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Invested in America

January 27, 2012

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

Re: Order Instituting Proceedings to Determine Whether to Disapprove Proposed Rule Change, as Modified by Amendment No. 2, Consisting of Interpretive Notice Applying MSRB Rule G-17 to Underwriters of Municipal Securities
File Number SR-MSRB-2011-09

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 to its order instituting proceedings to determine whether to disapprove a rule change proposed by the Municipal Securities Rulemaking Board ("**MSRB**"), as modified by Amendment No. 2, consisting of a proposed interpretive notice (the "**Proposal**") applying MSRB Rule G-17 to underwriters of municipal securities.[2]

SIFMA submitted on September 30, 2011 comments to the MSRB's initial proposal dated August 22, 2011. SIFMA subsequently submitted on November 30, 2011 comments to Amendment No. 2 to the Proposal. As noted in those comment letters, SIFMA strongly supports the MSRB's efforts to provide guidance on the application of Rule G-17 to underwriters, but is concerned about the timing of the Proposal and the vague and overbroad nature of certain requirements that the Proposal would impose on underwriters. In particular, we highlight the following points, which we believe raise the most serious concerns:

[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).

[2] Exchange Act Release No. 34-65918 (Dec. 8, 2011) ("**Disapproval Proceedings Order**").

SIFMA reiterates its objection to the timing of the Proposal. Given the areas of potentially significant overlap between the Proposal and MSRB's municipal advisor rules, SIFMA believes that the Proposal should be withdrawn and re-proposed at a future date so that the Proposal can be considered in tandem with the MSRB's municipal advisor rules and the SEC's own final registration rule for municipal advisors. It is important that the overall scheme of regulation, disclosure content and allocation of disclosure responsibilities among various regulated persons be compatible and consistent and that potential commentators can consider the aggregate effects of all of these rules.

SIFMA believes that the various written disclosure obligations that the Proposal would impose on underwriters will be costly, and that these costs would be justified only to the extent those additional requirements result in greater issuer protection. It is of concern that the Proposal is overly broad and burdensome and is not likely to produce a benefit commensurate with the associated costs. While the MSRB states that "many of the disclosures required can be tailored,"[3] the Proposal lacks sufficient detail to guide underwriters. For example, the 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 (such as a financing involving a variable rate demand obligation or a plain vanilla interest rate swap, which are commonplace and would be well understood by sophisticated issuers, but would be considered a "complex transaction" under the Proposal).

At a minimum, the Proposal should be revised as follows:

- Regarding role disclosures, SIFMA notes that in accordance with MSRB Rule G-23, municipal underwriters already provide written disclosures to issuers explaining the primary role of an underwriter and distinguishing that role from that of a financial advisor with legal fiduciary duties to the issuer.[4] The Proposal should be revised to minimize duplication with MSRB Rule G-23.

[3] See Disapproval Proceedings Order p. 2.

[4] See SIFMA's Model Clarifying Statements for Municipal Securities Underwriters (Revised November 2011), available under "Additional Forms and Documents" at: http://www.sifma.org/services/standard-forms-and-documentation/municipal-securities-markets/, stating that members should make such role disclosure to issuers at the earliest possible time.

- 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.

- 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 and 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.

- For large and frequent issuers that regularly issue securities and are very familiar with the underwriting process, the generalized role and compensation disclosures generally would be redundant and not meaningful, and should not be required unless the issuer requests them.[5]

- Similar to the provision stating that the Proposal will not apply to selling group members, the Proposal should be amended to not apply to underwriters whose participation level is below 10 percent.

In the alternative, to the extent that written risk disclosures are ultimately required to be sent directly to the issuer, various aspects of the rule would need to be clarified to provide adequate guidance:

- There needs to be more specific guidance regarding which issuer personnel must have the requisite level of knowledge and sophistication to trigger additional disclosure requirements.

- SIFMA does not believe that it would be appropriate or practical to impose upon the underwriter the duty to assess the level of sophistication and experience of the issuer official to whom the disclosures is delivered if such official is reasonably believed to have authority to bind the issuer. The Proposal should be clarified to state that underwriters may rely on a representation from such official that he or she is sufficiently sophisticated and experienced. Issuers should be responsible for ensuring that they authorize appropriate personnel to contract for them.

[5] However, as noted above, to comply with MSRB Rule G-23, SIFMA members have already incorporated into their policies and procedures the practice of providing written disclosures to issuers explaining the primary role of underwriters.

- Moreover, references in the Proposal to "atypical or complex" transactions are vague and insufficient to give underwriters sufficient notice as to when the special disclosures for "complex transactions" will be required.

SIFMA reiterates its request for more guidance on how underwriters are to fulfill their duties to provide written risk disclosures during complex financings that are executed on an accelerated timeframe. The MSRB notes that "if an underwriter is asking an issuer to bind itself to the terms of a complex financing, it would be unreasonable for the underwriter to expect the issuer to do so without having an opportunity to fully understand the nature of its commitment." However, it is generally the issuer that drives the timing of a transaction, not the underwriter. As stated in our prior comment letter, absent additional guidance, the proposed disclosure and acknowledgement requirements could result in underwriters needing to compel delays in transactions, even though the issuer's business needs might make it desirable or necessary for the transactions to proceed without delay.

SIFMA believes the requirement in the Proposal as it relates to issue price certificates is not appropriate because evaluating the reasonableness of an issue price certificate is better left to the tax authorities than to securities self-regulatory authorities.

The Proposal should not impose requirements on underwriters that recommend swaps, as those same activities will be subject to detailed rules to be issued by the CFTC and SEC. The MSRB has stated that it will address any inconsistencies between MSRB and CFTC/SEC rules through additional rulemakings in the future, but SIFMA believes the more appropriate and rational course of action under the circumstances would be to defer the imposition of any disclosure requirements or other business conduct standards relating to swaps and security-based swaps until related CFTC and SEC rules have been finalized.

To the extent the Proposal is approved without significant change, SIFMA believes that the proposed implementation period of 90 days is insufficient and should be lengthened.

In addition, SIFMA supports the following interpretive guidance in the MSRB's comment letter dated December 7, 2011[6] and believes they should be included in a revised proposal:

- That the disclosure requirement relating to third-party payments would apply where such payments would give rise to an actual or potential conflict and typically would not apply to third-party arrangements for products and services that are routinely entered into in the normal course of business (as long as any specific routine arrangement does not give rise to an actual or potential conflict).

- That underwriters may provide transaction-specific disclosures of material financial characteristics and risks prior to the execution of the bond purchase agreement, rather than prior to the execution of an engagement letter or response to a request for proposal.

Finally, SIFMA would like to note that it disagrees with a number of comments made by the MSRB and by commentators regarding the Proposal, some of which are noted in the Disapproval Proceedings Order. Specifically:

- The MSRB states 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."[7] SIFMA respectfully disagrees with this assessment. Even if the MSRB's assessment were to be correct for some underwriters, the MSRB should still grant the exemption for large and sophisticated issuers, as a particular underwriter could always choose to provide disclosures across the board if it believes that would be easier from a practical perspective. The MSRB also states that generalized disclosures would be beneficial even to the most sophisticated issuers "when staff and other issuer officials change over time due to attrition, reassignment, election or otherwise." Given the size and depth of the in-house financing departments of large and sophisticated issuers, SIFMA believes it would be highly unusual for attrition, reassignments or elections to

[6] Letter from Margaret C. Henry, General Counsel, Market Regulation, MSRB, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, December 7, 2011 ("**MSRB Comment Letter**").

[7] Id. at FN 5.

compromise the core institutional knowledge of those issuers. To the extent the MSRB is concerned of such an unlikely event, it would be more reasonable to impose a narrower obligation that is tailored to address that situation, rather than to impose a blanket obligation to provide generalized disclosures to all large and sophisticated issuers.

- SIFMA disagrees with comments suggesting that disclosures be made to, and approvals be obtained from, the issuer's governing body. SIFMA believes that these requirements would burden the issuance process for municipal securities with additional red tape that would not improve the integrity of the process or the quality of issuer decision-making during security issuances. It should be sufficient for the required disclosures to be provided in a timely manner to an authorized official of the issuer (or the issuer's financial adviser, if the issuer has retained one).

  For similar reasons, the Proposal should not be changed to require underwriters to have "actual knowledge" rather than a "reasonable belief" that the official receiving the underwriter's disclosure has the power to bind the issuer by contract.

- SIFMA disagrees with comments submitted by the National Association of Independent Public Finance Advisors ("NAIPFA") stating that because underwriters do not have a fiduciary duty to issuers, they should be subjected to a "more rigorous" disclosure process than advisors, and should be required, at a minimum, to obtain "informed consent" from issuers as to their disclosed conflicts, to mirror the standard applicable to municipal advisors.[8] NAIPFA's argument is self-serving and turns on its head the distinction between underwriters, who as arms-length counterparties to issuers, must act according to "simple principles of fair dealing,"[9] and advisors, who as fiduciaries of issuers must act in their best interest.

[8] Letter from Colette J. Irwin-Knott, CIPFA, President, National Association of Independent Public Finance Advisors, dated September 30, 2011.

[9] 76 Fed. Reg. 55989, at 55993.

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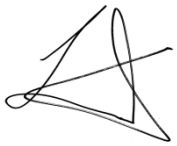
Please do not hesitate to contact me with any questions at (212) 313-1130; or Lanny A. Schwartz and Robert L.D. Colby of Davis Polk & Wardwell LLP, at (212) 450-4174 and (202) 962-7121, respectively.

Sincerely yours,



Leslie M. Norwood
Managing Director and
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cc: ***Securities and Exchange Commission***
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

Municipal Securities Rulemaking Board
Lynnette Kelly, Executive Director
Ernesto Lanza, Deputy Executive Director and Chief Legal Officer
Margaret Henry, General Counsel, Market Regulation