

January 14, 2014

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20540-1090

Re: Response to Comments on SR-MSRB-2013-07

Dear Ms. Murphy:

On September 17, 2013, the Municipal Securities Rulemaking Board (“MSRB”) filed with the Securities and Exchange Commission (“SEC”) a proposed rule change consisting of proposed MSRB Rule G-47, on time-of-trade disclosure obligations; proposed revisions to MSRB Rule G-19, on suitability of recommendations and transactions; proposed MSRB Rules D-15 and G-48, on sophisticated municipal market professionals (“SMMPs”); and the proposed deletion from the Rule Book of interpretive guidance that is being codified by these rule changes (the “proposed rule change”).¹ The SEC published the proposed rule change for comment in the Federal Register on October 1, 2013² and received two comment letters.³ This letter responds to the comments, which are substantially similar to previous comments from SIFMA and ICI on the

¹ On September 26, 2013, after the MSRB filed the proposed rule change with the SEC, the MSRB publicly announced its adoption of a policy to more formally integrate the use of economic analysis in MSRB rulemaking. By its terms, the policy does not apply to rulemaking initiatives, like the proposed rule change, that were initially presented to the MSRB Board of Directors before September 26, 2013. The MSRB has, however, historically taken account of the costs and burdens of its rulemaking initiatives, including those associated with the proposed rule change. Significantly, the proposed changes related to time-of-trade disclosure and SMMPs involve no substantive change to existing requirements.

² See Exchange Act Release No. 70593 (Oct. 1, 2013).

³ Comment letters were submitted by the Investment Company Institute (“ICI”) and the Securities Industry and Financial Markets Association (“SIFMA”).

related MSRB requests for comment⁴ that are addressed in the proposed rule change, fully incorporated here by reference.

Although the two commenters suggest that the MSRB modify the proposed rule change in some respects, they continue to generally support the rulemaking initiative. SIFMA states that it continues to support the efforts by the MSRB to provide clarity to regulated entities by reorganizing or eliminating certain interpretive guidance associated with MSRB Rule G-17 and developing new or revised rules that highlight core principles. SIFMA further states that it supports the MSRB's efforts to harmonize MSRB Rule G-19 with FINRA Rule 2111 on suitability. ICI similarly states that it supports the MSRB's efforts to harmonize MSRB Rule G-19 with FINRA Rule 2111 and incorporate related suitability guidance into the rule.

Comments on Proposed Rule G-47

Retention of Existing Time-of-Trade Disclosure Interpretive Guidance

As part of the proposed rule change, as noted, the MSRB proposes to delete from its Rule Book the interpretive guidance on time-of-trade disclosure that would be superseded by the codification into rules of the substance of that guidance. Among the purposes of this codification are the streamlining of the MSRB's Rule Book and the promotion of regulatory efficiency. SIFMA states that all existing time-of-trade interpretative guidance should be archived and preserved. SIFMA additionally notes that the interpretive guidance should remain accessible for examination and enforcement purposes because it governs conduct until the effective date of the proposed rule change.

The MSRB understands these concerns and, to address them consistent with the purposes of this rulemaking initiative, the MSRB will archive on its website all of the existing guidance that is to be deleted from the Rule Book in connection with the proposed rule change. To the extent that past interpretive guidance does not conflict with any MSRB rules or interpretations thereof, it remains potentially applicable, depending on the facts and circumstances of a particular case. To preserve the guidance at issue in the Rule Book itself, however, would undermine the MSRB's goal to provide streamlined rule language.

Requests to Make Substantive Changes to the Proposed Rule

⁴ SIFMA submitted comments in response to MSRB Notice 2013-04 (Feb. 11, 2013) (requesting comment on a proposed rule that would codify the time of trade disclosure obligation of dealers currently described in interpretive guidance to MSRB Rule G-17), MSRB Notice 2013-07 (Mar. 11, 2013) (requesting comment on proposed revisions to MSRB Rule G-19), and MSRB Notice 2013-10 (May 1, 2013) (requesting comment on proposed rules that would streamline and codify existing guidance regarding the application of MSRB rules to transactions with SMMPs currently set forth in interpretive guidance to MSRB Rule G-17). ICI also submitted comments in response to MSRB Notice 2013-07 (Mar. 11, 2013).

Several of SIFMA's comments on proposed Rule G-47 request substantive changes to existing requirements, as detailed below. As the MSRB explained in its initial notice, entitled "Request for Comment on Codifying Time of Trade Disclosure Obligation," the overall objective of the rule change is limited in scope. The Request for Comment stated that "the codification of the interpretive guidance into a rule is not intended to substantively change the time of trade disclosure obligation."⁵ Because each of these comments would require that the MSRB substantively change the obligation, they are beyond the scope of this rulemaking initiative and may be considered by the Board as part of a future, substantive initiative.

First, SIFMA states that proposed Rule G-47 should reflect that a substantially different time-of-trade disclosure obligation exists when a dealer's customer is selling a bond as compared to when the customer is purchasing a bond. As explained in the proposed rule change, the MSRB proposes to retain the existing disclosure requirement when a dealer's customer is selling a bond. To address SIFMA's concern, to the extent possible within the scope of this rulemaking initiative, the MSRB previously added rule language to clarify that whether the customer is purchasing or selling is a factor that can be considered in making the determination as to what information is material and therefore must be disclosed by the dealer. This guidance is consistent with the MSRB's existing interpretive guidance, under which the scope of what is material depends upon a facts and circumstances analysis. In addition, the MSRB believes this change addresses SIFMA's concern that other regulators will expect dealers to conduct the same research and make the same disclosure to customers regardless of whether the customer is purchasing or selling a municipal security.

Notwithstanding this change, SIFMA requests that proposed Rule G-47 be "further modified with the inclusion of supplementary material" that explains that purchases and sales by customers involve "substantially different" time-of-trade disclosure obligations. Fulfilling this request, however, would involve a substantive change to the current disclosure obligations. SIFMA suggests that the obligations should be substantively different because the MSRB's more recent interpretive guidance has primarily focused on purchases by customers. But, as explained in the proposed rule change, earlier guidance addresses both purchases by customers *and* sales by customers, and nothing in the more recent guidance purports to change the previous guidance in this regard.⁶ Moreover, the application to both types of transactions is in accord with the text of Rule G-17 itself, which provides that the duty of fair dealing applies to each dealer "[i]n the conduct of its municipal securities . . . activities," without suggesting any distinction between a

⁵ See MSRB Notice 2013-04 (Feb. 11, 2013).

⁶ Even very recent guidance makes clear that the obligation applies to both types of transactions. See, e.g., *MSRB Answers Frequently Asked Questions Regarding Dealer Disclosure Obligations Under MSRB Rule G-17* (Nov. 30, 2011) ("Importantly, dealers must implement processes to ensure that material information regarding municipal securities is disseminated to their registered representatives who are engaged in sales *to and from customers.*") (emphasis added).

dealer's purchases or sales.⁷ The previous guidance is also in accord with the MSRB's general statement in the context of time-of-trade disclosure—although certain guidance may have focused on dealers' sales—that Rule G-17 applies to “all transactions in municipal securities.”⁸

Second, SIFMA opposes the elimination of interpretive guidance based on which “SIFMA believes that providing access to a [preliminary official statement], whether on EMMA or some other electronic platform, through a customized hyperlink, . . . can satisfy a dealer's time of trade obligation for new issues of municipal securities.”⁹ As explained in the proposed rule change, existing guidance does not state that providing mere *access* to a preliminary official statement, or even to all material information regarding a security and transaction, would be sufficient, and the adequacy of a means of disclosure depends on the “particular facts and circumstances present.”¹⁰ The principles embodied in the cited guidance are sufficiently codified in proposed Rule G-47. To alter the proposed rule to codify SIFMA's particular reading of that guidance would involve a substantive change to current requirements.¹¹ In any event, the existing guidance, although to be deleted from the Rule Book, will be archived on the MSRB's

⁷ Rule G-17; see *Restated Interpretive Notice Regarding the Application of MSRB Rules to Transactions with Sophisticated Municipal Market Professionals* (July 9, 2012) (“This interpretive notice . . . does not alter the basic duty to deal fairly, which applies to *all transactions* and all customers.”) (emphasis added); *Guidance on Disclosure and Other Sales Practice Obligations to Individual and Other Retail Investors in Municipal Securities* (July 14, 2009) (“All activities of dealers must be viewed in light of these basic principles [under Rule G-17], regardless of whether other MSRB rules establish additional requirements on dealers.”) (emphasis added).

⁸ *MSRB Reminds Firms of Their Sales Practice and Due Diligence Obligations when Selling Municipal Securities in the Secondary Market* (Sept. 20, 2010).

⁹ SIFMA letter at 6.

¹⁰ See, e.g., *Interpretive Notice Regarding Rule G-17, on Disclosure of Material Facts* (Mar. 30, 2002), at n.7.

¹¹ See, e.g., *MSRB Answers Frequently Asked Questions Regarding Dealer Disclosure Obligations Under MSRB Rule G-17* (Nov. 30, 2011) (“Dealers operating electronic trading or brokerage systems have the same obligations to disclose material information as other dealers.”); *MSRB Reminds Firms of Their Sales Practice and Due Diligence Obligations When Selling Municipal Securities in the Secondary Market* (Sept. 20, 2010) (“The MSRB has also noted that the fact that material information is publicly available through EMMA does not relieve a firm of its duty to specifically disclose it to the customer at the time of trade”); *id.* (“Importantly, the dealer may not simply direct the customer to EMMA to fulfill its time-of-trade disclosure obligations under Rule G-17.”).

website and, as noted, potentially applicable to the extent it does not conflict with any MSRB rules or interpretations thereof, depending on the facts and circumstances of a particular case.

Third, SIFMA recommends that the MSRB clarify that information barriers are not required to be breached by dealers in order to disclose “material information.” As the MSRB stated in the proposed rule change, the MSRB is not proposing to substantively revise the current time-of-trade disclosure obligations. Rather, the MSRB seeks to codify them. The MSRB understands the issue raised by SIFMA and, as noted, can consider this type of clarification in the future.

Finally, SIFMA requests that the MSRB state that time-of-trade disclosures do not need to be made to customers who hold discretionary accounts. SIFMA, however, does not suggest that the current guidance contains any such exception to the disclosure obligation. This request would require that the MSRB substantively change the current requirements.

In sum, these comments request substantive changes to existing requirements, which are beyond the scope of this rulemaking initiative. These comments may be considered by the Board as part of a future, substantive initiative.

Comments on Proposed Revisions to Rule G-19

With respect to the proposed revisions to harmonize Rule G-19 with FINRA’s existing suitability rule,¹² SIFMA states that an implementation period of at least one year is needed. As the MSRB explained in the proposed rule change, it does not believe such a lengthy implementation period is necessary, noting that the revised rule would largely be consistent with FINRA’s suitability rule, with which many dealers already are familiar. We note that SIFMA urged the MSRB in February of 2013 to harmonize Rule G-19 with FINRA’s suitability rule, as proposed here.¹³ To address this implementation concern, however, the MSRB believes that an extension of the effective date for the proposed rule change of an additional 60 days, to total 120 days following the date of SEC approval, is appropriate.

¹² As explained in the proposed rule change, existing Rule G-19(d), on discretionary accounts, would no longer be included in the harmonized rule as the FINRA rule does not contain a counterpart to the provision. MSRB staff plans to recommend that the Board consider adopting a separate rule addressing discretionary accounts. We note that dealers owe their customers a duty of fair dealing under MSRB Rule G-17 with respect to any transactions they effect in municipal securities with or for any discretionary account.

¹³ See Letter dated February 19, 2013 from David L. Cohen, Managing Director, Associate General Counsel, Securities Industry and Financial Markets Association, to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board, *available at* <http://www.msrb.org/RFC/2012-63/sifma.pdf>.

In its comment letter, ICI recommends that the MSRB codify all suitability guidance concerning 529 college savings plans into Rule G-19. ICI notes that it made this recommendation in response to the MSRB's request for comment, and the MSRB declined. ICI then states that the SEC's published notice does not include "any rationale to explain the basis for the MSRB's determination."¹⁴ The notice (including the sections prepared by the MSRB), however, specifically explains that the guidance at issue is not proposed to be codified in Rule G-19 because the MSRB may create a separate rule addressing 529 plans in the future, and the relevant guidance will remain intact until such time as the MSRB may adopt such a rule.¹⁵ ICI previously has requested that the MSRB even more clearly specify which MSRB rules apply to 529 plans, and such a future rule dedicated to 529 plans could help address this request. In any event, all of the independent improvements associated with the proposed rule change should not be delayed pending such future rulemaking determinations and processes.

Comments on Proposed Stand-Alone SMMP Rule G-48

SIFMA expresses concerns that dealers' modified duties to SMMPs in the proposed stand-alone Rule G-48 should instead be reflected within the rules governing dealers' obligations to non-SMMP customers. SIFMA notes that the analogous institutional account exemption to FINRA's suitability rule is organized within the FINRA rule, and would prefer that the same organization be followed in Rule G-19.¹⁶ Additionally, SIFMA states that the absence of the modification of time-of-trade disclosure obligations to SMMPs in proposed Rule G-47 risks regulatory confusion.¹⁷

As the MSRB stated in the proposed rule change, however, one of the benefits of adopting stand-alone rules is to make them more prominent and easier for dealers and other market participants to locate. The proposed stand-alone SMMP rule would address dealers' modified duties in multiple areas and under multiple rules, including Rule G-19 and proposed Rule G-47, as well as some that are not part of this rulemaking initiative. The MSRB believes that a stand-alone rule describing the relief in these multiple areas available to dealers who do business with SMMPs will provide greater clarity to dealers regarding their obligations. Furthermore, in the future the MSRB may modify other current (or newly created) dealer obligations when dealers are doing business with SMMPs. These kinds of modification could be accomplished simply by amending the stand-alone SMMP rule from time to time, making this approach an efficient means for organizing these types of provisions.

Alternatively, SIFMA states that Rules G-19, G-47 and G-48 should cross reference each other to further the MSRB's objective to provide clarity to market participants about dealer

¹⁴ ICI letter at 2.

¹⁵ See Exchange Act Release No. 70593 (Oct. 1, 2013), at 45-46 and nn. 6, 34 and 48.

¹⁶ SIFMA letter at 5.

¹⁷ *Id.*

Elizabeth M. Murphy
January 14, 2014
Page 7

obligations to SMMPs. This comment was considered following the MSRB's publication of its request for comment and, as stated in the proposed rule change, it is the MSRB's judgment, as a matter of the technical organization or structure of its Rule Book, that such cross-references are unnecessary.

If you have any questions regarding this matter, please contact me at (703) 797-6600.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Post', with a stylized flourish extending to the right.

Michael L. Post
Deputy General Counsel