

September 6, 2013

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

Re: Response to Comments on File No. SR-MSRB-2013-05

Dear Ms. Murphy:

On June 17, 2013, the Municipal Securities Rulemaking Board (“MSRB”) filed with the Securities and Exchange Commission (“Commission”) a proposed rule change consisting of amendments to Rule G-11 (on primary offering practices), Rule G-8 (on books and records) and Rule G-32 (on disclosures in connection with primary offerings) (the “proposed rule change”).¹

The proposed rule change includes provisions to enhance communications between the senior managing underwriter and syndicate and selling group members during a primary offering of municipal securities and also includes provisions specifically addressing retail order periods.

The proposed rule change was published by the Commission for comment in the Federal Register on June 28, 2013 and the Commission received seven comment letters.² This letter provides the MSRB’s responses to these comments.

¹ See Exchange Act Release No. 69834 (June 24, 2013), 78 FR 39038 (June 28, 2013).

² See letters from Michael Nicholas, Chief Executive Officer, Bond Dealers of America (“BDA”) dated July 19, 2013; Dustin McDonald, Director, Federal Liaison Center, Government Finance Officers Association (“GFOA”) dated July 18, 2013; Dorothy Donohue, Deputy General Counsel, Securities Regulation, Investment Company Institute (“ICI”) dated July 19, 2013; Jeanine Rodgers Caruso, CIPFA and President, National Association of Independent Public Finance Advisors (“NAIPFA”) dated July 19, 2013; David L. Cohen, Managing Director, Securities Industry and Financial Markets Association (“SIFMA”) dated July 18, 2013; Robert J. McCarthy, Director of Regulatory Policy, Wells Fargo Advisors (“Wells Fargo”) dated July 19, 2013; and Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association and Dustin McDonald, Director, Federal Liaison Center, Government Finance Officers Association (“Joint Letter”) dated August 29, 2013.

The BDA, GFOA, SIFMA and Wells Fargo comment letters each support many different components of the proposed rule change, but each commenter expresses concerns about other aspects of the proposed rule change.

Definition of Retail Customer for Purposes of a Retail Order Period

GFOA, ICI and NAIPFA reiterate their previous comments that the MSRB should create a definition of “retail” for purposes of a retail order period. ICI further suggests that—within that definition—institutions trading on behalf of retail investors (such as funds) should be considered “retail.”

The MSRB appreciates that an issuer may choose from among many options (not all of which are summarized here) when deciding which eligibility criteria to select for orders submitted during its retail order period. For example, an issuer may decide to consider orders from a certain type of investor, such as a natural person, *i.e.*, an individual investor; a trust department acting on behalf of a natural person; or a registered investment adviser acting on behalf of a natural person. As another example, an issuer may accord priority to an order from a “local” investor, defined only by reference to the residency or domicile of the investor. An issuer may also choose to include an order from an institutional investor that represents a family foundation or trust or an order from a mutual fund. Alternatively, an issuer may simply impose an aggregate limitation on the total par amount of an order. Given the variety of potential factors and the breadth of issuers in the municipal market, the MSRB does not propose to create a definition of a “retail customer” in the proposed rule. The MSRB continues to believe that issuers should designate the eligibility criteria for their retail order periods on an issue-by-issue basis and that issuers should have the flexibility to choose the criteria that best suit their unique circumstances. Likewise, the MSRB does not propose any non-binding definition of a retail order as suggested by GFOA. Doing so may have the effect of skewing issuers’ selection of eligibility criteria, contrary to the MSRB’s intention in this rulemaking initiative that issuers have broad flexibility in this regard.³

The MSRB understands the concerns expressed by GFOA and NAIPFA regarding issuers that may not have the requisite experience developing eligibility criteria. The MSRB believes that an issuer who may not have experience conducting retail order periods may benefit from engaging a municipal advisor experienced in such matters to assist it in managing all of the various aspects of the primary offering process to help ensure that the issuer’s objectives for the offering will be met. This advice would include providing input to an issuer seeking to develop eligibility criteria for the retail order period.

NAIPFA expresses concerns about underwriters providing advice to issuers on developing eligibility criteria. The MSRB notes that the proposed rule change does not alter this baseline activity of underwriters vis-à-vis issuers in establishing criteria for retail order periods, and NAIPFA has not demonstrated how the status quo of having no standard definition of “retail

³ The discussion of mere examples here of eligibility criteria that might be used is not intended to suggest that issuers use any particular criteria.

customer” is violative of either Rule G-23 or G-17. NAIPFA also expresses concerns about an underwriter’s ability to manipulate the marketing process in order to be engaged by the issuer. The substance of this comment does not speak to the specifics of the proposed rule change, which simply seeks to reinforce dealer compliance with the terms of a retail order period. NAIPFA expresses concern that the MSRB’s view of the benefits of the proposed rule change cannot be evaluated because the MSRB has not proposed a uniform definition of “retail” for purposes of the rule. NAIPFA cites the Commission notice, which recounts the MSRB’s statement that “[r]etail investors will benefit from the proposed rule change because they will have greater access to bonds sold in the primary market.” This statement, in context, however, referred to the immediately preceding sentence, which stated that the proposed rule change would benefit “‘retail’ investors that *issuers have determined* should have the opportunity to compete to buy their bonds in the primary market.” The MSRB believes that the proposed rule change will benefit those investors that meet issuer’s eligibility criteria for retail orders because orders from dealers will be more likely to comply with the issuer’s eligibility criteria for participation in the retail order period. In addition, regulatory authorities will have additional tools to enforce compliance with Rule G-11.

As an alternative to imposing eligibility criteria for retail order periods, the MSRB plans, as stated in its previous filing, to develop educational materials concerning retail order periods that would assist issuers in their development of such criteria.

Representations and Required Disclosures about Each Order

Wells Fargo raises privacy concerns with respect to the requirement on dealers to submit identifying information related to retail orders. BDA, SIFMA and Wells Fargo suggest that certain provisions of the proposed rule are unnecessarily burdensome or prescriptive either with regard to the information itself or because of concerns regarding the process by which the information would be submitted.

The MSRB has previously responded to substantially similar comments, including those received pursuant to requests for comment,⁴ as detailed in the MSRB’s initial filing of the proposed rule change.⁵ With regard to the requirement to submit identifying information required by the issuer, the MSRB believes that issuers should be given the tools to verify orders for their municipal securities. The MSRB is aware of the responsibilities imposed on dealer firms to protect customer information. The MSRB notes that these obligations apply both to dealers that may supply customer information and to syndicate managers that must safeguard information supplied to them. The MSRB does not believe that the various regulations that address the protection of customer specific information prohibit regulatory authorities from requiring dealers to provide specific customer information to advance a legitimate regulatory objective. The MSRB believes that issuers will be sensitive to such concerns and will similarly

⁴ See MSRB Notice 2012-13 and MSRB Notice 2012-50.

⁵ See Exchange Act Release No. 69834 (June 24, 2013), 78 FR 39038 (June 28, 2013).

respect the privacy of customer information. Moreover, issuers should be open to modifying, at a dealer's request, a specific information requirement if a dealer can demonstrate legitimate customer privacy concerns or that capturing such information may violate applicable laws.

The MSRB continues to believe that the amount of customer specific information that is required by the proposed rule change is not a significant increase in the amount of information that dealers routinely collect and submit at the present time. And again we note that in response to one of the MSRB's earlier requests for comment, GFOA and NAIPFA who may represent the interests of issuers in this regard, are generally supportive of the requirement to provide additional information about each order.

The MSRB understands but disagrees with SIFMA's suggestion that the MSRB select the least burdensome approach for dealers and revise the proposed rule to allow dealers to make a single representation that each order meets the requirements of Rule G-11(k) by virtue of submitting an order designated as "retail" during the retail order period and to allow these representations to be made in either the master agreement among underwriters or the selling group agreement. Such a rule would be effectively aligned with what is done today. In requiring order by order information, the MSRB is highlighting the importance of submitting (as retail orders) only orders that meet the issuer's eligibility criteria. In practice, the diligence necessary for a dealer to provide a blanket statement is likely to approximate, if not exceed, the requirements set forth in the proposed rule change. The MSRB intends that dealers who submit orders either using software purchased from a third party vendor or otherwise exert the requisite care and attention to each order in order to deliver the type of orders that comply with the issuers' preferences.

SIFMA suggests that another alternative to the proposed rule would be that dealers be required to separately inform the syndicate manager in writing if any order does not comply with the provisions of Rule G-11(k)(i), (ii), or (iii). The MSRB believes that a dealer should not submit an order that does not comply with the applicable provisions of Rule G-11(k).

Definitions of Going Away Orders and Retail Order Period

GFOA and SIFMA recommend that the MSRB delete all references to "going away orders." In GFOA's view, the usage in the proposal is not consistent with the commonly accepted meaning of the term.⁶ GFOA acknowledges that the MSRB's definition of going away orders would suffice to eliminate orders for dealer inventory made during a retail order period—which is one of the potential abuses that the proposed rule change is intended to address. GFOA nevertheless suggests the proposed rule change should be revised so that only "*bona fide*" customer orders would be permitted during a retail order period, based on GFOA's view that those customers that sell bonds quickly should not be allowed to participate in a retail order

⁶ SIFMA reiterated its concern with the definition of going away orders and suggests that in lieu thereof, the definition of retail order period should reference the term "*bona fide* orders" in light of the policy goal that only submission of *bona fide* customer orders is permissible.

period. In GFOA's view, the orders of "ultimate investors," and not "intermediate investors," are the only "*bona fide*" customer orders that should be permitted during a retail order period. The MSRB has not incorporated SIFMA's recommendation to substitute the term *bona fide* for "going away" in the definition of retail order periods because it is not sufficiently precise. In response to this comment, the MSRB proposes to eliminate the term "going away order" and instead directly employ the previously proposed definition language. The MSRB proposes to revise Rule G-11(a) to delete what had been subsection (xii) and would also revise Rule G-11(k)(ii) so that it reads "whether the order is one for which a customer is already conditionally committed." The MSRB believes that, under that language, orders for dealer inventory would not be allowed.

The MSRB has not adopted GFOA's recommendation to use the term "*bona fide*" for several reasons. First, the use of the "*bona fide*" concept to attempt to categorize customers that are likely to hold the bonds rather than sell them quickly would lead to a highly subjective inquiry. Indeed, it is unclear under the proposal where the line might be drawn between "intermediate" investors and "ultimate" investors. Moreover, it is not a goal of the proposed rule change to prescribe a holding period in order to participate in a retail order period, nor has the MSRB undertaken an assessment of whether such a requirement would be consistent with the promotion of a free and efficient market. We note nevertheless that, to the extent consistent with all applicable laws and regulations, issuers have discretion to establish customer eligibility criteria to define the customers that they would like to participate in a retail order period. We also note that issuers can enlist the assistance of dealers in identifying customers that are eligible or ineligible under the issuer's criteria, and issuers also may audit customer orders.

In addition, the GFOA comment letter raises the question of whether the proposed rule change applies retail order period protections when retail orders are given priority over orders from other customers. This could occur, for example, when there is one order period and orders from both "retail" and institutional customers are solicited. The MSRB wishes to emphasize that the definition of "retail order period" in the proposed rule change should be flexible to accommodate an order period that runs concurrently as well as sequentially. In the original proposed rule change, the term "issuer's designated eligibility criteria" was intended to be a broad term that may encompass an issuer's decision generally to give priority to retail orders. Accordingly, the MSRB proposes to amend the original proposed rule change which was originally filed with the Commission on June 17, 2013 and revise the definition of the term "retail order period" in Rule G-11(a)(vii) and to revise Rule G-11(k) to clarify that in each case dealers would be required to submit the additional information and make the required representations provided in Rule G-11(k) in the case of orders designated as retail submitted during the retail order period.

The Joint Letter from SIFMA and GFOA, prior to the filing of the proposed amendment, expresses concerns about the possibility that the amendment would change the original proposal in significant ways that would be controversial and substantially impact numerous entities in the municipal securities market. Among various technical changes, the only substantive change in the proposed amendment is proposed by the MSRB in response to one of GFOA's suggestions to clarify that the new protections would apply to periods that run concurrently. The thrust of the

original proposed rule change was to enhance the regulation of customer orders meeting an issuer's eligibility criteria. Because those criteria have application in both sequential and concurrent order periods, the MSRB agrees with GFOA that it is desirable to make this coverage explicit. The MSRB, however, does not believe this refinement itself is significant or likely to result in controversy, in light of the stated goal of the original proposal.

Approval by the Issuer of Terms and Conditions when Prepared by the Senior Syndicate Manager

SIFMA objects to the proposed rule change's requirement that an issuer approve the written statement of all terms and conditions when that statement is prepared by the senior syndicate manager rather than the issuer. Rule G-11 currently provides that a statement of terms and conditions prepared by the senior syndicate manager shall be provided to the issuer but does not specifically require approval by the issuer. The MSRB believes this new requirement is desirable to fulfill the intention that issuers understand their role and choices with respect to the syndicate process.

Effective Dates for the Proposed Rule Change

Wells Fargo recommends that the MSRB synchronize the effective date for the proposed amendments to Rules G-8 and G-11 with the later effective date for the proposed amendments to Rule G-32 (not later than March 31, 2014). The MSRB agrees that the effective dates for the proposed amendments to Rules G-8 and G-11 can be synchronized with the later effective date for Rule G-32 to a date after approval of the proposed rule change by the Commission but not later than March 31, 2014.

Educational Materials

The MSRB appreciates comments provided by BDA in each of its comment letters regarding the content of educational materials to assist issuers in administering retail order periods. The MSRB plans to develop such materials and will continue to solicit and incorporate input from issuers in that process.

Should you have any questions, please do not hesitate to contact me or Kathleen Miles at (703) 797-6600.

Very truly yours,

A handwritten signature in blue ink, appearing to read "M. Post", with a stylized flourish at the end.

Michael L. Post
Deputy General Counsel