SIFMA Municipal Advisor Model Language:

Model Form of Underwriter Letter of Intent

SIFMA has prepared model documents and related guidance to help municipal securities dealers comply with the new regulatory requirements created by the SEC’s Municipal Advisor Rule. The SEC’s Municipal Advisor Rule imposes a registration regime upon municipal advisors, i.e., firms that give advice absent an exemption or exclusion to municipal entities and obligated persons, and imposes a fiduciary duty upon municipal advisors that give advice to municipal entities. MSRB rulemaking will impose additional requirements and prohibitions on the behavior of municipal advisors.

The Rule granted certain exemptions and exclusions from the definition of municipal advisor for persons providing certain types of advice that would otherwise deem that person to be a municipal advisor. One such exclusion is for a firm that has been engaged to be an underwriter for a particular issuance of municipal securities. Although there is no regulatory requirement to have a written engagement letter, for compliance purposes some firms may find it useful to document the relationship. The model language below can be suggested to municipal entities and obligated persons if they would like to receive advice from a firm they want to contract with on a principal basis on a transaction.

SIFMA’s model disclosures are designed to be a starting point to aid firms with compliance with the SEC’s Municipal Advisor Rule; however, close attention must be paid to the specific language used as the Rule and the SEC’s interpretive guidance is very definitive in what is required for the exemptions or exclusions to properly apply. SIFMA encourages underwriters to expand or modify these documents as necessary to reflect their own analysis of the rule or specifics of particular transactions.

SIFMA recommends that firms update their internal procedures and continue to educate their personnel about this new regulatory requirement.

Attachment A

Note to [Municipal Entity/Obligated Person]: Brokers, dealers, and other financial institutions (“financial services firms”) that seek to enter into principal transactions with municipal entities or obligated persons generally cannot give advice unless they qualify for an exemption or exclusion to the SEC’s Municipal Advisor Rule. One such exclusion to the rule for financial services firms is when a firm has been engaged as an underwriter by the municipal entity or obligated person. If you would like to receive advice from a financial services firm regarding the issuance of municipal securities by engaging them as an underwriter, you should consider sending the language below to the financial services firm to aid in documenting their compliance with an exclusion to the rule which would permit the firm to give advice to you as a municipal entity or obligated person.

Form of Underwriter Letter of Intent[[1]](#footnote-1)

[State or local government/Obligated Person] is aware of the “Municipal Advisor Rule” of the Securities and Exchange Commission (effective July 1, 2014) and the underwriter exclusion from the definition of “municipal advisor” for a firm serving as an underwriter for a particular issuance of municipal securities.

[State or local government/Obligated Person] hereby designates [Underwriter] as an underwriter for [brief description of the Bonds] (the “Bonds”) that [State or local government/Conduit Issuer/Obligated Person] currently anticipates issuing. [State or local government/Obligated Person] expects that [Underwriter] will provide advice to [ State or local government/Obligated Person] on the structure, timing, terms, and other matters concerning the Bonds.

It is [State or local government/Obligated Person]’s intent that [Underwriter] serve as an underwriter for the Bonds, subject to satisfying applicable procurement laws or policies, formal approval by [governing body/issuer], finalizing the structure of the Bonds and executing a bond purchase agreement. While [State or local government/Obligated Person] presently engages [Underwriter] as the underwriter for the Bonds, this engagement letter is preliminary, [[2]](#footnote-2) nonbinding and may be terminated at any time by [State or local government/Obligated Person], without penalty or liability for any costs incurred by the underwriter, or [Underwriter].

Furthermore, this engagement letter does not restrict [State or local government/Obligated Person] from entering into the proposed municipal securities transaction with any other underwriters or selecting an underwriting syndicate that does not include [Underwriter].

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[Underwriter]

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[[State or local government/Obligated Person] duly authorized official responsible for public finance]

Attachment B

[Optional Attachment to Form of Underwriter Letter of Intent

Disclosures Pursuant to MSRB Rule G-17

I. Disclosures Concerning the Underwriter’s Role:

(i) MSRB Rule G-17 requires an underwriter to deal fairly at all times with both municipal issuers and investors.

(ii) An underwriter’s primary role is to purchase the Bonds with a view to distribution in an arm’s-length commercial transaction with the Issuer. An underwriter has financial and other interests that differ from those of the Issuer.

(iii) Unlike a municipal advisor, an underwriter does not have a fiduciary duty to the Issuer under the federal securities laws and is, therefore, not required by federal law to act in the best interests of the Issuer without regard to its own financial or other interests.

(iv) An underwriter has a duty to purchase the Bonds from the Issuer at a fair and reasonable price, but must balance that duty with its duty to sell the Bonds to investors at prices that are fair and reasonable.

(v) An underwriter will review the official statement for the Bonds in accordance with, and as part of, its respective responsibilities to investors under the federal securities laws, as applied to the facts and circumstances of this transaction.

II. Disclosures Concerning the Underwriter’s Compensation

The underwriter will be compensated by a fee and/or an underwriting discount that will be set forth in the bond purchase agreement to be negotiated and entered into in connection with the issuance of the Bonds. Payment or receipt of the underwriting fee or discount will be contingent on the closing of the transaction and the amount of the fee or discount may be based, in whole or in part, on a percentage of the principal amount of the Bonds. While this form of compensation is customary in the municipal securities market, it presents a conflict of interest since the underwriter may have an incentive to recommend to the Issuer a transaction that is unnecessary or to recommend that the size of the transaction be larger than is necessary.

III. Additional Conflicts Disclosures:

OPTION 1: [[The underwriter] has not identified any additional potential or actual material conflicts that require disclosure.]

OPTION 2: [[The underwriter] has identified the following additional potential or actual material conflicts:]

1. Drafting Note: Underwriters should consider having municipal entity or obligated person send the above model language to the underwriter in an e-mail to memorialize an oral agreement. [↑](#footnote-ref-1)
2. MSRB Rule G-17. Underwriters should consider the timing of sending the requisite Rule G-17 disclosures. Per the SEC January 2014 FAQs, an engagement letter or letter of intent must contain the following feature: “the engagement letter or a separate writing done at or before the time of the engagement provides all disclosures that are required to be made by underwriters by the time of an engagement under MSRB Rule G-17, including disclosures about the role of the underwriter, the underwriter’s compensation, and actual or potential material conflicts of interest (excluding only those permitted to be disclosed after the time of engagement under MSRB Rule G-17).” [↑](#footnote-ref-2)