MSRB
Municipal Securities
Rulemaking Board

December 7, 2011

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: Response to Comments on Amendment No. 2 to File No. SR-MSRB-2011-09

Dear Ms. Murphy:

On November 10, 2011, the Municipal Securities Rulemaking Board (the "MSRB") filed with the Securities and Exchange Commission (the "Commission") Amendment No. 2[1] to a proposed rule change originally filed with the Commission on August 22, 2011 (the "Original Proposal" and, together with Amendment No. 2, the "Proposal").[2] The Proposal consists of a proposed interpretive notice concerning the application of MSRB Rule G-17 (on conduct of municipal securities and municipal advisory activities) to underwriters of municipal securities. Amendment No. 2 was published by the Commission for comment in the Federal Register on November 21, 2011 and the Commission received seven responses.[3]

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1 Amendment No. 2 to File No. SR-MSRB-2011-09 (November 10, 2011).

2 File No. SR-MSRB-2011-09 (August 22, 2011). The Commission published the original proposal for comment in the Federal Register on September 9, 2011 and received five comment letters. *See* Exchange Act Release No. 65263 (September 6, 2011), 76 FR 55989 (September 9, 2011). On November 10, 2011, simultaneously with the filing of Amendment No. 2, the MSRB submitted to the Commission its response to these comment letters. *See* Letter from Margaret C. Henry, MSRB General Counsel, Market Regulation, to Elizabeth M. Murphy, Commission Secretary, dated November 10, 2011 (the "Prior MSRB Response").

3 *See* Exchange Act Release No. 65749 (November 15, 2011), 76 FR 72013 (November 21, 2011). Comments were received from AGFS, Bond Dealers of America ("BDA"), Government Finance Officers Association ("GFOA"), National Association of Independent Public Finance Advisors ("NAIPFA"), Public Financial Management, Inc. ("PFM"), Securities Industry and Financial Markets Association ("SIFMA"), and WM Financial Strategies ("WM").

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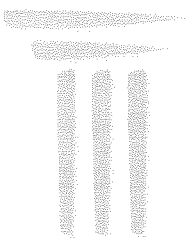
This letter provides the MSRB's responses to these comments. In summary, the MSRB does not believe that any further changes to the Proposal are warranted, although the MSRB provides some additional clarifications with regard to how certain matters are to be understood in our responses below. To the extent that any commenters on Amendment No. 2 express comments or concerns that were previously expressed by commenters on the Original Proposal, the MSRB's responses thereto contained in the Prior MSRB Response continue to reflect the MSRB's views and are incorporated herein by reference, subject to the further responses set forth below.

General Matters

All commenters support the application of the principles of fair dealing under Rule G-17 to the interactions of underwriters with issuers. In addition, BDA and WM support the more limited applicability of the Proposal in the case of competitive underwritings as provided for under Amendment No. 2. SIFMA argues that the Proposal is premature because the Commission's rulemaking on municipal advisors remains pending, but the MSRB disagrees for the reasons described in the Prior MSRB Response. SIFMA also argues that a so-called "'one-size-fits-all' approach imposes overbroad and costly obligations on underwriters that do not meaningfully enhance issuer protection." Again, the MSRB disagrees, noting that the Proposal in fact recognizes that there is significant variability of size, sophistication and frequency of accessing the market among issuers across the country, and many of the disclosures required under the Proposal can be tailored, and in some cases are not required at all, based on a number of relevant factors set out in the Proposal and described in greater detail in the Prior MSRB Response and below. Most across-the-board disclosure provisions in the Proposal either require transaction-specific or underwriter-specific disclosures of relevant conflicts of interest or consist of standardized educational disclosures with respect to which, as described below, underwriters most likely would realize greater cost-effectiveness and reduced regulatory risk by making such disclosures globally rather than on a case-by-case basis.

Disclosures of the Role of the Underwriter and Conflicts of Interest

In response to comments received by the Commission on the Original Proposal, the MSRB included in Amendment No. 2 a number of changes regarding the disclosures that underwriters would be required to make under the Proposal in connection with the role of the underwriter and conflicts of interest for the reasons enunciated in the Prior MSRB Response. After reviewing the comments on Amendment No. 2, the MSRB believes that the revised provisions of the Proposal establish the appropriate disclosure requirements and do not merit further modification.



AGFS, which did not comment on the Original Proposal, states that "it is essential that the explicit disclosures and disclosure procedures outlined in MSRB Notice 2011-61 be approved and implemented." PFM, which also did not comment on the Original Proposal, states that the Proposal "represents a significant improvement over the [Original Proposal] which was submitted to the Commission for approval in August 2011."[4] The remaining commenters on Amendment No. 2, all of whom had previously provided suggestions on the Original Proposal, provide comments either that were previously raised and addressed in the Prior MSRB Response or that represent new issues that are addressed below.

NAIPFA, SIFMA and WM suggest that underwriter disclosures should be minimized or eliminated when the issuer has employed a municipal advisor, arguing that disclosures may result in issuer confusion, although SIFMA concedes that "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." As noted above, AGFS disagrees that disclosures should be minimized or eliminated, as does GFOA.

GFOA suggests additional modifications to the language to more specifically describe the duties that underwriters do not have under federal law and to affirmatively note that issuers may choose to engage the services of an independent financial advisor. AGFS also states that issuers should be encouraged to obtain advice from a municipal advisor subject to a fiduciary duty. BDA supports the Proposal's prohibition on recommending against hiring a municipal advisor. Absent elimination of underwriters' disclosures, NAIPFA suggests that the disclosure regarding the underwriter's fair pricing duty be recast in terms of being "not unreasonable" and "not necessarily the 'best' or 'lowest rate available'" and that underwriters be required to disclose their compensation at both the beginning and end of a transaction and to provide disclosure regarding potential conflicts in forms of compensation other than contingent fee arrangements. BDA suggests certain changes in language regarding the disclosures about underwriters not having a fiduciary duty, the nature of underwriters' fair pricing duties, and the conflict created by contingent fee arrangements. SIFMA states that disclosures of the role of underwriters and the conflict created by contingent fee arrangements should not be required for large and frequent issuers.

The MSRB believes that the provisions relating to these disclosures are appropriate for the reasons described in the Prior MSRB Response and as set forth below, and therefore no further modifications in these provisions are warranted. Providing more information to issuers, as the MSRB has proposed, about the nature of the duties of the professionals they engage –

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[4] PFM also discusses whether certain advice provided by an underwriter should be subject to the fiduciary duty applicable to municipal advisors. The MSRB views these issues as beyond the scope of the Proposal.

regardless of the issuer's size, sophistication or frequency of accessing the market[5] – can only serve to empower, rather than confuse, issuers. In particular, the MSRB does not subscribe to the view that issuers are better served by receiving less information about their transaction participants or their duties. The required disclosures appropriately draw a contrast with municipal advisors in noting that underwriters do not have a fiduciary duty but do not require the underwriter to parse out the specifics of what a fiduciary duty entails, which cannot be done accurately in a short statement.

The MSRB also believes that it is appropriate to characterize the underwriter's duties of fair pricing as a balance between the interests of the issuer and investors and that enunciating the fair pricing duty in terms of prices being not unreasonable would inaccurately state the applicable legal standard. The MSRB does not agree that underwriters should be required to provide a disclosure that the price to the issuer may not be the best or lowest price available since, depending on the specific pricing of a new issue, might not be an accurate disclosure.

In addition, the MSRB believes that it has accurately characterized compensation arrangements contingent on closing or on the size of the transactions as creating a conflict of interest – it may be that other factors on which an underwriter and the issuer have a coincidence of interests may outweigh the conflicting interests resulting from the contingent arrangement, but that does not change the fact that such arrangement itself represents a conflict. Further, given the transaction-based nature of the typical relationship between underwriters and issuers, the Proposal's requirements regarding disclosure of compensation conflicts, together with the other conflicts disclosures included in the Proposal, adequately address concerns that may arise in cases where potential conflicts may arise under less typical compensation scenarios.

The MSRB believes that the Proposal's provision that an underwriter must not recommend that the issuer not retain a municipal advisor is a stronger protection to issuers than a disclosure that an issuer may choose to engage an advisor because this provision affirmatively restrains an underwriter from taking action to discourage the use of an advisor rather than simply informing an issuer of a choice it already has and has no reason to believe it does not have. Thus, the MSRB has retained the prohibition on recommending against the hiring of a municipal advisor rather than adopting a disclosure stating that an issuer may wish to consider retaining a municipal advisor.

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[5] The MSRB believes that not providing an exemption for certain types of issuers with respect to generalized disclosures would actually reduce the burden and regulatory risk to underwriters as compared to a formulation that requires such disclosures for only some issuers, and such disclosures even to the most sophisticated issuers can serve important purposes when staff and other issuer officials change over time due to attrition, reassignment, election or otherwise.

With regard to various other conflicts disclosures included in the Proposal, BDA supports the change made by Amendment No. 2 to clarify that disclosures of third-party payments do not require that the amount paid be disclosed. GFOA states that it will encourage issuers to make inquiries regarding the amounts of any disclosed third-party payments. The MSRB agrees that such further inquiries can be made. In addition, the MSRB wishes to make clear that the third-party payments to which the disclosure requirement under the Proposal would apply are those that give rise to actual or potential conflicts of interest and typically would not apply to third-party arrangements for products and services of the type that are routinely entered into in the normal course of business, so long as any specific routine arrangement does not give rise to an actual or potential conflict of interest.

BDA agrees that profit sharing arrangements with investors should be disclosed but expresses concerns that some market participants may read the Proposal's language too broadly. The MSRB believes that the language of the proposal appropriately reflects that the disclosure applies in the cases were there exists an arrangement to split or share profits realized by an investor upon resale.

GFOA supports the Proposal's provisions relating to credit default swap disclosures, while SIFMA requests clarification that, in the case of conduit issuers that may issue bonds for multiple obligors or other credits, any disclosures with respect to credit default swap activities need only be made to the obligor that is obligated with respect to the securities that the underwriter has underwritten. The MSRB observes that the Proposal only requires that credit default swap disclosures be made to the issuers of the municipal securities and not to any conduit borrowers or other obligors. However, the MSRB will take under advisement the question of whether such disclosure should be extended to any applicable obligors other than the issuer.

Disclosures in Connection with Underwriting Transactions

GFOA believes that it would be beneficial to issuers if underwriters were to err on the side of more information in providing information to issuers on routine financings and states that "there is never too much relevant information that can be provided to an issuer." As noted above, NAIPFA, SIFMA and WM argue that underwriter disclosures should be minimized or eliminated when the issuer has employed a municipal advisor, arguing that disclosures may result in issuer confusion. GFOA disagrees, stating that it "strongly believe[s] that the [Proposal] should require the underwriter to disclose risks of a financing. While the issuer can and should consult with other professionals about a financing (including a financial advisor and bond counsel), the underwriter should be clear about the risks associated with a transaction, and has the responsibility to do so."[6]

[6] GFOA also suggests that the Commission and the MSRB begin considering "establishing some type of suitability standard for the types of financial products that may be sold to

If such disclosures are to be required, NAIPFA opposes the "reasonable belief" standard for underwriters to determine whether issuer personnel lack knowledge or experience with a recommended structure and therefore whether the disclosure requirement is triggered for a routine transaction, arguing instead that underwriters should be required to make a case-by-case assessment of such knowledge and understanding. However, BDA supports the "reasonable belief" standard. PFM argues that "[t]here is nothing but mischief" in the Proposal's standard for determining the level of disclosure to an issuer that is based on the financial ability to bear the risks of the recommended financing. SIFMA believes that written risk disclosures to "large and frequent issuers that regularly issue securities and are very familiar with the underwriting process . . . will result in unnecessary disclosures that add costs without enhancing issuer protection." SIFMA also believes that the concept of complex financings includes some financing structures that are "commonplace and well understood" by such issuers. SIFMA states that the preparation of written risk disclosures would entail considerable work, may require detailed review by counsel, and could pose timing and logistical issues for financings that proceed quickly. SIFMA suggests that written disclosures for "sophisticated issuers" should be required only upon request and that the MSRB should establish an objective standard for determining which issuers are sophisticated.

The MSRB believes that the provisions relating to these disclosures are appropriate for the reasons described in the Prior MSRB Response and set forth below, and therefore no further modifications in these provisions are warranted. Providing more information to issuers, as the MSRB has proposed, about the material financial characteristics and risks of an underwriting transaction recommended by an underwriter under the circumstances described in the Proposal will provide considerable benefits to, rather than confuse, issuers. In particular, the MSRB does not subscribe to the view that issuers are better served by hearing fewer opinions or receiving less information about their transactions. In fact, the solution to any potential confusion that might result from underwriters providing required disclosures and municipal advisors providing to issuers advice regarding such transactions most certainly is not to silence one party or the other, but instead is to recognize that the parties to the transaction may not have a common understanding of key features of their transaction and need to take further steps to gain that common understanding or to understand the basis and validity of any divergences in views before proceeding to consummate the underwriting.

The MSRB does not believe it would be appropriate to modify the "reasonable belief" standard regarding the level of knowledge and experience of issuer personnel and the other factors to be used to determine the level of required disclosure and notes that the MSRB provides some guidance on the factors that are relevant in coming to such reasonable belief. Although the

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state and local governments." Although outside the scope of the Proposal, the MSRB will keep this suggestion under advisement.

MSRB would concede that the financial ability to bear the risks of a recommended financing would not normally be a sufficient basis, by itself, for determining the level of disclosure to provide, the Proposal states three distinct factors that should be considered together in coming to this determination.[7]

Finally, the MSRB declines to modify the requirements for providing written disclosures to sophisticated issuers. Of course, to the extent such issuers have extensive knowledge or experience with a proposed financing structure, high capabilities of evaluating the risks of the recommended financing, and strong financial ability to bear the risks of the recommended financing, the level of disclosure required would be considerably reduced. For issuers that do not have these levels of competencies, the discipline and clarity of providing such written disclosures will provide considerable protection against the possibility that the issuer might proceed with a transaction that it otherwise would not undertake if it fully understood the material terms and risks thereof. The MSRB concedes that some underwriters may bear up-front costs in creating basic frameworks for the required disclosures for the various types of products they may offer their issuer clients, but the on-going burden should thereafter be considerably reduced and the preparation of written disclosures would become an inter-related component of the necessary documentation of the transaction. Finally, with respect to financings that are moving to completion on an accelerated timeframe, the MSRB believes that, if an underwriter is asking an issuer to bind itself to the terms of a complex financing, it is unreasonable for the underwriter to expect the issuer to do so without having an opportunity to fully understand the nature of its commitment.

Manner, Timing and Acknowledgement of Disclosures

GFOA states that disclosures to issuers are of limited value to issuers if they are not understandable and that a "plain English" standard should be adopted. The MSRB agrees that reasonable efforts must be made to make the disclosures understandable, providing in the Proposal that disclosures must be made in a fair and balanced manner and, if the underwriter does not reasonably believe that the official to whom the disclosures are addressed is capable of independently evaluating the disclosures, the underwriter must make additional efforts reasonably designed to inform the issuer or its employees or agent.

GFOA states that the provision of the Proposal regarding which issuer personnel are to receive the written disclosures of the underwriter "may be adequate to set a baseline standard and

[7] Further, although the argument presented by PFM on this point might be relevant in determining whether the recommended structure could expose an issuer to bankruptcy, a consideration of whether an issuer might face such bankruptcy, without regard to the other relevant factors identified in the Proposal, would certainly be an insufficient basis on which to determine the level of disclosure required.

understanding of what is required of the underwriter" but that "once in place, additional discussions between the MSRB, SEC and marketplace participants may be in order to achieve the goal of the standard." GFOA further notes that the goal should be to "ensure that the underwriter provides adequate information about a financing to key decision making personnel of the issuer. Depending on the issuer, such personnel are likely to include appropriate staff members, but may or may not include members of its governing body." NAIPFA, however, argues against a "reasonable belief" standard for underwriters to determine whether an official or employee of an issuer has the authority to bind the issuer by contract and proposes that the MSRB instead require that underwriters have actual knowledge of such authority.[8] BDA supports the "reasonable belief" standard but requests clarification that such reasonable belief extends to the expectation that an official will be delegated the authority to bind the issuer given that in some cases such delegation may not occur until a later time in the course of a financing. NAIPFA also raises questions regarding the extent of delegation of authority from an issuer's governing body to a finance official, effectively stating that in most cases the only venue for disclosure that would be available would be to the full governing body. In addition, NAIPFA raises a number of questions regarding the handling of underwriters' responses to requests for proposals, which the Proposal identifies as an example of one potential vehicle through which required disclosures could be provided to an issuer. SIFMA suggests that, in cases where an issuer has engaged a financial advisor, any underwriter disclosures should be made to such financial advisor rather than to issuer personnel and that the financial advisor should have the responsibility of providing such information in an appropriate manner.

While acknowledging that some methods of providing written disclosures may operate more effectively than others and that in some cases determining who is authorized to bind the issuer may raise complexities, the MSRB does not view NAIPFA's narrow view of which personnel should receive the disclosures as practicable. Rather, the MSRB has determined to take the approach suggested by GFOA, and therefore has not changed this provision of the Proposal but will monitor disclosure practices under the Proposal and will engage in a dialogue with industry participants and the Commission to determine whether sufficient improvements have occurred in the flow of disclosures to decision-making personnel of issuers or whether additional steps should be taken. The MSRB notes that an official, such as a finance director, who is expected to receive the delegation of authority from the governing body to bind the issuer could reasonably be viewed as an acceptable recipient of disclosures for purposes of the Proposal so long as such expectation remains reasonable.

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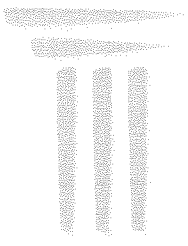
[8] In the Prior MSRB Response, the MSRB observed that NAIPFA had requested in a comment letter on an MSRB proposal regarding disclosures to be made by municipal advisors to issuers that a municipal advisor be permitted to rely on the apparent authority of an issuer representative when making the disclosure, provided the municipal advisor had no reason to believe the individual with whom it was dealing lacked the requisite authority.



BDA suggests that the MSRB provide clarification of certain elements of the timing of the various disclosures required under the Proposal. In particular, BDA suggests reformulating the timing requirement with respect to the initial disclosure of the arm's-length nature of the underwriter-issuer relationship to provide that it must be included in a response to a request for proposal or in promotional materials provided to the issuer, rather than at the earliest stages of the relationship with respect to an issue. SIFMA seeks clarification regarding the timing of disclosures about the material financial characteristics and risks of an underwriting transaction recommended by an underwriter, and further seeks guidance on how underwriters are to make disclosures in light of the fact that, in some cases, terms may not be finalized very shortly before the execution of the purchase contract and the underwriter may not be certain that it will be engaged to undertake that role until the purchase contract is signed.

The MSRB believes that the timeframe set out in the Proposal, which matches the timeframe for this same disclosure under guidance provided in connection with recent amendments to Rule G-23, on activities of financial advisors,[9] is appropriate and should not be changed. As requested by BDA, the MSRB clarifies that, other than the disclosure with regard to the arm's-length nature of the relationship, the remaining disclosures regarding the underwriter's role, underwriter's compensation, and other conflicts of interest all must be provided when the underwriter is engaged to perform underwriting services (such as in an engagement letter), not solely in the bond purchase agreement. Further, as requested by SIFMA, the contract referred to in the timing provision for transaction-specific disclosures of material financial characteristics and risks, which seeks to ensure that issuers have a sufficient amount of time to evaluate the underwriter's recommendation prior to executing on such recommendation, is in fact the bond purchase agreement. With regard to circumstances where an underwriter may be uncertain of its role in a financing until the signing of the bond purchase agreement, the MSRB observes that such an underwriter is undertaking any number of activities prior to the execution of the bond purchase agreement without certainty of ultimately serving in that role and the fact that this disclosure might join such other activities as being made under those circumstances does not create an undue hardship. The MSRB addresses concerns regarding financings where final terms are determined very late in the process earlier in this letter.

NAIPFA supports the requirement that disclosures be acknowledged in writing by the issuer but expresses concern regarding an underwriter's obligation if the issuer has not provided such acknowledgement. NAIPFA requests that the Proposal provide a "level of effort" with respect to what actions must be taken to obtain the issuer's written acknowledgement prior to proceeding with the engagement. BDA states that underwriters should not be required to

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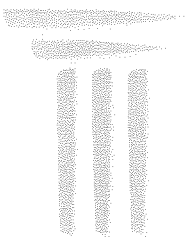
[9] *See* "Guidance on the Prohibition on Underwriting Issues of Municipal Securities for Which a Financial Advisory Relationship Exists Under Rule G-23," November 27, 2011, published in MSRB Notice 2011-29 (May 31, 2011).

document why it was unable to obtain a written acknowledgement but should only be required to document that the disclosure was made and whether it has received an acknowledgement.

The MSRB is clarifying that, under the Proposal, if an issuer does not provide the underwriter with a written acknowledgement of receipt of disclosures, the failure to receive such acknowledgement must be documented, as well as what actions were taken to attempt to obtain the acknowledgement, in order for the underwriter to fulfill its obligation to document why it was unable to obtain the acknowledgement. However, the MSRB has not amended the Proposal to lay out specific actions that must be taken to attempt to receive the acknowledgement.

BDA notes that the Proposal permits disclosures concerning the role of the underwriter and the underwriter's compensation to be made by a syndicate manager on behalf of other syndicate members, with other conflicts disclosures to be made by the particular underwriters subject to such conflicts. BDA further states that disclosures should not be required from "underwriters who do not have a role in the development or implementation of the financing structure or other aspects of the issue." SIFMA similarly suggests an exemption for syndicate members whose participation level is below 10 percent. The MSRB declines to create any such exemption since not all conflicts or other concerns that arise in the context of an underwriting are necessarily proportionate to the size of participation of an underwriter. The MSRB notes, however, that with respect to disclosures about the material financial characteristics and risks of an underwriting transaction recommended by underwriters, where such recommendation is made by the syndicate manager on behalf of the underwriting syndicate, the Proposal does not prohibit syndicate members from delegating to the syndicate manager (through, for example, the agreement among underwriters) the task of delivering such disclosure in a full and timely manner on behalf of the syndicate members, although each syndicate member would remain responsible for providing disclosures with respect to conflicts specific to such member.

The MSRB notes that all of the provisions of the Proposal relating to the timing of disclosures and the persons to whom such disclosures must be delivered should be viewed in light of the overarching goals of Rule G-17 and the Proposal. The various timeframes are not intended to establish hair-trigger tripwires resulting in numerous but meaningless rule violations so long as underwriters act in substantial compliance with such timeframes and have met the key objectives of the Proposal in these regards, being that an issuer has clarity throughout all substantive stages of a financing regarding the roles of its professionals, the issuer is aware of conflicts of interest well before it effectively becomes fully committed (either formally or due to having already expended substantial time and effort) to completing the transaction with such underwriter, and the issuer has the information required to be disclosed with sufficient time to take such information into consideration before making certain key decisions on the financing. The MSRB will monitor matters relating to the timing of disclosures under the Proposal in order to determine whether any further action in this area is merited.

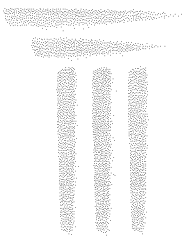


Miscellaneous Matters

PFM suggests that the Proposal's articulation of the underwriter's fair pricing duty to the issuer is attenuated by the reference in the Proposal to the MSRB's long-standing view that whether an underwriter has dealt fairly with an issuer for purposes of Rule G-17 is dependent upon all of the facts and circumstances of an underwriting and is not dependent solely on the price of the issue. The MSRB believes that this long-standing view enhances, rather than detracts from, issuer protection and that PFM has misunderstood its meaning. The MSRB's view is that, even if an underwriter provides a fair price to an issuer for its new issue offering, its fair practice duties under Rule G-17 are not thereby discharged because, among other things, the many principles laid out in the Proposal also must be addressed. Conversely, an underwriter cannot justify under Rule G-17 an unfair price to an issuer by balancing that unfair price with the fact that it may otherwise have been fair to the issuer under the other fairness principles enunciated in the Proposal.

GFOA and NAIPFA note their concerns regarding so-called "flipping" activities in the new issue market, requesting that the MSRB work with other regulators on developing an operational definition of the term and to consider other educational or rulemaking actions to address any problems that may arise from such activities. Although the MSRB will reach out to these organizations and the Commission in an attempt to develop a shared understanding of what such activities entail and potential concerns regarding the implications of these activities, the MSRB notes that, to the extent these activities could be characterized as arrangements between the underwriter and an investor purchasing new issue securities from the underwriter according to which profits realized from the resale by such investor of the securities are directly or indirectly split or otherwise shared with the underwriter, these activities may already be subject to the Proposal's disclosure obligation with respect to profit-sharing with investors.

With respect to the handling of retail orders, BDA states that the Proposal establishes two different standards for "essentially the same situation," referring to the framing of retail orders and the acceptance of retail orders. However, the MSRB believes that BDA has misunderstood these provisions of the Proposal. The Proposal provides that an underwriter that knowingly accepts an order that has been framed as a retail order when it is not would violate Rule G-17 if its actions are inconsistent with the issuer's expectations regarding retail orders, but also provides that a dealer that places an order that is framed as a qualifying retail order but in fact represents an order that does not meet the qualification requirements to be treated as a retail order violates its duty of fair dealing. These two provisions are entirely consistent and appropriate, since in the first provision an underwriter is receiving an order framed by a third party whereas in the second provision a dealer (not limited to an underwriter) is itself placing and framing the order. Therefore, the MSRB has not modified these provisions.



SIFMA requests clarification that the Proposal is not intended to apply to private placement agents. Given the nature of role disclosures provided for in the Proposal in light of the characteristics of a true "private placement" of municipal securities, as described below, those elements of the role disclosures that would not be applicable to a true private placement of municipal securities – in particular, those relating to the arm's-length nature of the relationship, the lack of a fiduciary standard, and the review of the official statement if no such document will be prepared – would not be required to be included in the disclosures made under the Proposal in connection with a dealer serving as placement agent for a new issue. However, Rule G-17 itself, and the remaining provisions of the Proposal, would continue to apply. Dealers must remain cognizant of the fact that the circumstances under which a true private placement may arise in the municipal market are quite constrained, and dealers are cautioned against casually relying upon common characterizations of new issue municipal offerings as private placements since many – if not most – of such transactions may not be true private placements. In particular, a private placement, for purposes of this paragraph, must involve a situation where the dealer has taken on a true agency role with the issuer (which at a minimum negates any arm's-length aspect of the relationship and would normally give rise to state law fiduciary obligations owed to the issuer[10]) and where the dealer does not take any principal position (including any so-called "riskless principal" position) in the securities. The fact that an offering qualifies for the exemption from the Commission's Rule 15c2-12 under paragraph (d)(1)(i) thereof, or that the securities are offered only in large denominations, or are only offered to sophisticated municipal market professionals or other classes of institutional investors, does not by itself determine whether an offering is a private placement. Although state law fiduciary obligations may not be identical to the fiduciary obligations that the MSRB may ultimately adopt for municipal advisors, dealers should be aware that such state fiduciary duties may entail additional disclosure and fairness obligations that the dealer must meet to satisfy its duty to the issuer which may be more or less extensive than those required under the Proposal.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Margaret C. Henry

Margaret C. Henry
General Counsel, Market Regulation

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10 Although state law fiduciary obligations may not be identical to the fiduciary obligations that the MSRB may ultimately adopt for municipal advisors, dealers should be aware that such state fiduciary duties may entail additional disclosure and fairness obligations that the dealer must meet to satisfy its duty to the issuer which may be more or less extensive than those required under the Proposal.