheck, operated by FINRA, would be better suited for this purpose.

2. The SEC Should Allow Applicants To Incorporate by Reference Any Information Contained on Their Other Registration Forms

In the event that the SEC does not provide applicants with the alternative forms of registration proposed above, municipal advisors should be allowed to rely on their prior registrations and disclosures on Forms BD, ADV, MSD, U4, 7-R and 8-R, and incorporate any part of them (and not just disciplinary history) by reference. In addition, the additional or different disclosures requested on the municipal advisor registration forms should be limited to those unique to municipal advisory activities and essential to the purposes of registration.

This would better streamline an applicant's reliance on other registration forms and allow it to effectively satisfy its registration obligations through cross-references. In addition, the SEC should be mindful that any requests for information beyond that which is already requested by Forms BD, ADV and U4, the primary registration forms, would unnecessarily increase the cost of registration and reduce the efficiency of registration by preventing cross-referencing between registration forms.

This heightened cost of registration would raise the burden of functioning as a municipal advisor, and discourage advice to municipal entities.

Moreover, the SEC should be mindful that any large organization, whether a bank or trust company with unregistered personnel or a registered broker-dealer or investment adviser, would incur significant time, burden and expense in identifying personnel involved in activities that would subject them to registration. This registration challenge would be compounded for any applicant if individuals are required to register separately on Form MA-I. Moreover, it would be acutely costly and burdensome for banks and trust companies that are required to provide information regarding, or separately register, personnel who have not previously registered with the SEC, FINRA or NASAA in any capacity.[51]

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[51] The SEC should also recognize that by sweeping persons that are already regulated into the definition of "municipal advisor," it will also subject them to rigorous and costly recordkeeping and reporting requirements under rules to be promulgated by the MSRB, which are in addition to the significant costs and burdens associated with registering as municipal advisors in the first place. For example, the MSRB's proposed Rule G-42 not only includes a pay-to-play limitation but also has extensive recordkeeping and reporting obligations that require a municipal advisor to report quarterly to the MSRB information regarding contributions to officials of municipal entities and bond ballot campaigns, as well as provide lists of municipal entities that the municipal advisor has either advised or solicited during the quarter. MSRB Notice 2011-04,
(...continued)

3. The SEC Should Provide Municipal Advisors With a Sufficient Phase-In Period for Registration

Whatever the final form and extent of the SEC's registration program, the SEC should provide municipal advisors with a sufficient phase-in period to register following final adoption of permanent registration rules. In order to identify the parts of their organizations that engage in municipal advisory activities, large firms would require a phase-in period of at least two years if the SEC adopted its proposed rules as final without making the modifications discussed throughout this letter (*e.g.*, it could take two years for a large firm to determine whether any public funds are in its accounts), and at least one year if the SEC modified its rules as suggested by SIFMA in this letter. Firms would also need this time to consider internal reorganizations in order to reduce the burden of initial registration and ongoing compliance with the municipal advisor registration requirements, and many firms may find it operationally most efficient to transition at the end of a calendar year (most logically, the year after the year in which final rules are adopted).

B. Selected Issues With Proposed Forms MA and MA-I and the Self-Certification

To the extent that proposed Forms MA and MA-I continue to be required for registration, the SEC should remove from the forms several particularly burdensome information requirements regarding a municipal advisor and such associated persons as its individual employees and affiliated companies (such as sister affiliates), including information relating to their other business activities that are not related to municipal advisory activities.

(continued...)

Request for Comment on Pay To Play Rule for Municipal Advisors (Jan. 14, 2011). The extensive reporting obligations of proposed MSRB Rule G-42 would further increase the costs and burdens to be placed on persons that are already subject to regulation. This would be especially true if a large firm with thousands of government accounts, were, by virtue of the SEC's proposed definition of "investment strategies," required to track and report every single account or, to reduce the volume of information reported, undertake the burden of differentiating which of those accounts were provided with "advice" in a given quarter.

1. Information Relating to Municipal Advisory Firms

(a) Disclosure Relating to Affiliates

Form MA requests overly extensive disclosure relating to a municipal advisor's affiliates, which would be particularly burdensome for a municipal advisor that is a member of a large affiliated group of financial institutions to gather and provide.

For example, Item 6 of Form MA would require the applicant to indicate in which of 20 enumerated types of businesses any of its associated persons (which include sister affiliates) are engaged (*e.g.*, broker-dealer, investment adviser, swap dealer, banking institution, pension consultant, real estate broker, sponsor or syndicator of limited partnerships). Schedule D requires the applicant to list the names and other information regarding all associated persons, including foreign affiliates, that are broker-dealers, municipal securities dealers or government securities brokers or dealers, or investment advisers, municipal advisors, registered swap dealers, banking or thrift institutions or trust companies and, for each such listed person, to indicate in which of nineteen enumerated types of businesses they are engaged. Applicants would also have to provide the name and country of any foreign financial regulatory authority, if any, with which the affiliate is registered.

Similarly, Item 8 and Schedules A, B, C and D of proposed Form MA require disclosure of every person that, directly or indirectly, controls the applicant or that the applicant directly or indirectly controls. Furthermore, Item 9 of proposed Form MA would require disclosure of disciplinary history of all associated persons of a municipal advisor, which includes not only employees engaged in municipal advisory activities but also all sister affiliates of the municipal advisor.[52] Although Form ADV, on which proposed Form MA is

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[52] Exchange Act § 15B(e)(7) (defining the term "person associated with a municipal advisor" or "associated person of an advisor" as "any partner, officer, director, or branch manager of such municipal advisor (or any person occupying a similar status or performing similar functions); any other employee of such municipal advisor who is engaged in the management, direction, supervision, or performance of any activities relating to the provision of advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities; and any person directly or indirectly controlling, controlled by, or *under common control with* such municipal advisor") (emphasis added); *see also* Proposed Form MA, Glossary of Terms, 76 *Fed. Reg.* 824, 964 (Jan. 6, 2011) (proposing a similar definition, which also includes common control affiliates, for the terms "associated person" or "associated person of a municipal advisor" for purposes of Form MA).

based, requests similar business information regarding an investment adviser's sister affiliates, it does not require disclosure of a sister affiliates' disciplinary history.[53]

The disclosures regarding affiliates of an applicant, particularly the disclosure of disciplinary history, potentially encompass a distant set of commonly controlled affiliates. These sister affiliates' activities may have no connection to municipal advisory activities, let alone, in the case of financial institutions with global operations, a nexus or connection to any activities in the United States. These disclosures should be limited to disclosures of affiliates that either control or are controlled by the municipal advisor. Otherwise, the forms would impose a vast information-gathering burden on applicants, which may have hundreds of sister affiliates that are located throughout the world and subject to multiple financial regulators.

Moreover, the public disclosure of this, and other similar information on Form MA, would not serve any public interest relating to the regulation of municipal advisors where such affiliates have no connection to municipal advisory activities. At a minimum, disclosure regarding sister affiliates should be substantially narrowed to only those common control affiliates that provide services to municipal entities or obligated persons in the United States.

(b) Other Unnecessary or Inapplicable Information

The disclosures required for investment advisers on Form ADV, on which proposed Form MA is based, are, in many cases, not relevant to municipal advisors. In addition, the SEC has not articulated a convincing purpose for much of the information on Form MA. A general recitation that the SEC "believes that the information . . . would be useful for its regulatory purposes, including planning and preparing for inspections and examinations, and to the public generally . . ."[54] does not constitute a sufficient explanation of the need for this intrusive information. Given the breadth of the definition of "municipal advisor" as proposed to be interpreted by the SEC, many of the activities of municipal advisors are not like those of investment advisers. For instance, brokerage of escrow funds is not like the "assets under management" investment advisory

[53] Form ADV, Item 11 (Disclosure Information) (requesting the disciplinary history of the investment adviser and all of its "advisory affiliates" (*i.e.*, all current employees; all officers, partners or directors; and all persons directly or indirectly controlling or controlled by the investment adviser)).

[54] Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 856 (Jan. 6, 2011).

business that is a focus of Form ADV. Many of the questions on Form MA drawn from Form ADV are not likely to obtain useful responses from municipal advisors. Therefore, Form MA should not request information, even if it is generic and non-particularized, regarding a municipal advisor's clients, compensation arrangements, other business activities, financial industry affiliations, proprietary and sales interests in its municipal advisory clients' transactions and investment or brokerage discretion, as currently proposed on Items 1, 4, 5 and 7 and Schedule D.

Moreover, it would be difficult for a municipal advisor to collect this information on an ongoing basis, especially for large financial firms with disparate operations engaged in municipal advisory activities. Instead, in determining which, if any, disclosures drawn from Form ADV are applicable to municipal advisor registration, the SEC should carefully consider the context in which Form ADV disclosures were considered and adopted, and how the activities of municipal advisors differ from those of traditional investment advisers. In particular, information regarding a municipal advisor's proprietary and sales interests and investment brokerage discretion is transaction-specific and of little utility. Such information would be burdensome for an applicant to ascertain and gather. Moreover, it is unclear why a municipal entity or obligated person would be interested in learning about a municipal advisor's arrangement with another municipal entity or obligated person.

In addition, the SEC should delete Section 4-D of Schedule D of proposed Form MA so that a municipal advisor is not required to disclose the name and contact information of persons that solicit municipal advisory clients on its behalf. A municipal advisor may have competitive concerns about disclosing publicly the identity of those persons that it engages to undertake solicitation on its behalf. Finally, and perhaps most significantly, it is unclear what benefit disclosing this information would have.

2. Information Relating to Individuals Should Be More Limited; Individual Registration by Employees Should Be Eliminated

A municipal advisory firm should not be required to provide information regarding its individual associated persons (*e.g.*, employees) on Form MA unless those persons are "primarily engaged" in municipal advisory activities, as in Form MA-T. This is particularly true if those persons are already registered with a broker-dealer, investment adviser, municipal securities dealer, commodity trading advisor or swap dealer. Limiting disclosures to those individual persons who devote a significant amount of time or resources to, or whose primary job activity is, the provision of municipal advisory services would focus the requirement on the persons likely to be most active in municipal advisory activities and reduce the burden on municipal advisors in identifying, gathering and disclosing information on numerous individuals.

Moreover, limiting disclosure to a more narrow category of individuals should not affect a municipal entity or obligated person's access to the key information regarding the municipal advisor; it would still receive information on those individuals with whom it is most likely to come into contact or from whom it is most likely to receive services.

In addition, the SEC should not require individuals to register separately with the SEC on Form MA-I. The information requested regarding individuals largely duplicates Form MA's disclosures regarding a municipal advisor's associated persons. Requiring separate registrations of individuals on Form MA-I would be excessively burdensome and costly. Because the definition of "municipal advisor" as currently proposed by the SEC is overly broad, large numbers of individuals will be required to register or cease their municipal advisory activities. These individuals may provide only occasional services to municipal entities or obligated persons. Indeed, the only clear purpose for having individuals register separately rather than aggregating their information on Form MA, seems to be to obtain self-certifications from individuals, which itself is problematic, as discussed below. The registration of individuals in the manner proposed by the SEC is not called for in any respect by Section 975.

In addition to imposing a significant burden and considerable costs on municipal advisory firms and their individual associated persons, registration of individuals would force the SEC to devote substantial resources to processing many individual applications for registration. This would be in addition to processing municipal advisory firms' registrations on Form MA. In fact, the SEC expects approximately 21,800—if not more—individuals to register as municipal advisors on Form MA-I. This would be in addition to the 800 municipal advisory firms that have already registered with the SEC on Form MA-T and would be required to re-register on Form MA, and at least 200 additional firms that are also expected to register.[55] The sheer number of registrations would place significant

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[55] *Id.* at 865; *see also* Commissioner Elisse B. Walter, *Statement on Study Enhancing Investment Adviser Examinations (Required by Section 914 of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act)* (Jan. 2011) ("The [SEC] staff expects that this requirement will result in thousands of new entities and individuals registering with the [SEC]. More than 800 entities have already registered, and at least 200 more are expected to do so. Regarding individuals, the process has not yet begun, but the staff estimates that the number of (...continued)

strain on the SEC's budget and personnel, especially if it plans to review all applications for municipal advisors that are filed under the permanent registration program.[56] The burden of registering investment advisers, broker-dealers and associated persons of broker-dealers currently is borne by FINRA, funded by registration fees and membership charges. SIFMA questions whether the incremental regulatory benefit (which it does not believe would be significant) stemming from the public availability of the information that would be produced by a system of individual registration would justify this massive resource commitment by both applicants and the SEC.

In lieu of requiring individuals to register separately with the SEC on Form MA-I, the SEC could work with the MSRB to establish, through the MSRB, a licensing and registration mechanism for individuals who are municipal advisors, which would be similar to the program used to register a broker-dealer's licensed associated persons with FINRA. Because the MSRB is already planning to develop qualification tests for individuals engaged in municipal advisory activities,[57] having only the MSRB, as opposed to both the SEC and MSRB, involved in the licensing and registration of individuals would eliminate

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(continued...)

individuals could be more than 20,000. [SEC Office of Compliance Inspections and Examinations (OCIE)] staff estimates that nearly half of the examinations of municipal advisors will divert resources directly from the investment advisory area.").

[56] Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 860 (Jan. 6, 2011) ("The information currently required by temporary Form MA-T is not reviewed by the [SEC] prior to registration, although the [SEC] retains full authority to review such information and examine any registered municipal advisor at any time. The [SEC] intends that the permanent registration process would entail a review of each Form MA and Form MA-I filed.").

[57] *See* MSRB Notice 2011-14, *Request for Comment on Draft MSRB Rule G-36 (On Fiduciary Duty of Municipal Advisors) and Draft Interpretive Notice* (Feb. 14, 2011). The MSRB's request for comment highlights the need to limit the fiduciary duty to the statutorily defined persons. First, the MSRB specifically noted that if the current form of the SEC's permanent registration rule is adopted it may need to reconsider its notice. Second, the MSRB notice makes clear the severe consequences of inclusion in the SEC's municipal advisor definition. Under the MSRB proposal, all proprietary trading in connection with a municipal advisory assignment would be banned, except where a municipal advisor is selling a GIC to the municipal client. This prohibition, which is stricter than the Investment Advisers Act's fiduciary duty, would extend to a municipal advisor's affiliates. Thus, once classified as a municipal advisor, a firm and its affiliates could be prohibited from providing a full suite of fixed-income products and municipal derivatives, which are often sold on a proprietary basis, to municipal entities.

duplication and reserve the SEC resources for regulation of municipal advisory firms.

If it were deemed necessary to formally register individuals (in addition to licensing them), the MSRB could adopt Form U4 and require it to be filed in connection with granting a license to individuals who engage in municipal advisory activities on behalf of an SEC- and MSRB-registered municipal advisory firm. Indeed, because many individual municipal advisors may also be associated persons of a broker-dealer or investment adviser, it would better serve the interests of the public to have a single source of information—on Form U4—about a licensed individual. It would also be easier for an individual and his or her employer to ensure that the individual is properly licensed under all applicable regulatory programs if only a single form is required to be filed with any applicable regulator.

3. The SEC Should Not Require a Self-Certification

The SEC should not require a self-certification by municipal advisors and individuals as a condition to registration. The self-certification on proposed Form MA focuses not just on past performance, but also on the ability of the municipal advisor, and every natural person associated with it, to meet "such standards of training, experience, and competence, and such other qualifications, including testing, . . . required by the [SEC], the MSRB or any other relevant self-regulatory organization."[58] A similar self-certification, tailored to an individual person, is also included on proposed Form MA-I.[59] These certifications are not currently required by Form BD or ADV. Given that the SEC and MSRB have yet to even propose what standards of training, experience and competence, and such other qualifications, including testing, will be applicable to municipal advisors, it is premature for prospective municipal advisors to even comment as to whether having such a self-certification would serve a useful purpose.

In addition, requiring a municipal advisory firm to conduct an annual review of its business and reasonably determine that it can carry out the municipal advisory activities in which it is engaged, including requiring the applicant to document the review process, would be costly, burdensome and confusing. Without any guidance as to the standards against which a municipal advisory firm would be required to determine its ability to carry out its activities, firms would

[58] Proposed Form MA, Self-Certification, 76 *Fed. Reg.* 824, 917 (Jan. 6, 2011).

[59] *Id.* at 927.

be unsure as to how to conduct such reviews. As a result, they may either incur unnecessary costs in designing a review process that is overly broad, or engage in a less than thorough review, which would open the firm up to potential liability for self-certifying as to its capabilities when it was, in fact, not as capable as it determined.

It is noteworthy that the forms and their certifications would be deemed "reports" filed with the SEC,[60] which could subject inaccurate certifications to administrative, civil or even criminal liability. It is inconsistent with basic standards of fairness to be compelled to face potential criminal liability for inaccurately certifying one's competence.

If the purpose of requiring self-certifications on Forms MA and MA-I is to make it easier for the SEC to charge a firm or individual for fraudulently certifying that they were qualified to engage in municipal advisory activities, this approach would impose undefined potential liability on the person making the certification, whether on behalf of the municipal advisory firm or in an individual capacity, or both. This exposure is especially acute because the person is self-certifying to compliance with future, and as-yet unknown, requirements for engaging in municipal advisory activities. The SEC's interest in ensuring the competence of municipal advisory firms and individuals who engage in municipal advisory activities would be better served by creating an examination process through the MSRB, in which the qualifications that are necessary for any person to engage in municipal advisory activities are clearly defined by the MSRB.

V. The Fiduciary Duty

Section 975 deems a municipal advisor to have a "fiduciary duty to any municipal entity for whom such municipal advisor acts as a municipal advisor."[61] The SEC has thus far provided no guidance as to which municipal advisory activities the fiduciary duty applies and how a municipal advisor fulfills its

[60] Proposed Rule 15Ba1-2(d), 76 *Fed. Reg.* 824, 882 (Jan. 6, 2011); Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 839 (Jan. 6, 2011) ("Forms MA and MA-I would constitute "reports" for purposes of Sections 15B(c), 17(a), 18(a), 32(a) (15 U.S.C. 78o-4(c), 78q(a), 78r(a), 78ff(a)) and other applicable provisions of the Exchange Act. As a consequence, it would be unlawful for a municipal advisor to willfully make or cause to be made, a false or misleading statement of a material fact or omit to state a material fact in Form MA or Form MA-I.").

[61] Exchange Act § 15B(c)(1).

fiduciary duty to a municipal entity.[62] SIFMA plans to respond to any proposals of the SEC and the MSRB in the area of fiduciary duty with a full range of comments. For purposes of this letter, however, SIFMA requests that the SEC preliminarily clarify that a municipal advisor has a fiduciary duty to its municipal entity clients only. SIFMA notes that Section 975 makes clear that the fiduciary duty does not extend to obligated persons.[63] SIFMA also requests that the SEC consider certain guiding principles when it drafts rules and interpretative guidance regarding the fiduciary duty.[64]

A. The Fiduciary Duty Should Extend to Municipal Entity Clients Only

The SEC should clarify that the fiduciary duty imposed under Section 975 applies only when a municipal advisor, acting as such, provides advice to its municipal entity client, and not to an obligated person. Under this framework, the fiduciary duty would also not apply when a municipal advisor undertakes a solicitation of a municipal entity because the municipal entity being solicited is not the municipal advisor's client. It would similarly not apply when a municipal advisor solicits a municipal entity in order to have the municipal entity engage

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[62] SIFMA notes that the MSRB has proposed interpretive guidance regarding the fiduciary duty, but the MSRB's guidance does not take into account the SEC's overbroad interpretation of the activities that trigger municipal advisor status. *See* MSRB Notice 2011-14, *Request for Comment on Draft MSRB Rule G-36 (On Fiduciary Duty of Municipal Advisors) and Draft Interpretive Notice* (Feb. 14, 2011).

[63] Exchange Act § 15B(c)(1) (providing that a municipal advisor has a "fiduciary duty to any *municipal entity* for whom such municipal advisor acts as a municipal advisor") (emphasis added).

[64] SIFMA notes that the SEC staff recently released a study on investment advisers and broker-dealers. This study outlines the staff's recommendation that the SEC establish a uniform fiduciary standard for investment advisers and broker-dealers when providing investment advice about securities to retail customers and includes suggestions for considering harmonization of the broker-dealer and investment adviser regulatory programs. *Study on Investment Advisers and Broker-Dealers (As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act)* (Jan. 2011). SIFMA recognizes that this study will greatly inform the SEC's consideration of the obligations to be imposed under any fiduciary duty, as well as the interactions between various fiduciary duties. SIFMA also expects that the SEC will carefully consider the points raised in this study when it determines the nature of the fiduciary duty of municipal advisors and how it interacts with the marketplace for and provision of municipal and non-municipal services alike. SIFMA respectfully requests that the SEC wait until after the fiduciary duty for broker-dealers and investment advisers are harmonized in the retail context, so that it may draw on its experience when determining how to design and harmonize fiduciary duties in the municipal advisory context.

such municipal advisor as its advisor, because the municipal entity is not yet the municipal advisor's client. Limiting the application of the fiduciary duty to instances where a municipal advisor is providing advice to its municipal entity client would be consistent with the text of Section 975 and MSRB's stated position that the fiduciary duty applies only to a municipal advisor's client and never in the context of a municipal advisor's solicitation activities.[65]

In addition, clarifying that the fiduciary duty does not apply to a municipal advisor's solicitation activities would alleviate the inherent and unavoidable conflict that arises by imposing a duty to act in the interests of a person that is not one's client, such as when a person is hired by an unaffiliated third party to solicit business for that third party from municipal entities or obligated persons. If the SEC is concerned that a person engaging in solicitation may conduct its activities in an unscrupulous manner, it could work with the MSRB to draft fair dealing guidelines or rules that specifically govern the manner by which municipal advisors may solicit municipal entities.[66] Within the framework of those rules, the SEC could use its enforcement authority under the Exchange Act to discipline a municipal advisor for violating these standards of conduct.[67]

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[65] MSRB Notice 2011-04, *Request for Comment on Pay To Play Rule for Municipal Advisors* (Jan. 14, 2011) ("Two types of persons are municipal advisors within the meaning of Section 15B(e)(4) of the Exchange Act. Some provide advice to or on behalf of municipal entities or obligated persons. Others solicit third-party business from municipal entities. . . . The first type of municipal advisor is subject to a fiduciary duty to the municipal entity with which it is engaging in municipal advisory business [*i.e.*, provides advice to or on behalf of the municipal entity]. . . . The other type of municipal advisor does not have a municipal entity as its client and, accordingly, has no fiduciary duty to the municipal entity."); *see also* MSRB Notice 2010-47, *Application of MSRB Rules to Municipal Advisors*, n.5 (Nov. 1, 2010); note 63 and accompanying text.

[66] For example, these guidelines or rules could require a municipal advisor engaging in solicitation to deal fairly with the municipal entity and disclose the identity of its third-party client; the nature of its relationship with such client; the nature and source of any compensation it receives; and the basis for determining this compensation. Because the municipal advisor would not have a fiduciary duty to the municipal entity that it solicits, it should only be required to affirmatively disclose this information to the municipal entity, and not be required to receive consent, whether express or implied, from the municipal entity.

[67] *See, e.g.*, Exchange Act § 15B(c)(1) ("[N]o municipal advisor may engage in any act, practice, or course of business . . . that is in contravention of any rule of the [MSRB]."); *id.* §§ 15B(c)(2) and (4) (providing the SEC with the authority to discipline municipal advisors and their associated persons).

B. The SEC Should Be Guided by Defined Principles When Determining the Fiduciary Duty

When proposing rules or interpretative guidance regarding the scope of a municipal advisor's fiduciary duty to its municipal entity clients, the SEC should be mindful that many persons that are also municipal advisors already provide non-municipal advisory services to their municipal entity clients. These include brokerage, investment advisory and banking and trust services, many of which may already have a fiduciary duty or other similar obligation or are otherwise subject to regulation with respect to such services. Therefore, the contours of any fiduciary duty applicable to a municipal advisor must be flexible and allow a person to continue to provide a range of municipal and non-municipal advisory services to its clients, while concurrently affording adequate protection to those clients.

In particular, the SEC, working in conjunction with the MSRB,[68] should be guided by the following principles when it drafts rules and interpretative guidance regarding the fiduciary duty of a municipal advisor to its municipal entity clients:

- The SEC should clearly define the fiduciary duty of a municipal advisor. In this regard, the fiduciary duty should apply only to personalized advice given by a municipal advisor, acting as such, in the context of a specific transaction or assignment. It should not apply to other non-advisory, ancillary or unrelated services or products that are also being provided to the municipal entity client. The fiduciary duty should also not extend indefinitely. It should generally be considered to terminate when the municipal advisor ceases to provide advice with respect to the particular transaction or assignment for which it owes the duty.

- The SEC should provide guidance as to how the fiduciary duty can be implemented by municipal advisors. Given the wide range of activities under the municipal advisor rubric based on the SEC's proposed interpretative positions, the SEC should provide guidance

[68] MSRB Notice 2010-47, *Application of MSRB Rules to Municipal Advisors* (Nov. 1, 2010) ("The MSRB will be developing additional rules for municipal advisors over the coming months and years. The [MSRB] . . . expects to provide guidance on . . . what it means for a municipal advisor to have a fiduciary duty to a municipal entity, as provided for in the Dodd-Frank Act.").

as to how the fiduciary duty may be tailored to a municipal advisor's particular business model. In this regard, the fiduciary duty should be consistent with other standards of care imposed, or to be imposed, on broker-dealers, investment advisers, banks and trust companies and swap dealers.

- The fiduciary duty should allow municipal entities to choose among various models for compensating a municipal advisor.

- Where products and services involve material conflicts of interest (*e.g.*, where a municipal advisor also acts as counterparty or takes a proprietary interest in its client's transactions), municipal advisors should be able to provide disclosures to municipal entities in a pragmatic way to clearly and effectively communicate, and receive consent to, these conflicts of interest. This disclosure and consent process should take into account the varying sophistication of the municipal entities for whom such municipal advisor acts in an advisory capacity. In addition, a municipal advisor should be able to fulfill its disclosure obligations by, at its discretion, either providing a brochure that outlines its material conflicts of interest at the outset of its first municipal advisory engagement with its municipal entity client or on a transaction-by-transaction (or assignment-by-assignment) basis.[69]

By determining the scope of a municipal advisor's fiduciary duty in light of these principles, the SEC will better ensure that municipal entities continue to receive the full range of municipal and non-municipal advisory services on which they have come to rely. The SEC will also ensure that competition in the marketplace is not reduced by potentially inflexible and conflicting fiduciary duties and other similar obligations, the effect of which would only serve to harm, and not better protect, municipal entities.

[69] *See*, *e.g.*, Richard Ketchum, Chairman & CEO, FINRA, *Remarks Delivered at CCOutreach BD National Seminar* (Feb. 8, 2011) ("We believe a fiduciary standard should attempt to eliminate conflicts, but where conflicts can't be eliminated, they should be properly and clearly disclosed to customers"), *available at* http://www.finra.org/Newsroom/Speeches/Ketchum/P122907.

VI. There Should Be Coordinated Regulatory Action With Respect to Municipal Advisors

As the regulatory landscape for municipal advisors develops, the SEC must ensure that there is continuous coordination internally at the SEC, as well as between the SEC, MSRB and any other regulators, such as the CFTC, involved in this area. In particular, the SEC should not issue further rule or interpretative proposals that may increase the responsibilities of municipal advisors, and should encourage regulators such as the MSRB and the CFTC to delay their rule proposals, until after the SEC issues final rules and interpretative guidance on the definition of "municipal advisor" and related terms, and on the permanent registration structure.

In order to provide meaningful comments on rule proposals such as the investment adviser pay-to-play rule currently being amended by the SEC or the MSRB's pay-to-play rule for municipal advisors,[70] market participants first need clear guidance from the SEC as to who will and will not be municipal advisors and a definitive understanding as to the scope of the final registration and regulatory programs. Only then will regulators, such as the SEC, MSRB and CFTC, be able to assess the impact of proposed regulations on persons that, for one reason or another, will be registering as municipal advisors. Similarly, it will not be until this point that market participants have an idea as to whether they will be municipal advisors and therefore be in a position to analyze how they may be impacted by any applicable proposed regulations.

VII. Conclusion

SIFMA supports the principle that municipal advisors should operate in a fair, transparent and well-regulated manner. However, as outlined above, SIFMA believes that the SEC's proposed rules and proposed interpretative positions

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[70] Investment Advisers Act Proposed Rule 206(4)-5(a)(2), 75 *Fed. Reg.* 77052, 77100 (Dec. 10, 2010) (proposing to make it unlawful for an investment adviser to "provide or agree to provide, directly or indirectly, payment to any person to solicit a government entity for investment advisory services on behalf of such investment adviser unless such person is [a] regulated municipal advisor . . . ."); Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 832 n.104 (Jan. 6, 2011) (proposing to allow entities to register voluntarily as municipal advisors and subject themselves to the regulatory program for municipal advisors as a condition to being paid as solicitors on behalf of affiliated investment advisers under the proposed amendment to the pay-to-play rule under the Investment Advisers Act); MSRB Notice 2011-04, *Request for Comment on Pay to Play Rule for Municipal Advisors* (Jan. 14, 2011) (requesting comment on the MSRB's proposed pay-to-play rule, new rule G-42, for municipal advisors).

regarding municipal advisory activities are overly broad and confusing in many respects, may ultimately harm municipal entities and obligated persons and will subject currently regulated entities to burdensome, overlapping, duplicative and unnecessary requirements and potential liabilities. Thus, to avoid disrupting and raising the costs of services provided to municipal entities and obligated persons by regulated entities, the SEC should first address the activities of municipal advisors that are unregulated today, and, after considering in detail the interaction between existing regulatory frameworks and potential municipal advisor regulation, subsequently address the activities of regulated entities.

At the time the SEC addresses Section 975's application to regulated entities, the SEC should retain the narrower statutory definition of "investment strategies" and provide clear guidance as to the meaning of that term. The SEC should also provide clear guidance as to what constitutes "advice" for purposes of Section 975 and provide broad-based exceptions for banks and trust companies with respect to their traditional banking and trust activities. The SEC should also recognize that the proposed registration process for municipal advisors and their associated persons is unnecessarily burdensome and duplicative for registered entities and individual associated persons, with little regulatory benefit. In that regard, the SEC should significantly reduce the size and scope of the proposed registration structure, including by providing for alternative mechanisms for persons already registered with the SEC to register for municipal advisory activities and eliminating the separate registration process for individuals, such as employees.

SIFMA hopes that it can serve as a constructive and insightful voice of the securities industry as the SEC and other regulators work together to define the registration and regulatory structure, and fiduciary duty, applicable to municipal advisors and to establish final rules and interpretative guidance relating to municipal advisors.

Sincerely yours,

Leslie M. Norwood
Managing Director and
Associate General Counsel

cc: The Honorable Mary L. Schapiro, Chairman
The Honorable Kathleen L. Casey, Commissioner
The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
Robert Cook, Director, Division of Trading and Markets
James Brigagliano, Deputy Director, Division of Trading and Markets
David Shillman, Associate Director, Division of Trading and Markets
Martha Haines, Assistant Director and Chief, Office of Municipal Securities
Victoria Crane, Assistant Director, Office of Market Supervision

Lynnette Kelly Hotchkiss, Executive Director, Municipal Securities Rulemaking Board

Municipal Securities Markets

Municipal Securities Markets

Follow the links below to view the documents in SIFMA's Municipal Securities Markets Standard Forms and Documentati Library.

MSRB Rule G-17 Model Disclosure Documents

SIFMA's G-17 Model Disclosure Documents are designed to be a starting point for disclosures concerning the underwriter's role, compensation, and conflicts, as well as regarding the material financial characteristics and risks inherent in certain complex transactions commonly recommended by underwriters.

- Model Underwriter Disclosures Pursuant to MSRB Rule G-17
- Model Fixed Rate Disclosure Risk Disclosures Pursuant to MSRB Rule G-17
- Model Floating Rate Notes Disclosures Pursuant to MSRB Rule G-17
- Model Variable Rate Demand Obligations (VRDO) Risk Disclosures Pursuant to MSRB Rule G-17
- Model Forward Delivery Bonds Disclosures Pursuant to MSRB Rule G-17
- Model Interest Rate Swaps Disclosures Pursuant to MSRB Rule G-17
- Model Tender Offers Disclosures Pursuant to MSRB Rule G-17

Master Agreement Among Underwriters (MAAU)

An agreement setting forth the legal relationships between syndicate members and permitting the efficient execution of one standardized agreement ra than the execution of separately negotiated legal contracts each and every time a firm joins a syndicate. For use with negotiated offerings of municipal securities.

2002 Version

- MAAU Master Standard Terms and Conditions – Negotiated Offerings of Municipal Securities
- MAAU Master Standard Terms and Conditions – Competitive Offerings of Municipal Securities
- SIFMA Proposed G-17 Model Language for MAAU Riders

1997 Version

- MAAU Master Standard Terms and Conditions
- MAAU Instructions, Terms and Acceptance
- MAAU Guidance Notes
- SIFMA Proposed G-17 Model Language for MAAU Riders

Additional Forms and Documents

Best Practices for NIIDS Testing and Implementation for Underwriters of Municipal Securities

Best practices for underwriters of municipal securities in submitting new issue underwriting information to the Depository Trust and Clearing Corporation's (DTCC) New Issue Information and Dissemination Service (NIIDS).

Clarifying Statements for Municipal Securities Underwriters

Model documents SIFMA member firms may use to clarify their role and establish issuer expectations when working with municipal issuers and condu borrowers.

Master Selling Group Agreement

Intended for use in negotiated purchases and public offerings of municipal securities, whereby a manager and dealer wish to join together to form selli groups.

Model Bond Purchase Agreement

Intended for use in connection with governmental tax or revenue-supported securities, including fixed, variable rate, auction and credit enhanced securities. Not intended for use in connection with conduit financing transactions.

SIFMA Municipal Securities Division Seeks Comments on Revised Draft of its Model Bond Purchase Agreement for Municipal Securities - October 12, 2011

Instructions and Commentary
General Provisions and Conditions
Terms and Acceptance

Model Joint Account Agreement

Created for the purpose of forming a joint trading account for the joint and several purchase and sale of municipal securities in the secondary market.

Municipal Secondary Market Disclosure Filings

A generic cover sheet for muni disclosure filings. Filings should be made to the Municipal Securities Rulemaking Board's (MSRB) Electronic Municipa Market Access (EMMA) website, www. emma.msrb.org.

Public Finance Issuer Advisory: Mechanical Aspects of Municipal Bond Sale Practices

Intended to advise state and local government bond issuers to review certain mechanical aspects related to their municipal bond sale procedures to ens that local and state governments issue bonds in the most effective way possible.

Recommendations for Communicating with Beneficial Owners of Defaulted Municipals

A joint trade association release, in consultation with The Depository Trust Company (DTCC). The Joint Recommendations provide practical advice tc issuers, their counsel, nominee holders, and agents of issuers on how to get notices on defaults through to beneficial owners in the era of book-entry-oı bonds. They provide procedures for issuer control of the communications process and make recommendations about the format of notices, the paymeı reasonable expenses by the issuer, and the provision of notices by the issuer for retransmission through the chain of nominee holders.

sifma

Invested in America

JULY 2012

SIFMA Model Underwriter Disclosures Pursuant to MSRB Rule G-17

[Letterhead of Underwriter/Senior Managing Underwriter] **[Comment 1]**

[Date] **[Comment 2]**

[Name of Issuer] **[Comment 3]**
Address
City, State, Zip Code

Attn: [Name of Authorized Issuer Official] **[Comment 4]**

Re: Disclosures by Underwriter/Senior Managing Underwriter
Pursuant to MSRB Rule G-17
[Name or Short Description of Proposed Bond Issue]

Dear [Name of Authorized Issuer Official]:

We are writing to provide you, as [_________] of [Name of Issuer] (Issuer), with certain disclosures relating to the captioned bond issue (Bonds), as required by the Municipal Securities Rulemaking Board (MSRB) Rule G-17 as set forth in MSRB Notice 2012-25 (May 7, 2012)[1].

<u>OPTION 1</u>: [Name of Firm] [intends/proposes] to serve as an underwriter, and not as a financial advisor or municipal advisor, in connection with the issuance of the Bonds.

<u>OPTION 2</u>: The Issuer has engaged [Name of Firm] to serve as an underwriter, and not as a financial advisor or municipal advisor, in connection with the issuance of the Bonds.

As part of our services as underwriter/senior managing underwriter, [Name of Firm] may provide advice concerning the structure, timing, terms, and other similar matters concerning the issuance of the Bonds. [As senior managing underwriter, we are providing this letter on behalf of the underwriters that are members of the underwriting syndicate for the Bonds. You also may receive additional separate disclosure letters pursuant to Rule G-17 from one or more co-managing underwriters for the Bonds.]

IF A CONDUIT ISSUE, ADD THE FOLLOWING (MODIFY AS NECESSARY TO REFLECT THE TERMS OF THE TRANSACTION): [As the issuer of the Bonds, you will be a party to the bond purchase agreement and certain other legal documents to be entered into in connection with the issuance of the Bonds, but the material financial risks described in this letter will be borne by the

[1] Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (effective August 2, 2012).

obligor, as set forth in those legal documents. A copy of this letter is also being sent to the obligor.]

I. Disclosures Concerning the Underwriters' Role:

(i) MSRB Rule G-17 requires an underwriter to deal fairly at all times with both municipal issuers and investors.

(ii) The underwriters' primary role is to purchase the Bonds with a view to distribution in an arm's-length commercial transaction with the Issuer. The underwriters have financial and other interests that differ from those of the Issuer.

(iii) Unlike a municipal advisor, the underwriters do not have a fiduciary duty to the Issuer under the federal securities laws and are, therefore, not required by federal law to act in the best interests of the Issuer without regard to their own financial or other interests.

(iv) The underwriters have a duty to purchase the Bonds from the Issuer at a fair and reasonable price, but must balance that duty with their duty to sell the Bonds to investors at prices that are fair and reasonable.

(v) The underwriters will review the official statement for the Bonds in accordance with, and as part of, their respective responsibilities to investors under the federal securities laws, as applied to the facts and circumstances of this transaction[2].

II. Disclosures Concerning the Underwriters' Compensation: **[Comment 5]**

The underwriters will be compensated by a fee and/or an underwriting discount that will be set forth in the bond purchase agreement to be negotiated and entered into in connection with the issuance of the Bonds. Payment or receipt of the underwriting fee or discount will be contingent on the closing of the transaction and the amount of the fee or discount may be based, in whole or in part, on a percentage of the principal amount of the Bonds. While this form of compensation is customary in the municipal securities market, it presents a conflict of interest since the underwriters may have an incentive to recommend to the Issuer a transaction that is unnecessary or to recommend that the size of the transaction be larger than is necessary.

III. Additional Conflicts Disclosures: **[Comment 6]**

OPTION 1: [[The underwriter] has not identified any additional potential or actual material conflicts that require disclosure.]

OPTION 2: [[The underwriter] has identified the following additional potential or actual material conflicts: **[Comment 7]**

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2 Under federal securities law, an issuer of securities has the primary responsibility for disclosure to investors. The review of the official statement by the underwriters is solely for purposes of satisfying the underwriters' obligations under the federal securities laws and such review should not be construed by an issuer as a guarantee of the accuracy or completeness of the information in the official statement.

- Conflicts of Interest/Payments to or from Third Parties
    - [Distribution agreements: [The underwriter] has entered into a separate agreement with [distributor] that enables [distributor] to distribute certain new issue municipal securities underwritten by or allocated to [the underwriter], which could include the Bonds. Under that agreement, [the underwriter] will share with [distributor] a portion of the fee or commission paid to [the underwriter].]
    - [Disclosure of payments, values, or credits received by the underwriter in connection with its underwriting of the Bonds from parties other than the Issuer that relate directly or indirectly to collateral transactions integrally related to the Bonds, i.e. such as an affiliate providing a letter of credit or standby bond purchase agreement, or acting as trustee, serving as remarketing agent, swap counterparty, escrow bidding agent, or GIC bidding agent: Affiliates of the underwriter may serve in separate capacities in connection with the issuance of the Bonds, including serving as [_________]. The affiliated entity will be separately compensated for serving in that capacity. [The underwriter] expects to receive a payment, value, or credit from its affiliated swap dealer affiliate if the Issuer decides to enter into an interest rate swap on the Bonds.] **[Comment 8]**

- Conflicts of Interest/Profit-Sharing with Investors
    - [Describe any such relationship, if applicable.]

- Conflicts of Interest/Credit Default Swaps **[Comment 9]**
    - [[The underwriter] engages in the issuance or purchase of credit default swaps (CDS) for which the reference is the Issuer or an obligation of the Issuer. This potentially can represent a conflict of interest, in that trading in CDS may affect the pricing of the underlying reference obligations, as well as the pricing of other obligations (such as the Bonds) brought to market by the Issuer.]

- Other Conflicts of Interest Disclosure
    - [Employee of underwriter/affiliate on governing body of Issuer or of obligor, if any]
    - [Director/trustee/employee of obligor on board of directors of underwriter/affiliate]
    - [Employee of underwriter/affiliate related to senior Issuer official]
    - [Bank affiliate of underwriter to receive swap termination payment, loan repayment, or redemption of bank bonds]
    - [Underwriter [may/intends to] place Bonds in the underwriter's or an affiliate's tender option bond program to be held for the account of the underwriter or the affiliate]
    - [Underwriter/affiliate holds a loan or securities (in a material amount) of Issuer outside the ordinary course of business, including, for example, a distressed loan or securities that are not trading and that may be/will be refunded by the transaction]
    - [Underwriter representing multiple issuers/obligors on same project]
    - [For a LIBOR-based transaction, underwriter/affiliate is a reference bank for purposes of setting LIBOR]
    - [Any other relevant conflicts or potential conflicts]

[IV. Disclosures Concerning Complex Municipal Securities Financing: **[Comment 10]**

OPTION 1: [Since [the underwriter] has recommended to the Issuer a financing structure that may be a "complex municipal securities financing" for purposes of MSRB Rule G-17, attached is a description of the material financial characteristics of that financing structure as well as the material financial risks of the financing that are known to us and reasonably foreseeable at this time.]

<u>OPTION 2</u>: [Since [the underwriter] has not recommended a "complex municipal securities financing" to the Issuer, additional disclosures regarding the financing structure for the Bonds are not required under MSRB Rule G-17.]

<u>OPTION 3</u>: [In accordance with the requirements of MSRB Rule G-17, if [the underwriter] recommends a "complex municipal securities financing" to the Issuer, this letter will be supplemented to provide disclosure of the material financial characteristics of that financing structure as well as the material financial risks of the financing that are known to us and reasonably foreseeable at that time.]

If you or any other Issuer officials have any questions or concerns about these disclosures, please make those questions or concerns known immediately to the undersigned. In addition, you should consult with the Issuer's own financial and/or municipal, legal, accounting, tax and other advisors, as applicable, to the extent you deem appropriate.

It is our understanding that you have the authority to bind the Issuer by contract with us, and that you are not a party to any conflict of interest relating to the subject transaction. If our understanding is incorrect, please notify the undersigned immediately.

We are required to seek your acknowledgement that you have received this letter. Accordingly, please send me an email to that effect, or sign and return the enclosed copy of this letter to me at the address set forth [above/below]. Depending on the structure of the transaction that the Issuer decides to pursue, or if additional potential or actual material conflicts are identified, we may be required to send you additional disclosures regarding the material financial characteristics and risks of such transaction and/or describing those conflicts. At that time, we also will seek your acknowledgement of receipt of any such additional disclosures.

We look forward to working with you and the Issuer [and the obligor] in connection with the issuance of the Bonds. Thank you.

Sincerely,

____
[Senior Manager or Co-Manager with Conflict]

Acknowledgement:

____
[Name of Authorized Issuer Official]

Date: ____________________

CC **[Comment 11]**: [Obligor/Municipal Guarantor]
[Co-managers/Lead Manager]
[Bond Counsel]
[Financial Advisor]
[Underwriters' Counsel]

The following comments are included for the convenience of the drafter. All comments should be deleted from the actual letter.

[Comment 1] If there is no underwriting syndicate relating to the Bonds, references in this letter to "Senior Managing Underwriter" should be deleted and references to "underwriters" should be changed to the singular. Co-managing underwriters are reminded that they may be required to send a separate disclosure letter to the Issuer in certain circumstances. See Comments 6 and 7 below.

[Comment 2] The disclosure pursuant to MSRB Rule G-17 concerning the arm's-length nature of the underwriter-issuer relationship must be made in the earliest stages of the underwriter's relationship with the Issuer with respect to an issue (*e.g.*, in a response to a request for proposals or in promotional materials provided to the Issuer).

Similarly, pursuant to MSRB Rule G-23, a dealer that clearly identifies itself in writing as an underwriter and not as a financial advisor from the earliest stages of its relationship with the Issuer with respect to that issue (*e.g.*, in a response to a request for proposals or in promotional materials provided to the Issuer) will be considered to be "acting as an underwriter" under Rule G-23(b) with respect to that issue. The writing must make clear that the primary role of an underwriter is to purchase, or arrange for the placement of, securities in an arm's-length commercial transaction between the Issuer and the underwriter and that the underwriter has financial and other interests that differ from those of the Issuer.

The provision of the disclosures required by Rule G-17 would also satisfy comparable disclosure requirements under Rule G-23 and, depending on timing and circumstances, may be provided in lieu of a separate letter under Rule G-23.

[Comment 3] It is important to note that neither Rule G-17 nor Rule G-23 generally cover conduit obligors. For conduit issues, the disclosures should be sent to the Issuer once it has been identified.

[Comment 4] All of the disclosures must be made in writing to an official of the Issuer that the underwriter reasonably believes has the authority to bind the Issuer by contract with the underwriter and that, to the knowledge of the underwriter, is not a party to a disclosed conflict.

[Comment 5] Disclosure concerning the underwriters' compensation generally must be made when the underwriters are engaged to perform underwriting services, such as in an engagement letter rather than in a bond purchase agreement.

[Comment 6] Conflicts disclosure must be made when an underwriter is engaged to perform underwriting services, such as in an engagement letter. With regard to conflicts discovered or arising after the underwriter has been engaged (for example, conflicts that may not be present until an underwriter has recommended a particular financing), the disclosure must be provided in sufficient time before the execution of a contract with the underwriter to allow the Issuer official to evaluate the recommendation.

Conflicts disclosure must be made by the particular underwriter/syndicate member subject to such conflicts. Conflicts disclosure by the senior managing underwriter is not intended to address separate conflicts disclosures from a co-managing underwriter that may be necessary. A co-managing underwriter should consider whether to send its own Rule G-17 conflicts disclosure letter at the time of its appointment by the Issuer, identifying any applicable potential or actual material conflicts. In the event that a co-managing underwriter determines that no potential or actual material conflicts exist, it should maintain appropriate records to substantiate that determination. Although not required to do so, a co-managing underwriter may choose to send the Issuer a Rule G-17 conflicts disclosure letter even if no potential or actual material conflicts are identified.

The situations listed in this letter are meant to trigger a discussion of potential conflicts and are not exhaustive. Conflicts disclosure may need to be updated if additional conflicts arise.

[Comment 7] Each underwriter should separately review the potential or actual material conflicts identified in Option 2 to determine whether any are applicable and require separate disclosure by that underwriter. Inapplicable items should be deleted.

[Comment 8] The underwriter is not required to disclose the amount of any such third-party payments. The third-party payments to which the disclosure requirement would apply are those that give rise to actual or potential conflicts of interest and typically would not apply to third-party arrangements for products and services of the type that are routinely entered into in the normal course of business, so long as any specific routine arrangement does not give rise to an actual or potential conflict of interest.

[Comment 9] Include a description of the underwriter's CDS activity generally only if the underwriter is engaging in such activities that are applicable to the Issuer. Activities with regard to CDS based on baskets or indexes of municipal issuers that include the Issuer or its obligation(s) need not be disclosed, unless the Issuer or its obligation(s) represents more than 2% of the total notional amount of the CDS or the underwriter otherwise caused the Issuer or its obligation(s) to be included in the basket or index.

[Comment 10] If an underwriter in a negotiated offering recommends a complex municipal securities financing to the Issuer, it must make particularized disclosures as to the material financial characteristics of the complex municipal securities financing, as well as the material financial risks of the financing that are known to the underwriter and reasonably foreseeable at the time of the disclosure. In addition, as described in Section III of this letter, the underwriter also must disclose any incentives for the underwriter to recommend the financing and other associated conflicts of interest. The disclosures referred to in this paragraph are not required if the underwriter has not recommended the complex municipal securities financing to the Issuer. The level of disclosure required may vary according to the Issuer's knowledge or experience with the proposed financing structure or similar structures, capability of evaluating the risks of the recommended financing and financial ability to bear the risks of the recommended financing, in each case based on the reasonable belief of the underwriter. The disclosures must be made in writing to an official of the Issuer whom the underwriter reasonably believes has the authority to bind the Issuer by contract with the underwriter (i) in sufficient time before the execution of a contract with the underwriter to allow the official to evaluate the recommendation and (ii) in a manner designed to make clear to such official the subject matter of such disclosures and their implications for the Issuer. The disclosures concerning a complex municipal securities financing must address the specific elements of the financing, rather than being general in nature. If the underwriter does not reasonably believe that the official to whom the disclosures are addressed is capable of independently evaluating the disclosures, the underwriter must make additional efforts reasonably designed to inform the official or its employees or agent.

General descriptions of certain complex municipal securities financing structures and the related risks are attached hereto. The disclosures should be tailored to the unique features and risks of the specific financing. The level of disclosure may be re-evaluated over time as the Issuer gains experience with a complex financing over the course of multiple new issues utilizing that structure or as the Issuer undergoes personnel changes with new employees with differing levels of expertise.

Although the attached descriptions include disclosure regarding fixed rate bonds, absent unusual circumstances or features, the typical fixed rate bond offering is not viewed as a complex municipal securities financing for which disclosure is required under Rule G-17. Nevertheless, the underwriter may choose to provide disclosures to the Issuer on the material aspects of a fixed rate bond structure that it recommends, particularly if the underwriter reasonably believes that the Issuer's personnel lack knowledge or experience with such structure.

[Comment 11] Although MSRB Rule G-17 generally does not cover conduit obligors, the underwriter should consider sending a copy of its disclosure letter to an appropriate official of the obligor and to any other party who will be financially obligated with respect to the payment of the Bonds. In addition, the senior managing underwriter should consider sending a copy of its letter to any co-managing underwriters, including those who may be appointed at a later date, and a co-managing underwriter sending the Issuer a separate disclosure letter should consider sending a copy of its letter to the senior managing underwriter.

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AUGUST 1, 2012

SIFMA Model Risk Disclosures Pursuant to MSRB Rule G-17

[Fixed Rate Bonds[1]]

The following is a general description of the financial characteristics and security structures of fixed rate municipal bonds ("Fixed Rate Bonds"), as well as a general description of certain financial risks that are known to us and reasonably foreseeable at this time and that you should consider before deciding whether to issue Fixed Rate Bonds. If you have any questions or concerns about these disclosures, please make those questions or concerns known immediately to us. In addition, you should consult with your financial and/or municipal, legal, accounting, tax and other advisors, as applicable, to the extent you deem appropriate. DELETE THE FOLLOWING SENTENCE IF THE ISSUER HAS DETERMINED THE STRUCTURE OF THE FINANCING: [If you decide that you would like to pursue this financing alternative, we may provide you with additional information more specific to your particular issue.]

IF A CONDUIT ISSUE, ADD THE FOLLOWING (MODIFY AS NECESSARY TO REFLECT THE TERMS OF THE TRANSACTION): [As the issuer of the Bonds, you will be a party to the bond purchase agreement and certain other legal documents to be entered into in connection with the issuance of the Bonds, but the material financial risks described below will be borne by the obligor, as set forth in those legal documents. A copy of our disclosure letter is also being sent to the obligor.] [IF NOT A CONDUIT ISSUE, DELETE REFERENCES BELOW TO "THE OBLIGOR".]

Financial Characteristics

Maturity and Interest. Fixed Rate Bonds are interest-bearing debt securities issued by state and local governments, political subdivisions and agencies and authorities. Maturity dates for Fixed Rate Bonds are fixed at the time of issuance and may include serial maturities (specified principal amounts are payable on the same date in each year until final maturity) or one or more term maturities (specified principal amounts are payable on each term maturity date) or a combination of serial and term maturities. The final maturity date typically will range between 10 and 30 years from the date of issuance. Interest on the Fixed Rate Bonds typically is paid semiannually at a stated fixed rate or rates for each maturity date.

Redemption. Fixed Rate Bonds may be subject to optional redemption, which allows you, at your option, to redeem some or all of the bonds on a date prior to scheduled maturity, such as in connection with the issuance of refunding bonds to take advantage of lower interest rates. Fixed Rate Bonds will be subject to optional redemption only after the passage of a specified

[1] Although Fixed Rate Bonds generally are not "complex municipal securities financings" for purposes of MSRB Rule G-17, the underwriters nevertheless may wish to provide disclosures regarding Fixed Rate Bonds in certain circumstances, depending on the level of sophistication and experience of the issuer and its personnel. Under MSRB Rule G-17, the underwriters must provide an issuer with disclosures about complex municipal securities financings that they recommend to the issuer for a negotiated offering.

period of time, often approximately ten years from the date of issuance, and upon payment of the redemption price set forth in the bonds, which may include a redemption premium. You will be required to send out a notice of optional redemption to the holders of the bonds, usually not less than 30 days prior to the redemption date. Fixed Rate Bonds with term maturity dates also may be subject to mandatory sinking fund redemption, which requires you to redeem specified principal amounts of the bonds annually in advance of the term maturity date. The mandatory sinking fund redemption price is 100% of the principal amount of the bonds to be redeemed.

Security

Payment of principal of and interest on a municipal security, including Fixed Rate Bonds, may be backed by various types of pledges and forms of security, some of which are described below.[2]

General Obligation Bonds
"General obligation bonds" are debt securities to which your full faith and credit is pledged to pay principal and interest. If you have taxing power, generally you will pledge to use your ad valorem (property) taxing power to pay principal and interest. Ad valorem taxes necessary to pay debt service on general obligation bonds may not be subject to state constitutional property tax millage limits (an unlimited tax general obligation bond). The term "limited" tax is used when such limits exist.

General obligation bonds constitute a debt and, depending on applicable state law, may require that you obtain approval by voters prior to issuance. In the event of default in required payments of interest or principal, the holders of general obligation bonds have certain rights under state law to compel you to impose a tax levy.

Revenue Bonds
"Revenue bonds" are debt securities that are payable only from a specific source or sources of revenues. Revenue bonds are not a pledge of your full faith and credit and you are obligated to pay principal and interest on your revenue bonds only from the revenue source(s) specifically pledged to the bonds. Revenue bonds do not permit the bondholders to compel you to impose a tax levy for payment of debt service. Pledged revenues may be derived from operation of the financed project or system, grants or excise or other specified taxes. Generally, subject to state law or local charter requirements, you are not required to obtain voter approval prior to issuance of revenue bonds. If the specified source(s) of revenue become inadequate, a default in payment of principal or interest may occur. Various types of pledges of revenue may be used to secure interest and principal payments on revenue bonds. The nature of these pledges may differ widely based on state law, the type of issuer, the type of revenue stream and other factors.

[2] The discussion of security characteristics is limited to general obligation and revenue bond structures. This summary should be expanded and modified, as necessary, for other security structures, such as bonds that are secured by a double-barreled pledge (general obligation and revenues), annual appropriations or a moral obligation of the issuer or another governmental entity. If the security for the bonds is known at the time this disclosure is provided to the issuer, include only those portions relevant to the actual security for the bonds.

Some revenue bonds (conduit revenue bonds) may be issued by a governmental issuer acting as conduit for the benefit of a private sector entity or a 501(c)(3) organization (the obligor). Conduit revenue bonds commonly are issued for not-for-profit hospitals, educational institutions, single and multi-family housing, airports, industrial or economic development projects, and student loan programs, among other obligors. Principal and interest on conduit revenue bonds normally are paid exclusively from revenues pledged by the obligor. Unless otherwise specified under the terms of the bonds, you are not required to make payments of principal or interest if the obligor defaults.

The description above regarding "Security" is only a brief summary of certain possible security provisions for the bonds and is not intended as legal advice. You should consult with your bond counsel for further information regarding the security for the bonds.

Financial Risk Considerations

Certain risks may arise in connection with your issuance of Fixed Rate Bonds, including some or all of the following (generally, the obligor, rather than you, will bear these risks for conduit revenue bonds):

Issuer Default Risk
You may be in default if the funds pledged to secure your bonds are not sufficient to pay debt service on the bonds when due. The consequences of a default may be serious for you and, depending on applicable state law and the terms of the authorizing documents, the holders of the bonds, the trustee and any credit support provider may be able to exercise a range of available remedies against you. For example, if the bonds are secured by a general obligation pledge, you may be ordered by a court to raise taxes. Other budgetary adjustments also may be necessary to enable you to provide sufficient funds to pay debt service on the bonds. If the bonds are revenue bonds, you may be required to take steps to increase the available revenues that are pledged as security for the bonds. A default may negatively impact your credit ratings and may effectively limit your ability to publicly offer bonds or other securities at market interest rate levels. Further, if you are unable to provide sufficient funds to remedy the default, subject to applicable state law and the terms of the authorizing documents, you may find it necessary to consider available alternatives under state law, including (for some issuers) state-mandated receivership or bankruptcy. A default also may occur if you are unable to comply with covenants or other provisions agreed to in connection with the issuance of the bonds.

This description is only a brief summary of issues relating to defaults and is not intended as legal advice. You should consult with your bond counsel for further information regarding defaults and remedies.

Redemption Risk
Your ability to redeem the bonds prior to maturity may be limited, depending on the terms of any optional redemption provisions. In the event that interest rates decline, you may be unable to take advantage of the lower interest rates to reduce debt service.

Refinancing Risk

If your financing plan contemplates refinancing some or all of the bonds at maturity (for example, if you have term maturities or if you choose a shorter final maturity than might otherwise be permitted under the applicable federal tax rules), market conditions or changes in law may limit or prevent you from refinancing those bonds when required. Further, limitations in the federal tax rules on advance refunding of bonds (an advance refunding of bonds occurs when tax-exempt bonds are refunded more than 90 days prior to the date on which those bonds may be retired) may restrict your ability to refund the bonds to take advantage of lower interest rates.

Reinvestment Risk

You may have proceeds of the bonds to invest prior to the time that you are able to spend those proceeds for the authorized purpose. Depending on market conditions, you may not be able to invest those proceeds at or near the rate of interest that you are paying on the bonds, which is referred to as "negative arbitrage".

Tax Compliance Risk

The issuance of tax-exempt bonds is subject to a number of requirements under the United States Internal Revenue Code, as enforced by the Internal Revenue Service (IRS). You must take certain steps and make certain representations prior to the issuance of tax-exempt bonds. You also must covenant to take certain additional actions after issuance of the tax-exempt bonds. A breach of your representations or your failure to comply with certain tax-related covenants may cause the interest on the bonds to become taxable retroactively to the date of issuance of the bonds, which may result in an increase in the interest rate that you pay on the bonds or the mandatory redemption of the bonds. The IRS also may audit you or your bonds, in some cases on a random basis and in other cases targeted to specific types of bond issues or tax concerns. If the bonds are declared taxable, or if you are subject to audit, the market price of your bonds may be adversely affected. Further, your ability to issue other tax-exempt bonds also may be limited.

This description of tax compliance risks is not intended as legal advice and you should consult with your bond counsel regarding tax implications of issuing the bonds.

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AUGUST 1, 2012

SIFMA Model Risk Disclosures Pursuant to MSRB Rule G-17

[Floating Rate Notes[1]]

The following is a general description of the financial characteristics of Floating Rate Notes (FRNs), as well as a general description of certain financial risks that are known to us and reasonably foreseeable at this time and that you should consider before deciding whether to issue FRNs. If you have any questions or concerns about these disclosures, please make those questions or concerns known immediately to us. In addition, you should consult with your financial and/or municipal, legal, accounting, tax and other advisors, as applicable, to the extent you deem appropriate. DELETE THE FOLLOWING SENTENCE IF THE ISSUER HAS DETERMINED THE STRUCTURE OF THE FINANCING: [If you decide that you would like to pursue this financing alternative, we may provide you with additional information more specific to your particular FRN issue.]

IF A CONDUIT ISSUE, ADD THE FOLLOWING (MODIFY AS NECESSARY TO REFLECT THE TERMS OF THE TRANSACTION): [As the issuer of the FRNs, you will be a party to the bond purchase agreement and certain other legal documents to be entered into in connection with the issuance of the FRNs, but the material financial risks described below will be borne by the obligor, as set forth in those legal documents. A copy of our disclosure letter is also being sent to the obligor.] [IF NOT A CONDUIT ISSUE, DELETE REFERENCES BELOW TO "THE OBLIGOR".]

Financial Characteristics

Maturity and Interest. FRNs are debt securities either with short-term maturities (generally one to five years) or with nominal long-term maturities coupled with a mandatory tender for purchase after a stated period (in either case, the Floating Rate Note Period) that also generally is one to five years in length. The purchase price of the FRNs subject to mandatory tender at the end of the Floating Rate Note Period is 100% of the principal amount (par). FRNs may be issued as part of a multi-modal issue or as a separate issue of securities. If the FRNs are not retired at maturity or at the end of the Floating Rate Note Period, as the case may be, the FRNs may be remarketed into or refinanced by a new Floating Rate Note Period, new FRNs, variable rate demand obligations (VRDOs), fixed rate bonds or other obligations. FRNs may be offered to investors in authorized denominations of $5,000 or any integral multiple. FRNs typically are sold without third-party credit or liquidity support.

The interest rate on the FRNs floats, generally weekly, and is based on a spread to an index (typically, either the SIFMA Index or LIBOR, each briefly described below), subject to any

[1] Under MSRB Rule G-17, the underwriters must provide an issuer with disclosures about complex municipal securities financings that they recommend to the issuer for a negotiated offering. Floating Rate Notes generally will be treated as a complex municipal securities financing.

applicable maximum interest rate. The spread will be fixed for the duration of the Floating Rate Note Period and will be determined at the time of pricing of the FRNs, based on your credit ratings, if any, your financial condition, general market conditions, the duration of the Floating Rate Note Period and whether interest is intended to be taxable or tax-exempt. The maximum interest rate for the FRNs generally will range between 9% per annum and 15% per annum. Interest on the FRNs typically is paid monthly or semiannually.

"*SIFMA Index*" is the Municipal Swap Index compiled from weekly interest rate resets of tax-exempt variable rate issues reported to Municipal Market Data that meet specific criteria established from time to time by SIFMA. The SIFMA Index is generally determined on Wednesday of each week and published and effective for the one-week period beginning on Thursday. In our capacity as a remarketing agent, we may remarket bonds that are included in calculating the SIFMA Index.

"*LIBOR*" is the London-Interbank Offered Rate, which is an interest rate for a specified period for US Dollar investments that is managed by the British Bankers Association. LIBOR is determined each day at 11am (London time) and is the average rate (with some adjustments) derived from the quotations provided by certain reference banks that are determined by the British Bankers' Association. IF APPLICABLE, ADD THE FOLLOWING: [We or an affiliate may be a reference bank for purposes of setting LIBOR.]

In most cases, the authorizing documents for the FRNs include an alternate mechanism for determining the interest rate on the FRNs in the event that the SIFMA Index or LIBOR, as applicable, is not calculated.

<u>Redemption</u>. FRNs generally will not be subject to optional redemption until six months prior to the maturity date or the end of the Floating Rate Note Period. If optional redemption is permitted, FRNs may be redeemed on any business day during that six-month window at a redemption price of par plus accrued interest. You will be required to send out a notice of optional redemption to the holders of the FRNs.

<u>Mandatory Tender at End of Floating Rate Note Period.</u> Unlike VRDOs, FRNs are not subject to optional or mandatory tender during a Floating Rate Note Period. FRNs (unless maturing) are subject to mandatory tender by the holders at par at the end of the Floating Rate Note Period. If you intend to remarket the FRNs at the end of the Floating Rate Note Period, you will be required to appoint a broker-dealer or a municipal securities dealer as remarketing agent to sell the FRNs at the end of the Floating Rate Note Period. You [or the obligor] will negotiate the terms of the remarketing, including the remarketing fee, at the time of the remarketing. The remarketing agent generally either will agree to underwrite or to use its best efforts to remarket the FRNs into a new Floating Rate Note Period or as VRDOs, fixed rate bonds or other obligations.

Depending on the terms of the FRNs, you [or the obligor] may be obligated to fund the purchase price of the FRNs if the remarketing agent is unable to successfully remarket the FRNs or if you are unable to refinance the FRNs at the end of the Floating Rate Note Period. In that situation (referred to as a "hard put"), if you do not provide sufficient funds, you will be in default. In other instances (referred to as a "soft put"), if the remarketing agent is unable to successfully remarket the FRNs or if you are unable to refinance the FRNs at the end of the Floating Rate Note Period, you will not be obligated to fund the purchase price of the FRNs, but the interest rate that you pay on the FRNs will increase. That adjusted interest rate, after the passage of a specified period of time, could go as high as the maximum interest rate and remain at that level until the FRNs are paid in full. The terms of any hard put or soft put can vary and will be negotiated in connection with the issuance of the FRNs and will be set forth in the authorizing documents for the FRNs.

[IF APPROPRIATE FOR A PARTICULAR ISSUER OR TRANSACTION, PORTIONS OF THE RISK DISCLOSURE FOR FIXED RATE BONDS MAY BE INSERTED, SUCH AS, FOR EXAMPLE, EXCERPTS FROM THE "SECURITY" SECTION TO DESCRIBE THE RELEVANT SECURITY FOR THE FRNs.]

Financial Risk Considerations

Certain risks may arise in connection with your issuance of FRNs, including some or all of the following (generally, the obligor, rather than you, will bear these risks for conduit revenue bonds):

Interest Rate Risk
Interest rate risk is the possibility that the interest rate that you pay on the FRNs during the Floating Rate Note Period may increase, which can be triggered by factors such as a general increase in short-term interest rates or in the index on which the interest rate is based. In addition, at the end of a Floating Rate Note Period, if you decide to roll the FRNs into a new Floating Rate Note Period, the interest rate on the FRNs during the new Floating Rate Note Period also may increase as a result of various factors, including general market conditions, increases in spreads over the index used to set the interest rate and your credit ratings, if any, or your financial condition. In either situation, the debt service costs associated with the FRNs will increase, which may negatively affect your coverage ratios and reduce the amount of your available cash. The interest rate on the FRNs may be capped at a maximum interest rate, which generally will range between 9% per annum and 15% per annum. See "Financial Characteristics – *Maturity and Interest*" above.

Index Risk
Recent reports have identified problems in the way that LIBOR has been set in past years. Although the matter is still under review by relevant regulatory authorities, there is a possibility that the method of establishing LIBOR could change. The Municipal Securities Rulemaking Board also recently announced that it will review indices used by the municipal market to develop educational materials about their use and to ensure that the market operates fairly and transparently. The method of establishing indices used in the municipal market, including the SIFMA Index, may change over time. A change in LIBOR or the SIFMA Index may affect the interest rate that you pay on the FRNs. In addition, there is a risk that, at any point in time, the indices (and therefore the rate of interest that you pay on the FRNs) may be affected by factors that are unrelated to the market for FRNs or for tax-exempt securities generally. The

authorizing documents for your FRNs should include an alternate mechanism to determine the interest rate on the FRNs in the event that the applicable index is not calculated.

Refinancing Risk
If you intend to remarket or refinance the FRNs at the end of a Floating Rate Note Period (whether as new FRNs, VRDOs, fixed rate bonds or other obligations), as a result of changes in market conditions, changes in law or changes in your credit ratings, if any, or your financial condition, you may be unable to remarket or refinance the FRNs at the end of the Floating Rate Note Period or you may pay a higher interest rate during any new Floating Rate Note Period. If the FRNs are structured to include a hard put and you are unable to successfully remarket or refinance the FRNs at the end of the Floating Rate Note Period, you may be obligated to fund the full amount of the purchase price of the tendered FRNs, much sooner than you otherwise may be expecting. If the FRNs are structured with a soft put and you are unable to successfully remarket or refinance the FRNs at the end of the Floating Rate Note Period, you may pay a higher interest rate to the holders of the FRNs, which could be as high as the maximum interest rate and remain at that level until the FRNs are paid in full. See "Financial Characteristics – *Mandatory Tender at End of Floating Rate Note Period*" above.

Issuer Default Risk
You may be in default if the funds pledged to secure your FRNs are not sufficient to pay debt service on the FRNs when due. You also may be in default if the FRNs are subject to a hard put and you are unable to fully fund the purchase price of the FRNs at the end of the Floating Rate Note Period. The consequences of a default may be serious for you and, depending on applicable state law and the terms of the authorizing documents, the holders of the FRNs and the trustee may be able to exercise a range of available remedies against you. For example, if the FRNs are secured by a general obligation pledge, you may be ordered by a court to raise taxes. Other budgetary adjustments also may be necessary to enable you to provide sufficient funds to pay debt service on or, if applicable, purchase price of the FRNs. If the FRNs are revenue bonds, you may be required to take steps to increase the available revenues that are pledged as security for the FRNs. A default may negatively impact your credit ratings. Further, a default may effectively limit your ability to publicly offer bonds or other securities at market interest rate levels. If you are unable to provide sufficient funds to remedy the default, subject to applicable state law and the terms of the authorizing documents, it may be necessary for you to consider available alternatives under state law, including (for some issuers) state-mandated receivership or bankruptcy. A default also may occur if you are unable to comply with covenants or other provisions agreed to in connection with the issuance of the FRNs.

This description is only a brief summary of issues relating to defaults and is not intended as legal advice. You should consult with your bond counsel for further information regarding defaults and remedies.

Reinvestment Risk
You may have proceeds of the FRNs to invest prior to the time that you are able to spend those proceeds for the authorized purpose. Depending on market conditions, you may not be able to

invest those proceeds at or near the rate of interest that you are paying on the FRNs, which is referred to as "negative arbitrage".

Tax Compliance Risk

The issuance of tax-exempt bonds is subject to a number of requirements under the United States Internal Revenue Code, as enforced by the Internal Revenue Service (IRS). You must take certain steps and make certain representations prior to the issuance of tax-exempt bonds. You also must covenant to take certain additional actions after issuance of the tax-exempt bonds. A breach of your representations or your failure to comply with certain tax-related covenants may cause the interest on the FRNs (if issued as tax-exempt obligations) to become taxable retroactively to the date of issuance of the FRNs, which may result in an increase in the interest rate that you pay on the FRNs or the mandatory redemption of the FRNs. The IRS also may audit you or your FRNs or other bonds, in some cases on a random basis and in other cases targeted to specific types of bond issues or tax concerns. If the FRNs are declared taxable, or if you are subject to audit, you may be unable to remarket or refinance the FRNs at the end of a Floating Rate Note Period or you may pay a higher interest rate during any new Floating Rate Note Period. Further, your ability to issue other tax-exempt bonds also may be limited.

This description of tax compliance risks is not intended as legal advice and you should consult with your bond counsel regarding tax implications of issuing the FRNs.

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AUGUST 1, 2012

SIFMA Model Risk Disclosures Pursuant to MSRB Rule G-17

[Variable Rate Demand Obligations[1]]

The following is a general description of the financial characteristics of Variable Rate Demand Obligations (VRDOs), as well as a general description of certain financial risks that are known to us and reasonably foreseeable at this time and that you should consider before deciding whether to issue VRDOs. If you have any questions or concerns about these disclosures, please make those questions or concerns known immediately to us. In addition, you should consult with your financial and/or municipal, legal, accounting, tax and other advisors, as applicable, to the extent you deem appropriate. DELETE THE FOLLOWING SENTENCE IF THE ISSUER HAS DETERMINED THE STRUCTURE OF THE FINANCING: [If you decide that you would like to pursue this financing alternative, we may provide you with additional information more specific to your particular VRDO issue.] [ADD THE FOLLOWING SENTENCE IF THE VRDOs ARE STRUCTURED WITH AN INTEREST RATE SWAP: If you are contemplating entering into an interest rate swap in connection with your VRDOs, you should consider the financial risk considerations discussed in the SIFMA Model Risk Disclosures Pursuant to MSRB Rule G-17 related to Interest Rate Swaps.]

IF A CONDUIT ISSUE, ADD THE FOLLOWING (MODIFY AS NECESSARY TO REFLECT THE TERMS OF THE TRANSACTION): [As the issuer of the Bonds, you will be a party to the bond purchase agreement and certain other legal documents to be entered into in connection with the issuance of the Bonds, but the material financial risks described below will be borne by the obligor, as set forth in those legal documents. A copy of our disclosure letter is also being sent to the obligor.] [IF NOT A CONDUIT ISSUE, DELETE REFERENCES BELOW TO "THE OBLIGOR".]

Financial Characteristics

Maturity and Interest. VRDOs are debt securities with nominal long-term maturities (often 20 to 30 years) in which the interest rate is reset by a remarketing agent on a periodic basis (e.g., daily, weekly, monthly, annually or commercial paper periods up to 270 days). For each interest reset, subject to any maximum interest rate stated in the VRDOs, the remarketing agent is required to set the interest rate at the rate necessary, in its judgment, as the lowest rate that permits the sale of the VRDOs at 100% of their principal amount (par) on the interest reset date. The maximum interest rate for the VRDOs generally will range between 9% per annum and 15% per annum, depending on, among other factors, the structure of the VRDOs, the terms of any credit or liquidity support and whether interest is intended to be taxable or tax-exempt. Interest on the VRDOs is paid at the applicable variable rate monthly (for daily, weekly or

[1] Under MSRB Rule G-17, the underwriters must provide an issuer with disclosures about complex municipal securities financings that they recommend to the issuer for a negotiated offering. Variable rate demand obligations generally will be treated as a complex municipal securities financing.

monthly modes), semiannually (for the annual mode) or at the end of each commercial paper period (for the commercial paper or CP mode). VRDOs typically are offered to investors in minimum authorized denominations of not less than $100,000.

Redemption. Optional redemption of VRDOs generally is more flexible than with fixed rate bonds and is usually at a redemption price of par, without redemption premium. Short-term VRDO modes (daily or weekly) may be subject to optional redemption on any business day or, in some cases, on any interest payment date. Longer term VRDO modes (monthly, annual or CP) typically will be subject to optional redemption on any interest payment date. You will be required to send out a notice of optional redemption to the holders of the bonds, usually not less than 15 to 30 days prior to the redemption date.

Optional and Mandatory Tender. For VRDOs in a daily, weekly, monthly or annual mode, the owner of the VRDOs generally will have the option to tender (or "put") its VRDOs for purchase at par at a specified time (typically any business day for daily and weekly modes and on the interest reset date for longer modes) with a specified amount of advance notice (e.g., same day's notice for VRDOs in the daily mode, 7 days' notice for VRDOs in the weekly mode and 15 to 30 days' notice for longer modes). At the end of each commercial paper period for a VRDO in the CP mode, the VRDO will be subject to mandatory tender for purchase at par. VRDOs also may be subject to mandatory tender for purchase upon the occurrence of certain events, including certain conversions from one interest rate mode to another or upon replacement or expiration of a credit or liquidity facility. As described below, the remarketing agent is obligated to use its best efforts to remarket VRDOs subject to optional or mandatory tender.

Liquidity Support. In the ordinary course, the source of funds to pay owners of tendered VRDOs will be the proceeds of the remarketing of the VRDOs by the remarketing agent to new investors. You [or the obligor] will be required to ensure a source of funds to pay the purchase price due to the tendering owners in the event that the remarketing agent is unable to successfully remarket the VRDOs. While some issuers may provide liquidity support from their own funds (self-liquidity), in most cases liquidity support will be provided from a financial institution. The liquidity support may take the form of an irrevocable letter of credit issued by a bank (the letter of credit also will provide credit support for the payment of principal of and interest on the VRDOs) or it may be in the form of a standby bond purchase agreement (SBPA). Unlike a letter of credit, the SBPA typically will set forth certain events that will permit the provider of the SBPA to terminate the SBPA upon notice or, in some circumstances, will cause the SBPA to terminate automatically. The authorizing documents for the VRDOs may provide that, if the liquidity facility has been terminated, you [or the obligor] will be required to purchase the VRDOs from their owners and/or pay a higher interest rate on the VRDOs, in some cases as high as the maximum permitted rate on the VRDOs.

Role of Remarketing Agent. The remarketing agent is a broker-dealer or municipal securities dealer appointed and paid by you [or the obligor] to set the periodic interest rate on the VRDOs and to use its best efforts to sell VRDOs that have been tendered (optionally or mandatorily) for purchase. Typically, the underwriter or senior managing underwriter of the VRDOs is the remarketing agent. The remarketing agent's annual fee is based on the outstanding principal amount of the VRDO issue and the interest mode then in effect. [STATE THE REMARKETING FEE IF IT HAS BEEN DETERMINED: The remarketing fee for the VRDOs during the initial [______] mode will be [__] basis points per year.]

In some cases, the remarketing agent, in its sole discretion, may acquire tendered VRDOs for its own inventory in order to achieve a successful remarketing (i.e., because there otherwise are not enough buyers to purchase the VRDOs or for other reasons), thereby avoiding the need to draw on any liquidity facility to pay the tendering bond owners. The remarketing agent, however, is not obligated to purchase VRDOs and may cease doing so at any time without notice. Although not required to do so, the remarketing agent also may make a market in the VRDOs by purchasing and selling VRDOs outside of the formal tender process. Any such purchases and sales may be at prices other than par. The remarketing agent also may sell VRDOs that it owns to one or more affiliated investment vehicles or enter into derivative arrangements with affiliates or others in order to reduce its exposure to the VRDOs. The purchase of VRDOs by the remarketing agent may create the appearance that there is greater demand for the VRDOs in the market than is actually the case.

Under certain circumstances, you [or the obligor] may remove the remarketing agent or the remarketing agent may resign or cease its remarketing efforts. The authorizing documents for the VRDOs will set forth any required notice and will require appointment of a successor remarketing agent.

[IF APPROPRIATE FOR A PARTICULAR ISSUER OR TRANSACTION, PORTIONS OF THE RISK DISCLOSURE FOR FIXED RATE BONDS MAY BE INSERTED, SUCH AS, FOR EXAMPLE, EXCERPTS FROM THE "SECURITY" SECTION TO DESCRIBE THE RELEVANT SECURITY FOR THE VRDOs.]

Financial Risk Considerations

Certain risks may arise in connection with your issuance of VRDOs, including some or all of the following (generally, the obligor, rather than you, will bear these risks for conduit revenue bonds):

Interest Rate Risk
Interest rate risk is the possibility that the interest rate that you pay on the VRDOs may increase, which can be triggered by various factors, such as a general increase in short-term interest rates, a decrease in marginal income tax rates, credit concerns relating to you or your market sector or industry or a reduction in the credit quality or ratings of the entity providing liquidity and/or credit support for the VRDOs. If any of these events occur, the debt service costs associated with the VRDOs will increase, which may negatively affect your coverage ratios and reduce the amount of your available cash. The interest rate on the VRDOs may be capped at a maximum interest rate, which generally will range between 9% per annum and 15% per annum. See "Financial Characteristics – *Maturity and Interest*" above.

Liquidity Risk
You may face liquidity risk since VRDOs may be subject to optional and mandatory tender for

purchase by their owners. If the remarketing agent is unable to successfully remarket the tendered VRDOs, in order to pay the tendering owners, the tender agent or trustee will demand funds from you, if you are providing self-liquidity, or it will draw funds under any applicable liquidity facility. Thereafter, unless and until the VRDOs are successfully remarketed, you will pay interest to the liquidity provider at an agreed-upon rate on the amount drawn, which is typically higher than the rate otherwise borne by the VRDOs. In addition, you may be required to pay the principal of the unremarketed VRDOs by the date set forth in the letter of credit or SBPA, which date is likely to be earlier than the stated maturity date of the VRDOs. The period of time by which you must pay the principal amount and interest on the VRDOs to the liquidity provider is known as a "term out." If there is no term out, you will be required to immediately repay the full amount of any draws to the liquidity provider. Depending on the amount of the VRDOs that are not remarketed, you might be obligated to repay the entire principal amount of the VRDOs.

Credit or Liquidity Facility Renewal Risk

Liquidity facilities, such as a letter of credit or SBPA, typically are issued for a term shorter than the stated maturity of the VRDOs, generally from one to five years. Upon expiration of the term, the liquidity facility must be renewed or replaced. You may be unable to replace the expiring liquidity facility or you may have difficulty obtaining a replacement liquidity facility at a reasonable cost. There are a limited number of financial institutions that are acceptable to the market and who are willing to provide liquidity facilities for tax-exempt VRDOs. In addition, as a result of market conditions and prospective changes in regulatory requirements, the cost of obtaining a liquidity facility may vary from currently prevailing market rates. If a liquidity provider is unwilling to extend the expiring liquidity facility and you are unable to find a suitable replacement, the VRDOs will be subject to mandatory tender for purchase and you will be required to pay the purchase price (par plus accrued interest) of the VRDOs, either by remarketing the VRDOs in a different mode that does not require liquidity (such as converting the VRDOs to fixed rate bonds), issuing refunding bonds, securing a bank loan, finding some other source of repayment or drawing on the liquidity facility. Your ability to convert the VRDOs to a different mode, to issue refunding bonds or to secure a bank loan will depend on a number of factors, including general market conditions and your creditworthiness. In the event of a draw on the liquidity facility, you will have to repay the liquidity provider as described above under "Liquidity Risk."

Liquidity Provider Default Risk

In the event that a liquidity provider is not able to perform under its liquidity facility, a default or a mandatory tender of the VRDOs may result, depending on the terms of the authorizing documents. You may be required to pay a higher rate of interest or, if a mandatory tender is triggered, you may be required to pay the purchase price (par plus accrued interest) of the VRDOs, either by remarketing the VRDOs in a different mode that does not require liquidity (such as converting the VRDOs to fixed rate bonds), issuing refunding bonds, securing a bank loan or finding some other source of repayment. Your ability to convert the VRDOs to a different mode, to issue refunding bonds or to secure a bank loan will depend on a number of factors, including general market conditions and your creditworthiness.

Issuer Default Risk

You may be in default if the funds pledged to secure your VRDOs are not sufficient to pay debt service on the VRDOs when due. The consequences of a default may be serious for you and, depending on applicable state law and the terms of the authorizing documents, the holders of the VRDOs, the trustee and any credit and/or liquidity support provider may be able to exercise a range of available remedies against you. For example, if the VRDOs are secured by a general obligation pledge, you may be ordered by a court to raise taxes. Other budgetary adjustments also may be necessary to enable you to provide sufficient funds to pay debt service on the VRDOs. If the VRDOs are revenue bonds, you may be required to take steps to increase the available revenues that are pledged as security for the VRDOs. A default may negatively impact your credit ratings, including ratings on the VRDOs. If the ratings on the VRDOs are decreased, holders of VRDOs that are subject to optional tender may elect to put their VRDOs, the remarketing agent may have difficulty remarketing the VRDOs and the VRDOs likely will bear a higher interest rate after any applicable interest reset. Further, a default may effectively limit your ability to publicly offer bonds or other securities at market interest rate levels. If you are unable to provide sufficient funds to remedy the default, subject to applicable state law and the terms of the authorizing documents, it may be necessary for you to consider available alternatives under state law, including (for some issuers) state-mandated receivership or bankruptcy. A default also may occur if you are unable to comply with covenants or other provisions agreed to in connection with the issuance of the VRDOs.

This description is only a brief summary of issues relating to defaults and is not intended as legal advice. You should consult with your bond counsel for further information regarding defaults and remedies.

Reinvestment Risk

You may have proceeds of the VRDOs to invest prior to the time that you are able to spend those proceeds for the authorized purpose. Depending on market conditions, you may not be able to invest those proceeds at or near the rate of interest that you are paying on the VRDOs, which is referred to as "negative arbitrage".

Tax Compliance Risk

The issuance of tax-exempt bonds is subject to a number of requirements under the United States Internal Revenue Code, as enforced by the Internal Revenue Service (IRS). You must take certain steps and make certain representations prior to the issuance of tax-exempt bonds. You also must covenant to take certain additional actions after issuance of the tax-exempt bonds. A breach of your representations or your failure to comply with certain tax-related covenants may cause the interest on the VRDOs (if issued as tax-exempt obligations) to become taxable retroactively to the date of issuance of the VRDOs, which may result in an increase in the interest rate that you pay on the VRDOs or the mandatory redemption of the VRDOs. The IRS also may audit you or your VRDOs or other bonds, in some cases on a random basis and in other cases targeted to specific types of bond issues or tax concerns. If the VRDOs are declared taxable, or if you are subject to audit, holders of VRDOs that are subject to optional tender may elect to put their VRDOs, the remarketing agent may have difficulty remarketing the VRDOs and the VRDOs likely will bear a higher interest rate after any applicable interest reset. Further, your ability to issue other tax-exempt bonds also may be limited.

This description of tax compliance risks is not intended as legal advice and you should consult with your bond counsel regarding tax implications of issuing the VRDOs.

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AUGUST 2012

SIFMA Model Risk Disclosures Pursuant to MSRB Rule G-17

Forward Delivery Bond Issues[1]

[THE FOLLOWING MODEL DISCLOSURE RELATING TO FORWARD DELIVERY BONDS IS INTENDED TO BE USED AS PART OF THE UNDERWRITER'S DISCLOSURE OF THE MATERIAL FINANCIAL CHARACTERISTICS AND RISKS OF A COMPLEX MUNICIPAL SECURITIES FINANCING THAT INCLUDES A FORWARD DELIVERY. THIS DISCLOSURE MAY BE PROVIDED SEPARATELY OR ADDED TO ANY COMPLEX MUNICIPAL SECURITIES FINANCING DISCLOSURE THAT IS OTHERWISE BEING PROVIDED TO THE ISSUER IN CONNECTION WITH THE TRANSACTION.]

Financial Characteristics

The following is a general description of the financial characteristics of the proposed forward delivery of the [DESCRIBE THE BONDS] (the Forward Delivery Bonds), as well as a general description of certain financial risks that are known to us and reasonably foreseeable at this time and that you should consider before deciding whether to proceed with the Forward Delivery Bonds. If you have any questions or concerns about these disclosures, please make those questions or concerns known immediately to us. In addition, you should consult with your financial and/or municipal, legal, accounting, tax and other advisors, as applicable, to the extent you deem appropriate. DELETE THE FOLLOWING SENTENCE IF THE ISSUER HAS DETERMINED THE STRUCTURE OF THE FORWARD DELIVERY BONDS: [If you decide that you would like to pursue the issuance of the Forward Delivery Bonds, we may provide you with additional information more specific to your particular Forward Delivery Bonds.]

IF A CONDUIT ISSUE, ADD THE FOLLOWING (MODIFY AS NECESSARY TO REFLECT THE TERMS OF THE TRANSACTION): [As the issuer of the Forward Delivery Bonds, you will be a party to the forward purchase agreement and certain other legal documents to be entered into in connection with the issuance of the Forward Delivery Bonds, but the material financial risks described below will be borne by the obligor, as set forth in those legal documents. A copy of our disclosure letter relating to the Forward Delivery Bonds is also being sent to the obligor.] [IF NOT A CONDUIT ISSUE, DELETE REFERENCES BELOW TO "THE OBLIGOR".]

What are Forward Delivery Bonds?
In a typical issuance of fixed rate bonds, the bonds are issued and delivered within one to four weeks of the date of the bond purchase agreement (ordinarily the date that the bonds are priced). In a forward delivery bond transaction, the period between the date that the bonds are priced and the date that the bonds are issued and delivered is longer, ranging perhaps from several months to more than a year. The issuance of forward delivery bonds can be an appropriate strategy to refund outstanding tax-exempt bonds that are not eligible for an advance refunding (either because those bonds have already been advance refunded or do not

[1] Under MSRB Rule G-17, the underwriters must provide an issuer with disclosures about complex municipal securities financings that they recommend to the issuer for a negotiated offering. A forward delivery bond issue generally will be treated as a complex municipal securities financing.

otherwise qualify for advance refunding under the federal tax rules) and are not eligible for a current refunding (under the federal tax rules, a current refunding means that the new bonds are issued no more than 90 days prior to the redemption or maturity date of the outstanding bonds). Issuance of Forward Delivery Bonds will allow you to lock in a rate of interest that may (or may not) be available if you wait to price and issue refunding bonds at a later date. The Forward Delivery Bonds will be priced in the current market for delivery on a later date, typically within the 90-day window prior to the redemption or maturity date of the outstanding bonds to be refunded.

Forward Purchase Agreement
At the time of the pricing of the Forward Delivery Bonds, you, as issuer, will enter into a forward bond purchase agreement (BPA) with us, as underwriter. The Forward Delivery Bonds will be priced for delivery on a later date that is specified in the forward BPA. The forward BPA ordinarily contains a number of conditions that must be satisfied on the delivery date of the Forward Delivery Bonds, similar to the conditions included in a typical bond purchase agreement relating to a normal delivery of bonds. However, under the forward BPA, those conditions also must be met on the date of delivery of the Forward Delivery Bonds after the passage of a longer period of time. Those conditions will include, among others, delivery of an opinion of bond counsel addressing the tax status of the Forward Delivery Bonds as of the date of their delivery. [ADD OTHER SIGNIFICANT CONDITIONS EXPECTED TO BE INCLUDED IN THE FORWARD PURCHASE AGREEMENT, SUCH AS ADDITIONAL OPINIONS, AUDITOR'S LETTERS, RATINGS REQUIREMENTS AND ISSUER/OBLIGOR REPRESENTATIONS]

[DESCRIBE OTHER MATERIAL CHARACTERISTICS OF THE TRANSACTION, INCLUDING RIGHTS AND OBLIGATIONS OF ULTIMATE INVESTORS, IF THE INVESTORS ARE IDENTIFIED AT THE TIME OF THE FORWARD PURCHASE AGREEMENT, AND WHETHER THE UNDERWRITER'S OBLIGATION TO TAKE DELIVERY OF THE BONDS IS CONDITIONED UPON PERFORMANCE BY THE INVESTORS.]

INCLUDE EITHER OR BOTH OF THE FOLLOWING SENTENCES, IF APPLICABLE: [The forward BPA will include a liquidated damages provision that will entitle you to receive a predetermined amount as liquidated damages in the event that we don't perform our obligations as set forth in the forward BPA, subject to any conditions to our performance that are included in the forward BPA.] [Although our obligations will not be subject to performance by the investors purchasing the Forward Delivery Bonds, the forward BPA may require that investors deliver an investor acknowledgement letter confirming that the investors understand the terms of, and risks associated with, the delivery of the Forward Delivery Bonds.]

Pricing of the Forward Delivery Bonds
The pricing of the Forward Delivery Bonds typically will include a premium above then-current market interest rates to reflect the additional interest rate risk borne by the investors as a result of the delayed delivery of the Forward Delivery Bonds. That premium typically can range between [10] and [75] basis points, depending on the length of the forward delivery period and the maturity date of the Forward Delivery Bonds.

Financial Risk Considerations

Certain risks may arise in connection with the issuance of the Forward Delivery Bonds, including some or all of the following (generally, the obligor, rather than you, will bear these risks in connection with a forward delivery of conduit revenue bonds):

Risk that You will be Unable to Satisfy Conditions for Delivery of the Forward Delivery Bonds
The issuance of the Forward Delivery Bonds will require satisfaction of various conditions on their date of delivery, as set forth in the forward BPA. There is a risk that you [or the obligor] may be unable to satisfy those conditions on the date of delivery if certain events or actions occur or do not occur (as the case may be), including, among others, any one or more of the following [ADD ADDITIONAL MATERIAL EVENTS OR ACTIONS; MODIFY OR DELETE THOSE BELOW THAT ARE NOT APPLICABLE]:

- An intervening change in law may prevent bond counsel from rendering the required tax opinion on the delivery date.
- An intervening change in law may prevent you [or the obligor] from performing or any other counsel from delivering a required opinion on the delivery date.
- If material litigation has been filed or an event of default occurs under the underlying documents relating to the Forward Delivery Bonds (or other bonds), you [or the obligor] may not be able to satisfy the conditions of the forward BPA and we [or the investors] may have the right to terminate the obligation to purchase the Forward Delivery Bonds.
- If a TEFRA hearing and elected official approval is required, you may be unable to issue the Forward Delivery Bonds if those do not occur on a timely basis.
- You [or the obligor] may be unable to meet any ratings requirements applicable to the Forward Delivery Bonds on the delivery date.
- A material adverse change in your [or the obligor's] condition may prevent you [or the obligor] from meeting the requirements of the forward BPA to deliver current disclosure information.

Risk that We Will be Unable to Perform
Under the forward BPA, we will agree to purchase the Forward Delivery Bonds at a later date. Although we don't expect this to occur, there is a risk that, for any number of reasons, such as our bankruptcy or regulatory constraints, we will be unable to perform our obligations on the delivery date for the Forward Delivery Bonds. [In the event that we fail to perform, you may be entitled to a payment of liquidated damages as set forth in the forward BPA.]

Risk that the Universe of Potential Investors May be Limited
The universe of potential investors for the Forward Delivery Bonds may be limited as a result of the additional risks associated with forward delivery of securities. In addition, given the greater risk that we bear due to the delayed nature of our obligation to purchase the Forward Delivery Bonds, we may require additional credit approvals in order to accept orders from certain investors. In either event, the pricing of the Forward Delivery Bonds, and the amount of the forward delivery premium, may be adversely affected.

Alternatives to the Forward Delivery Bonds May be Better
The outstanding bonds to be refunded by the Forward Delivery Bonds mature [or are subject to mandatory tender for purchase] on [DATE] [INSERT THE FOLLOWING IF APPLICABLE] [and are callable (for refinancing or remarketing) beginning on [DATE]]. It is possible that you may obtain a better economic result if you simply wait and refinance or remarket the outstanding bonds on [DATE] rather than proceed with issuance of the Forward Delivery Bonds.

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SIFMA Model Risk Disclosures Pursuant to MSRB Rule G-17

Interest Rate Swaps[1]

The following is a description of the characteristics of interest rate swaps, as well as a description of certain financial risks that are known to us and reasonably foreseeable at this time and that you should consider before deciding whether to enter into an interest rate swap[2] in connection with your Bonds. If you decide that you would like to pursue this financing alternative, [[the underwriter] [the swap dealer (Swap Dealer)] or your municipal advisor and qualified independent representative, as applicable] will provide you with additional information describing the material terms of your particular interest rate swap.[3] If you have any questions or concerns about these disclosures, please make those questions or concerns known immediately to us. **There may be accounting, legal and other risks associated with a swap and you should consult with your financial and/or municipal, legal, accounting, tax and other advisors, as applicable, to the extent you deem appropriate concerning such risks.**

[Insert following the October 14, 2012 CFTC Business Conduct Standards compliance date: **Under the CFTC Business Conduct Standards, the Swap Dealer is required to have a reasonable basis to believe that you have a "qualified independent representative" in connection with your swap. See Other Considerations -- Compliance With Dodd-Frank herein.**]

Characteristics of Interest Rate Swaps; Rights and Obligations of Swap Parties

Financial Characteristics. An interest rate swap is a two-party agreement by and between you and a Swap Dealer to exchange payments based on periodic changes in interest rates or indices on the dates and for the term specified in the swap agreement. Interest rate swaps typically involve an exchange of payments calculated based upon fixed and floating rates or upon two different floating rates. In the municipal market, the floating rates commonly used are the SIFMA Index (SIFMA) and the London Interbank Offered Rate (LIBOR).[4] Swap payments are calculated based on a "Notional Amount" specified in the swap agreement; the Notional Amount is not, however, exchanged by the parties.

[1] Under MSRB Rule G-17, an interest rate swap entered into in connection with an offering will generally be treated as a complex municipal securities financing.

[2] These disclosures can also be delivered, as applicable, in connection with material amendments of existing swaps.

[3] The Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (effective August 2, 2012) provides that the Underwriter may satisfy its swap disclosure obligation if the required disclosure has been provided to an issuer by the Swap Dealer or the issuer's independent swap or other financial advisor, as long as the Underwriter has a reasonable basis for belief in the truthfulness and completeness of such disclosure.

[4] "*SIFMA Index*" is the Municipal Swap Index compiled from weekly interest rate resets of tax-exempt variable rate issues reported to Municipal Market Data that meet specific criteria established from time to time by SIFMA. The SIFMA Index is generally determined on Wednesday of each week and published and effective for the one-week period beginning on Thursday.

"*LIBOR*" is the London-Interbank Offered Rate, which is an interest rate for a specified period for US Dollar investments that is managed by the British Bankers Association. LIBOR is determined each day at 11am (London time) and is the average rate (with some adjustments) derived from the quotations provided by certain reference banks that are determined by the British Bankers' Association. In most cases, swap documents refer to an alternate mechanism for establishing the index in the event that the SIFMA Index or LIBOR, as applicable, is not calculated.

Payment obligations on your swap will generally be netted so that only one party makes a payment on each payment date.

Nature of the Swap Obligation. The execution of a swap typically will not affect the nature of your obligation or legal liability to your Bondholders. Upon the execution of a swap, you continue to be legally obligated to your Bondholders to make debt service payments. From an economic perspective, the swap enables you to effectively convert your rate payment obligation, for example, from floating to fixed or from fixed to floating, but your bond and swap obligations are separate and distinct.

Master Agreements. Your swap will be executed under the terms of a Master Agreement, using the documents published by the International Swaps and Derivatives Association, Inc. (ISDA). Multiple swap transactions may be documented under one Master Agreement by the execution, from time to time, of separate confirmations executed by the parties. Swaps are typically aggregated and, if applicable, netted under one Master Agreement, with the effect that parties that have executed multiple swaps may treat them as one single agreement. This is consistent with the treatment of swaps, generally, under principles of U.S. bankruptcy law.

Swap Termination. A swap may be terminated by you or the Swap Dealer prior to its scheduled termination date upon the occurrence, as to the other party, of one or more of the following Events of Default: Failure to Pay or Deliver, Breach of Agreement, Credit Support Default, Misrepresentation, Default Under Specified Transactions, Cross Default, Bankruptcy, and Merger Without Assumption and one or more of the following Termination Events: Illegality, Credit Event Upon Merger and any other event specified in the swap documents, typically including certain ratings downgrades. Consistent with the aggregation of swaps under a Master Agreement, the occurrence of an Event of Default or of certain Termination Events in respect of a party to a Master Agreement may have the effect of terminating all of the swaps under such Master Agreement.

Termination Payments. Upon a swap termination, a payment may be owed by either party depending upon market conditions at the time of termination, regardless, generally, of which party is the defaulting party or the party affected by a Termination Event. The amount that would be payable by one party to the other if a swap were terminated on any particular day is typically referred to as the "Termination Payment" for the swap. A Termination Payment typically reflects the then-current mark-to-market value of a swap upon its termination in light of then-prevailing market conditions. For example, if you agree to pay a fixed rate on a swap and, following swap execution, fixed rates in the relevant market decline, it would be expected that the mark-to-market of the swap would be "against" you (*i.e.*, you would owe a Termination Payment if the swap were terminated because your obligation under the swap is to pay a fixed rate at a time when market rates are lower).

Mark-to-Market Amounts. A calculation of the mark-to-market value of a swap that would be payable if the swap were terminated may be used for various purposes. Among other things, it reflects, on any given date, the amount of any unrealized loss or gain on the swap for purposes of your financial statements; it may be used for purposes of establishing compliance with financial covenants and other terms of your indenture and other credit agreements; and it may be used to calculate the amount of collateral you are required to deliver to secure your payment obligations under the swap.

Tax Considerations. Consideration should be given as to whether a swap should be "integrated" with the Bonds for purposes of yield calculation on the Bonds for U.S. Federal tax purposes. You should consult with your Bond Counsel regarding the tax implications of entering into the swap.

Material Economic and Operational Terms of Interest Rate Swaps

OPTION 1: Fixed Payer Swap

In a fixed payer swap, an issuer makes payments based on a fixed rate determined at the pricing of the swap and receives payments based on a floating rate index such as SIFMA or LIBOR. An issuer typically enters into a fixed payer swap to hedge against the interest rate volatility of variable rate debt. The floating rate payments made by the Swap Dealer are intended to offset an issuer's variable rate debt exposure, so that, as a result of the variable rate debt taken together with the swap, an issuer makes payments based on a net fixed rate.

[Describe material economic and operational terms of the fixed payer swap.]

OPTION 2: Fixed Receiver Swap

In a fixed receiver swap, an issuer makes payments based on a floating rate index such as SIFMA or LIBOR and receives payments based on a fixed rate determined at the pricing of the swap. An issuer typically enters into a fixed receiver swap in connection with fixed rate debt. As a result of the fixed rate debt taken together with the swap, the issuer makes payments based on a net floating rate.

[Describe material economic and operational terms of the fixed receiver swap.]

OPTION 3: Basis Swap

In a basis swap, an issuer makes payments based on one floating rate index such as SIFMA or LIBOR and receives payments based on a different floating rate index.

[Describe material economic and operational terms of the basis swap.]

OPTION 4: Interest Rate Cap

In an interest rate cap, one party agrees to pay the other an amount determined by the degree, if any, that a floating rate exceeds a predetermined fixed rate, called the strike rate. Interest rate caps are typically purchased by an issuer in connection with variable rate debt to economically provide a maximum rate payable on variable rate debt without actually subjecting the terms of the debt to a maximum rate.

[Describe material economic and operational terms of the interest rate cap.]

OPTION 5: [Other Swaps]

[Insert description of swap: Rate Lock, Swaption, Interest Rate Floor, Yield Curve Swap, Security-Based Swap, etc.]

[Describe material economic and operational terms of the swap.]

Risk Considerations of Interest Rate Swaps

Credit/Counterparty Risk. Counterparty risk is the risk that the Swap Dealer (or its Credit Support Provider or Guarantor) will not fulfill its obligations as specified by the terms of the swap. An issuer that elects not to clear its swap is exposed to the credit and counterparty risk of the Swap Dealer. If an Event of Default or Termination Event occurs as to the Swap Dealer, including, without limitation, as a result of the Swap Dealer's bankruptcy or significant ratings downgrade, you will generally have the right to terminate the swap, but the amount of any payment you receive, if any termination payments are owed to you, would be subject to the Swap Dealer's ability to make the required payment. Upon the bankruptcy or other insolvency of a Swap Dealer, among other things, your obligation to make payments to your insolvent counterparty, the timing of swap terminations and the valuation of a swap upon its termination as well as your right to the return of any excess collateral you may have posted, may be determined, or affected, by principles of relevant bankruptcy or other insolvency law. You may not receive amounts from the Swap Dealer to which you would otherwise be entitled, including but not limited to ongoing payments under the swap, termination payments and the return of any excess collateral. You should consult with your counsel regarding these and other considerations, and your rights, in the event of the Swap Dealer's bankruptcy or other applicable insolvency proceeding.

Termination Risk. Termination risk is the risk that the swap (or multiple swaps under a Master Agreement) could be terminated prior to its (or their) scheduled termination date(s) as a result of any of several events relating to either you or the Swap Dealer, including your payment default on a swap or the Bonds or a downgrade of your ratings and other events specified by the terms of the swap and the Master Agreement. Upon an early termination, a substantial Termination Payment could be due and payable; you may either owe a Termination Payment to the Swap Dealer or receive a Termination Payment from the Swap Dealer depending on then-prevailing market rates in the relevant market for a swap with the same term and structure. You may be able to fund a Termination Payment from the proceeds of your borrowings. However, your contractual obligation to make a Termination Payment is unconditional and is not subject to your ability to incur debt or access the public markets.

Interest Rate Risk. Interest rate risk is the risk that rates will increase or decrease, and such fluctuations will affect the swap's cash flow, mark-to-market value and upon an early termination, the required Termination Payment. On a fixed payer swap, you also forgo the opportunity to take advantage of lower rates if rates decrease.

Basis Risk. Basis risk arises from the mismatch between the rate you receive under the swap and the rate you pay on the Bonds. For example, basis risk describes the risk in a fixed payer swap that the floating rate you receive under the swap may not equal the floating rate you pay on the variable rate bonds that you are hedging. The two rates may not fluctuate the same way or to the same extent. Basis risk will also be impacted by the ratings of any credit enhancer or liquidity provider on the variable-rate bonds, a failed remarketing, as well as general market conditions.

Tax Risk.[5] Tax risk is a specific basis risk stemming from the mismatch between, for example, the percentage of LIBOR or other rate you receive on a swap and the interest rate you pay on your tax-exempt variable rate bonds, as a result of the occurrence of tax events affecting your bonds or tax-exempt bonds generally, including changes in marginal income tax rates and other changes in the Federal and state tax systems. For example, a reduction in marginal Federal income tax rates, a reduction of the Federal tax rate on interest income, a change in the treatment of municipal bond interest or a change in the structure of the Federal tax system may cause variable tax-exempt interest rates and the SIFMA Index to rise relative to taxable interest rates or LIBOR, increasing basis risk, as the amounts you receive under the swap may be less than the amounts you then owe on the Bonds.

Liquidity Risk. Liquidity risk is the risk that it may be difficult to terminate a swap or to assess the market value of a swap under certain market conditions. The Swap Dealer may, but is not obligated (unless specifically agreed to under the swap documentation), to unwind or terminate the swap at market at your request. Generally, you may not assign, amend or novate the swap without the prior written consent of the Swap Dealer. There can be no assurance, and the Swap Dealer does not guarantee, that another swap dealer will be willing to accept the rights and obligations under your swap or that the Swap Dealer would consent to such a transfer.

Collateral Risk.[6] Under certain circumstances, you may be required to deliver collateral to secure your payment obligations under the swap. Your obligation to post collateral on a swap will be calculated, from time to time, on the basis of the mark-to-market value of the swap (and on other swaps under the Master Agreement) and may be substantial. Since you deliver collateral [directly to the Swap Dealer] [to a third

[5] Include when there is a mismatch between the interest rate payable on the Bonds and the rate payable on the swap.
[6] Include when an issuer agrees to deliver collateral to secure its obligations under the swap.

party custodian], the return of your collateral is subject to the [credit and bankruptcy risks of the Swap Dealer] [and the credit and operational risks of the third-party custodian.][7] [If a third-party custodian were to default in its obligations to return collateral in connection with the swap, you could suffer losses, and such losses could be substantial.] You should consult with your counsel regarding your rights with respect to collateral.

Operational Risk. Operational risk is the risk of loss arising from failures of systems and controls for recording, monitoring and quantifying the risks and contractual obligations associated with swaps, for valuing transactions and transferring funds or for detecting human error or system failures. Monitoring and management of a swap or your swap portfolio may require the dedication of resources and personnel on an ongoing basis.

Amortization Risk. Amortization risk is the risk of a mismatch between the principal amount of the Bonds and the Notional Amount of the related swap.

Other Considerations

[*Delete the following sentence if the Issuer is not issuing VRDOs.*] [If you are contemplating entering into a swap in connection with your VRDOs, you should consider the financial risk considerations discussed in the SIFMA Model Risk Disclosures Pursuant to MSRB Rule G-17 related to Variable Rate Demand Obligations.] [*Delete the following sentence if the Issuer is not issuing Fixed Rate Bonds.*] [If you are contemplating entering into a swap in connection with your Fixed Rate Bonds, you should consider the financial risk considerations discussed in the SIFMA Model Risk Disclosures Pursuant to MSRB Rule G-17 related to Fixed Rate Bonds.] [*Delete the following sentence if the Issuer is not issuing FRNs.*] [If you are contemplating entering into a swap in connection with your FRNs, you should consider the financial risk considerations discussed in the SIFMA Model Risk Disclosures Pursuant to MSRB Rule G-17 related to Floating Rate Notes.] Certain other considerations may also arise in connection with your execution of a swap, including some or all of the following:

Pricing of Swaps. Price and other terms of swaps are individually negotiated between you and the Swap Dealer. The Swap Dealer does not represent or warrant to you that the prices at which the Swap Dealer may offer to enter into a swap with you will be the best prices available to you. Similarly, provision of an indicative valuation or price by the Swap Dealer should not be considered to be an offer to enter into or terminate the relevant transaction at that value or price. Because swaps are not standardized or publicly traded, their value at any time may not be precisely ascertainable; different market participants, using different pricing models, may arrive at different values. The transaction costs associated with a swap may be material and may impact the level at which a swap is executed or terminated. Transaction costs include, but are not necessarily limited to, trading costs, hedging costs, funding charges, swap dealer fees and legal expenses.

Upfront Payment.[8] Consideration should be given as to the characterization of an upfront payment made by the Swap Dealer on any swap. To the extent that that the Swap Dealer makes an upfront payment to you that constitutes an off-market payment, such amount could be considered to be a loan from the Swap Dealer to you. You should consult with your counsel regarding any upfront payment you may receive from the Swap Dealer in connection with the swap.

Trading for Swap Dealer's Own Account; Swap Dealer's Financial Market Activities. The Swap Dealer may act in various capacities throughout the financial markets and these activities may, in certain

[7] Include depending on whether an issuer is expected to deliver collateral directly to the Swap Dealer or to a third-party custodian.

[8] Include if the swap includes an upfront payment.

circumstances, adversely affect the value of the swap. The Swap Dealer may engage in proprietary trading for its own accounts in instruments similar to the swap, subject to regulatory restrictions on such proprietary trading activities, engage in similar or offsetting transactions with other counterparties or act as calculation agent with respect to Events of Default, Termination Events or other events. Such trading and hedging activities can adversely affect the value of the swap.

Index Risk. The Swap Dealer may provide data that is used to compile the floating rate index on the swap, such as the SIFMA Index and LIBOR. [The Swap Dealer or an affiliate of the Swap Dealer may be a reference bank for purposes of setting LIBOR.][9] [In the Underwriter's capacity as a remarketing agent, the Underwriter may remarket bonds that are included in the calculation of the SIFMA Index.][10] Recent reports have identified problems in the way that LIBOR has been set in past years. Although the matter is still under review by relevant regulatory authorities, there is a possibility that the method of establishing LIBOR could change. The Municipal Securities Rulemaking Board also recently announced that it will review indices used by the municipal market to develop educational materials about their use and to ensure that the market operates fairly and transparently. The method of establishing indices used in the municipal market, including the SIFMA Index, may change over time. A change in LIBOR or the SIFMA Index may affect the rate that you pay, or receive, as the case may be, on the swap. In addition, there is a risk that, at any point in time, the indices (and therefore the rate that you pay, or receive on the swap, as the case may be) may be affected by factors that are unrelated to the market for swaps generally.

Compliance with Dodd-Frank. Under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd Frank"), which was signed into law in July 2010, regulatory agencies, including the U.S. Commodity Futures Trading Commission (the "CFTC") and the Securities and Exchange Commission are required to adopt, and are in the process of promulgating, regulations governing multiple aspects of swap transactions and the functioning of the swap market. More specifically, the CFTC has adopted regulations which enumerate certain business conduct standards applicable to swap dealers (the "CFTC Business Conduct Standards") when dealing with counterparties generally, and additional requirements applicable to swap dealers when dealing with Special Entities[11], including municipal market issuers. Under the CFTC Business Conduct Standards, the Swap Dealer is required to have a reasonable basis to believe that you have a "qualified independent representative" for the swap that has, among other things, undertaken a duty to act in your best interests and to evaluate the pricing and appropriateness of the swap. The compliance date for the CFTC Business Conduct Standards is October 14, 2012. As further regulations under Dodd-Frank are finalized or become effective, the Swap Dealer is expected to be required to adopt additional processes or procedures. The [Underwriter] [Swap Dealer] reserves the right to supplement these disclosures or request certain additional representations from you and your qualified independent representative.

Role of the [Underwriter][Swap Dealer]. The [Underwriter][Swap Dealer] is acting solely as a principal, and not as your agent, advisor or fiduciary in connection with the swap. The [Underwriter][Swap Dealer] has not assumed a fiduciary responsibility in your favor with respect to the swap and nothing in the swap documents or in any prior relationship between you and the [Underwriter][Swap Dealer] creates an advisory, fiduciary or agency relationship between you and the [Underwriter][Swap Dealer] in respect of the swap (whether or not the Swap Dealer or any affiliate of the [Underwriter][Swap Dealer] has provided or is currently providing other services to you on related or other matters). In connection with the swap, the Swap Dealer is your arm's length contractual counterparty. The [Swap Dealer][Underwriter] has different financial interests than you do. You should determine, without reliance upon the [Underwriter][Swap Dealer] or any of its affiliates, the financial and economic risks and merits, as well as the legal, tax and accounting characterizations and consequences, of the swap and that you are capable of

[9] Include if applicable.
[10] Include if applicable.
[11] As such term is defined in Dodd-Frank and the CFTC Business Conduct Standards.

assuming such risks and should consult, to the extent you deem necessary, with your own legal, tax, accounting and financial advisors [qualified independent representative, municipal advisors] to determine whether the swap is in your best interest and make an independent analysis and decision to enter into the swap based on such advice. The [Swap Dealer] [Underwriter] is not expressing an opinion as to whether you should enter into a swap.

Assessing the Magnitude of Potential Exposure

In assessing the magnitude of your exposure on a swap, consideration should be given both as to the impact on your ongoing cash flow as well as the impact if the swap were to terminate at a time when you would be obligated to make a Termination Payment.

For example, your maximum exposure on each payment date under a fixed-payer swap is determined by assuming, as of a date of determination, that the floating rate is zero. The maximum exposure on each payment date would be equal to the fixed rate applied to the Notional Amount in respect of such payment period. Likewise, if such swap were terminated at such time as the swap floating rate was at or near zero, the Termination Payment could be substantial, and would approximate the present value of the fixed rate applied to the Notional Amount payable over the remaining term of the swap. In addition, if you have entered into the swap in connection with an issue of variable rate bonds, and there is a disruption in the market or some other event affects the rate on your variable rate bonds, you may be required to make maximum payments on the swap at a time when you are also required to make payments on the Bonds at or near their maximum rate. [*Delete the following sentence if the Issuer is not issuing VRDOs.*] [If you are contemplating entering into a swap in connection with your VRDOs, you should consider the financial risk considerations discussed in the SIFMA Model Risk Disclosures Pursuant to MSRB Rule G-17 related to Variable Rate Demand Obligations related to the magnitude of potential exposure on the VRDOs.]

For each product, add disclosure as applicable: [12]

OPTION 1: Fixed Payer Swap

OPTION 2: Fixed Receiver Swap

OPTION 3: Basis Swap

OPTION 4: Interest Rate Cap

OPTION 5: [Other Swaps]

[12] Include, as appropriate, a description [text, grid or other format] of the magnitude of the potential exposure of an issuer under market conditions unfavorable to an issuer, as to both regularly scheduled swap payments and swap termination payments.

sifma

Invested in America

AUGUST 2012

SIFMA Model Risk Disclosures Pursuant to MSRB Rule G-17

Tender Offers[1]

[THE FOLLOWING MODEL DISCLOSURE RELATING TO TENDER OFFERS IS INTENDED TO BE USED AS PART OF THE UNDERWRITER'S DISCLOSURE OF THE MATERIAL FINANCIAL CHARACTERISTICS AND RISKS OF A COMPLEX MUNICIPAL SECURITIES FINANCING THAT INCLUDES A TENDER OFFER. THIS DISCLOSURE MAY BE PROVIDED SEPARATELY OR ADDED TO ANY COMPLEX MUNICIPAL SECURITIES FINANCING DISCLOSURE THAT IS OTHERWISE BEING PROVIDED TO THE ISSUER IN CONNECTION WITH THE TRANSACTION.]

Financial Characteristics

The following is a general description of the financial characteristics of the proposed tender offer for the outstanding [DESCRIBE BONDS THAT WILL BE THE SUBJECT OF THE TENDER OFFER] (the Outstanding Bonds), as well as a general description of certain financial risks that are known to us and reasonably foreseeable at this time and that you should consider before deciding whether to proceed with the tender offer. If you have any questions or concerns about these disclosures, please make those questions or concerns known immediately to us. In addition, you should consult with your financial and/or municipal, legal, accounting, tax and other advisors, as applicable, to the extent you deem appropriate. DELETE THE FOLLOWING SENTENCE IF THE ISSUER HAS DETERMINED THE STRUCTURE OF THE TENDER OFFER: [If you decide that you would like to pursue the tender offer, we may provide you with additional information more specific to your particular tender offer.]

IF A CONDUIT ISSUE, ADD THE FOLLOWING (MODIFY AS NECESSARY TO REFLECT THE TERMS OF THE TRANSACTION): [As the issuer of the [DESCRIBE THE BONDS OR OTHER OBLIGATIONS THAT WILL FUND THE TENDER OFFER] (the New Bonds), you will be a party to the bond purchase agreement and certain other legal documents to be entered into in connection with the issuance of the New Bonds, but the material financial risks described below will be borne by the obligor, as set forth in those legal documents. A copy of our disclosure letter relating to the New Bonds and the tender offer is also being sent to the obligor.] [IF NOT A CONDUIT ISSUE, DELETE REFERENCES BELOW TO "THE OBLIGOR".]

Legal Framework

The tender offer will be an offer to purchase some or all of the Outstanding Bonds through a public offer to the holders of the Outstanding Bonds. The tender offer will be funded from the proceeds of the [New Bonds]/[IF NOT ALREADY DEFINED, DESCRIBE THE BONDS OR OTHER OBLIGATIONS THAT WILL FUND THE TENDER OFFER (the New Bonds)]. Among other circumstances, a tender offer can be an appropriate financial strategy where the outstanding tax-exempt bonds, such as the Outstanding Bonds, are not eligible for an advance

1 Under MSRB Rule G-17, the underwriters must provide an issuer with disclosures about complex municipal securities financings that they recommend to the issuer for a negotiated offering. A tender offer generally will be treated as a complex municipal securities financing.

refunding (either because those bonds have already been advance refunded or do not otherwise qualify for advance refunding under the federal tax rules) and are not eligible for a current refunding (under the federal tax rules, a current refunding means that the New Bonds are issued no more than 90 days prior to the redemption date of the Outstanding Bonds).

As market participants in connection with issuance of the New Bonds, we and you are subject to various laws and regulations, including anti-fraud provisions and Rule 10b-5 of the Securities and Exchange Commission (SEC). These anti-fraud provisions also apply to issuers, like you, engaging in a repurchase of outstanding debt, such as the Outstanding Bonds. In connection with corporate securities, there is also extensive regulation of tender offers through legislation, regulations issued by the SEC and various court cases. While these laws, regulations and court cases may not specifically apply to municipal securities, adherence to their principles generally is considered best practice to satisfy fair dealing obligations in the marketplace. The tender offer will constitute a firm offer to the market to purchase the Outstanding Bonds, subject to certain provisions and conditions. You should consult with your legal and financial professionals if you decide to proceed with the tender offer and in evaluating the legal framework for the tender offer and the exercise of conditions to a tender offer.

Third-Party Participants

Often a tender offer involves the engagement of certain third parties, such as an Information Agent or Tender Agent. These firms have specialized knowledge of the tender process for book-entry securities held through The Depository Trust Company (DTC), including the ability to help identify bondholders and to increase the expectation that necessary information relating to the tender offer will reach all bondholders in a timely manner. We have worked with several Information Agent firms and can provide suggestions on selecting a firm, but ultimately it is [your/the obligor's] decision whether to engage a third party or whom to engage relating to the tender offer.

Pricing of the Tender Offer

[USE THE FOLLOWING PARAGRAPH FOR A MODIFIED DUTCH AUCTION TENDER OFFER.] The tender offer is contemplated to be a modified dutch auction tender offer for a period of [__] business days. With a modified dutch auction tender offer, bondholders will submit Outstanding Bonds for tender at prices determined by them within a predetermined range that you set. The mechanism to determine clearing amounts and prices should be transparent to all participants and will be mechanical in nature.

[USE THE FOLLOWING PARAGRAPH FOR A FIXED PRICE TENDER OFFER.] The tender offer is contemplated to be a fixed price tender offer for a period of [__] business days. With a fixed price tender offer, bondholders electing to submit Outstanding Bonds for tender will do so at the price or prices that you determine at the time that the tender offer is publicly disseminated to the holders of the Outstanding Bonds. Subject to certain notice and timing requirements, you will have the ability to modify the fixed price or prices during the course of the tender offer, should you wish to do so.

The completion of the tender offer may be subject to certain conditions that you establish at the time that the tender offer commences. For example, depending on the nature of the tender offer and based on discussions with your counsel, you may elect not to complete the tender offer if certain events occur, such as war or escalation of hostilities, moratorium, bankruptcy, adverse legal proceedings, material default or a material change in the economics of the tender offer.

Role of the Dealer Manager
[You or the obligor have engaged us/If you or the obligor engage us] as dealer manager for the tender offer [and/,] we will perform the duties typical of a tender offer as provided in the Dealer Manager Agreement, to be executed by [you/the obligor] and us, as dealer manager. We maintain relationships with both investors and issuers/obligors and must balance those competing interests through the normal course of our business, including in connection with tender offers. [MODIFY OR DELETE THE FOLLOWING SENTENCES, AS APPLICABLE.] [We also have disclosed to you that one or more of our affiliates own Outstanding Bonds in an aggregate amount of $______ million [for our own account or as part of sponsored mutual funds]. In our roles as underwriter for the New Bonds and dealer manager for the tender offer, we have not engaged that affiliate in any manner related to this transaction and we anticipate engaging with them like we would any other investor or holder of Outstanding Bonds].

Financial Risk Considerations

Certain risks may arise in connection with a tender offer, including some or all of the following (generally, the obligor, rather than you, will bear these risks in connection with a tender offer for conduit revenue bonds):

Uncertainty of Results
The results of a tender offer can be uncertain. Since there is limited ability to communicate with investors prior to a tender offer, there may be a high degree of uncertainty as to the principal amount of the Outstanding Bonds that actually will be tendered for purchase. The level of participation cannot be known at the time the tender offer is launched and may affect the tender price or prices that you ultimately offer and pay. As a consequence, there is execution uncertainty with a tender offer.

Varying Impact on Particular Bondholders
A tender offer or the specific terms or financing structure may affect particular bondholders differently, including holders of the Outstanding Bonds or other bonds that are not part of the tender offer. This may affect the results of the tender offer. We are obligated to deal fairly with all investors.

Alternatives to the Tender Offer May be Better
The Outstanding Bonds mature [or are subject to mandatory tender for purchase] on [DATE] [INSERT THE FOLLOWING IF APPLICABLE] [and are callable (for refinancing or remarketing) beginning on [DATE]]. No assurances can be provided as to the ultimate financial effect of the tender offer and it is possible that you may obtain a better economic result if you simply wait and refinance or remarket the Outstanding Bonds on [DATE] rather than proceed with a tender offer.