



October 23, 2014

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

Re: **MSRB Notice 2014-16 (September 8, 2014): MSRB Seeks Input on Strategic Priorities**

Dear Mr. Smith:

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> appreciates the opportunity to comment on the Municipal Securities Rulemaking Board’s (“MSRB”) Regulatory Notice 2014-16, “MSRB Seeks Input on Strategic Priorities.” We believe it is appropriate for the MSRB to seek comment on its strategic priorities for the coming year, and we appreciate the opportunity to present our views.

Notice 2014-16 poses several questions in the context of the MSRB’s four key strategic goals: municipal advisor (“MA”) regulation, municipal entity protection, market efficiency and price transparency. Our comments cover all four of these areas and also offer recommendations on MSRB governance issues that relate closely to the execution of initiatives under the strategic goals. We also propose the addition of a fifth strategic goal: reduce the cost of regulatory compliance.

## **I. Municipal Advisor Regulation**

A key initiative for the MSRB in 2015 will be the execution of rulemaking projects that will bring previously unregulated non-dealer municipal advisors under full and appropriate regulatory oversight. SIFMA has provided and will continue to provide specific

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<sup>1</sup> 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).

comments on these initiatives as they move through the rulemaking process as they are important to our members.<sup>2</sup> In general, we believe the MSRB's focus with regard to MA regulation should be to establish on an expedient basis a set of regulations that protects issuers and regulates dealer and non-dealer MAs equally.<sup>3</sup> It is especially important that MA regulations do not impose superfluous or duplicative obligations on dealer MAs. It has been over four years since the Dodd-Frank Act establishing MA regulation was enacted, yet key elements of MA regulation, like professional qualification testing, still appear to be years away from full implementation.

On the issue of professional qualification testing, as we have advocated before, in the interest of issuer protection, SIFMA urges the MSRB to begin administering the Series 52 or 53 exam to all MAs now. We believe that these exams cover the vast majority of topics and issues that apply to practicing MAs. Waiting until a separate MA exam is fully developed means that some issuers will continue to be exposed to unqualified MAs serving in roles as fiduciaries and providing advice on important financial transactions and decisions. The mere development and requirement of a separate test would be an additional cost not only to the MSRB, but to the industry.

SIFMA urges the MSRB to consider requiring MAs, when they are engaged on competitive municipal primary offering transactions, to certify that issuers are in compliance with continuing disclosure agreements (CDAs) on previous bond transactions. It appears from the market's experience with the SEC's ongoing Municipalities Continuing Disclosure Cooperation Initiative that there have been many instances in recent years where offering documents incorrectly stated that issuers were in compliance with previous CDAs. While we believe this issue has largely been corrected, it would still be a useful function for issuers

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<sup>2</sup> See letter from Leslie Norwood to Ronald Smith, September 30, 2014 (SIFMA Submits Comments to MSRB on Draft Amendments to MSRB Rule G-37), available at <http://www.sifma.org/issues/item.aspx?id=8589951268>; See also Letter from Leslie Norwood to Ronald Smith, August 25, 2014 (SIFMA Submits Comments to MSRB on a Revised Draft Proposal for MSRB Rule G-42 Regarding Duties of Non-Solicitor Municipal Advisors) available at <http://www.sifma.org/issues/item.aspx?id=8589950587>; See also Letter from David L. Cohen to Elizabeth Murphy, August 21, 2014 (SIFMA Submits Comments to SEC on MSRB Proposed New Rule G-44 on Supervisory and Compliance Obligations of Municipal Advisors, Draft Amendments to MSRB Rules G-8 and G-9), available at <http://www.sifma.org/issues/item.aspx?id=8589950531>; See also Letter from David L. Cohen to Elizabeth Murphy, May 21, 2014 (SIFMA Submits Comments to the SEC on New MSRB Rule A-11 Establishing Fees for Municipal Advisor Professionals), available at <http://www.sifma.org/issues/item.aspx?id=8589949239>; See also Letter from Leslie Norwood to Ronald Smith, May 16, 2014 (SIFMA Submits Comments to the MSRB Regarding Proposal on Establishing Professional Qualification Requirements for Municipal Advisors), available at <http://www.sifma.org/issues/item.aspx?id=8589949179>.

<sup>3</sup> Kenneth Bentsen, Jr., Commentary: *Regulation of MAs: Bring it On*, The Bond Buyer, July 31, 2014, available at <http://www.bondbuyer.com/news/commentary/commentary-regulation-of-mas-bring-it-on-1064851-1.html>.

and investors to assign responsibility for certifying CDA compliance, particularly on competitive sales, where the underwriter plays no role in planning or structuring the transaction. As fiduciaries to issuers and as regulated entities, MAs are in the best position to serve this role.

Finally, it is important to consider the MSRB's fee structure in the context of MA regulation. Between 2010 and 2013, MSRB revenues increased 73 percent from \$22.7 million to \$39.3 million. Much of that revenue is associated with new and increased taxes imposed by the MSRB on dealer trading activity in the form of increased transaction and technology fees. During that same period, the MSRB's cash and liquid investments increased 165 percent from \$17.9 million to \$47.4 million.

Trends in MSRB finances raise several issues. First, we do not believe the MSRB has done enough to balance the burden of supporting the cost of the MSRB's activities between dealer members and non-dealer municipal advisor members<sup>4</sup>. It is vital that the MSRB find a means of taxing all industry members in an appropriately balanced manner to ensure that each segment of your membership pays its fair share of your expenses. We believe the MSRB should undertake an across-the-board evaluation of your financing model and consider alternatives that would ensure that non-dealer municipal advisors pay their fair share. Moreover, the non-dealer advisors should be expected to bear the expense of not just their particularized regulatory initiatives and activities, but also of other resource-intensive Board initiatives like the "Central Transparency Platform" and improvements to the EMMA system from which they benefit.

Second, we question the propriety of accumulating such a large level of liquid assets derived from industry resources. We understand that the MSRB intends to make substantial investments in technology upgrades in the future. We also recognize and commend the MSRB for refunding \$3.6 million in technology fees in August. Perhaps it is time to suspend collection of the technology fee altogether.

## **II. Municipal Entity Protection**

The Dodd-Frank Act provides the MSRB with limited authority to impose rules for the purpose of the protection of municipal entities. In general, we believe the MSRB should use its authority in this area judiciously and in the context in which it was granted<sup>5</sup>. While

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<sup>4</sup> In the fiscal year that ended September 30, 2013, dealers paid to the MSRB in excess of \$33.8 million – representing 86 percent of MSRB revenues.

<sup>5</sup> See Securities Exchange Act 15B(b)(2) (as revised): "The Board shall propose and adopt rules to effect the purposes of this title with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers and advice provided to or on behalf of municipal entities or obligated persons by brokers, dealers, municipal securities dealers, and municipal advisors with respect to municipal financial

the level of sophistication of municipal entities varies widely, those charged with managing the finances of state and local governments are professionals, and MSRB rules with regard to municipal entity protection should reflect that reality. In general, we believe the MSRB's core mission is and should be focused on investor protection and the issuance and trading of municipal securities.

Before undertaking new initiatives focused on municipal entity protection, we believe the MSRB should take reasonable steps to ensure that the issuer community at large actually wants the protection the MSRB is considering providing. From our experience with municipal advisor regulation, for example, at least some issuers view the "protections" provided by MA regulation as paternalistic and unnecessary. Some issuers have lost access to services that they would have otherwise had, absent regulation. The MSRB should seek to avoid similar outcomes.

Also, we believe the MSRB should consider a "sophisticated municipal entity and obligor" exclusion from some rules focused on municipal entity protection, as appropriate, just as there is a "sophisticated municipal market professional" (SMMP) which allow for modified investor protection rules. We believe a similar structure applied to sophisticated issuers and obligors would be appropriate and welcome.

### **III. Price Transparency and EMMA**

We believe the Electronic Municipal Market Access (EMMA) system is a successful product and we believe it contributes significantly to the transparency and efficiency of the market. Still, we believe there are steps the MSRB could take to make the system better still:

- Publish usage statistics. It would be of great value and would be in the interest of transparency for the MSRB to publish detailed statistics on EMMA usage, including usage by retail investors, professional investors, dealers, MAs, issuers and others,

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products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors. The rules of the Board, as a minimum shall: . . . (C) be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, *and, in general, to protect investors, municipal entities, obligated persons, and the public interest; and not be designed to permit unfair discrimination among customers, municipal entities, obligated persons, municipal securities brokers, municipal securities dealers, or municipal advisors, to fix minimum profits, to impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by municipal securities brokers, municipal securities dealers, or municipal advisors, to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the Board, or to impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title.*" (emphasis added).

free Web-based usage versus paid subscribers, etc. to the extent it is discernible. Usage statistics would help demonstrate the value the market receives from the substantial investment the dealer community has made in the platform and would help gauge and prioritize which enhancements to the system would be of most value.

- Improve user experience and navigation. EMMA could be better organized to help retail investors find relevant and useful information quickly, particularly for issuer disclosure information. For example, the file names for many issuer disclosure documents bear no relation to their content and are difficult for a layman to discern. Additionally, consider adding print and e-mail functionality for the trading activity tools: Trade Summary, Trade Details, Trade Price and Yield Graphs, and Price Discovery Tool.
- Add new content. Adding new features to EMMA could assist in compliance of securities regulations by dealers and other market participants. For example, consider adding functions where an issuer could post an "IRMA letter" stating that they have contracted with an Independent Registered Municipal Advisor or where a professional investor could post their SMMP affirmation.
- Add to continuing disclosure compliance functionality. While we welcome the functionality the MSRB has added to EMMA focused on issuer continuing disclosure compliance, we urge the Board to take additional steps in this area. For example, EMMA could provide a means for issuers to voluntarily post evidence of their compliance with continuing disclosure obligations.

#### **IV. Other Issues for Consideration**

Below are some additional initiatives that we believe are consistent with the MSRB's mission and strategic goals:

- Reduce cost of regulatory compliance. The MSRB should consider adding a fifth strategic goal of reducing the cost of regulatory compliance for dealers and MAs. The cumulative cost of compliance for dealers has increased dramatically in recent years, is becoming oppressive in some cases, and could threaten the viability of some dealers' municipal securities businesses. We urge the MSRB to undertake a comprehensive analysis of regulation in the municipal market with the goal of identifying areas where rule changes could reduce compliance costs without threatening investor protection. When making rule changes, the MSRB should also take into consideration simultaneous initiatives of the SEC, FINRA, and industry utilities that require personnel time and system development.

- Rule and enforcement harmonization. In all areas, we urge the MSRB to work closely with FINRA and the SEC to ensure that regulations for municipal securities and other over-the-counter fixed income products are appropriately harmonized. This is especially important with regard to continuing education, institutional account affirmations, and initiatives like disclosure of price reference information on matched trades and pre-trade price transparency. We also urge the MSRB to make every reasonable effort to ensure that SEC and FINRA examiners are fully trained on the application of MSRB rules and that rules are enforced uniformly across all regulated entities.
- Add sunset provisions. The MSRB should consider adopting sunset provisions on new rules the Board adopts and adding sunset provisions to existing rules. Sunsets would help force a review of the efficacy and costs/benefits associated with MSRB rules. In general, we believe that a periodic review of the efficacy of existing rules is a healthy practice. For example, we believe it is time to review the 2012 interpretation of Rule G-17 requiring certain disclosures by dealers on the context of new issue underwriting. We also believe the MSRB should review the effects of the 2011 change to Rule G-23 prohibiting dealers from bidding on competitive offerings where they had served as financial advisor, especially with regard to small issuers, as it stated at the time it would.
- Cost-benefit analysis. We urge the MSRB to continue to build its capacity to undertake cost-benefit analyses of proposed rule changes. The hiring of a chief economist complements the recent adoption of an economic analysis policy. Rigorous cost-benefit analyses, including assessing the impact on liquidity, are a vital element to ensuring the appropriateness of regulatory changes. A number of expected market structure proposals are likely to propose significant system development expenditures for the broker dealer community. It is critical that the MSRB strike the appropriate balance between investor protection interests and the efficient operation of the municipal markets.
- Board composition. In the interest of ensuring that the Board is comprised of the best-qualified members, we urge the MSRB to consider two changes to the rules governing board membership. First, we urge you to rethink the practice that effectively prohibits fund managers and other professional investors from serving as buy-side board representatives if they are employed at a firm that is affiliated with a dealer or bank. Second, as we have argued before, we do not believe the provision requiring that at least three of the 10 industry representatives on the board be non-dealer MAs is fair. It is unfair that other industry constituencies do not have minimum board membership positions (beyond a single representative) specified in

rule, and it is unfair that dealer MAs essentially cannot serve as MA representatives on the Board.

**V. Conclusion**

SIFMA sincerely appreciates this opportunity to present its views on the MSRB's strategic priorities. We look forward to working with the Board and staff to effect many of these suggestions, which we believe balances investor protection with the efficient operation of the municipal markets, and we would be happy to meet with you and the MSRB's staff to discuss our comments further. Please do not hesitate to contact me with any questions at (212) 313-1265.

Sincerely yours,

A handwritten signature in blue ink that reads "David L. Cohen". The signature is fluid and cursive, with the first name "David" and last name "Cohen" clearly legible.

David L. Cohen  
Managing Director  
Associate General Counsel

cc: ***Municipal Securities Rulemaking Board***  
Lynnette Kelly, Executive Director