



September 1, 2009

Justin R. Pica  
Director, Uniform Practice Policy  
Municipal Securities Rulemaking Board  
1900 Duke Street  
Suite 600  
Alexandria, VA 22314

Re: MSRB Notice 2009-43: Request for Comment on Additional Increases in  
Transparency of Municipal Auction Rate Securities and Variable Rate Demand  
Obligations

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Dear Mr. Pica:

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> appreciates this opportunity to respond to Notice 2009-43<sup>2</sup> (the "Notice") issued by the Municipal Securities Rulemaking Board ("MSRB") in which the MSRB requests comment on its draft amendments to Rule G-34(c), on variable rate security market information, that would increase the amount of information currently collected and made transparent by the MSRB on municipal Auction Rate Securities (“ARS”) and Variable Rate Demand Obligations (“VRDOs”). SIFMA is in favor of transparency generally, and specifically in favor of the transparency on the Electronic Municipal Market Access (“EMMA”) Dataport of many of the documents and data points set forth in the draft amendments. However, SIFMA feels strongly that broker dealers are not the appropriate parties to provide this information to EMMA as they are not a party to the requested documents, they are being asked to disclose information which may not be within their knowledge and the requirements will be extremely burdensome for them to fulfill. This new rule proposal is particularly problematic for legacy transactions. Nonetheless, if the MSRB decides to continue on this path of making broker dealers responsible for supplying additional documents and data, our comments on the specifics of the Notice are provided below.

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<sup>1</sup> The Association, or “SIFMA,” brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA’s mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public’s trust and confidence in the markets and the industry. SIFMA works to represent its members’ interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

<sup>2</sup> MSRB Notice 2009-43 (July 14, 2009).

### ARS and VRDO Documents

The draft amendments would require ARS program broker dealers to submit certain ARS documents to the MSRB through the EMMA Dataport. The specific ARS documents that would be required to be submitted to the MSRB via the EMMA Dataport include ARS auction procedures and interest rate setting mechanisms, which may include the trust indenture, broker dealer agreement, and auction agent agreement (the “ARS documents”). These documents are already summarized in official statements on file with EMMA, and many broker dealers already have auction procedures on their websites as well.

The draft amendments would also require VRDO Remarketing Agents to submit certain VRDO documents to the MSRB through the EMMA Dataport. The specific VRDO documents that would be required to be submitted to the MSRB via the EMMA Dataport are VRDO liquidity facility documents, including current Letter of Credit and Stand-by Bond Purchase Agreements (the VRDO documents and, together with the ARS documents, the “ARS and VRDO documents”). Again, these are documents that are already summarized in official statements. VRDO liquidity facility documents are typically entered into between an issuer, a liquidity facility provider, such as a bank, and the trustee. SIFMA’s broker dealer members are not parties to those documents. SIFMA is concerned about its members being required to submit to EMMA, for outstanding issues, documents that they were not a party to, and for which those who are parties to the agreements did not necessarily contemplate public release, and which therefore may contain confidential information. Of course, if this rule change is adopted, parties to new issue transactions would be on notice that such documents will be sent to EMMA in the future. We reiterate, however, that SIFMA’s broker dealer members are typically not a party to liquidity facility documents, and can only forward on to EMMA information that they receive from issuers when and if they receive it.

SIFMA’s members would like to note that some broker dealers have been voluntarily filing these kinds of documents (when and if they are received for new issues) with industry information services such as Bloomberg or posting them on their firm’s website, and they could be sent to investors upon request. An alternate suggestion, instead of the proposed rule, may be for EMMA to provide a statement for any municipal short-term issue that advises the following: “To obtain copies of program documents, contact your investment professional”.

However, SIFMA feels that broker dealers are not necessarily the appropriate party to be required to provide the requested documents and information to EMMA, and that there are other entities (those who are parties to these agreements) that may be more appropriately tasked with sending this information to EMMA. This is true both in terms of efficiency and the dissemination to investors of timely and accurate information. SIFMA feels that if disclosing

material information to investors is the goal of this rule proposal, to the extent that the broker dealer has already filed a final official statement for an issue with EMMA pursuant to its obligations under Rule G-32, and that official statement contains information regarding the ARS and VRDO documents, broker dealers should not be required to make additional filings related to those documents.<sup>3</sup>

### Timing of Implementation

#### *New or Amended Documents*

The draft rule change states dealers would be required to provide the current versions of the ARS and VRDO documents within one business day of receipt. That time frame is unduly burdensome for a broker dealer to submit documents to which it is not a party. Issuers and liquidity facility providers do not send broker dealers these documents in any uniform manner, and it may take a couple of days internally at a broker dealer for these documents to get routed to the proper place for submission to EMMA. SIFMA feels that a more reasonable submission deadline would be no later than five business days after receipt.<sup>4</sup>

#### *Current Documents for Outstanding Issues*

The draft rule change also states dealers would be required to provide the current versions of a variety of documents on outstanding issues within 30 days after the effective date of the draft amendments. SIFMA feels strongly that this rule proposal should not apply to outstanding issues. As stated above, SIFMA is concerned about its members being required to submit to EMMA, for outstanding issues, documents that they were not a party to, and for which those who are parties to the agreements did not necessarily contemplate public release, and which therefore may contain confidential information. If the MSRB nonetheless decides to implement this rule change for outstanding issues, SIFMA feels that 30 days is not a reasonable timeframe, and suggests that the dealers be required to utilize reasonable effort to submit the ARS and VRDO documents within 180 days of the effective date of the draft amendments for the reasons stated hereinafter. First, there are approximately 16,500 outstanding VRDO transactions that are serviced by approximately 80 different remarketing agent broker dealers. The top four remarketing agent broker dealers each service in excess of 1,100 weekly VRDO issues alone, not including VRDOs that have daily or other reset periods. There are approximately 1,750 outstanding ARS transactions concentrated with approximately two dozen program broker dealers. Most of the dealers that are active as ARS program broker dealers are also active as VRDO remarketing agents, which concentrates the impact of this rule proposal on certain broker

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<sup>3</sup> It is important to note that the SEC recently released proposed changes to Rule 15c2-12, which would eliminate the exemption for VRDOs. See <http://www.sec.gov/rules/proposed/2009/34-60332.pdf>.

<sup>4</sup> This is similar to the MSRB timeframe for submission of advance refunding documents.

dealers. This rule proposal will create an unreasonable burden on the handful of firms that are very active in the municipal short-term market.<sup>5</sup> The sheer number of transactions for which documents will need to be submitted to the EMMA Dataport, and number of documents per transaction, is the primary reason that more time is needed. Second, broker dealers do not have ready access to all of these documents in an electronic form that can be easily uploaded to the EMMA Dataport. Many of these documents, particularly on older deals, are in storage on a “closing set” CD-ROM (not necessarily as a separate, easy-to-extract file) or in paper format in bound closing volumes. Third, those documents that the broker dealer only has on paper need to be scanned, and may require other manual processes such as breaking up the document files into sizes that can be uploaded. Finally, it is important to note that any documents for outstanding deals that need to be scanned will not be able to be word searchable. Given that broker dealers are not parties to these agreements, the amount of work by broker dealers needed to satisfy this proposed new requirement is staggering. For these reasons, SIFMA feels the MSRB should change the draft amendments for broker dealers to be required to utilize reasonable effort to submit the ARS and VRDO documents within 180 days of the effective date of the draft amendments.

#### ARS Bidding Information

The additional ARS bidding information being requested would increase the cost of doing business for auction rate securities, through increased work and liability, for a product that is winding down. There have not been any new ARS issues in over a year and a half, and none are expected. In light of the current status of the ARS market and the fact that there are no new ARS transactions anticipated, the burdens of providing this information to the MSRB are very costly in terms of time and resources and not practicable. However, if ultimately required, the disclosure of this information to EMMA by way of a document, instead of breaking out each data element, would help minimize the burden.

SIFMA needs to point out that disclosure of the “number of unique bidders” may be misleading, as there is no uniform paradigm for processing and counting bidders and orders. There are two specific reasons: (1) firms’ systems may aggregate orders from separate lines of business; and (2) bids from other broker dealers (non-program broker dealers) will often “count” as one bid, but actually may represent the aggregation of multiple orders. Not all orders or investors will be accounted for individually. Therefore, without the knowledge of how each firm’s systems are aggregating bids from other lines of business and non-program broker dealers, any filings to EMMA and resultant disclosure are likely to be inaccurate and misleading.

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<sup>5</sup> Conservatively, if it takes an hour to locate, extract, scan, and upload each such document or document sets, it would take several man-years for firms that have any degree of market share in these issues to satisfy this proposed rule change.

Also, following the March 14, 2008 SEC No Action Letter<sup>6</sup> SIFMA received on municipal auction rate securities, issuers have been disclosing their intent to bid and bidding results on public websites. These notices are posted on broker dealers' ARS websites or are posted on [www.dacbond.com](http://www.dacbond.com), which is a free public website run by DAC. Therefore, submission of this information to EMMA by the broker dealer is redundant and inefficient.

#### Additional VRDO Information

The collection and submission by broker dealers of the additional VRDO information to EMMA would be extremely burdensome, and the requirement would also increase the cost of doing business for VRDO transactions, through increased work and liability.

#### *Tender Agent and Liquidity Provider Information*

SIFMA feels that broker dealers should not be responsible for submitting to EMMA the identity of and contact information for each tender agent and liquidity provider, including indicating those VRDOs for which an issuer provides "self-liquidity" and the identity of the party providing such self-liquidity, and maintaining the accuracy of that information. Again, an issuer contracts with banking institutions to provide tender agent services and liquidity facility services. The remarketing agent broker dealer is not in privity of contract with the tender agent or the liquidity facility provider. The remarketing agent broker dealer may not receive notice of substitutions of liquidity facilities that it is entitled to receive or may not receive notice in a timely manner. Also, personnel at various tender agent and liquidity facility provider institutions and their coverage of clients changes frequently (sometimes without notice to remarketing agents), and therefore it is not appropriate for the remarketing agent broker dealer to be responsible for updating this information with the MSRB.

#### *Holders of VRDOs*

SIFMA feels strongly that specific disclosure of remarketing agent broker dealer inventory of VRDOs would be detrimental to the municipal securities market by giving competitors a trading advantage against each other. This information is collected by regulators as part of the SEC's Financial and Operational Combined Uniform Single ("FOCUS") Report,<sup>7</sup> but the FOCUS Report is not disseminated to the public for transparency purposes so as not to disclose proprietary information about a firm. This proposed rule change would require the remarketing agent broker dealer to send to EMMA the par amount of the VRDOs, if any, held by the remarketing agent, a liquidity provider ("Bank Bonds") for the VRDOs, and a party other than the remarketing agent or as a Bank Bond. First, SIFMA feels that it is important to disclose

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<sup>6</sup> <http://www.sec.gov/divisions/corpfin/cf-noaction/2008/mars031408.pdf>.

<sup>7</sup> [http://www.sec.gov/about/forms/formx-17a-5\\_schedi.pdf](http://www.sec.gov/about/forms/formx-17a-5_schedi.pdf).

to VRDO investors that the remarketing agent may, but is not obligated to, purchase bonds for its own account, and this is typically disclosed in an official statement. Again, SIFMA feels that the inventory level of securities at each firm is proprietary information. If this information is collected and disseminated by the MSRB, then the trading strategies of the various firms may be irreparably damaged. Second, the remarketing agent does not necessarily know the par amount of Bank Bonds that are being held by the liquidity facility provider at any point in time, since the remarketing agent is not in privity of contract with the liquidity facility provider. Investors who want to sell their VRDOs, tender their VRDOs directly to the tender agent. Depending on when VRDOs are tendered to the tender agent, the remarketing agent may not know the VRDOs have been tendered and are about to become Bank Bonds. Also, Bank Bonds may be subject to a revised amortization scheduled pursuant to the terms of the liquidity facility.

It is important to note that ARS and VRDOs are fundamentally different types of securities. The liquidity provided when ARS program broker dealers or issuers bid for and purchase ARS is not as of right to bondholders and may be discontinued, while VRDOs actually benefit from a dedicated liquidity facility that provides liquidity to all investors in that security. Broker dealer participation in VRDO transactions does not affect the liquidity of the securities any differently than participation by any other investor. All investors may exit their positions by tendering them to the tender agent for the issue. SIFMA feels that remarketing agents could provide, on a reasonable effort and aggregated basis, the amount of VRDOs that were successfully remarketed, which would include the par amount of VRDOs for that issue that were held by parties other than the remarketing agent plus the par amount of VRDOs held by the remarketing agent. SIFMA feels strongly that the amount of Bank Bonds and the amount of VRDOs held by remarketing agent broker dealers should not be required to be separately reported.

#### *Interest Rate on Bank Bonds*

SIFMA feels that any disclosure about the Bank Bond rate is more appropriately left to the issuer's annual financial statement to be considered among other financial disclosures in context with the rest of the issuer's transactions as opposed to a stand-alone piece of information. Transparency of the Bank Bond rate, on its own, does not aid investors; it merely places an unnecessary burden on broker dealers who would be required to provide it. Remarketing agents are contractually bound to continue to remarket VRDOs at a market rate, regardless if the bonds are tendered to the tender agent or are Bank Bonds. The Bank Bond interest rate does not affect the interest rate paid to investors, or the actions of the remarketing agent, as the Bank Bond rate reflects the negotiated rate for Bank Bonds between the issuer and the liquidity facility bank, not the periodic market rate for VRDOs. SIFMA does not believe this proposed requirement is justified.

Remarketing agent broker dealers may not know the current Bank Bond rate and therefore cannot provide the Bank Bond rate to EMMA. The interest rate may be based on a calculation methodology for which the remarketing agent broker dealer may not have access to all of the factors that determine the rate. The interest rate on Bank Bonds may be a blended rate, consisting of a composite calculation of the rates then in effect when each block of bonds was tendered by an investor and that block became Bank Bonds. Bank Bonds may also have different rates depending on how long they have been Bank Bonds. This information is not something a remarketing agent broker dealer is typically responsible for determining or tracking, and it would be onerous for the remarketing agent broker dealer to attempt to ascertain and track this information, which may differ from reset period to reset period, particularly for VRDOs that reset daily or weekly.

#### Request for Comment

SIFMA has covered most of the MSRB's specifically bulleted requests for comment hereinabove. The final point that SIFMA would like to address is the MSRB's question, would dealers be able to provide a summary of the material terms of any such documents not available for submission to the MSRB? In the official statement, summary information is already presented regarding the then-current ARS and VRDO documents. Official statements are vetted by counsel to all parties to the transaction, and submitted by the broker dealers as required under Rule G-32. SIFMA feels strongly that broker dealers should not be responsible for independently summarizing documents to which they are not a party, and submitting those document summaries to EMMA for disclosure. This is not an appropriate allocation of responsibility, and it would significantly increase the potential liability of the broker dealer. Any such document summaries have the potential for being misleading. If firms are forced to manage this increased risk, it's likely that either the transaction costs will increase or firms will be less willing to participate in transactions – both of which are a cost to issuers. SIFMA feels that, in the interest of investor protection, investors would be better off choosing to invest (or not to invest) in a particular security based on the full official statement and ARS and VRDO documents. If those documents are not available, then investors should take that into consideration in their investment decision, instead of making an investment decision on document summaries provided by a third party which may be incomplete or inaccurate. SIFMA reiterates its suggestion that instead of the proposed rule, EMMA should provide a statement for any municipal short-term issue such as the following: "To obtain copies of program documents, contact your investment professional".

#### Conclusion

SIFMA is in favor of transparency, but feels this rule proposal as written is onerous, and objects to this plan of making broker dealers responsible for information in agreements to which

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they are not parties or to which they cannot gain ready access. SIFMA would like the MSRB and SEC to conduct a cost-benefit analysis to examine, not only this proposed rule change, but the cumulative impact of recent rule changes on the broker dealers, specifically with regard to the potential increase in liability for broker dealers and the potential effects on market efficiency.<sup>8</sup> SIFMA suggests that: 1) if adopted, the time for submission of any new or amended documents should be within five days of receipt instead of one day; 2) if an official statement is on file with EMMA disclosing summaries of the ARS and VRDO documents for outstanding transactions, then that should be sufficient disclosure; 3) as opposed to burdening dealers with backfilling documents for historical issues, the industry could adopt a model or best practices for continuing disclosure agreements to add the ARS and VRDO documents, when amended or replaced; 4) if adopted, the broker dealers should be required to utilize reasonable effort to submit the ARS and VRDO documents within 180 days of the effective date of the draft amendments instead of 30 days; and 5) the MSRB and SEC should consider whether a replacement or amended liquidity facility should be deemed to be a material event under Rule 15c2-12, in light of the current amendments to the rule regarding VRDOs.

We appreciate this opportunity to comment on this proposed rule change. SIFMA's members feel strongly that further dialog would be helpful to achieve more transparency, and we would like to discuss these comments and suggestions with MSRB staff further. If you have any questions concerning these comments, or are open to discuss these comments with us further, please feel free to contact the undersigned at 212.313.1130 or via email at [lnorwood@sifma.org](mailto:lnorwood@sifma.org).

Respectfully,

A handwritten signature in black ink, appearing to be 'L. Norwood', written in a cursive style.

Leslie M. Norwood,  
Managing Director  
and Associate General Counsel

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<sup>8</sup> "Tighter Regulation Proposed for Muni Dealers to Increase Issuer Disclosure", 41 SRLR 33, August 17, 2009.



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cc: ***Securities Industry and Financial Markets Association***

Municipal Executive Committee  
Municipal Legal Advisory Committee  
Municipal Credit, Research, Strategy and Analysis Committee  
Municipal Syndicate & Trading Committee  
Municipal Operations Committee  
ARS/VRDO Transparency Task Force  
Regional Dealers Fixed Income Committee