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Invested in America

November 30, 2011

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Amendment No. 2 to File Number SR-MSRB-2011-09

Amendment No. 2 to Proposed Interpretive Notice Applying MSRB Rule G-17 to Underwriters of Municipal Securities

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("**SIFMA**")[1] appreciates the opportunity to provide the Securities and Exchange Commission (the "**Commission**" or the "**SEC**") with comments on the Municipal Securities Rulemaking Board ("**MSRB**")'s Amendment No. 2 to its proposed interpretive notice applying MSRB Rule G-17 to underwriters of municipal securities (the "**Amended Proposal**").

SIFMA strongly supports the MSRB's efforts to provide guidance on the application of Rule G-17 to underwriters. The principle of fair dealing embodied in MSRB Rule G-17 is critical to ensuring that the municipal securities market operates in a fair and transparent manner and provides a foundation for a strong and efficient market, which is in the best interest of all market participants. SIFMA appreciates the complex and challenging nature of the issues before the MSRB and commends the MSRB for taking a thoughtful and deliberative

[1] 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).

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approach to them. It is in this context that SIFMA reiterates its concern over the timing of this proposal and urges the MSRB to take additional time to address certain flaws in the Amended Proposal. We discuss in greater detail below the aspects of the Amended Proposal that raise the most serious concerns.

I. The Amended Proposal Is Premature

SIFMA reiterates its objection to the timing of this proposal. Many underwriters do not know yet whether they will be municipal advisors as a consequence of final rules to be issued by the SEC, or how the obligations imposed under this notice will dovetail with their obligations under the MSRB's municipal advisor rules. To the extent that underwriters may ultimately become subject to duplicative or inconsistent (but as yet unknown) obligations relating to the same or similar activities, it is extremely difficult for them to comment on this proposed interpretive notice. In some cases, it is not possible to know if a firm even has an interest in commenting.

SIFMA believes that at a minimum, the portion of the Amended Proposal addressing an underwriter's obligation to provide written risk disclosures should be withdrawn and refiled with the Commission at a later point, as it is almost certain that other MSRB rules will impose in the near future similar disclosure obligations for financial advisors and other registered municipal advisors, and it is important that the overall scheme, disclosure content and allocation of disclosure responsibilities among various regulated persons be rational and consistent.

II. The Amended Proposal's "One-Size-Fits-All" Approach Imposes Overbroad and Costly Obligations On Underwriters That Do Not Meaningfully Enhance Issuer Protection

The municipal issuer market is large and diverse. There are estimated to be more than 55,000 different issuers of municipal securities in the United States. Some are large and frequent issuers with sophisticated in-house professionals that have significant securities issuance experience. Others in the medium- and small-issuer portion of the market may access the market less frequently and have less developed in-house capabilities. Between the large, most sophisticated issuers and the small, less experienced ones, there is a dramatic difference in terms of experience, knowledge and internal capacity, such that the types of disclosures that would be helpful and meaningful versus redundant and wasteful would vary significantly depending on the issuer. In addition, another key distinction that should inform whether, to what extent and what types of disclosures underwriters should be required to provide to issuers is whether or not the issuer has retained a financial advisor with respect to a transaction.

The Amended Proposal would require underwriters to make generalized role and compensation disclosures to issuers in all negotiated underwritings, regardless of the sophistication of the issuer. Moreover, even where the issuer has retained a financial advisor to advise the issuer on the material characteristics and risks of a transaction, the Amended Proposal would require that underwriters provide (potentially duplicative) written risk disclosures to the issuer. The Amended Proposal would require underwriters to assess the capacity and sophistication of the issuer even where the issuer has a professional financial advisor advising it with respect to a transaction. In addition, the Amended Proposal would require underwriters to provide issuers with detailed written disclosures about "complex transactions" even where the recipient of the disclosure is a large and frequent issuer and may be very familiar with those transactions. SIFMA believes that a thorough cost-benefit analysis of these potentially costly requirements is critical to avoid unintended consequences that could unnecessarily hamper municipal market activity. Unless carefully evaluated, these additional requirements could constrain the ability of underwriters to offer services to issuers in a cost-effective and timely manner, without meaningfully enhancing issuer protection. SIFMA urges the Commission to carefully consider these costs and weigh them against the potential benefits, none of which are properly considered in the MSRB's proposal.

- ***Written Risk Disclosure Requirements Should Not Apply If Issuer Has Retained a Financial Advisor***: At a minimum, where the municipal entity has engaged a financial advisor, it should be the role of that advisor, not the underwriter, to provide the municipal entity with an analysis of the material risks and characteristics of a particular transaction and to explain the role of the underwriter. While there may be some arguments for requiring an underwriter to make particularized, entity-specific conflict-related disclosures to an issuer even if that issuer has a financial advisor, requiring an underwriter to provide written risk disclosures or generalized disclosure (including about the underwriter's role and compensation) to an issuer that is being advised by a financial advisor with respect to a transaction would blur and duplicate roles in ways that would be both confusing and inefficient. Where the issuer has retained a financial advisor, that advisor should be tasked with evaluating the material risks and characteristics of the transaction and with soliciting more information from the underwriter if the advisor deems that necessary or beneficial. Not requiring the underwriter to duplicate those efforts not only makes sense from a cost perspective, but would also ensure that the roles of underwriter and advisor remain appropriately separate and distinguishable. Finally, as noted above, it is almost certain that other MSRB rules will ultimately impose similar disclosure obligations for financial advisors. Until

such related MSRB rules have been re-proposed and can be considered, it is not possible to make informed comments on whether or not the overall disclosure scheme and allocation of disclosure responsibilities among the various regulated persons is appropriate.

- ***Underwriters Should Not Be Required To Evaluate Issuer Personnel Capacity and Sophistication If Issuer Has Retained a Financial Advisor***: If an issuer has a financial advisor with respect to an issuance, the underwriter should be permitted to make any required disclosures to that professional. It should be the responsibility of the financial advisor, not the underwriter, to tailor that disclosure in a manner that is appropriate to the issuer's level of sophistication. Moreover, a financial advisor is better situated than the underwriter to assess if additional disclosures or efforts would be necessary to ensure that issuer personnel are adequately informed.

- ***Underwriters Should Not Be Required To Provide Generalized Role and Compensation Disclosures or Written Risk Disclosures To Large and Frequent Issuers Unless Requested By Such Issuers***: The Amended Proposal would require underwriters to provide generalized role and compensation disclosures in all negotiated underwritings, regardless of the sophistication of the issuer. SIFMA believes that especially for large and frequent issuers that regularly issue securities and are very familiar with the underwriting process, the generalized role and compensation disclosures will not serve any meaningful purpose. Similarly, SIFMA believes that for these large and frequent issuers, mandating written risk disclosures for any "complex" transaction, where that term is vaguely defined, will result in unnecessary disclosures that add costs without enhancing issuer protection. The Amended Proposal casts a very wide net on the types of transactions that could be considered "complex." It states that any financing involving derivatives would be an example of a complex municipal securities financing. For the typical large and frequent issuer, a financing involving a plain vanilla interest rate swap, for example, will be commonplace and well understood. Yet because of the overly broad and prescriptive manner in which the Amended Proposal requires disclosure, underwriters may feel compelled to provide detailed disclosure with respect to these commonplace transactions to large and sophisticated issuers. Such written disclosures would entail considerable work and may require detailed review by underwriters' counsel in order to ensure that appropriate caveats are included in the disclosure. They would also pose significant logistical and timing issues for transactions that come

together and are finalized in the span of 24-48 hours, a not uncommon time frame for issuances involving large and frequent issuers. For all of these reasons, SIFMA believes that for these sophisticated issuers, the written risk disclosures and generalized role and compensation disclosures should not be required unless those issuers specifically request them. SIFMA believes that it would be appropriate for the MSRB to establish an objective standard for determining which issuers should be considered sufficiently large and sophisticated for these purposes.

- ***The Interpretive Notice Should Not Apply to Underwriters Whose Participation Level Is Below 10 Percent:*** The Amended Proposal states that the proposed interpretive notice does not apply to selling group members. SIFMA believes that in its cost-benefit analysis, the MSRB should consider extending a similar exception for syndicate members whose participation level is below 10 percent. SIFMA notes that issuances with multiple syndicate members will in the vast majority of cases involve large and frequent issuers. Under the proposed disclosure scheme, every underwriter in an underwriting pool presumably would be required to make particularized conflict disclosures every time an issuer chooses to go to market, which would lead to dozens of such disclosures annually for certain issuers. Requiring such disclosures from a syndicate member whose participation level is minimal is unlikely to be useful to the issuer and may even be counterproductive in that the issuer would be inundated with voluminous information that is not material to the issuance. On the other hand, the burden of producing such disclosure would be significant and may be disproportionately high compared to the underwriter's low participation level.

The above is a non-exhaustive list of factors and variables that SIFMA believes the MSRB should consider in conducting its cost-benefit analysis to determine whether the additional requirements imposed by the proposed interpretive notice are sufficiently narrowly tailored, so that the benefits of the additional regulation outweigh the costs. Absent such a careful evaluation, SIFMA believes that the Amended Proposal will result in unintended consequences and overly constrain the municipal market without yielding commensurate benefits.

III. Timing of Disclosure

The Amended Proposal states that the required risk disclosure must be made in writing to the appropriate issuer personnel "in sufficient time before the

execution of a contract with the underwriter" to allow the official to evaluate the recommendation. SIFMA requests clarification that "execution of a contract" does not refer to a response to a request for proposal ("RFP"), many of which specify that a response must be signed and is deemed to be an acceptance of the "offer" made by the RFP; or to counter-signing an appointment letter naming a firm as an underwriter or member of an underwriting syndicate; or to the execution of an engagement letter agreeing to serve as underwriter under a transaction structure and terms yet to be determined. SIFMA believes that execution of the purchase agreement would be the more appropriate trigger point from which to evaluate whether there was sufficient time to evaluate a recommendation.

Separately, in some cases, there may not be sufficient time before the execution of the purchase agreement to prepare and provide detailed and particularized written risk disclosure. Many municipal securities transactions do not come together until the last minute, with key structural or transaction terms negotiated close to or on the same day that the bond purchase agreement is signed. In many cases, important terms of the financing may be ironed out in the span of a 24 hour window and the underwriter may not have certainty even as to its engagement until the purchase agreement is executed. SIFMA requests guidance on how an underwriter should fulfill its duty to provide written risk disclosure and to obtain a written acknowledgement in these circumstances. Absent such guidance, the proposed disclosure and acknowledgement requirements could result in underwriters needing to compel delays to the transaction until the written risk disclosure can be revised and re-reviewed by legal counsel, even though market conditions or the issuer's business needs might make it desirable or necessary for the transaction to proceed without delay. One approach to this situation, which SIFMA would support, is to permit in MSRB's final guidance that in the event of changes to transaction structure or market conditions that occur subsequent to the giving of an initial written risk disclosure, if the pricing occurs within 48 hours of such change, an underwriter may satisfy any incremental disclosure obligation through verbal disclosure that the underwriter contemporaneously documents in its internal files.

IV. Disclosure of Hedging and Risk Management Arrangements

The Amended Proposal provides that if a dealer issues or purchases credit default swaps ("**CDS**") the reference obligor for which is the issuer to which the dealer is serving as an underwriter, the underwriter must disclose to the issuer "the fact that it engages in such activities." SIFMA requests clarification that, in the case of a conduit issuer that issues bonds for multiple obligors or with respect to a specific project or revenue stream, any disclosure needs to be made solely to

the obligor or obligors that are obligated with respect to the securities transaction being underwritten by the underwriter.

V. Application to Private Placement Agents

SIFMA requests clarification that the Amended Proposal is not intended to apply to private placement agents. SIFMA believes that this is the intention of the proposal based upon certain of the proposed requirements (including the contents of the proposed "role" disclosure for underwriters), but clarification would promote certainty to placement agents regarding their regulatory obligations.

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Please do not hesitate to contact me with any questions at (212) 313-1130; or Lanny A. Schwartz and Robert L.D. Colby of Davis Polk & Wardwell LLP, at (212) 450-4174 and (202) 962-7121, respectively. SIFMA appreciates this opportunity to comment upon the MSRB's Amendment No. 2 to the Proposed Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities.

Sincerely yours,

Leslie M. Norwood
Managing Director and
Associate General Counsel

cc: The Honorable Mary L. Schapiro, Chairman
The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
The Honorable Daniel M. Gallagher, Commissioner

Lynnette Kelly Hotchkiss, Executive Director, Municipal Securities Rulemaking Board