



November 15, 2010

Peg Henry  
Deputy General Counsel  
Municipal Securities Rulemaking Board  
1900 Duke Street, Suite 600  
Alexandria, VA 22314

Re: MSRB Notice 2010-35: Request for Comment on MSRB Guidance on  
Municipal Securities Broker's Brokers

Dear Ms. Henry:

The Securities Industry and Financial Markets Association ("SIFMA")<sup>1</sup> appreciates this opportunity to respond to Notice 2010-35<sup>2</sup> (the "Notice") issued by the Municipal Securities Rulemaking Board ("MSRB") in which the MSRB requests comments on draft interpretive guidance on municipal securities broker's brokers ("MSBBs").

SIFMA supports effective and efficient regulation of the municipal securities markets that helps to aid market liquidity in a manner consistent with customer protection. As described more fully below, we are supportive of certain aspects of the proposed guidance ("Proposed Guidance"), but believe that, in important respects, the Proposed Guidance is inconsistent with the limited activities in which MSBBs engage, and may limit the effectiveness of MSBBs in carrying out the important role they play in the municipal securities secondary markets. We believe the adoption of the Proposed Guidance would impede the efficiency of the municipal securities interdealer market, to the ultimate detriment of investors in municipal securities. Lastly, we do not support the Proposed Guidance regarding Rule G-18, which imposes requirements on MSBBs that are not imposed by the rule as currently in effect. As described more fully below, we believe that the

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<sup>1</sup> The Securities Industry and Financial Markets Association (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). For more information, visit [www.sifma.org](http://www.sifma.org).

<sup>2</sup> MSRB Notice 2010-35 (Sept. 9, 2010).

proposed additional requirements are inconsistent with the role of MSBBs, and also constitute an amendment to the rule which should be addressed in a separate rulemaking. Accordingly, SIFMA requests that the MSRB (1) withdraw the Proposed Guidance regarding Rule G-18 to the extent it imposes obligations on MSBBs in excess of what the rule requires, and (2) modify other aspects of the Proposed Guidance as requested below.

#### Role of MSBBs in Municipal Securities Secondary Market

MSBBs play a very important role in the workings of the secondary municipal market. Few markets for new issues of securities can function efficiently or well without the support of a secondary market where securities can be traded after they are first sold in the primary market. In addition to supporting the primary market, a thriving secondary market also serves investors by providing them with an array of securities to suit their investment needs, as well as providing an environment to buy and sell their securities quickly when necessary. MSBBs provide liquidity to the secondary bond market, extended distribution networks, information flow, and anonymity to market participants.<sup>3</sup>

Moreover, as MSBBs do not inventory securities, they are never in competition with their counterparties. Rather, the role of an MSBB is to act as an intermediary representing the counterparty's trading desk. MSBBs do not employ research analysts or provide research services. Lacking the pressure of maintaining the profitability of their own proprietary accounts, their role is fundamental: provide superior market execution with competitive market pricing, information flow and enhanced services to assist secondary market counterparties achieve success within the marketplace.

MSBBs facilitate and effect transactions through: new issue trading, bid-wanted trading, situation trading, swap trading, and by providing greater information flow or "color" on securities and the market in general. When secondary market participants cannot or do not wish to obtain bids directly for bonds they want to sell, they ask one or more MSBBs to obtain bids from trading desks across the country. When the bid-wanted auction item is given to an MSBB, bids are elicited via a blind auction process. In a bid-wanted, the MSBBs never know what the "sell at" price is before the end of the auction when the seller decides whether or not to accept the highest bid.

MSBBs advertise their bid-wanted items electronically (through Bloomberg, proprietary online trading platforms, proprietary websites, electronic-mail dissemination applications, fax dissemination applications, vendors, etc.) and over the phone by making direct contact with

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<sup>3</sup> "Certain markets. . .are. . .informally organized around interdealer brokers, which display the bids and offers of other dealers anonymously. . .[I]nterdealer brokers provide liquidity by providing a central mechanism to display the bids and offers of multiple dealers and by allowing dealers. . . to trade large volumes of securities anonymously and efficiently based on those bids and offers." Securities and Exchange Commission, "Regulation of Exchanges," Release No. 34-38672, File No. S7-16-97 at 40 (May 23, 1997) [hereinafter Regulation of Exchanges] (citations omitted).

municipal bond trading desks nationwide. MSBBs solicit bids from interested parties, asking for bids to be received by a certain time during the trading day. All auction parameters are determined by the selling party and the MSBB is bound by those parameters in their intermediary (agency) role.

Established and reputable MSBBs maintain full trading history on all items; bid-wanted items (full description of all bid-wanted items), bid pads (programs containing the history of all firms that bid the item and the levels they bid, as well as PASS history, i.e., all firms that passed on bidding the item), execution history and ticketing/operational history.

When an MSBB acts as middleman, traders for selling and buying firms do not communicate with each other directly; all communications are with and through the MSBB. An MSBB acts as a confidential agent on behalf of a counterparty in the sale or purchase of bonds in order to prevent competing firms from discerning each other's trading strategies. The MSBB collates the bids and reports the best one to the potential seller, who may decide to sell them if the price is acceptable; MSBBs do not participate in the decision to buy or sell securities, exercise discretion as to the price at which a transaction is executed or determine the timing of a trade. An MSBB effects a trade between market participants by contemporaneously selling to the buyer and buying from the seller as a disclosed agent; all MSBB trades are equally matched transactions. All decisions are made by the seller or the buyer and the MSBB facilitates the trade. Only if the trade is done does the MSBB earn a commission.

After a municipal bid-wanted trade is executed, an MSBB provides the purchasing counterparty with information about the total number of bids received and about the cover bid, which is the next best bid after the level at which the bond traded. This is important information for dealers to have in assessing the depth of the market and the risk involved in bidding or offering bonds at particular levels. This information also permits trading desks to quote markets with greater certainty and, presumably, at lower spreads, increasing secondary market liquidity and the ability for investors to sell their bonds. With the information flow and access to the MSBBs' extended distribution network, trading desks can spend less time soliciting interest in bonds they want to buy or sell (with its potential negative market effect) and more time executing trades for their proprietary accounts or their customers. For traders, the timesaving element of working with MSBBs may make the difference between executing or missing a trade as well as obtaining a timely interdealer market price on their securities.

The advantage that MSBBs have in the market is their continuous communication with the dealer community or "Street." The MSBB has a "picture" of who owns what and tracks closely who is inclined to buy, as well as who might want to sell into the market on any given day. The anonymity MSBBs provide to their counterparties makes them more willing to give MSBBs information. Buyers and sellers look to them for information on the tone and direction of the market, and it is the MSBB's job to sense that tone and direction and be able to communicate it to their clients.

MSBBs often acquire knowledge of the various sectors of the municipal bond market, knowledge that individual dealers/banks may not have developed. It takes a considerable amount of effort, expense, and determination for an MSBB to acquire sufficient knowledge of any local market,

such as that of the Midwest region, for example. An MSBB with great strength and knowledge of their region and specialty types of bonds, contributes greatly to the efficiency of the associated markets, thus helping to lower interest rate costs to both local investors and local issuing communities. Brokering is much more than quoting rates, it is a complex and highly professional business that ultimately provides efficiencies to the overall market and all market participants.

#### Definition of Municipal Securities Broker's Broker

The Notice defines an MSBB as a "broker, dealer, or municipal securities dealer that principally effects transactions for other brokers, dealers, or municipal securities dealers ("dealers") or holds itself out as a broker's broker." SIFMA believes that this definition does not sufficiently define what an MSBB is, or the limited nature of their business activities. SIFMA feels strongly that that the MSRFB needs to adopt a concrete, accurate and complete definition of an MSBB, and proposes an alternative definition directly below. Further, SIFMA is unclear as to the purpose of the clause "or holds itself out as a broker's broker" and requests that this phrase be omitted from any final definition.<sup>4</sup>

SIFMA believes that MSBBs should be defined by the nature of the business that they conduct. In light of this, we offer the following definition:

The term Municipal Securities Broker's Broker shall mean a broker, dealer or municipal securities dealer that:

- a) acts as a disclosed agent or riskless principal in the purchase or sale of municipal securities for an undisclosed registered broker, dealer, municipal securities dealer, Sophisticated Municipal Market Professionals ("SMMP"), or institutional counterparty;
- b) does not have or maintain any municipal securities in any proprietary or other accounts, other than for clearance and settlement purposes;
- c) executes equally matched transactions contemporaneously;
- d) does not carry any customer accounts; does not at any time receive or hold customer funds or safekeep customer securities;
- e) does not participate in syndicates;
- f) acts in the limited agency capacity of providing liquidity, market information, order matching, and anonymity through the facilitation of transactions in the interdealer market;
- g) does not participate in the decision to buy or sell securities, exercise discretion as to the price at which a transaction is executed, or determine the timing of execution; and
- h) is compensated by a commission, not a mark-up.

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<sup>4</sup> We note that although the Notice offers the quoted definition "for the purposes of [the] [N]otice," SIFMA is concerned that this definition will become a de facto MSRFB definition. This is why we have offered what we believe to be a more accurate and complete definition.

SIFMA believes that a function-based definition of MSBB is necessary to ensure that the Proposed Guidance, if adopted, is appropriately tailored to the uniquely limited nature of MSBB activities. As the proposed definition clearly indicates, MSBBs, whether they process a transaction as “agent” or “riskless principal,” do not exercise any decision making authority in connection with transactions they effect. MSBBs act as limited agents, generally for the sellers of municipal securities, for the purposes of soliciting bids on those securities (“bid-wanted”) or for facilitating the execution of transactions for buyers or sellers (“situations” or “offerings”). MSBBs do not have authority to take any other action on behalf their clients. As described above, bid information is relayed back to the seller, so the seller can determine whether to trade the securities in question. If the seller should determine that it wants to sell the securities, the seller will inform the MSBB that the bonds are “for sale,” and *only at that time* will the MSBB contact the high bidder to effect the transaction.

SIFMA believes that only by adopting a definition of MSBB along the lines of the one above can the Proposed Guidance be properly analyzed. With this definition in mind, SIFMA offers the following comments on the Proposed Guidance.

#### Agent versus Principal

The Proposed Guidance seeks to establish a bright line distinction between when an MSBB trades as an agent versus principal: if the securities transacted are held even momentarily by the MSBB, even if only in a “clearing or similar account,” the transaction is deemed to be a principal transaction. Further, the Proposed Guidance states that this determination is applicable “for all MSRB rules, not just the uniform practice rules.” Although SIFMA appreciates that this aspect of the Proposed Guidance is intended to clarify the MSRB’s view of the nature of MSBBs’ trading activities, we believe that it elevates form over substance, and that MSRB should continue its long-standing practice, as reflected in current Rule G-18, of considering the MSBB’s special relationship with its trading counterparties, and the limited agency capacity in which it serves those counterparties, when applying its rules.

We note in this regard that even if the bright line approach to this issue is adopted, the vast majority of MSBBs transactions are *not* taken into any account of an MSBB. These transactions are effected on a continuous net settlement basis through the National Securities Clearing Corporation Continuous Net Settlement System (the “CNS System”), where the transactions are matched between seller and buyer, and the commission to the MSBB is netted out during the settlement process.<sup>5</sup> In addition, most MSBBs operate as fully-disclosed introducing broker-

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<sup>5</sup> These transactions are reported as “principal transactions” in the Real-Time Reporting of Municipal Securities system, because they are inter-dealer transactions, and the system when implemented did not include this functionality. See MSRB Notice 2003-03, “Plans for MSRB’s Real-Time Transaction Reporting System,” (Feb. 3, 2003). See also, “Municipal Securities Rulemaking Board, Specifications for Real-Time Reporting of Municipal Securities Transactions,” at § 1.31 (ver. 1.1 Sept. 2003) (current ver. 2.2 Nov. 2009, includes similar limitations in functionality).

dealers, and all transactions are cleared through the accounts of the clearing broker-dealer. No MSBB transactions appear to meet the definition of principal trade under MSRB Rules.<sup>6</sup> It may appear, however, that MSRB transactions could be defined as riskless principal transactions under MSRB rules.<sup>7</sup> We also note that the MSRB definition of “as agent” trades requires that the transactions are not processed through the account of the dealer, are charged a commission instead of a mark-up, and that the dealer disclose, or be willing to disclose, the identity of the other side of the transaction.<sup>8</sup> Anonymity, however, is one of the primary services that MSBBs provide to their trading counterparties, and is an important service to the market.<sup>9</sup> We believe that if an MSBB can maintain anonymity of seller and buyer without taking a security into its accounts, the transaction should be viewed as an agency transaction, in accordance with the special relationship it has with its trading counterparties.

MSBBs conduct their securities business in a manner that is consistent with an “agency” business under the traditional meaning of the term, without regard to how they process their transactions.<sup>10</sup> As described above, MSBBs act as *limited* agents on behalf of their trading counterparties, solely for the purpose of seeking bidders for the securities owned by their trading counterparties, and seeking executions of securities transactions on behalf of those counterparties. The Notice reflects this agency relationship by noting that MSBBs may have a “special relationship” with their dealer counterparties, which may create “agency or fiduciary obligations” from the MSBB to its dealer counterparty. However, unlike traditional agents, MSBBs’ authority to act for their dealer counterparties is extremely limited. For example, the bid-wanted process is subject to the

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<sup>6</sup> Principal Trade: A securities transaction in which the broker-dealer effects the transaction for its proprietary account. MSRB Glossary of Municipal Securities Terms, Second Edition (January 2004).

<sup>7</sup> Riskless Principal Transaction: A transaction in which a broker-dealer, after having received an order to buy a security, purchases the security as principal to satisfy the order to buy or, after having received an order to sell, sells the security as principal to satisfy the order to sell. *Id.*

<sup>8</sup> “As Agent” Trade: A securities transaction executed by a broker-dealer on behalf of and under the instruction of another party. The broker-dealer does not act in a principal capacity and may be compensated by a commission or fee (which must be disclosed to the party for whom it is acting) rather than by a mark-up. To function as a customer’s agent, a broker-dealer must disclose or express willingness to disclose the identity of the other side of the transaction. *Id.*

<sup>9</sup> “Trades are executed by the blind broker on an anonymous basis—i.e., without the disclosure to either dealer of the identity of the contra party at the time of the trade. . . [S]uch systems are designed to facilitate the execution of orders”. Securities and Exchange Commission, “Proprietary Trading Systems,” Release No. 34-26708, File No. S7-13-89 at 8 (April 11, 1989).

<sup>10</sup> Agency: “Agency is the fiduciary relationship that arises when one person (a “principal”) manifest assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.” “Restatement (Third) of Agency,” at §1.01 (2010). Agents operating under this standard have traditionally had the authority to legally bind their principals, which MSBBs do not.

control of the seller. Sellers may direct that certain potential bidders not be contacted, or that only certain bidders may be contacted. Sellers also determine the time parameters of any bid-wanted. Lastly, MSBBs do not have the authority to effect transactions for their clients at any price they find. Rather, they must return to the seller, and the seller makes the decision to sell, at which time the MSBB effects the transaction.

The only aspect of an MSBB's business that the MSRB has identified as resembling traditional principal transactions is the processing of those transactions which are actually settled through the clearing or other account of the MSBB, but we believe this distinction elevates form over substance. In all other respects, MSBBs act in the limited agency role described above. They do not maintain an inventory of securities for trading purposes and they do not determine whether a transaction will occur, or the price or time of any transaction. Nor can they profit themselves by marking-up a transaction with a counterparty. We believe that it is these conflicts of interest that underlie the principal trading rules.

For the reasons described above, MSBBs have traditionally treated their transactions for all purposes as agency transactions. In March 2001 MSRB stated its position that MSBB transactions should be treated as riskless principal transactions for its Uniform Practice Rules.<sup>11</sup> Subsequent to this, when the MSRB implemented its Real-Time Transaction Reporting System, the system did not allow for the reporting of interdealer transactions as being done by agent.<sup>12</sup> We believe that the way to remedy this issue is to modify the trade reporting systems to allow the reporting of inter-dealer transactions effected on an agency basis.

Based upon the foregoing, SIFMA believes that MSRB should continue its practice, as reflected in the current text of Rule G-18, of applying its General Rules to MSBBs in a manner reflective of the limited nature of MSBBs' business, and not proceeding from a mechanical application of those rules based on the manner in which transactions are processed.

#### Rule G-18

The Proposed Guidance regarding Rule G-18 not only provides additional guidance to help MSBBs in meeting their obligations under Rule G-18, but also substantially modifies the current rule. SIFMA generally supports the additional guidance, but does not support the expansion of Rule G-18 beyond its terms, and further believes that if the MSRB wishes to so expand Rule G-18 it should do so through the normal rule amendment process, with due consideration given to amending the rule not only as it relates to MSBBs, but to all MSRB members.

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<sup>11</sup> MSRB Interpretation on the Application of Rules G-8, G-12 and G-14 to Specific Electronic Trading Systems (Mar. 26, 2001).

<sup>12</sup> Municipal Securities Rulemaking Board, Specifications for Real-Time Reporting of Municipal Securities Transactions, *supra* note 5.

SIFMA supports the Proposed Guidance regarding the steps that may need to be taken in certain circumstances to ensure that the bid-wanted *process* is fair and reasonable. MSBBs currently undertake additional steps when they believe them to be warranted to ensure that they operate a fair bid-wanted process. These steps include seeking to contact the underwriter of an issue and/or prior known bidders on the issue, and similar measures to ensure that bid-wanted are not only widely disseminated, but also exposed to likely interested parties. However, as currently drafted, the Proposed Guidance speaks in terms of what the MSBB “must” do to ensure a fair and reasonable process is conducted. As noted above, the entire bid gathering process is subject to the control of the seller, and the MSBB is bound to follow the seller’s direction so long as such directions are not in contravention of any applicable rules. For this reason, we request that the Proposed Guidance be revised to make clear that these steps are not mandatory, but are suggestions for how an MSBB can meet its obligations.

SIFMA does not support the use of the Proposed Guidance to substantially amend Rule G-18. Rule G-18 currently requires that, in connection with their transactions for their dealer clients, MSBBs shall be under the same obligation to their dealer counterparties as are dealers when they conduct agency transactions with their customers, which is to “make a *reasonable effort* to obtain a price for the customer that is fair and reasonable in relation to prevailing market conditions.” Rule G-18, by its terms, is a process-based rule, not an outcome-based rule. The Proposed Guidance modifies Rule G-18 to require that MSBBs, and only MSBBs, make a determination after the bid process has run its course as to whether the resulting highest bid is fair. In addition, if the MSBB is unable to determine that the price is fair, the MSBB would be required to notify its dealer-client in writing of that fact, and would also be required to receive written acknowledgement of this fact prior to effecting the transaction. Rule G-18 does not, and if it were to be amended by the Proposed Guidance as proposed, would continue to not require these actions be taken by dealers when acting with customers (including retail customers) in an agency capacity.

We believe that this proposal inappropriately places the primary burden of determining whether a transaction should occur on the MSBB, rather than on the sellers of securities. The MSBB’s role in these transactions is to seek to provide their trading counterparties with information about the market for the securities in question at the time in question. The determination of whether a resulting high bid is fair, especially in a market as thinly traded as the municipal securities secondary market,<sup>13</sup> is inherently subjective, and is one which the seller is clearly in a better position to make, and which the MSRB requires that dealers make when acting as principal for their customers.<sup>14</sup>

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<sup>13</sup> See SEC Report on Transactions in Municipal Securities (July 1, 2004), available at: <http://www.sec.gov/news/studies/munireport2004.pdf>. The report found that during the study period, about 70% of municipal securities did not trade, and less than 1% of securities accounted for half of the transaction activity.

<sup>14</sup> See Regulation of Exchanges, *supra* note 3.

When dealers consider whether to trade a bond at a given price, dealers are focused on the market risk involved in establishing or terminating positions, as well as suitability concerns when dealing with customer transactions. The relevant factors for determining prevailing market price are not the same for every trade. For instance, dealers receive a variety of bid and offer information throughout the trading day, including information from interdealer brokers, dealer contacts, their internal research, market or credit analysts, and customers for securities. Dealers may receive this information orally or electronically (e.g., via facsimile, Bloomberg or other electronic messaging systems, or website access). Dealers view this quotation information as critical in assessing the current market price for a bond because it reveals the demand and supply for a particular security or type of security, which – according to basic economic principles – determines price. In some instances, this information may be more important than prior trades.

In addition, there are a myriad of reasons why prevailing market prices may deviate due to unquantifiable market forces. For example, on Day A, a dealer may get 5 bids on a bid wanted listing, with a high bid of 103.5 and a low bid of 101. On Day A, the bid side is established to be 103.5. The next day, Day B, no major market shift may have occurred, but the top two bidders for that type of security do not bid. The top two bidders may not have bid for any number of reasons, including they do not want to risk their capital that day, their portfolios are full with that name or type of credit, or their portfolios are full for that point in the yield curve. The bid side on Day B becomes 101. Liquidity ebbs and flows in the market, and is not constant. Liquidity for a particular securities issuance typically becomes thinner the older it gets. Liquidity for transactions that have recently been issued is fairly high, with a steep drop in liquidity as the issue matures.<sup>15</sup>

Another factor that determines market liquidity on a particular day is the level of supply of bonds. There have been a number of recent examples of leveraged counterparties needing to sell large amounts of bonds in the wake of collateral calls. In this scenario, it is not the securities that are distressed, but it is the seller that is distressed. In a market where supply greatly surpasses demand, the prevailing market price for securities will decrease until the level at which market participants are willing to commit investable capital.

We also note that dealers will often have as good or better a view of the day to day market variations described above than will an MSBB. Given that dealers have multiple sources of information, and typically employ a variety of research, market and credit analysts who are available to their traders, there is no reason to think that, as a general matter, an MSBB is in a better position than is the dealer to make a determination regarding fair market value. As stated above, dealers employ a variety of securities analysts, while MSBBs do not employ research, market, credit or other analysts. In the MSBB's role as auctioneer, the broker-dealer community does not look to MSBBs to provide those services. *In addition, the MSBB will never have any information regarding the dealer's client or the client's motivation for selling a security.* Given these facts, we believe that the dealer should be allowed to make its decision to buy or sell in a particular transaction based on the dealer's analysis of the information available.

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<sup>15</sup> See MSRB 2009 Factbook at 16 (2009).

We also believe that the proposed notice and acknowledgement scheme proposed for when an MSBB is unable to make a fair market value determination is unworkable. Given the fast paced nature of most bond trading desks, it is difficult (if not impossible) to imagine an MSBB and a dealer actually going through the steps of giving notice of the MSBB's inability to determine whether fair value has been achieved, and obtaining written acknowledgement of that disclosure outlined in the Proposed Guidance, *before the transaction is executed*. Given all of the market variations described above, and the extensive information and other resources that dealers have available to them, this market impediment seems unjustified, and potentially harmful.

SIFMA is concerned that the secondary market for municipal securities could be harmed because dealers may be discouraged from committing capital to the municipal securities secondary market, especially to lower-rated securities, retail-sized blocks and any security in a volatile market. Dealers will be less willing to buy securities for their own inventory or otherwise engage in trades that are not crossed internally due to the amount and timing of documentation for compliance purposes that may be required for each transaction. This impact will be heightened if, given all the market variations described above, MSBBs feel compelled to provide notice that they have not been able to make a fair market value determination. This risk is further heightened if dealers do not agree with the MSBB's conclusion that the bid offered cannot be concluded to be fair market value. Given how thinly traded the vast majority of municipal securities are, we believe that these potential risks greatly outweigh whatever the supposed benefit of this part the Proposed Guidance is intended to provide.

Should MSRB continue to pursue this aspect of the Proposed Guidance, SIFMA believes that it should be addressed in a separate rulemaking, and that additional information be provided to explain how these new requirements are intended to work in practice. For example, would an MSBB's dealer-client be free to trade a security with a customer based on a price that the MSBB was unable to determine was fair? If so, would the dealer be required to notify its customer in writing of the MSBB's inability to conclude that the price is fair and reasonable, and to obtain an acknowledgement from the customer? If the dealer-client cannot effect the trade with its customer, isn't the MSBB being forced to take on the dealer's client-protection responsibilities, without any information about the client? Lastly, what avenue would remain available for distressed sellers looking to liquidate municipal securities positions? Would they be barred from the market based on the MSBB's inability to make a fair price determination? We believe that issues such as these support the conclusion that Rule G-18 should not be amended in this manner, and that if such an amendment is to be considered, it should be vetted through the normal rulemaking process.

#### Transactions with Customers

The Proposed Guidance regarding transactions with customers does not appropriately reflect the limited and sophisticated nature of MSBBs' non-dealer counterparties. As indicated in the proposed definition of MSBB above, MSBBs effect transactions only with SMMPs and institutional investors. Given the sophisticated nature of these counterparties, SIFMA does not believe that subjecting these transactions to Rule G-30, and therefore prohibiting these counterparties from trading as they choose, is warranted.

SIFMA believes that MSBB's transactions with SMMPs should continue to be governed by the SMMP Notice published by MSRB in 2002.<sup>16</sup> In the SMMP Notice, the MSRB stated that for dealers in general, that if a dealer effects non-recommended secondary market agency transactions for SMMPs and its services have been explicitly limited to providing anonymity, communication, order matching and/or clearance functions and the dealer does not exercise discretion as to how or when a transaction is executed, then the MSRB believes the dealer is not required to take further actions on individual transactions to ensure that its agency transactions with other dealers are effected at fair and reasonable prices.

Based on the foregoing, any transaction between an SMMP and an MSBB that is effected without the securities being held in the MSBB's account, such as through the CNS System or by fully disclosed introducing MSBBs, would appear to be within the bounds of the SMMP Notice, and not subject to a transaction by transaction analysis under Rule G-30. Further, given the fact that an MSBB is only compensated by a commission on its transactions, and cannot benefit itself by marking-up securities, we believe that SMMPs should be allowed to decide whether it wants to trade with an MSBB even when the transaction is processed through a clearance and settlement account of the MSBB, so long as it is disclosed to the SMMP that the MSBB may process transactions either as riskless principal or agent. We believe that SMMPs should be allowed to continue to trade their securities as they see fit, and not be precluded access to the market in the manner they so choose.

SIFMA also believes that the definition of SMMP should be reviewed, to determine whether additional institutional investors should be accorded the same status as SMMPs. As we discussed in our June 7, 2010 letter to Ernesto Lanza commenting on MSRB Notice 2010-10, we believe the qualifications for institutional investors to be considered SMMPs should be modified. In the context of suitability interpretations, it is widely recognized that institutional and retail investors are qualitatively different,<sup>17</sup> and the threshold for determining an SMMP is very stringent. First, an SMMP must be an entity with total assets of at least \$100 million invested in municipal securities in the aggregate in its portfolio and/or under management. When a dealer has reasonable grounds for concluding that an institutional customer (i) has timely access to the publicly available material facts concerning a municipal securities transaction; (ii) is capable of independently evaluating the investment risk and market value of the municipal securities at issue; and (iii) is making independent decisions about its investments in municipal securities, and other known facts do not contradict such a conclusion, the institutional customer can be considered SMMP by the dealer.

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<sup>16</sup> Interpretive Notice Regarding the Application of MSRB Rules to Transactions with Sophisticated Municipal Market Professionals (April 30, 2002) (the "SMMP Notice").

<sup>17</sup> *Id.*

SIFMA feels a lower threshold is appropriate to establish that an institutional investor is an SMMP.<sup>18</sup> Many institutional accounts do, in fact, have the ability not only to assess the intrinsic value of particular debt securities, but also to evaluate independently the market for them. Certain institutional accounts that are active in the debt securities markets employ considerable in-house expertise evaluating potential investments — expertise that at times may be superior to those of bond dealers. These institutional customers include the asset management arms of virtually every multi-service financial services firm, large insurance companies, and hedge funds specializing in a wide range of liquid and illiquid municipal securities. These institutional customers also typically have sales and trading relationships across several investment banks, regularly possess internal research departments with specialized knowledge of the industry sectors in which they invest, direct contact with issuers and obligors, and have access to their own capital in addition to the capital in the dealer market. They also have access to information from multiple dealers as well as trading screens on which they may do comparative requests for quotations among their dealers.

Based on the foregoing, we believe that many institutional investors that do not meet the definition of SMMP should be accorded greater trading flexibility than would be afforded a retail investor whether by amending the SMMP standards or by recognizing that many institutional investors that do not meet the SMMP standards are still very sophisticated. In this connection, SIFMA suggests that a notice and acknowledgement scheme such as proposed for Rule G-18 transactions might be appropriate in this case. We believe that implementing such a scheme here, as opposed to under Rule G-18 for MSBB-dealer transactions, would appropriately balance an institutional investor's need for protection with its right to access the markets on terms that it deems appropriate, once they have been put on notice by the MSBB regarding its inability to determine whether a potential trade price is fair and reasonable.

#### Rule G-17

SIFMA agrees with the Proposed Guidance's statement that, like all other municipal securities dealers, Rule G-17 applies to MSBBs, and that all dealers have an obligation not to act in "any unfair, deceptive or dishonest manner" in the conduct of their securities business. Below we discuss each point of the Proposed Guidance as it relates to Rule G-17.

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<sup>18</sup> We note, for example, that Section 2(a)(51) of the Investment Company Act of 1940 defines a "qualified purchaser" to have an investment portfolio of at least \$5 million for an individual or at least \$25 million for a corporation, partnership or other entity.

*MSBBs and Non-Dealer Counterparties*

The Proposed Guidance states that MSBBs that have customers (which we understand to mean non-dealer counterparties that are institutional investors or SMMPs), must disclose this fact to both sellers and bidders in writing. While SIFMA agrees with this in principle, we believe that it is important to make clear that this requirement can be met in a variety of ways, such as at the time a dealer or non-dealer counterparty relationship is initiated, through website disclosure, or through a written communication to all counterparties that may include other important information, and that MSBBs should be free to choose to make this disclosure in whatever mode is suitable for their business.

The Proposed Guidance also states that MSBBs that have non-dealer counterparties must also put information barriers in place to ensure that they “are not provided with information about securities of other clients, including the ownership of such securities and information about bids (other than the winning bid that is reported to the MSRB).” While SIFMA agrees that counterparty-specific identification information should not be shared with other counterparties, this provision also appears to prohibit any market-related communication from an MSBB to a counterparty.

SIFMA is especially concerned that a broad restriction on MSBBs sharing market related information with counterparties may lead to a bifurcation of the municipal securities secondary market, as it relates to counterparties dealing through MSBBs versus other dealers. SIFMA strongly believes that the standards on communications should be the same for both MSBBs and dealers, and that the guiding principle should be that all market participants should have access to information needed to allow them to make informed decisions, thereby promoting full access, transparency and fair play in secondary markets.<sup>19</sup>

For example, we do not believe that an MSBB or a dealer should ever provide to a trading counterparty information about what another market participant is doing, if the sharing of such information would allow the trading counterparty to ascertain the identity of the other market participant or its proprietary trading information.<sup>20</sup> However, we do believe that sharing information about what similar securities have recently traded for, or may be currently bid at, is useful information that can allow the counterparty to make informed buy/sell decisions.

If the intended purpose of this provision is to prohibit all market communications, it is unclear to us how such a prohibition aids the operation of a fair and transparent market, or could be fair to market participants. Further, this prohibition appears to put customers of dealers in a superior position to counterparties of MSBBs, which also seems contrary to the goal of fair treatment of

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<sup>19</sup> “Market transparency and access to information is fundamental to a fair and efficient market.” “The MSRB Protecting Investors and the Public Interest,” available at: <http://msrb.org/Publications/~media/Files/MISC/TheMSRBProtectingInvestorsandthePublicInterest.ashx>.

<sup>20</sup> We believe such a standard is consistent with MSRB Rule G-24.

all market participants. Lastly, SIFMA is concerned that such disparate treatment of counterparties based on their status is contrary to the principles of Rule G-17.

#### *Self-Dealing*

SIFMA agrees with the Proposed Guidance's position that sharing of non-public information (including information about bids) between a non-MSBB affiliate (or corporate division, if the MSBB is part of a larger corporate entity) and an MSBB that is purchasing securities for the MSBB's own account (as opposed to the account of the highest bidder) constitutes self-dealing, without regard to whether the trade is done directly, or by interpositioning another dealer in the process. SIFMA further believes that an MSBB should *never* trade securities for its own account, and our proposed definition above incorporates this prohibition. A broker's broker that trades for its own account is not, in our view, an MSBB. We believe that not including such a prohibition in the definition can only lead to confusion about the appropriate roles of MSBBs.

#### *Bid-Wanted and Situations*

SIFMA agrees with the general principle stated in the Proposed Guidance that bid-wanted and situations must be conducted in a fair manner, and that absent clients' permission to represent both sides of a transaction, they must not take any action that works against a client's interest. However, we are concerned that the specific prohibitions on communications to bidders are overbroad, and would impede the conduct of efficient processes to the ultimate detriment of all market participants, as described below.

We believe that communications during bid-wanted and situations should continue to be judged on a case-by-case basis, and not by attempting to prohibit various types of communications. The MSBB should be free to manage the process to avoid, for example, the acceptance of clearly erroneous bids, as this appears to be required under Rule G-13.<sup>21</sup> MSBBs would know that in exercising this judgment as to when to intervene in a bid process they will be judged under Rule G-17.

We also believe the proposed prohibition against letting bidders know where they stand in the bid process is unnecessarily restrictive. Bidders routinely seek information after the "sharp" deadline for bids on whether their bid is likely to be used in a specific bid-wanted, so that they can determine whether the capital represented by their bid is likely to be used for that transaction. This is a long-standing industry practice expected by the broker-dealer community. If, after the sharp deadline, a bidder is clearly out of contention for a bid-wanted, that firm may decide to participate in another bid-wanted to continue to try to put their capital to work. These types of

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<sup>21</sup> Notice of Interpretation of Rule G-13 on Published Quotations (April 21, 1988), *reprinted in* MSRB Rule Book, available at <http://www.msrb.org/msrb1/rulesmotg13.htm>. SIFMA also notes that if MSBBs are unable to intervene in cases of obviously erroneous bids, incorrect information about market value of securities would be reported and disclosed to EMMA, and ultimately could result in customers paying in excess of fair market value. In these situations, FINRA arbitration is almost a certainty.

communication appear to generally benefit all market participants, and foster efficient capital deployment. We note that it is a generally accepted practice that once a bidder receives information consistent with that described directly above, the bidder may not change its bid.

SIFMA is generally supportive of the prohibition against bidder-specific communications other than those described directly above, including communications related to the price offered by the bidder (directions to “review” the bid, or that it is “sticking out”), subject to the following limitations. First, MSBBs should be free to provide non-bid specific market information to bidders at any time, including during a bid-wanted process. Second, as mentioned above, MSBBs should be allowed to contact a bidder when, in the MSBB’s judgment the bid submitted is clearly erroneous. Given the limited nature of these communications, we do not believe that there should be a requirement to notify all bidders to give them the opportunity to adjust their bids. We also are concerned that should a requirement to contact all bidders in a bid-wanted be imposed, this could lead to unintended consequences to the detriment of the auction process.

SIFMA believes that these communications issues may be better addressed by a disclosure to an MSBB’s counterparties describing the MSBB’s bids-wanted communication policies. Such a disclosure could include the MSBB’s policies on all of the points discussed above, and any other points the MSBB deems relevant. Such a disclosure scheme could allow the MSBB’s prospective counterparties to decide for themselves whether they wanted to conduct business with an MSBB given its communications policies. Lastly, we note that MSBB’s communications during a bid-wanted process would still be subject to the general Rule G-17 standard stated in the Proposed Guidance.

#### *Bid-Related Issues*

SIFMA agrees with the Proposed Guidance that it is inconsistent with Rule G-17 to submit fake cover bids, to adjust a bid without the bidder’s knowledge, to fail to inform the selling dealer of the highest bid, to accept bids after a sharp bid deadline, or to submit fictitious trade prices.

#### Recordkeeping/Record Retention

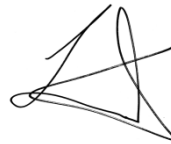
SIFMA agrees with the Proposed Guidance’s provisions addressing Rules G-8 and G-9, requiring MSBBs to keep records of all bids (including “quick answer” bids), together with the time of receipt, for at least three years, and prohibiting records of bids from being overwritten (e.g., when new bids are entered).

Letter to Ms. Henry  
November 15, 2010  
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We wish to thank the MSRB and its staff for their work in developing the Proposed Guidance and for this opportunity to comment on it. We would be pleased to discuss any of these comments in greater detail, or to provide any other assistance that would help facilitate your review of the Proposed Guidance. If you have any questions, please do not hesitate to contact the undersigned at (212) 313-1130.

Respectfully,

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

Letter to Ms. Henry  
November 15, 2010  
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cc: Securities Industry and Financial Markets Association  
Municipal Executive Committee  
Municipal Broker's Brokers Committee  
Municipal Legal Advisory Committee  
Municipal Syndicate and Trading Committee