



January 23, 2018

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street NW
Suite 1000
Washington, DC 20005

Re: MSRB Notice 2017-22: Request for Comment on Compliance Support

Dear Mr. Smith:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ greatly appreciates this opportunity to respond to Notice 2017-22² (the “Notice”) issued by the Municipal Securities Rulemaking Board (the “MSRB”) on their request for comment on compliance support. Our members welcome an increase in MSRB resources devoted to assisting them in complying with the MSRB rules that govern their conduct. We would like to take this opportunity to address certain overarching member concerns and present our views on how the MSRB can contribute to resolving them: (1) the need for more published MSRB interpretive guidance, (2) the need for the MSRB and examiners to work together to articulate guidance on the recordkeeping that will be required to demonstrate compliance with MSRB rules, (3) the need to increase the usefulness of MSRB compliance resources, including enhancing the MSRB website, simplifying email subscriptions, and improving the accessibility and content of educational materials and events, and (4) the need for MSRB participation at relevant industry conferences.

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 \$18.5 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 2017-22 (Nov. 16, 2017).

I. The Need for More Published MSRB Guidance

It is the view of our members that, in recent years, too much interpretation of MSRB rules has occurred through examination and enforcement rather than by published MSRB guidance. Regulated entities oftentimes learn of regulatory interpretations “through the grapevine” by talking to counterparts about FINRA and SEC exams. SIFMA feels strongly that compliance with MSRB rules has suffered because of the MSRB’s current policy on providing rule interpretations. Many members feel that if they call the MSRB requesting help on how to interpret an MSRB rule or interpretation, the MSRB will refer the matter to FINRA or the SEC for enforcement. Previously, questions from counsel were accepted on an anonymous basis, and members were told that requests could be hypothetical in nature. This promoted an open dialogue between the MSRB and regulated entities and lessened the likelihood of violations. Moreover, interpretive letters were issued with some frequency so that all regulated entities could be apprised of MSRB interpretations. Today, members feel that it is primarily other regulators who benefit from MSRB interpretations and that a “gotcha” form of regulation prevails. The MSRB refuses to make its interpretations known to regulated entities who are being examined, creating situations in which previously unpublished interpretations are shared with regulators, but not regulated entities. Consequently, regulated entities learn of those interpretations only when it is too late to alter their conduct. All MSRB interpretations should be made public, not just discovered by word of mouth.

Regulated entities would benefit from more published interpretations of MSRB rules. Before the MSRB settles on a new interpretation, MSRB staff should engage in discussions and outreach with relevant industry stakeholders. In the case of new interpretations, SIFMA feels that it is critical that the MSRB publish them for industry comment and file them with the SEC so that they will not only have the force and effect of rules, but also be informed by relevant industry input. When guidance is filed with the SEC, the MSRB should provide a careful and balanced assessment of the potential consequences.³ If guidance is not filed with the SEC, then SIFMA encourages the MSRB to explain why such a filing was not necessary pursuant to Section 19 of the Securities Exchange Act of 1934. One possible topic for guidance listed in this request for comments illustrates the need for industry input prior to publication of formal guidance – pre-arranged trading in new issues. Care should be taken to distinguish between pre-arranged trading versus the provision of liquidity to investors and the orderly distribution of securities. One rule that could benefit from more guidance is Rule G-42. For instance, the MSRB

³ See, Statement Regarding Commission Approval of MSRB Rule G-17 Interpretive Notice, Dissent by Commissioners Daniel M. Gallaher and Troy A. Paredes (May 14, 2012), available at: <https://www.sec.gov/news/public-statement/2012-spch051412dmgtaphm.html>.

should more clearly articulate the difference between a fiduciary duty and the included duty of care, as well as the limitations of each of these duties. To date, much of the guidance that exists has come from the SEC, not the MSRB. Other topics that the MSRB should prioritize when developing interpretive guidance include: the implementation of the changes to Rule G-15 requiring disclosure of markups on retail customer confirmations; the application of Rule G-47 to discretionary accounts; and Rule G-8 on recordkeeping, as mentioned below.⁴ Compliance advisories should be used only as reminder of existing rules, not as a vehicle for providing new interpretations of MSRB rules.⁵

Other regulators, such as the SEC and FINRA publish an annual list of priorities. It would be helpful if the MSRB would communicate its strategic goals or priorities annually as well.

II. Guidance on Required Recordkeeping

SIFMA also urges the MSRB to be more forthright about the recordkeeping associated with its rules. Quite frequently, rules are adopted with minimal associated amendments to Rule G-8. Nevertheless, examining authorities demand proof of compliance as evidenced by contemporaneous records, seemingly contrary to the principles of the Paperwork Reduction Act of 1995. A recent example of this problem is Rule G-42. The SEC has reportedly taken the position in examinations that a municipal advisor must demonstrate that it has reviewed comparable pricings to fulfill its fiduciary duty. There is no commentary on this topic in the SEC Municipal Advisor Rule itself, or written MSRB guidance to that effect. Additionally, FINRA has reportedly asked for narratives and documentation concerning municipal advisors' recommendations and suitability analysis. Again, there is no written guidance to that effect, unless one considers the MSRB's recent compliance advisory for municipal advisors to be interpretive guidance. The MSRB should work with examining authorities to determine what kinds of records those authorities will look for and make such recordkeeping requirements clear to regulated entities in Rule G-8, not by referring to the need for documentation in compliance advisories when no comparable provision of Rule G-8 exists. The need for recordkeeping should also be considered in the MSRB's cost-benefit analysis.

⁴ We do not believe that emerging technology issues, such as social media or cybersecurity should be a priority. We do not believe that the municipal securities market requires different rules on these issues, and we urge the MSRB to harmonize any efforts in these areas with existing FINRA guidance.

⁵ When considering guidance, frequently asked questions and answers or an analysis of common scenarios are most helpful.

III. Increase in Usefulness of Compliance Resources

SIFMA welcomes the creation of the MSRB's Compliance Advisory Group. The MSRB has chosen very qualified individuals from regulated entities to be members of the Group. The MSRB should consider their recommendations carefully, particularly if they are at odds with the recommendations of MSRB staff especially since the MSRB staff has limited experience working at regulated entities. The Compliance Advisory Group can help to inform the MSRB's proposals, but industry input should still be sought through a formal request for industry comment. Too often, it appears to our members that advisory groups are used by regulators to make it appear that industry input has been solicited when staff have already reached decisions about rule proposals. The recommendations of the Compliance Advisory Group should be solicited early in the process of developing a new interpretation when their views will be most useful, and the views of the members of the Compliance Advisory Group should be thoroughly considered. Notwithstanding the qualifications of the Compliance Advisory Group, they represent a mere sampling of views from select firms and cannot represent every regulated member of the industry.

Current issues SIFMA feels should be on the agenda of the Compliance Advisory Group and prioritized by the MSRB were mentioned above in Section I. We feel strongly certain themes should be focused on, including: the regulatory burden and practical impact of the MSRB rule set; simplification and harmonization of the MSRB rules with the FINRA rules; and consideration of methods to reduce the compliance burden on regulated entities.⁶ There are specific regulatory technologies that the MSRB should consider adopting to reduce dealer costs or simplify data quality management that we have detailed in our response to MSRB Notice 2017-19⁷, such as auto-populating fields on Form G-32.

The MSRB should consider structuring its website like FINRA's, with initial links for either "Industry Professionals" or "Investors." Once an industry professional clicked on the Industry Professional link, the MSRB could offer many more tabs of interest to industry professionals than it can on its currently combined

⁶ For example, one recent suggestion communicated to MSRB staff was for the MSRB to pre-fill Form G-37 with information it already collects from regulated parties on Form G-32 and via the Depository Trust and Clearing Corporation's New Issue Information Dissemination System, per the requirements of Rule G-34. Pre-filling the recent transactions, and co-managers in the syndicate, for that dealer would greatly reduce the burden on the dealer community from having to submit that information again to the MSRB. No change to Rule G-37 would be needed, as there would be no change to the final G-37 submission.

⁷ Available at: <https://www.sifma.org/wp-content/uploads/2017/11/SIFMA-Response-to-MSRB-Concept-Release-on-Primary-Offering-Practices.pdf>.

website. One problem with the current website is that it is difficult to find important topics, because “Rules and Guidance” and “Compliance Center” must compete for tab space with “Market Leadership,” “Education,” and “News and Events.” For example, it is very difficult to locate the lists of registered entities and Rule G-37 filings. In the Notice, the MSRB queried whether it would be helpful to provide information to regulated entities in understanding the circumstances in which firms may apply for an exemption from bans on business under Rule G-37. SIFMA feels that this is unnecessary, as the exemptions to Rule G-37 are clear on the face of the rule. On the other hand, it would be helpful for industry members if the MSRB alerted regulated entities to relevant enforcement actions by the SEC, FINRA and any bank regulator, and kept a centralized database of such enforcement decisions.

The MSRB should consider developing a public catalog of all MSRB communications that could be accessed on the MSRB website. Such a communications portal would enhance transparency and the MSRB’s information dissemination process. It is important that information from the MSRB is sent to all interested parties, and not just a limited group of people or solely the contacts listed on a regulated party’s Form A-12. SIFMA’s members also suggest simplifying the process to subscribe for specific MSRB email updates.⁸

In response to the MSRB’s question on how it can enhance the value of its compliance programs, SIFMA recommends that the MSRB solicit questions in advance of webinars and devote considerable time to answering them, rather than simply repeating the content of its rules. For regulated parties, going over the exact language of the rule in a conference or program is not additive to the discourse. It should be assumed that regulated parties have already read the relevant rule, and are attending a conference or other program to engage in further dialog or glean further information from MSRB staff. In addition to answering questions posed in advance or frequently asked questions and answers, discussing in detail how a new rule or guidance would apply in certain fact patterns or less-common scenarios would be helpful.

Furthermore, the MSRB should be cognizant of the timing of various industry conferences and events so as not to schedule MSRB programs and roundtables at the same time. Obviously, holidays and common vacation times should also be avoided, if possible. This will increase the number of legal and compliance personnel who can register for those webinars and participate in the question and answer portion. Increasing the number of regional programs would

⁸ We recognize that there is a link, under “News and Events” on the MSRB website, to sign up for notification of MSRB news and upcoming events. The MSRB should consider putting this link on its landing page and making this process more straight-forward for interested parties. Many find the current process for subscribing to certain types of emailed information from the MSRB confusing or hard to find.

also help increase the number of legal and compliance personnel that will be reached. Also, the MSRB should be mindful that there are regulated parties in all the time zones of the United States, so webinars held in the morning Eastern Time are unlikely to attract legal and compliance personnel in the Pacific Time Zone or beyond. Town hall-style events should be webcast if possible, and replays should be made available on the MSRB's website. Additionally, the MSRB should consider developing additional "advanced" programming, as much of the current content is "introductory," or simplistic, including the courses on MuniEdPro. Also, increasing the breadth of topics addressed would be helpful, as the content is largely focused on municipal underwriting and advising. To that end, SIFMA suggests that MuniEdPro should be free to the public. The content in MuniEdPro is largely introductory, and would be helpful to interested members of the investing public. However, we feel that very few retail investors would pay for the content.⁹ SIFMA and its members feel that educational materials for the public would be in furtherance of the MSRB's mission. Further, SIFMA considers it inappropriate for the MSRB to develop its educational content with revenue from regulated entities and then charge those regulated entities again for accessing that educational content.¹⁰

IV. Participation in Industry Conferences

In response to the MSRB's question on what conferences it should consider attending, SIFMA recommends that the MSRB conduct training on its rules during the National Association of Bond Lawyers ("NABL") conferences. SIFMA members frequently find that transactional attorneys (e.g., bond counsel and underwriters' counsel) are not well versed in MSRB rules. Previous presentations at NABL conferences have centered on the Electronic Municipal Market Access website, not MSRB rules. Additionally, the MSRB could have attended the 2017 NABL Bond Attorneys Workshop ("BAW") and discussed its recent Market Advisories on Selective Disclosure and Issuers' Designation of Underwriters Counsel, to increase connectivity and dialog with this important group of stakeholders.

⁹ The MSRB devotes a significant amount of resources to the display of information on EMMA, MuniEdPro, and other websites. Sharing usage statistics and trends of these websites with industry members would be appreciated.

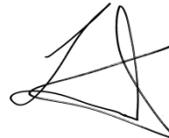
¹⁰ SIFMA notes that FINRA E-Learning courses can be accessed for a cost of \$12.50 each, or a cost of \$45 to access the entire catalog for a year (<https://blaze.firesolutions.com/enroll/finra>). MSRB MuniEdPro courses are significantly more expensive at \$45 each (<http://www.msrb.org/Regulated-Entities/MuniEdPro.aspx>), making them very costly if offered to a large amount of employees and cost-prohibitive for some firms.

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V. Conclusion

Again, SIFMA and its members applaud the MSRB for its efforts in increasing their compliance resources, as well as reaching out to the regulated community for suggestions, but wanted to start our conversation with the MSRB on this matter by making the comments described above. We feel a continued dialog between the MSRB and regulated industry members on these issues is essential to the effectiveness of the MSRB, and we stand ready to provide further feedback or 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,

A handwritten signature in black ink, appearing to be 'L. Norwood', written over a faint, light-colored signature line.

Leslie M. Norwood
Managing Director and
Associate General Counsel

cc: ***Municipal Securities Rulemaking Board***
Michael L. Post, General Counsel
Gail Marshall, Chief Compliance Officer

Financial Industry Regulatory Authority
Cynthia Friedlander, Director, Fixed Income Regulation