National Association of Independent Public Finance Advisors
P.O. Box 304
Montgomery, Illinois 60538.0304
630.896.1292 • 209.633.6265 Fax
www.naipfa.com

January 30, 2012

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

Re: File No. SR-MSRB-2011-09; Release No. 34-65918

Dear Ms. Murphy:

The National Association of Independent Public Finance Advisors ("NAIPFA") appreciates this opportunity to provide comments on the Securities Exchange Commission's (the "Commission") Order Instituting Proceedings to Determine Whether to Disapprove Proposed Rule Change, as Modified by Amendment No. 2, Consisting of Interpretive Notice Concerning the Application of Municipal Securities Rulemaking Board ("MSRB") Rule G-17 to Underwriters of Municipal Securities (the "Order"). NAIPFA's comments are provided in the hope that the proposed rule will be adopted in order to ensure that issuers can rely on receiving unbiased advice and that the issuer remains in control of their debt issuance process.

First, NAIPFA would like to thank the SEC and MSRB for amending Rule G-23 to prevent underwriters, hired by an issuer as a financial advisor, from switching roles to underwrite the same issue. Rule G-23 was needed for the protection of issuers. However, Rule G-23 does not address how a broker-dealer is to behave when it is engaged as an underwriter. There are over 50,000 issuers of municipal bonds, most of which tend to be small and unsophisticated municipal entities. Rule G-17 as modified by Amendment No. 2 (the "Rule") for the first time provides specific antifraud prohibitions and a fair dealing component which sets standards for underwriter behavior. Overall, NAIPFA believes that like Rule G-23, Rule G-17 should be adapted in order to protect issuers.

In addition, NAIPFA, in contrast to the views expressed by groups representing the broker-dealer community, does not believe that the a final rule defining the term "municipal advisor" is a necessary prerequisite with respect to any amendments relating to G-17. The obligations of an underwriter under Rule G-17 appear consistent with what has been proposed as municipal advisor obligations under the same Rule G-17.

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Previous NAIPFA Comments On Rule G-17

In its prior comments on the Rule, NAIPFA expressed concerns regarding the following aspects of the Rule:

1. The continued issuer confusion about the underwriter's role in a financial transaction;

2. The allowance of underwriters to obtain informed consent from a municipal official rather than from the municipal issuer's governing body;

3. The different standard applied to municipal advisors and underwriters with regard to the compensation disclosure requirements imposed;

4. The lack of a prohibition imposed upon underwriters preventing them from seeking reimbursement from bond proceeds for expenditures made on behalf of the issuer;

5. The differing standards for underwriters and municipal advisors with regard to the preparation of the issuer's official statements;

6. The lack of underwriting disclosures relating to bond "flipping";

7. The lack of a suitability standard to protect infrequent and unsophisticated issuers in the context of a negotiated fixed rate financing; and

8. The Rule's failure to curtail underwriter disclosures where a financial advisor has been engaged.

NAIPFA has attached as Exhibits A and B its prior comments to the Commission relating to Rule G-17 and its concerns therewith.

Additionally, NAIPFA wishes to clarify a statement made in our prior comment letter relating to the "fair and reasonable" pricing disclosure. Under G-17, underwriters will have an obligation to purchase securities from the issuer at a "fair and reasonable" price. This requirement, however, should not create an expectation by the issuer that the underwriter is providing the "best pricing" in the market. NAIPFA believes that the determinate of "best pricing" cannot be made by the underwriter whose conflicts of interest in this regard greatly outweigh any objectivity that an underwriter may have in regard to the pricing they have provided.

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Issuers Need to Better Understand Underwriter Duties and Obligations

Unlike the broker-dealer representatives which have spent a great deal of time, money and effort recently on lobbying efforts in an attempt to delay or curtail the changes promulgated by the Wall Street Reform and Consumer Protection Act of 2009 (the "Dodd-Frank Act"), NAIPFA does not believe that a rejection of the Rule would be beneficial to municipal issuers. Quite the contrary is true; municipal issuers will suffer if the Commission chooses to reject the Rule. NAIPFA is convinced that the Rule is far superior to no rule at all. Municipal issuers will have the benefit of receiving disclosures relating to the nature of their relationship with an underwriter. It is NAIPFA's hope that these disclosures will help less sophisticated, inexperienced municipal issuers better assess the potential consequences that arise in the negotiated issuance process. For example, the disclosures will make the issuer aware that an underwriter is acting in an arm's length commercial transaction and does not serve in a fiduciary capacity. These disclosures are an invaluable clarification to G-17 and will help municipal issuers understand the obligations and duties of an underwriter.

Needed Transparency for Underwriter Role

With the passage of the Dodd-Frank Act, municipal issuers believed that the municipal market was going to change in ways that would ensure that they would be better protected against abusive and harmful practices promulgated in the past by some market participants. Municipal issuers have seen some fulfillment of their expectations with the passage of the amendments to MSRB Rule G-23 ("Rule G-23" or "G-23"). However, G-23 is but one piece in the regulatory puzzle as it simply requires a broker-dealer to disclose to the issuer what role they intend to play in a municipal financing; for example, under Rule G-23 underwriters are not required to disclose either the nature of their role in the financing, or the nature of their compensation, both of which are extremely important aspects of any municipal financing and aspects of a financing that municipal issuers should understand.

Adoption of the Rule is crucial to the prevention of confusion and harm from occurring to municipal issuers. To illustrate these concerns, please consider the municipal finance environment that will develop if G-23 exists in the absence of the Rule: An underwriter would only be required to disclose to the issuer that it intends to act as the issuer's underwriter; the issuer, unless knowledgeable as to distinction between underwriter and municipal advisor, would likely assume, as has been the case in the past, that their underwriter was their trusted advisor and would thereafter unjustifiable rely on the advice provided to it. This would occur due to the required G-23 disclosure which would lack context since unsophisticated municipal issuers will be unaware of the new clear distinctions that have developed between the roles underwriters and municipal advisors play in a municipal financing. To fill in the necessary regulatory pieces and to provide context to the G-23 disclosure that municipal issuers receive, Rule G-17 must be adopted; failing to adopt the Rule will cause issuers to continue to be confused as to the role

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played by underwriters and municipal advisors, and as to who serves their interests and with fiduciary duties. This will result in harmful consequences to the municipal issuer and ultimately the public.

Rule G-17 Not Dependent on "Municipal Advisor" Definition

The belief that any and all regulation should await the final definition of the term "municipal advisor" is inapplicable with regard to this Rule. The clarification of underwriting duties and obligations follows the dictates of the Dodd-Frank Act.

NAIPFA believes that delaying enactment of certain rules pending a final definition of the term "municipal advisor" may have some cursory validity with regard to, for example, Rule G-17 as it applies to municipal advisors and Rule G-36. However, such an argument is irrelevant where, as here, the proposed rule relates solely to the activities of underwriters. Rule G-17 in the context being discussed here is such a rule; Rule G-17 as it relates to underwriters is independent from and will not be affected by any potential changes to the definition of the term "municipal advisor". As a result, NAIPFA can find no rational correlation between a delay in the adoption of the Rule and the adoption of a definition of "municipal advisor". The Commission should take every opportunity presented to it to set forth defined and concrete rules. This is such an opportunity and the Commission should avail itself of the same in order to put in place a set of regulations that will provide much needed clarity.

Sincerely,

Colette J. Irwin-Knott, CIPFA
President, National Association of Independent Public Finance Advisors

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
Liban Jama, Counsel to Commissioner Aguilar
Lynnette Kelly, Executive Director, Municipal Securities Rulemaking Board

EXHIBIT A

National Association of Independent Public Finance Advisors
P.O. Box 304
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630.896.1292 • 209.633.6265 Fax
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September 30, 2011

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

Re: SR-MSRB-2011-09

The National Association of Independent Public Finance Advisors ("NAIPFA") appreciates the opportunity to provide comments on draft Rule G-17 ("G-17"). NAIPFA's comments are provided in the spirit that the rule being established will ensure that issuers can rely on receiving unbiased advice and that the issuer remains in control of their debt issuance process.

The Municipal Securities Rulemaking Board ("MSRB") has made great strides in protecting frequent, sophisticated issuers by setting forth proposed requirements in G-17 for underwriters. NAIPFA is concerned, however, that G-17 may not protect the infrequent and/or small, unsophisticated issuers. There are over 50,000 issuers of municipal bonds and most of these tend to be infrequent issuers from small and unsophisticated municipal entities. NAIPFA believes that additional changes need to be made to G-17 to protect these issuers.

Issuer Confusion

NAIPFA believes that the best protection the MSRB could provide to issuers would be to eliminate an underwriter's ability to provide advice such as is allowed under Rule G-23.[1] NAIPFA reiterates that Rule G-23's allowance of the giving of advice by underwriters is inconsistent with the Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), and, as G-17 illustrates, the fact that underwriters are allowed to do so presents an enormous challenge to the MSRB who is now congressionally mandated to protect the interests of issuers while fairly regulating the activities of underwriters and municipal advisors. NAIPFA believes that most of the disclosures required under G-17 could be eliminated if underwriters were to be prohibited from providing advice.

However, in the absence of such a change, NAIPFA agrees with the assessment made by the Securities Industry Financial Markets Association ("SIFMA") that the requirements of G-17 create a "fiduciary lite" standard.[2] As a result, NAIPFA believes that the appearance of a "fiduciary lite" standard, created by G-17, will confuse municipal issuers as to the role their

[1] NAIPFA acknowledges that a change to G-23 could result from a unilateral action by the MSRB or as the result of further clarification stemming from the release of the SEC's final rule on municipal advisor registration.

[2] *See*, File No. SR-MSRB-2011-09, at 19.

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underwriter is playing.[3] Further, absent a change to Rule G-23, NAIPFA believes that a number of the disclosures are inconsistent with the free market system and undermine the "arm's length" commercial nature of the transaction by confusing the issuer as to the role being played by the underwriter.

NAIPFA is concerned that, rather than giving issuers protection against fraud and manipulation, these disclosures could in fact encourage manipulative practices due to the perceived level of trust that accompanies them.[4] When an issuer is presented with disclosures stating, for example, that the pricing with which they have been given is “fair and reasonable”, this will undoubtedly lead issuers, even sophisticated ones, to conclude that their underwriter is not acting in an arm’s length commercial transaction. Right or wrong, the perception created will cause issuers to unduly trust their underwriter which, in turn, will allow underwriters to influence the issuer’s decision making process. As a result, municipal issuers will be dissuaded from or even unaware they should be engaging in the vigorous negotiation that is required as part of an arm’s length commercial transaction. This undermines the free market system and is inconsistent with any notion of just and equitable principles of trade. Furthermore, this is not the intended result of the Dodd-Frank Act, and is contrary to its purpose as well as the purpose of all of the resulting regulations.

Therefore, NAIPFA requests that in the absence of a change to Rule G-23 eliminating an underwriter’s ability to provide advice, that G-17 be amended to require a disclosure that makes it clear that an underwriter is no replacement for a municipal advisor. As NAIPFA has stated in prior letters regarding underwriter disclosures, any regulatory framework put in place for disclosures should contain certain elements which make it clear that an underwriter (i) is not acting as an advisor but as an underwriter, (ii) is not a fiduciary to the issuer but rather a counterparty dealing at arm's length, (iii) has conflicts with issuers because they represent the interests of the investors or other counterparties, (iv) seek to maximize their profitability, and (v) have no continuing obligation to the issuer following the closing of the transaction. A disclosure taking into account these elements would eliminate any confusion on the part of the issuer and would clearly establish that the issuer should not rely on the advice provided by an underwriter.

Process for Presenting Required Disclosures to Issuers

In the absence of an amendment to Rule G-23 eliminating an underwriter's ability to provide advice to a municipal issuer, NAIPFA requests that the process required to be utilized by an underwriter for presenting disclosures be amended to require no less than what is required of

[3] NAIPFA is concerned that the confusion created by draft Rule G-17 will undermine the purpose of the Dodd-Frank Act, which was enacted to clarify the roles of the various market participants while minimizing the confusion that existed in the market as to the role played by underwriters.

[4] This is potentially even more true and troubling with regard to infrequent, unsophisticated issuers.

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municipal advisors. NAIPFA disagrees with the MSRB's approach with regard to the process by which underwriters must present disclosures to issuers. Unlike municipal advisors who are bound by a fiduciary duty to their issuer clients, underwriters have no such duty, and as a result, in the absence of a clear showing of fraud or manipulation, cannot be held accountable by municipal issuers for their actions or advice.

Consequently, NAIPFA believes that the MSRB has misplaced the regulatory burdens of disclosure onto municipal advisors. Under the municipal advisor portion of proposed Rule G-17 and proposed Rule G-36, municipal advisors are required to undertake a much more rigorous disclosure process than underwriters. NAIPFA believes this is the wrong approach since underwriters, unlike municipal advisors, cannot be held liable for the advice they provide to an issuer with regard to the structure, timing or terms of a securities issuance.[5] However, rather than require underwriters to engage in a rigorous disclosure process, the MSRB has determined to require the opposite, namely, a minimal and blurry disclosure process for underwriters and a rigorous disclosure process for municipal advisors. NAIPFA disagrees with this approach, and requests that in the absence of an amendment to Rule G-23 that underwriters be required to undertake at least as rigorous of a disclosure process as municipal advisors.

To further illustrate NAIPFA's concern, consider the following:

Under G-17, an underwriter is required to make disclosures "in writing to an official of the issuer whom the underwriter reasonably believes had the authority to bind the issuer by contract with the underwriter." This differs significantly from the process that has been proposed for municipal advisors. Under draft Rule G-36 and the draft municipal advisor portion of Rule G-17, a municipal advisor "*must receive written consent to its conflicts* by an official of the municipal entity that the municipal advisor reasonably believes has authority to bind the municipal entity by contract."[6] Under these rules, a municipal advisor must obtain written consent from the issuer, even though the municipal advisor is bound to serve as a fiduciary to the municipal issuer, whereas an underwriter who is not bound to act in the issuer's best interest is only required to present the disclosures. NAIPFA believes that at a minimum, underwriters should be required to obtain informed consent from the issuer.

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5 Under Rule G-23, underwriters are permitted to give advice with regard to the structure, timing, terms and other matters of a municipal issuance so long as they make certain “disclosures” in writing. These “disclosures”, however, will be drafted as disclaimers of liability and will do much more than merely “disclose” that the underwriter is acting in an arm’s length commercial transaction.

6 MSRB Notice 2011-48, *MSRB Files Municipal Advisor Fiduciary Duty Rule and Interpretive Notice*, August 23, 2011 (emphasis added); *See*, MSRB Notice 2011-49, *MSRB Files Interpretive Notice Concerning the Application of MSRB Rule G-17 to Municipal Advisors Advising Obligated Persons or Soliciting Municipal Entities on Behalf of Others*, August 24, 2011.

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Potentially more troubling, however, is the fact that unlike municipal advisors who usually enter into contracts with municipal issuers early on in the financing process, underwriters generally only enter into contracts with municipal issuers at the very end of the transaction. This concerns NAIPFA in two respects. First, NAIPFA is concerned that G-17 creates a situation whereby underwriter disclosures cannot be made to an official of the issuer until the very end of the transaction. Due to the municipal financing process, underwriters typically do not enter into contracts until the end of the transaction; underwriters are aware of this, and underwriters understand that up until the day of sale, the issuer is not bound to them by contract or otherwise. Therefore, it is not until this point that an underwriter will have a reasonable belief that an official has the authority to bind the issuer by contract. Thus, an underwriter will violate G-17 if it provides disclosures prior to an official action being taken by the municipal entity. As a result, NAIPFA's second concern is that it will be impossible for such disclosures to be given "in sufficient time before the execution of a contract [...] to allow the official to evaluate the recommendation." Since it is highly unlikely that an underwriter will have a reasonable belief that an official of the issuer has the authority to bind the issuer by contract prior to an official action by the municipal issuer on the date of sale, it is hard to imagine how disclosures could be made to an official of the issuer in sufficient time before the execution of a contract.

Therefore, NAIPFA respectfully requests that G-17 be amended to require underwriters to obtain informed consent from the municipal issuer's governing body and that any disclosures made pursuant to G-17 be made to the officials of the municipal entity with the power to bind the issuer. For purposes of illustration, in the case of cities, towns, villages, etc. these disclosures would go before the elected board or council, who would then give their consent to the disclosures. Because underwriters, unlike municipal advisors, do not have a fiduciary duty and generally do not enter into contracts until the end of the financing process, NAIPFA believes that this suggested amendment presents a reasonable and superior alternative to what has been presented in G-17 and more effectively protects the interests of municipal issuers by ensuring that disclosures will be made to the appropriate official(s) and by allowing the individuals who receive the disclosures sufficient time to review and evaluate them.

Alternatively, an underwriter should be prohibited from presenting its disclosures to municipal issuer officials based merely on a "reasonable belief". As noted above, NAIPFA is concerned that an underwriter will only have a reasonable basis for believing an official can bind it and the issuer to a contract when an official action is taken by the municipal entity's governing body, such as an action approving the bond purchase agreement. Therefore, NAIPFA believes that G-17 should be amended to prohibit the giving of disclosures based on a "reasonable belief" and should instead require an underwriter to have actual knowledge as to whether an official has the power to bind the issuer by contract. Under this alternative, an underwriter will have actual knowledge or will be able to obtain such knowledge when an official action by the municipal entity is taken with regard to the engagement of the underwriter. NAIPFA believes that this is a better standard than current G-17 because an official action by a municipal entity is a public

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record and, as such, the underwriter will be able to obtain knowledge with relative ease as to whether a particular official has the authority to bind the issuer. This amendment will ensure that disclosures are made to the appropriate official which, ultimately, will better protect the interests of the municipal entity.[7]

Eliminate the "Fair and Reasonable" Pricing Disclosure

NAIPFA requests that the concept put forth regarding the implied representation that the price an underwriter pays in a negotiated sale be "fair and reasonable", be replaced with the concept that the price an underwriter pays be "not unreasonable". NAIPFA agrees with the assessment put forth by the Bond Dealers of America and SIFMA that "the fair pricing obligation in the context of a new issue should employ a good faith standard[,] that there is no prevailing market price for new issues[, and] that an underwriter should only be required to purchase securities at the price that it and the issuer negotiated and agreed to in good faith, without regard to a prevailing market price."[8] In addition, NAIPFA believes that putting in place a fair and reasonable pricing requirement is inconsistent with an arm's length commercial transaction, places an unnecessary burden on the underwriting community, and is unnecessary to "promote just and equitable principles of trade."

Although NAIPFA disagrees with the MSRB's prescription, NAIPFA appreciates the MSRB's attempt to protect issuers of municipal securities from fraudulent and manipulative acts and practices, and promote just and equitable principles of trade, while still emphasizing the duty of fair dealing owed by underwriters to municipal issuers. Further, NAIPFA agrees that "simple principles of fair dealing require that underwriters have more than a *caveat emptor* relationship with their issuer clients."[9] However, NAIPFA believes that the dictates of the rule prohibiting fraud and manipulation are sufficient. What is more, NAIPFA fears that imposing a fair and reasonable fee standard is inconsistent with an arm's length commercial transaction[10] and could have a chilling effect on the market. NAIPFA is concerned that such a requirement could cause underwriting firms to exit the market out of fears of liability from having to affirmatively state that their pricing is fair and reasonable. The recent stimulus bond programs give a perfect illustration of why a fair and reasonable pricing mandate is unmanageable. Under the stimulus bond programs, how could the first underwriter state that their pricing was fair and reasonable when no other comparable issues existed in the market? NAIPFA believes that in situations such as this, the fair and reasonable pricing standard could well have an impact on whether an underwriter brings an issue to market. Conversely, NAIPFA believes that a "not unreasonable" standard strikes the appropriate balance between upholding the MSRB's goal of limiting

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7 Even under this approach, however, NAIPFA is concerned that municipal issuers will not have sufficient time prior to entering into a contract with the underwriter to review and evaluate the G-17 disclosures.

8 *See id.* at 18.

9 *Id.* at 20.

10 Discussed, *supra*, at 1-2.

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manipulative acts and encouraging fair dealing, while allowing underwriters and the free market to function more efficiently.

Notably, however, NAIPFA would not be opposed to eliminating this disclosure altogether if G-23 were to be amended to eliminate an underwriter's ability to provide advice. NAIPFA believes that such a change would clarify the role of an underwriter and would eliminate confusion on the part of the issuer as to the motivations of the underwriter, which would in turn put the issuer on notice that they need to engage in an aggressive arm's length commercial negotiation with their underwriter.

Minimize Disclosures When A Municipal Advisor Is Engaged

The need for numerous disclosures would appear to be minimized when the issuer of municipal securities engages a municipal advisor to act on their behalf. For example, when a municipal advisor is engaged, the requirement that an underwriter provide a disclosure regarding the "fair and reasonable" nature of their fee seems to be unnecessary. In addition, it would also seem unnecessary to require underwriters to provide disclosures on matters such as complex financings, or payments to and from third parties. NAIPFA has not undertaken an exhaustive analysis of what disclosures may be made irrelevant when a municipal advisor is engaged on a transaction, but it is clear to NAIPFA that many of the disclosures could be eliminated or minimized in that situation. Therefore, NAIPFA respectfully requests that the MSRB conduct an analysis of what aspects of a municipal financing are to be the responsibility of the municipal advisor. At the conclusion of this analysis, the MSRB should then amend G-17 to eliminate all underwriter disclosures that overlap areas of the financing covered by the role of the municipal advisor.

Compensation Disclosures

In the absence of an amendment to Rule G-23 that eliminates an underwriter's ability to provide advice, NAIPFA respectfully requests that underwriters be required to provide a disclosure in the same manner and to the same extent as what was put forth in the draft municipal advisor portion of Rule G-17. Underwriter compensation is based primarily on the size and type of an issuance. Therefore, if an underwriter is going to be allowed to provide advice to an issuer of municipal securities regarding matters such as the structure and terms of the securities, there exists at least the appearance of a significant incentive for the underwriter to advise the issuer to either issue a larger amount of securities than they may have otherwise thought necessary, or issue a different kind of security that may not be in the best interest of the municipal entity.[11] Thus, it is

[11] NAIPFA is aware of situations in which certain state and federal loan programs have been available to issuers,

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imperative that the underwriter be required to disclose to an issuer and obtain their informed consent, in writing, that the form of their compensation creates a conflict of interest.[12]

Issuer Protection

The MSRB has gone to great lengths describing the disclosures that are needed to inform municipal issuers as to the various aspects of the municipal financing. This approach is based on the assumption that "the typical fixed rate offering may be presumed to be well understood". NAIPFA believes that for small and/or infrequent issuers this assumption is not necessarily true. It cannot be assumed that small and/or infrequent issuers fully understand such transactions. Therefore, NAIPFA respectfully requests that G-17 be amended to take into consideration the needs of unsophisticated municipal issuers.

To accomplish this, NAIPFA proposes that a less rigid disclosure system be adopted that would require an underwriter to assess the knowledge and understanding of municipal issuers on a case by case basis. To help underwriters determine whether an issuer has the requisite knowledge and understanding required to nullify the need for disclosures, the MSRB could put forth guidance as to the factors an underwriter can look to in making a determination. For example, the conclusion that an issuer is knowledgeable could be justified if the issuer has completed one or more public offerings within the last two years.[13] Another factor could be the amount of outstanding securities that an issuer has. For example, such a factor could be whether the issuer had outstanding within the past five-years more than $100 million of securities.

NAIPFA believes that such an approach strikes an appropriate balance between the needs of infrequent, unsophisticated issuers and underwriters. This approach would ensure that small and/or infrequent municipal issuers are made aware of the nature of the transaction when they do not have the necessary knowledge to make informed decisions. In addition, this approach is flexible enough to give underwriters the ability to avoid making disclosures when such disclosures are unnecessary.

Underwriter Duties in Connection With Issuer Disclosure Documents

NAIPFA has concerns regarding underwriter duties in connection with issuer disclosure documents. NAIPFA agrees with the following MSRB assessment:

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but rather than attempting to access these programs underwriters have advised municipal entities to issue securities. In addition, underwriters often charge different fees based on the type of security issued, which could cause an underwriter to recommend the issuance of one type of security over another.

[12] *See*, MSRB Notice 2011-49.

[13] Given the fluidity within the regulatory landscape, NAIPFA believe a two-year window is appropriate.

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> It would seem a curious result [] for the underwriter not to be required under rule G-17 to have a reasonable basis for its own representations set forth in the official statement, as well as a reasonable basis for the material information it provides to the issuer in connection with the preparation of the official statement, including a reasonable belief in the truthfulness and completeness of any information provided by others that serves as a material basis for such underwriter's information.[14]

However, NAIPFA wishes to point out that there would still exist two different standards of accountability between underwriters and municipal advisors who prepare official statements. Underwriters may only be held accountable if they do not have a reasonable belief as to the truthfulness and completeness of any information provided. However, municipal advisors are likely to be required to "make reasonable inquiries in order to help ensure the appropriate disclosures are made in the official statement" as part of their fiduciary responsibilities.[15] Therefore, NAIPFA respectfully requests that when an underwriter intends to assist in the preparation of an official statement that a disclosure be made to the issuer stating that the underwriter can only be held liable where it can be shown that they did not act with a reasonable belief that the information presented was truthful and complete. Such a disclosure would assist municipal issuers in better understanding the nature of their relationship to the underwriter and would ensure that issuers understand that they may have a difficult time holding their underwriter responsible if their official statement is found to contain material misstatements or omissions.

Disclosure on Reimbursement From Bond Proceeds

Absent a change in Rule G-23 to eliminate an underwriter's ability to provide advice, NAIPFA requests that, in the absence of a disclosure and informed consent, underwriters be prohibited from seeking reimbursements from bond proceeds for expenditures made on behalf of the issuer for any expenses incurred by the underwriter. NAIPFA is concerned that in a situation where the underwriter provides advice to the issuer of municipal securities, the underwriter could, without fraud or manipulation, recommend to the issuer that it be reimbursed for expenses, such as, travel to a rating meeting. In such a case, the underwriter should be required to provide to the issuer a disclosure stating that: "Expenses made in connection with the issuance of securities were incurred by the underwriter on behalf of the issuer, but that the issuer is under no obligation to issue additional bonds to reimburse the underwriter for these expenditures." This disclosure would ensure that issuers are made aware that the expenditures were legitimate expenses made in

[14] *See*, File No. SR-MSRB-2011-09, at 18.
[15] *See*, MSRB Notice 2011-48 (although this rule has been withdrawn from SEC consideration, NAIPFA does not anticipate further changes will be made with respect to a municipal advisor's duty of inquiry or duty of care).

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connection with the issuance of securities, but that the issuer is not obligated to issue additional bonds to reimburse the underwriter for these expenses. This will allow the municipal issuer to fully consider an underwriter's advice with regard to whether they should issue additional bonds for the purpose of reimbursing the underwriter.

Conclusion

NAIPFA hopes these comments provide insight into our concerns with regard to draft Rule G-17 and also its interface with an underwriter's ability to provide advice. We believe a large number of issuers are infrequent and/or small issuers. NAIPFA remains very concerned that these issuers will not be adequately protected and will be confused about the differing roles of underwriters and municipal advisors. Consequently, the suggested amendments detailed in this comment letter would provide much needed additional clarity to these issuers. In addition, NAIPFA hopes that additional clarifications regarding the roles of underwriters and municipal advisors will be forthcoming in the final municipal advisor registration rule due to be released at the end of this year.

NAIPFA believes all issuers should expect to receive and should receive unbiased advice. As such, NAIPFA reiterates its belief that advice should only be provided parties acting as municipal advisors with prescribed fiduciary duties. However, because the current regulatory framework allows for the provision of advice by underwriters, NAIPFA believes that draft Rule G-17 must require comprehensive and timely disclosures with regard to the conflicts that exist when an underwriter provides services to a municipal issuer that go beyond merely buying and selling securities.

Therefore, NAIPFA postulates that small and/or infrequent issuers would benefit from having:

1. All underwriting disclosures presented to the governing body by the underwriter when the underwriter is retained at the onset of the project, and that those disclosures be made to the municipal entity's governing body;
2. The initial underwriting disclosures contain (a) the basis for compensation, (b) a statement to the effect that the basis for compensation is a conflict of interest that could cause the underwriter to recommend that the size of the issuance be larger than is necessary, (c) a statement that sets forth that an underwriter is not a municipal advisor and that the issuer should consult a municipal advisor if they wish to obtain unbiased advice, and (d) a statement, when applicable, that an official statement prepared from the underwriter’s perspective is produced under a different standard than the fiduciary standard of a municipal advisor;

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P.O. Box 304
Montgomery, Illinois 60538.0304
630.896.1292 • 209.633.6265 Fax
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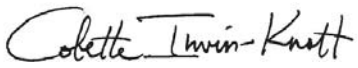
3. A standard for ascertaining the issuer's capacity and knowledge with regard to certain kinds of issuances of securities and, if necessary, ascertain whether a particular security is suitable for that particular issuer;
4. The concept of "fair and reasonable" pricing be modified so that the issuer is not confused as to the arm's length commercial nature of the transaction; and
5. Underwriters be prohibited from being reimbursed for expenses absent their obtaining informed, written consent from the issuer.

Sincerely,



Colette J. Irwin-Knott, CIPFA
President, National Association of Independent Public Finance Advisors

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
Liban Jama, Counsel to Commissioner Aguilar
Lynnette Hotchkiss, Executive Director, Municipal Securities Rulemaking Board

EXHIBIT B

National Association of Independent Public Finance Advisors
P.O. Box 304
Montgomery, Illinois 60538.0304
630.896.1292 • 209.633.6265 Fax
www.naipfa.com

November 30, 2011

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

Re: SR-MSRB-2011-09

The National Association of Independent Public Finance Advisors ("NAIPFA") appreciates the opportunity to provide comments on the amended draft Rule G-17 ("G-17" or the "Rule"). NAIPFA's comments are provided in the spirit that the rule being established will ensure that issuers can rely on receiving unbiased advice and that the issuer remains in control of their debt issuance process.

NAIPFA would like to reiterate its belief that the Municipal Securities Rulemaking Board ("MSRB") has made great strides in protecting frequent, sophisticated issuers by setting forth proposed requirements for underwriters in G-17. NAIPFA is concerned, however, that as proposed, G-17 may not protect infrequent and/or small, unsophisticated issuers. There are over 50,000 issuers of municipal bonds and most of these tend to be small and unsophisticated municipal entities. NAIPFA believes that G-17 requires additional changes in order to protect these issuers, as discussed below.

Minimize Disclosures When a Municipal Advisor Is Engaged

As NAIPFA has previously stated, the need for numerous disclosures by underwriters could be minimized in a negotiated sale when the issuer of municipal securities engages a registered municipal advisor to act on its behalf. For example, when a municipal advisor is engaged, the requirement that an underwriter provide a disclosure regarding the "fair and reasonable" nature of their fee seems unnecessary and duplicative given that it is often the role of the municipal advisor to advise on the fairness and reasonableness of the pricing given. In addition, it would also seem unnecessary to require underwriters to provide disclosures on matters such as complex financings, or payments to and from third parties, since these are all matters that are either opined upon or made irrelevant by the employment of a municipal advisor. NAIPFA has not undertaken an exhaustive analysis of what disclosures may be made irrelevant when a municipal advisor is engaged on a transaction, but it is clear to NAIPFA that many of the disclosures could be eliminated or minimized in that situation.[1] Therefore, NAIPFA requests that the MSRB

[1] The MSRB's letter to the SEC dated November 9, 2011, regarding the activities of municipal advisors may

National Association of Independent Public Finance Advisors
P.O. Box 304
Montgomery, Illinois 60538.0304
630.896.1292 • 209.633.6265 Fax
www.naipfa.com

amend G-17 to eliminate or curtail underwriter disclosures that overlap areas of the financing covered by the role of the municipal advisor.

Issuer Confusion

As noted in its prior letter, NAIPFA believes that the best protection the MSRB could provide to issuers would be to eliminate an underwriter's ability to provide advice as is currently allowed under Rule G-23.[2] Further, NAIPFA disagrees with the MSRB's interpretation of Section 15B(e)(4) of the Securities Act of 1934 and does not believe that the law grants underwriters the ability to provide advice to municipal issuers regarding the structure, timing, terms or other similar matters relating to the issuance of bonds.[3]

In addition, NAIPFA would like to reiterate its concern that rather than give issuers protection against fraud and manipulation, the disclosures relating to underwriter pricing, and specifically with regard to the requirement that underwriter pricing be "fair and reasonable," could in fact encourage manipulative practices because of the level of undue trust that such disclosures create.[4]

Historically, issuers have placed a great deal of trust in their underwriter and, as a result, have often considered their underwriter to be a "trusted advisor." The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2009 (the "Dodd-Frank Act") and resulting regulations were, in part, drafted for the purpose of limiting the harmful consequences to municipal issuers that have resulted from the misplaced trust that issuers have put in their underwriters. Under this Rule, when an issuer is presented with a disclosure stating that the pricing with which they have been given is "fair and reasonable," this will undoubtedly lead issuers, even sophisticated ones, to conclude that they and the underwriter are engaging in something less than a true arm's length commercial transaction.[5] Right or wrong, the perception created, that the underwriter's interests are not adverse to those of the issuer, will cause issuers, as has been the case historically, to place an undue amount of trust in their underwriter. As a result, municipal issuers will be dissuaded from or even unaware that they should be engaging in the vigorous negotiation that is required as

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provide background in determining which of the underwriter disclosures could be eliminated when a municipal advisor is engaged by an issuer.

2 NAIPFA acknowledges that a change to G-23 could result from a unilateral action by the MSRB or as the result of further clarification stemming from the release of the SEC's final rule on municipal advisor registration.

3 *See*, Letter from Nathan R. Howard, Esq., dated February 22, 2011, commenting on Securities Exchange Commission ("SEC") File No. S7-45-10, at 1-10, http://sec.gov/comments/s7-45-10/s74510-392.pdf. *See also*, Letter from NAIPFA, dated February 22, 2011, commenting on SEC File No. S7-45-10, at 5-7, http://sec.gov/comments/s7-45-10/s74510-424.pdf.

4 This is potentially even truer with regard to infrequent unsophisticated issuers.

5 Traditionally, the term "arm's length" has been used to describe negotiations between adverse parties who are seeking to ascertain the "fair market value" of a good or service, the ultimate "fair" or "reasonableness" of which is irrelevant.

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part of an arm's length commercial transaction. The fact that a fair and reasonable pricing standard will cause issuers to misplace trust in and rely on their underwriter to give them a "good deal" will ultimately undermine the arm's length nature of the transaction, thereby creating a system that is not based on any notion of just and equitable principles of trade, but is instead based on the undue trust that will exist between the issuer and the underwriter. This was not the intended result of the Dodd-Frank Act, and is contrary to its purpose as well as the purpose of all of the resulting regulations.

Therefore, NAIPFA believes that a "not unreasonable" standard would be a better approach and would clearly identify to issuers that underwriters are acting in a true arm's length commercial transaction and that issuers must be diligent to ensure that they are getting a fair market price for their bonds. Further, such a standard will uphold the MSRB's goal of limiting manipulative acts and encouraging fair dealing by requiring pricing to not be unreasonable.

In the absence of such a change, NAIPFA requests that the disclosure describing the "fair and reasonable" pricing be expanded to include a disclosure that states something such as the following: although the pricing provided is "fair and reasonable" it is not necessarily the "best" or "lowest rate available". Such an addition would help to limit the level of undue trust that an issuer places with a particular underwriter.

Process for Presenting Required Disclosures to Issuers

NAIPFA appreciates the MSRB's clarifications in this area. The clarity provided, particularly with respect to the timing and manner of the disclosures, is very helpful. However, NAIPFA is still concerned with regard to whom the disclosures are to be made.

Current draft Rule G-17 maintains the prior draft's requirement that disclosures must be made to an official of the issuer that the underwriter "reasonably believes" has the authority to bind the issuer by contract. NAIPFA is concerned as to when an underwriter will have a "reasonable belief." The MSRB has attempted to provide clarity by stating that an underwriter may make its disclosures "in a response to a request for proposals or in promotional materials provided to an issuer." NAIPFA is unsure how an underwriter develops a reasonable belief that the person receiving the response to the request for proposals ("RFP") or promotional materials is an official with the authority to bind the issuer.

In addition, NAIPFA is concerned that this particular bright-line rule creates ambiguities in the regulatory framework that will be harmful to municipal issuers. For example, does an underwriter have a reasonable belief if the official receiving the RFP responses is an administrative assistant? Does the underwriter lack a reasonable belief if the official's title is listed? For example, if the RFP says to return RFP responses to the assistant city manager, would an underwriter have a reasonable belief that this was the official with the power to bind

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the issuer by contract? Will the mere receipt of the RFP response by, for example, an administrative assistant be sufficient to impute the knowledge of any conflict to the entire municipal entity? What if instead of an RFP, the administrative assistant was presented with promotional materials? Does an underwriter have a reasonable belief when it presents promotional materials containing its disclosures such an official (i.e., an official other than the one with the authority to bind the issuer by contract)? What things should an underwriter look to in order to develop a reasonable belief that the individual it is providing promotional materials to is the appropriate individual?

Some of the answers to the foregoing questions may seem obvious. However, NAIPFA is concerned that because underwriters are allowed to provide advice without fear of accountability that the current reasonable belief standard will likely be insufficient to protect the interests of issuers.

As NAIPFA stated in its prior letter, unlike municipal advisors who usually enter into contracts with municipal issuers early on in the financing process, underwriters generally only enter into contracts with municipal issuers at the very end of the transaction. Although the MSRB has attempted to require disclosures prior to the signing of a bond purchase agreement, NAIPFA remains concerned that the presentation of disclosures to "an official of the issue that the underwriter reasonably believes has authority to bind the issuer" will not provide the *issuer* with a sufficient level of knowledge as to any existing conflicts. Due to the pervasive and extraordinarily dangerous nature of underwriting conflicts of interest, resulting from an underwriter's lack of accountability to the issuer where the underwriter provides "advice" to the issuer, NAIPFA requests that G-17 be amended to require underwriters to provide their disclosures to the governing body of the municipal entity. For purposes of illustration, in the case of cities, towns, villages, etc. these disclosures would go before the elected board or council, who would then give their consent to the disclosures. Because underwriters, unlike municipal advisors, do not have a fiduciary duty, NAIPFA believes that this suggested amendment is necessary in order to effectively protect the interests of municipal issuers.

Alternatively, an underwriter should be prohibited from presenting its disclosures to municipal issuer officials based merely on a "reasonable belief." The MSRB has stated that it "does not consider it necessary for underwriters to obtain the consent of the issuer governing bodies when issuer finance officials have been delegated the ability to *contract* with the underwriter."[6] NAIPFA agrees with this statement. However, NAIPFA believes that such cases are rare and that finance officials are generally not delegated the authority to enter into contracts with underwriters prior to the date of sale. Instead, it is often the case that an official has been granted some limited authority to, for example, distribute/receive an underwriting RFP, receive

[6] Letter from the MSRB, dated November 10, 2011, in response to comment letters submitted to the SEC in connection with SEC File No. SR-MSRB-2011-09 (emphasis added).

National Association of Independent Public Finance Advisors
P.O. Box 304
Montgomery, Illinois 60538.0304
630.896.1292 • 209.633.6265 Fax
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promotional materials from an underwriter, or negotiate the terms of a financing with an underwriter; however, this does not in and of itself mean that the official has the authority to bind the issuer, and should not be allowed to give rise to a "reasonable belief" that such an official has the power to do so. Further, municipal officials are not generally delegated the authority to select an underwriter, but are merely given the authority to make recommendations to the governing body with regard to the selection of an underwriter; ordinarily it is the governing body itself that formally selects the underwriter. Thus, because the governing body of the municipal entity is usually the only entity with the ability to select the underwriter and bind the issuer by contract, the Rule should be amended to reflect this reality. The Rule should also presume that officials of the issuer generally do *not* have the authority to formally select an underwriter or bind the issuer by contract to an underwriter.[7] To that end, NAIPFA believes that G-17 should be amended to require underwriters to have actual knowledge as to whether the official being presented with disclosures has the power to bind the issuer by contract.

As noted above, the vague nature of the "reasonable belief" standard makes it untenable. Under NAIPFA's proposed alternative, however, an underwriter will have actual knowledge or will be able to obtain such knowledge when a formal action by the municipal entity is taken with regard to the engagement of the underwriter. NAIPFA believes that this is a superior standard than that put forth in G-17 because a formal action by a municipal entity is a public record and, as such, the underwriter will be able to obtain knowledge with relative ease as to whether a particular official has the authority to bind the issuer. Unlike the Rule, this amendment will ensure that disclosures are made to the appropriate official, which ultimately will better protect the interests of the municipal entity.

Acknowledgement of Disclosures

The MSRB's inclusion of a requirement that disclosures be acknowledged in writing by the official of the issuer of receipt of the disclosures is a welcomed addition to the Rule. However, because of the underwriter's lack of accountability to the issuer even where the underwriter provides "advice" to the issuer, NAIPFA is concerned that issuers will be unduly harmed if an underwriter is not required to obtain written acknowledgement of its disclosures. Imagine a situation in which an underwriter makes its disclosures in a response to an RFP and that RFP response goes to an individual who does not have the authority to bind the issuer by contract. At that point, the underwriter has complied with the rules and must now wait for its written acknowledgements. When the acknowledgement does not come, the underwriter's only obligation is to document a reason (e.g. "Issuer did not return form.") and then proceed with the engagement. NAIPFA believes that this situation, paired with the fact that the underwriter will not be able to be held accountable for its actions by the issuer, creates an extremely dangerous

[7] This facet of the underwriter-issuer relationship is distinct from that of the municipal advisor-issuer relationship in that it is often the case that an official of the issuer will have the authority to select and bind the issuer by contract to a municipal advisor.

National Association of Independent Public Finance Advisors
P.O. Box 304
Montgomery, Illinois 60538.0304
630.896.1292 • 209.633.6265 Fax
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situation for municipal issuers who may inadvertently engage an underwriter without having had the opportunity to fully consider any of their conflicts of interest.[8]

Therefore, NAIPFA requests that G-17 be amended to require underwriters to put forth some level of effort to obtain the written acknowledgement of the issuer prior to proceeding with the engagement.

Compensation Disclosures

NAIPFA appreciates the MSRB's inclusion of a compensation related disclosure as part of the duties of an underwriter. However, unlike the disclosures required by municipal advisors who have fiduciary responsibilities and can be held accountable for any improprieties with which they may engage, underwriters are only required to make disclosures to issuers when their fee is contingent. NAIPFA is concerned that such a limited compensation disclosure will be harmful to municipal issuers. For example, unlike municipal advisors who are engaged by contract early on in the transaction, underwriters are not bound by contract until the very end of the transaction and are therefore free to, and often do, adjust their compensation, usually upward, until the date of sale. Therefore, it would likely be beneficial to issuers to require underwriters to disclose the amount of their compensation at the onset of their engagement, and again at the end of the transaction so as to make the issuer aware of any changes that may have occurred in regard to the underwriting fee.

In addition, disclosures regarding other non-contingent fees may be necessary. For example, a compensation disclosures may be necessary where the broker-dealer is serving as underwriter but is also serving in some other capacity for the issuer, such as its investment advisor or swap advisor. With regard to underwriters serving as investment advisors, NAIPFA is aware of instances in which an underwriter will charge a lower underwriting fee, only to recoup its losses later on by charging a higher than normal investment advising fee. In such situations, where a broker-dealer serving as underwriter also serves in another fee generating capacity, the broker-dealer should be required to disclose contemporaneously with its underwriter related G-17 disclosures any other fees that it shall receive resulting from the issuance of bonds.

Further, as discussed more fully hereinafter, additional compensation disclosures may be necessary with regard to the practice known as "flipping".

These are just two examples of the kind of non-contingent fee disclosures that may be necessary,

[8] This situation is distinct fro that of a municipal advisor as a result of a municipal advisor's fiduciary duty. If, for example, a municipal advisor acts unreasonably and does not present its disclosures to a proper party, the municipal advisor could potentially be held accountable by the *municipal entity* if its conflicts interfered with its performance. This is not the case with regard to underwriters who, although may be held accountable by regulatory, would likely not be able to be held accountable by the municipal entity.

National Association of Independent Public Finance Advisors
P.O. Box 304
Montgomery, Illinois 60538.0304
630.896.1292 • 209.633.6265 Fax
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and help illustrate why there is a need for such disclosures. Therefore, NAIPFA requests that the underwriter fee disclosures go beyond merely contingent fee conflicts, and instead encompass, as is the case with municipal advisors, the vast array of potential fee conflicts that are associated with the engagement of an underwriter.

Bond "Flipping"

As the Government Finance Officers' Association (the "GFOA") has noted[9], the practice of "flipping"[10] is a major concern and should at a minimum be a disclosed practice.[11] Such a disclosure could take the form of a report presented to the municipal issuer thirty-days following the closing of the issue setting forth trade data similar to what is required to be provided to the MSRB.

This disclosure would add much needed transparency to the municipal market and would provide issuers with knowledge relating to the price that they received for their bonds. Like the GFOA, NAIPFA believes that the MSRB should provide clarity in regard to the definition of "flipping" and should put forth information relating to the harmful effects of "flipping" on municipal issuers. Such additional information would help municipal issuers make an informed decision with regard to the selection of an underwriter as well as placing municipal issuers in a better position to engage in the vigorous negotiation that is required by an arm's length commercial transaction.

Required Disclosures to Issuers

NAIPFA appreciates the MSRB's acknowledgement that the typical fixed rate offering may not be well understood by every municipal issuer. However, NAIPFA is concerned with regard to an underwriter's ability to "presume" that the issuer has the requisite knowledge and experience. NAIPFA believes that allowing underwriters to presume an issuer is competent will ultimately lead to harmful consequences for small, infrequent and less sophisticated issuers who often do not have the knowledge or experience to understand typical fixed rate offerings. Additionally, NAIPFA is unclear as to what would cause an underwriter to "reasonably believe that the issuer lacks knowledge or experience," thereby rebutting the presumption of competency. For example, would an underwriter have a reasonable belief that the issuer lacked knowledge and experience if the issuer had never issued bonds, but the issuer's finance director had been a party

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[9] *See*, letter from the Government Finance Officers' Association, dated October 3, 2011, commenting on SEC File No. SR-MSRB-2011-09, at 2.

[10] NAIPFA believes that it would be helpful if the Securities and Exchange Commission or the MSRB would put forth a formal definition of the term "flipping."

[11] NAIPFA is supportive of an outright ban on the practice, and believes that the bond provisions of the American Recovery and Reinvestment Act of 2009 provide a good basis for developing such a ban, although even its provisions, particularly relating to the percent of bonds that must not be "flipped," could be strengthened.

National Association of Independent Public Finance Advisors
P.O. Box 304
Montgomery, Illinois 60538.0304
630.896.1292 • 209.633.6265 Fax
www.naipfa.com

to one private placement of $100,000 of bonds three years ago while working for a different municipality? What about a municipality that issued $1 million of bonds five years ago, but had no personnel with any experience issuing bonds? What about a municipality that had issued $10 million of bonds ten years ago and still employed the same personnel?

Because of the difficulty in determining when an underwriter will have a reasonable belief that is sufficient to overcome the presumption of competency, NAIPFA would like to reiterate its prior comment that the Rule should be amended to require underwriters to assess the knowledge and understanding of municipal issuers on a case-by-case basis. To help underwriters determine whether an issuer has the requisite knowledge and understanding required to nullify the need for disclosures, the MSRB should put forth guidance as to the factors an underwriter can look to in making a determination.

NAIPFA believes that such an approach strikes an appropriate balance between the needs of infrequent, unsophisticated issuers and underwriters. Unlike the current draft of the Rule, this approach eliminates the presumption that issuers understand even typical fixed rate offerings. This approach would thereby ensure that small and/or infrequent municipal issuers are made aware of the nature of the transaction when they do not have the necessary knowledge to make informed decisions. However, this approach is flexible enough to give underwriters the ability to avoid making disclosures when such disclosures are not necessary. Although the differences between this approach and the approach taken by the Rule may seem subtle, the shifting of the presumption is substantial and would lead to a much greater degree of protection for municipal issuers.

Conclusion

NAIPFA hopes these comments provide insight into our concerns with regard to draft Rule G-17. We believe a large number of issuers are infrequent and/or small issuers. NAIPFA remains very concerned that these issuers will not be adequately protected and will remain confused about the roles of underwriters and municipal advisors. Consequently, the suggested amendments detailed in this comment letter would provide much needed additional clarity to these issuers.

Sincerely,

Colette Irwin-Knott

Colette J. Irwin-Knott, CIPFA
President, National Association of Independent Public Finance Advisors

National Association of Independent
Public Finance Advisors
P.O. Box 304
Montgomery, Illinois 60538.0304
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