



August 19, 2009

Elizabeth M. Murphy  
Secretary  
United States Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549-1090

Re: Comment Letter on Release No. 34-60359; File No. SR-MSRB-2009-08

Dear Secretary Murphy:

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> appreciates this opportunity to comment on a notice of filing with the Securities and Exchange Commission (“Commission”) of a proposed rule change by the Municipal Securities Rulemaking Board (“MSRB”) consisting of interpretive guidance on disclosure and other sales practice obligations to individual and other retail investors in municipal securities<sup>2</sup>. SIFMA is supportive of disclosure generally and efforts to increase investor confidence in the municipal securities market, but has some concerns regarding the proposed rule change.

#### Basic Investor Protection Obligation and Standards of Care

The Notice states in its preface that it relates to the obligations of dealers to individuals and other retail investors. As MSRB rules do not provide a definition for “individual and other retail investors”, SIFMA believes definitional clarification is necessary if the MSRB intends there to be heightened disclosure for certain subsets of customer trades. As currently written, MSRB rules define three types of entities that dealers can trade with: first, other dealers (inter-dealer trades); second, customers not qualified as a sophisticated municipal market professional

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<sup>1</sup> SIFMA, or the “Association”, brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA’s mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public’s trust and confidence in the markets and the industry. SIFMA works to represent its members’ interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

<sup>2</sup> Release No. 34-60359; File No. SR-MSRB-2009-08 (July 21, 2009), and MSRB Notice 2009-42 (July 14, 2009), collectively, the “Notice”.

(“SMMP”); and third, SMMPs. The second category, customers, includes individuals and other retail investors as well as institutional accounts who are not SMMPs. MSRB Rule G-17 states that municipal securities dealers shall deal fairly with all persons, and shall not engage in any deceptive, dishonest, or unfair practices. As currently written, MSRB Rule G-17 is not limited, and applies to both retail and institutional investors, with the exception that non-recommended trades to SMMPs are treated as inter-dealer trades.<sup>3</sup> In an inter-dealer transaction or an unsolicited transaction with an SMMP, the municipal securities dealer is not required to disclose material facts available from industry sources, as the counterparty dealer or SMMP already has access to established industry sources.

As noted in MSRB Notice 2009-42, many changes have occurred in the municipal securities industry since 2002, the most significant of which is the MSRB’s development of the Electronic Municipal Market Access (“EMMA”) System. All investors, retail and institutional alike, can now access information about municipal securities for free on the EMMA website. This information includes not only trade data, but also the official statement and continuing disclosure, including annual financial information and material event notices. Another development in the industry has been increased access to electronic trading platforms by retail and non-SMMP institutional investors. When retail and non-SMMP institutional investors engage in unsolicited transactions with electronic trading platforms or mere order takers, the SMMP standard of care should apply, as most or all of the material facts on municipal securities are now readily ascertainable for free on the EMMA website.

#### Access to Material Information in the Municipal Securities Market

As noted above, EMMA is a newly established industry source for information, and SIFMA fully hopes and expects that from the launch of the MSRB’s continuing disclosure service on July 1, 2009 forward, EMMA will have a comprehensive set of information about municipal securities. There remain, however, some outstanding issues regarding continuing disclosure for municipal securities. First, there is no central reliable source for all continuing disclosure prior to July 1, 2009. Indeed, this shortcoming was recognized and was the primary justification for the MSRB becoming the sole repository for municipal securities continuing disclosure information. Second, rating agencies do not publicize rating changes or reports in a public, uniform, real-time manner or note all CUSIP numbers that are impacted, making it very difficult to track all the respective securities affected by a ratings action. This issue is particularly acute when the ratings action applies to a liquidity provider, credit enhancement provider or conduit borrower. Third, given the large number of outstanding municipal issues, the industry relies on information service providers who are not regulated and who may have

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<sup>3</sup> MSRB Rule G-17 Interpretive Notice Regarding the Application of MSRB Rules to Transactions with Sophisticated Municipal Market Professionals, April 30, 2002.

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incorrect or incomplete data populated in their systems. Fourth, some financial guarantors, who are not in privity of contract with dealers, have been assigning their financial guaranty insurance policies to successor entities without informing issuers, investors or other market participants. These issues persist and lead to a threshold issue. The Rule G-17 Interpretive Notice Regarding Rule G-17, on Disclosure of Material Facts, states that customs and practices of the industry suggest that the sources of information generally used by a dealer may vary with the type of municipal securities.<sup>4</sup> Considering that EMMA is now not only the central source for trade prices, official statements and advance refunding documents, but is also now the sole repository for municipal securities continuing disclosure, SIFMA feels strongly that dealers should not have to check every possible established industry source. For most transactions, a check of EMMA and one other established industry source<sup>5</sup> for historical continuing disclosure information, rating information, and any other pertinent information should suffice.

Moreover, SIFMA is concerned that if disclosure obligations for secondary market trades are made comparable to primary market trades, which have a far longer timeframe for diligence and research, then this burden may impinge on the efficiency of the markets and may make dealers less willing to enter into trades with retail customers. Because of the wide range of information available through the internet, it is not possible to winnow the wheat from the chaff on all possible information in advance of making a retail secondary market trade, as you would in preparing the official statement for disclosure purposes for primary market trades.

#### Disclosure of Material Nonpublic Information

The Notice states that dealers must disclose not only information made available through established industry sources, but also material information they know about the securities even if such information is not then available from established industry sources. However, to comply with current SEC rules, dealer firms have policies and procedures on insider trading and information barriers which specifically prohibit such disclosure. A typical policy would state: buying or selling securities while in possession of material nonpublic information is prohibited, as is the communication of that information to others. If the information is not available from established industry sources, the information is not likely public information. Certain divisions or functions at dealer institutions, such as investment banking, frequently have ongoing business relationships with issuers that may expose them to material nonpublic information about a security or an issuer. Therefore, an information barrier is typically set up separating those divisions or functions that may have material nonpublic information from those trading securities, to avoid any appearance of insider trading or dealing. SIFMA promotes fair and

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<sup>4</sup> MSRB Rule G-17 Interpretive Notice Regarding Rule G-17, on Disclosure of Material Facts, March 20, 2002.

<sup>5</sup> This other established industry source is likely to be one of the four former NRMSIRs: Bloomberg L.P.; DPC Data Inc.; Interactive Data Corporation; or Standard & Poor's Securities Evaluations, Inc.

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competitive markets in which inappropriate use of material nonpublic information is not tolerated. Disclosing material nonpublic information to certain investors who are transacting in a security, but not all investors in a public manner, does not support these goals. Dealers need to be able to rely on the protections provided by customary systems of information barriers to avoid allegations of insider trading when in possession of material nonpublic information. The MSRB should clarify that it supports maintaining appropriate information barriers.

#### Disclosure of Complex Information in a Summary Form

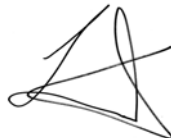
The proposed rules state that for variable rate demand obligations (“VRDO”), auction rate securities (“ARS”), or other securities for which interest payments may fluctuate, material facts requiring disclosure at time of trade would include a description of the basis on which periodic interest rate resets are determined. It is unclear, however, how detailed those disclosures must be pursuant to this requirement. Is it sufficient to tell the customer that a VRDO rate is set by the remarketing agent? For an ARS, the auction procedures are quite detailed and are set forth in the official statement or other publicly available documents, but are not quickly summarized. Likewise, any requirement by the dealer to summarize, at the time of trade, any material terms of the credit and liquidity facility, such as the termination provisions for a Standby Bond Purchase Agreement are likely problematic. First, dealers are not parties to the credit and liquidity facility agreements, and can only disclose what information they do have. Second, the provisions can be long and complex, and do not lend themselves to a quick summary at time of trade, but instead require a full review by the customer. Finally, the role of the remarketing agent in a VRDO transaction is typically set forth fully and clearly in the “Bondholders’ Risks” or another section of the official statement, and should be read in full by the investor. Requiring a dealer to summarize these provisions at the time of trade is not in the interest of investor protection, as it is in the best interest of the investor to read the full disclosure information prepared by counsel and available on these issues.

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Conclusion

We appreciate this opportunity to comment on this proposed rule change. If you have any questions concerning these comments, or would like to discuss these comments further, please feel free to contact the undersigned at 212.313.1130 or via email at [lnorwood@sifma.org](mailto:lnorwood@sifma.org).

Respectfully,

A handwritten signature in black ink, appearing to be 'L. Norwood', written in a cursive style.

Leslie M. Norwood,  
Managing Director  
and Associate General Counsel

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cc:    ***Securities and Exchange Commission***  
          Martha Mahan Haines  
          Mary Simpkins  
      ***Municipal Securities Rulemaking Board***  
          Lynnette Kelly Hotchkiss  
          Ernesto A. Lanza  
      ***Securities Industry and Financial Markets Association***  
          Municipal Executive Committee  
          Municipal Legal Advisory Committee