



Invested in America

May 26, 2016

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street NW
Washington, DC 20005

Re: MSRB Notice 2016-11: Request for Comment on a Concept Proposal to Improve Disclosure of Direct Purchases and Bank Loans

Dear Mr. Smith:

The brokers, dealers and municipal securities dealers (“dealers”) of the Municipal Securities Division (“MSD”) of the Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciate this opportunity to respond to Notice 2016-11² (the “Notice”) issued by the Municipal Securities Rulemaking Board (the “MSRB”) in which the MSRB requests comment on a concept proposal to require municipal advisors to disclose information regarding the direct purchases and bank loans of their municipal entity clients (“Concept Proposal”). The Notice presents 17 questions and solicits comment on the benefits and burdens of, as well as possible alternatives to, the Concept Proposal. Rather than respond to the individual questions posed in the Notice, SIFMA’s MSD dealer members offer the below observations.

SIFMA commends the MSRB for soliciting views on the Concept Proposal to require municipal advisors to disclose information regarding the direct purchases and bank loans of their municipal entity clients. SIFMA supports the MSRB’s efforts to ensure that investors have timely access to information about municipal issuers, and believes that such disclosures are good for the market.

SIFMA, however, is not convinced that the means described in the Concept Proposal, which would require municipal advisors that advise municipal entities on

¹ SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over \$2.5 trillion for businesses and municipalities in the U.S., serving clients with over \$20 trillion in assets and managing more than \$67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² MSRB Notice 2016-11 (March 28, 2016).

direct purchases and bank loan financings to disclose material information related to the municipal entity's direct purchases and bank loans, is the most appropriate or effective means of obtaining and disseminating the information. SIFMA's MSD dealer members believe that the Concept Proposal both exceeds the MSRB's jurisdiction and creates regulatory gaps, and may have unintended consequences.³ SIFMA's MSD dealer members believe that SEC amendment and/or interpretation of existing regulations, particularly Rule 15c2-12, may be a more comprehensive avenue for ensuring that information regarding direct purchases of securities and bank loans entered into by issuers is consistently and uniformly reported to EMMA and made transparent to the market.

First, there is no colorable argument that the MSRB has the statutory authority to require disclosure of bank loans, because they are financial instruments that are not securities. The Concept Proposal cites to the MSRB's authority pursuant to Exchange Act sections 15B(b)(2) and 15B(b)(2)(C). These provisions do not give the MSRB jurisdiction over bank loans. Section 15B(b)(2) allows the MSRB to adopt rules with respect to "transactions in *municipal securities*" and "advice provided to or on behalf of municipal entities or obligated persons by...municipal advisors with respect to municipal financial products [and] *the issuance of municipal securities*."⁴ As the MSRB has previously acknowledged, it does not have the authority to define "securities" under the Exchange Act, and bank loans are not securities.⁵ Therefore, section 15B(b)(2) does not give the MSRB authority to require disclosure of bank loans even if the transaction involves a registered municipal advisor. The other provision relied upon by the Concept Proposal, section 15B(b)(2)(C), provides that the MSRB "shall...remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and to protect investors, municipal entities, obligated persons, and the public interest." That same section goes on to state that MSRB rules "shall...not be designed...to regulate by virtue of any authority conferred by this title matters not related to the purpose of this title." It cannot be read as a blank check that gives the MSRB authority beyond that specifically conferred.

³ As discussed below, we do not contest the MSRB's authority under Rule G-32 to regulate municipal advisors involved in transactions in which the financial instrument involved is a municipal security.

⁴ Emphasis added. "Municipal financial products" is, in turn, defined to mean "municipal derivatives, guaranteed investment contracts, and investment strategies." Exchange Act § 15B(e)(5).

⁵ *Bank Loan Disclosure*, MSRB Regulatory Notice 2015-03 n.3 (Jan.29, 2015); *see also* *Reves v. Ernst & Young, Inc.*, 494 U.S. 56 (1990).

Second, and relatedly, the Concept Proposal would create regulatory gaps. It would not capture financial instruments entered into by municipal issuers without the involvement of a municipal advisor. In addition, because bank loans are not municipal securities or municipal financial products, advising a municipality with respect to a bank loan transaction is not municipal advisory activity.⁶ Under each scenario, municipal issuers could enter into material loan financing agreements that would not be disclosed pursuant to the rule described in the Concept Proposal. Some municipal issuers may disclose some loans, but not others, depending on whether or not a municipal advisor is involved in each individual transaction and whether or not the transaction involves a bank loan, which would give the market an incomplete picture of the issuer's total indebtedness.

Third, the Concept Proposal could also have the unintended result of incentivizing issuers to enter into financial instruments, whether or not securities, without advisors or bank loans with other advisors or consultants, who are not required to register as municipal advisors as they are not advising on municipal securities, if the issuers do not wish to have their loans disclosed. This result would be lawful under the Concept Proposal, but would undercut the effectiveness of the SEC's and MSRB's municipal advisor program without increasing disclosure of bank loans and direct purchases.

The Concept Proposal draws attention to the MSRB's current use of Rule G-32 as a means for eliciting disclosure. We suggest further that non-dealer municipal advisors be subject to Rule G-32(c), similar to dealers, with respect to direct purchases of securities as to which they advise. As noted in the Concept Proposal, dealers are required to report the direct purchase of a security that they place and make an official statement, if any, available in an electronic format "promptly" after the distribution is approved by the issuer. SIFMA and its MSD dealer members believe this requirement should also cover non-dealer municipal advisors who advise on the direct purchase of a security.

Also, it is a long-held position of SIFMA and its MSD dealer members that it is impermissible for non-dealer municipal advisors to be acting as placement agents in the case of a direct placement of a municipal security, as there is no exemption for such activity in the broker dealer registration rules. Therefore, we believe if there is a firm

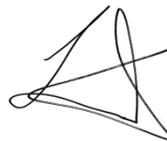
⁶ Exchange Act § 15B(e)(4).

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acting as placement agent on the transaction team for a private placement, such placement agent should be a registered broker-dealer or municipal securities dealer.⁷

Again, SIFMA's MSD dealer members support the MSRB's efforts to ensure that investors have timely access to information about municipal issuers. However, SIFMA's MSD dealer members do not believe that the Concept Proposal would achieve the stated objective of ensuring disclosure of all material information related to a municipal entity's direct securities purchases and bank loan financings. To the contrary, the Concept Proposal would lead to the gaps previously described. SIFMA's MSD submits these comments suggesting that SEC amendment of and/or interpretative guidance as to existing regulations, particularly Rule 15c2-12, may be a more comprehensive avenue for ensuring that information regarding direct purchases and bank loans entered into by issuers are consistently and uniformly reported to EMMA and made transparent to the market. Should the SEC decide to pursue either amendment or interpretive guidance (or both), which would be transformative with respect to the obligations of market participants, SIFMA's MSD dealer members would hope and expect to participate in that process. We would be pleased to discuss any of these comments in greater detail, or to provide any other assistance that would be helpful. If you have any questions, please do not hesitate to contact the undersigned at (212) 313-1130.

Sincerely yours,



Leslie M. Norwood
Managing Director
and Associate General Counsel

cc: ***Municipal Securities Rulemaking Board***

Lynnette Kelly, Executive Director
Robert Fippinger, Chief Legal Officer
Margaret Blake, Associate General Counsel
Carl Tugberk, Assistant General Counsel

⁷ See Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, SIFMA, to Mary Jo White, Chair, SEC, dated March 12, 2015, available at: <http://www.sifma.org/issues/item.aspx?id=8589953647>.