



February 8, 2013

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

Re: MSRB Notice 2012-61 (December 12, 2012): Request for Comment on Concept Proposal to Require Underwriters to Submit Preliminary Official Statements to the MSRB's Electronic Municipal Market Access (EMMA) System

Dear Mr. Smith:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment on the Municipal Securities Rulemaking Board’s (“MSRB”) concept proposal to require underwriters to submit Preliminary Official Statements (POS) to the MSRB’s EMMA system (the “Proposal”).

I. Executive Summary

As we have in the past, SIFMA continues to support the MSRB’s initiatives that promote greater disclosure and increased transparency that benefit market participants. The MSRB’s EMMA System, has been extremely beneficial to investors and other market participants by having market data and primary and secondary market disclosures freely available in a single location. SIFMA also commends the MSRB for soliciting market participant input through seeking comments on a concept proposal, rather than initially seeking comments on this issue through a formal rule proposal. As more fully detailed below, SIFMA has concerns about the Proposal that should be addressed by the MSRB prior to proceeding to rule making (if rulemaking is ultimately deemed necessary). Additionally, SIFMA suggests that the fastest way to make POSs

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).

available to retail investors is through educational outreach to municipal issuers, hopefully resulting in a new market best practice of posting the POS voluntarily on EMMA. We urge the MSRB to carefully weigh the incremental benefits to a small pool of retail investors that would actually review a POS on EMMA prior to the time of first execution of trades in a new issue after the bond sale before imposing the proposed new regulatory requirement.

II. Concept Proposal

In MSRB Notice 2012-61 the MSRB proposes the following for consideration and comment:

- 1) Whether to require an underwriter of a new issue of municipal securities to submit an issuer's preliminary official statement relating to such new issue and all supplements thereto, if such documents have been prepared, to the MSRB for display on EMMA by the end of the day on which it receives the POS.
- 2) In light of the provisions of the Tower Amendment, an underwriter for a new issue for which the issuer restricts the posting of the preliminary official statement or supplement on EMMA prior to the bond sale would instead be required to submit the preliminary official statement and all supplements thereto by no later than the time of first execution of trades in the new issue after the bond sale.
- 3) Thereafter, the underwriter would also be required to submit to EMMA any additional supplements to the preliminary official statement, if prepared, by the end of the day on which it receives such supplement.

So, in summary, the Proposal would require underwriting syndicate managers to submit to EMMA a POS for every transaction for which one was prepared, regardless if the transaction closed resulting in a sale of bonds.

III. Cost-Benefit Analysis / Sharing of Additional Data Currently Available

While SIFMA generally supports the policy goals of expanding the information available to investors and potential investors on EMMA, SIFMA would like the MSRB to conduct a cost-benefit analysis. The analysis should examine, not only this Proposal

but, the cumulative impact of recent rule changes on broker-dealers and municipal securities dealers, specifically with regard to the potential increase in costs of additional reporting requirements, as well as the cost impact of the Proposal on the MSRB's technology budget to index and archive POSs, which may outweigh the benefits from such disclosure. We understand that it is difficult to assess and quantify the benefits of the Proposal, since it is challenging to measure the likelihood of potential investors actually reviewing a POS on EMMA prior to the time of first execution of trades in the new issue after the bond sale, as well as anticipating the volume of issuers that may restrict the submission of a POS to EMMA during the same time period. To that end, SIFMA encourages the MSRB to share with the public data about current POS posting practices including: 1) which POSs have been posted on EMMA²; 2) how many times each posted POS has been viewed prior to the posting of the Official Statement (OS) on EMMA; and 3) how frequently POSs have been updated on EMMA. Additionally, SIFMA encourages the MSRB to share data about unique views on EMMA of OSs including how many OSs are reviewed on EMMA within two weeks of issuance – and if it is possible to distinguish between views by retail investors and views by other market participants. Providing the answers to these questions, for which the underlying data is solely within the control of the MSRB, will allow other interested parties to have a better understanding of current practices. Providing comparable data regarding access to (and actual review of) pre-sale documents on the U.S. Securities and Exchange Commission's Electronic Data Gathering, Analysis, and Retrieval system (commonly known as EDGAR) would also be useful.

IV. POS: SEC Rule 15c2-12 and MSRB Rule G-32

As noted in the Proposal, SEC Rule 15c2-12 does not require that a preliminary official statement be prepared; only that an underwriter send a preliminary official statement, if one is available and until a final official statement is available, to a potential investor upon request. Additionally, pursuant to MSRB Rule G-32, an underwriter is required to post to EMMA an official statement within one business day of receipt from the issuer, but no later than the closing date. Rule G-32 does not require the underwriter to post a preliminary official statement to EMMA unless (i) an official statement was not submitted to EMMA in accordance with Rule G-32, or the offering is exempt under SEC Rule 15c2-12; and (ii) a preliminary official statement has been prepared. In such cases, a preliminary official statement must be submitted to EMMA by no later than the closing date.

² Footnote 5 of the Proposal states "MSRB data from May 2011 to September 2012 indicates that while 21,294 new municipal issues were issued, only 62 pre-sale documents [significantly less than 1%], including preliminary official statements, were submitted voluntarily by or on behalf of issuers to the EMMA primary market disclosure service."

V. Disclosure Responsibilities of Underwriters

The responsibilities and potential liabilities of (and defenses available to) underwriters of municipal securities under the federal securities laws are too voluminous for a full³ discussion in the context of this comment letter. However, rushing underwriters to fulfill their responsibilities under 15c2-12 to review the POS must be weighed against the desire to publish the POS to potential investors at an earlier stage of a transaction. SIFMA members are also concerned that making a POS more widely available at an earlier stage of a transaction – where, for example, a transaction is delayed, rendering certain information stale, or in circumstances that result in the underwriter re-pricing the transaction - could potentially increase the underwriter's exposure to a class of investors who may have accessed the outdated document, but missed additions and corrections or, for that matter, the final offering document. The MSRB should also weigh these undoubtedly unintended consequences of a rule intended to improve disclosure, which could result in potential investors purchasing a municipal security based on outdated information contained in a POS and therefore failing to review the OS as a result of their mistaken belief that review of the POS was sufficient.

VI. Absence of Early POS – Presumption of Issuer “opt out”

In light of the provisions of Section 15B(d) of the Securities Exchange Act of 1934 (the so-called “Tower Amendment”), as noted by the MSRB, from May 2011 through September 2012, only 62 pre-sale documents, including preliminary official statements were submitted voluntarily by or on behalf of issuers to EMMA although approximately 22,000 issues came to market in that time. Even under the Proposal, issuers will continue to have full discretion as to whether any official statement or supplement will be prepared at all as well as full discretion as to whether any POS or supplement it does prepare may be posted on EMMA prior to the bond sale. SIFMA’s members are therefore concerned, if the Proposal were to proceed to rule making, how to document issuer “opt out” and believe that a final rule, if any, should incorporate a rebuttable presumption that if a POS was not submitted by the syndicate manager within the required time frame (or by the financial advisor in a competitive underwriting, as further discussed below in Section IX), that an absence of such submission was in accordance with the issuer's wishes.

³ See generally, Disclosure Roles of Counsel In State and Local Government Securities Offerings, Third Edition (2009).

VII. Locating a POS on EMMA – CUSIP yet to be assigned

SIFMA appreciates the MSRB's acknowledgement in Footnote 7 of the Proposal⁴ of the operational challenges in indexing documents on EMMA that would most likely be filed prior to the availability of CUSIP numbers for the expected underwriting. We also believe, in absence of a CUSIP number, it will be difficult for investors to search for and locate a particular POS. Simply having POSs on EMMA defeats the intended purpose of improving disclosure if investors are not able to find them with ease. Accordingly, the search functionality should be improved on EMMA prior to proceeding to rule making.

VIII. Negotiated Underwritings

Under the Proposal, when permitted by the municipal issuer, an underwriter would be required to submit the preliminary official statement and supplements to EMMA by the end of the day on which it receives the preliminary official statement or supplement from the issuer. SIFMA notes that this proposed "end of day" requirement is more restrictive than the "within one business day of receipt" submission requirements for an OS pursuant to MSRB Rule G-32. Additionally, often a POS or supplement from the issuer arrives late at night, on a weekend or federal or state holiday. We also note that a "business day" for trade reporting and settlement purposes may not align with the business hours of a public finance department that may receive the POS from the issuer. Accordingly, any timing requirement for the submission of a POS should take into consideration federal and state holidays that fall on a Monday through Friday, set an end of day deadline (such as 5:00pm⁵), and should be no more restrictive than timing requirements for submitting an OS to EMMA.

We also note that the review of a deemed-final POS received from an issuer fairly frequently results in underwriter-suggested changes and clarifications to the document, and it's not clear that the public would gain accurate information by accessing the first-proffered "deemed-final" version. Allowing at least one day for the back-and-forth in which underwriter concerns enhance the clarity and completeness of issuer disclosure is not unreasonable and should outweigh the proposal to publish the POS to

⁴ "The MSRB recognizes that, because CUSIP numbers may not be available for a new issue at the time a preliminary official statement is first made available, system changes to EMMA will be required to enable preliminary official statements and supplements to be "matched" to the CUSIP numbers assigned to the new issue and the related final official statement. In addition, EMMA system changes would be required to ensure that the final official statement replaces the preliminary official statement as the disclosure of record displayed on EMMA."

⁵ If a POS is received by an underwriter after 5:00pm on a business day, we suggest that it should be deemed received on the following non-holiday business day.

potential investors within hours of receipt. We therefore suggest that a reasonable time for submission of a POS, or supplement, to EMMA is within two business days of receipt from the issuer of the POS, or supplement, which has been “deemed-final” by the issuer⁶.

IX. Competitive Underwritings

In competitive underwritings, the POS and OS are traditionally prepared by the municipal issuer, their financial advisor, and counsel. Underwriters do not receive the POS until they receive a notice of sale from the issuer, prior to the formation of the syndicate⁷. The financial advisor therefore is the regulated party in the best position to submit the deemed-final POS to EMMA to allow review by investors at the earliest possible time. Under these circumstances, it seems appropriate that the issuer’s financial advisor be responsible for posting the POS on EMMA. If a transaction does not have a financial advisor, then the syndicate manager could submit the POS to EMMA within a reasonable time after the syndicate has been formed, but no later than the time of first execution of trades in the new issue after the bond sale⁸.

X. Implementation Period

Any regulatory scheme takes time to implement properly. Therefore, SIFMA requests that if any POS submission requirements are finalized, the MSRB provides for a reasonable implementation period to develop, test, and implement supervisory policies and procedures, as well as systems and controls, which would be no less than six months, before the Proposal becomes effective.

XI. Conclusion

SIFMA sincerely appreciates this opportunity to comment upon the Proposal. SIFMA fully supports the MSRB’s initiatives to promote greater disclosure and increased transparency. We believe the fastest way to make POSs available to retail

⁶ Some of SIFMA’s members have decentralized systems where the issuer may send the POS or OS to a regional location, which requires that regional location to send the document to a central office for submission to EMMA.

⁷ Under these circumstances, it is common that multiple potential underwriters receive the POS from the issuer’s financial advisor – and on occasion different potential underwriters receive different versions of the POS. Accordingly, only the issuer and their financial advisor truly can identify the “deemed-final” POS.

⁸ It is also worth noting that occasionally a POS is delivered to a co-manager on the day prior to going to market. Allowing co-managers to fulfill their responsibilities under 15c2-12 to review the POS must be weighed against the desire to publish the POS to potential investors at an earlier stage of a transaction.

Mr. Ronald W. Smith
Municipal Securities Rulemaking Board
Page 7 of 7

investors is through educational outreach to municipal issuers, hopefully resulting in a new market best practice of posting their POSs voluntarily on EMMA. Additionally, as more fully described above, we have some suggestions for the MSRB to consider if it decides to move forward to rule making.

Please do not hesitate to contact me with any questions at (212) 313-1265.

Sincerely yours,



David L. Cohen
Managing Director
Associate General Counsel

cc:

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