



February 13, 2012

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

Re: File No. SR-MSRB-2011-09 -- Rebuttal

Dear Ms. Murphy:

On November 10, 2011, the Municipal Securities Rulemaking Board (the “MSRB”) filed with the Securities and Exchange Commission (the “Commission” or “SEC”) Amendment No. 2<sup>1</sup> 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”).<sup>2</sup> 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<sup>3</sup> and the Commission received seven responses. The MSRB responded to those comments on December 7, 2011.<sup>4</sup>

On December 14, 2011, the Commission published in the Federal Register an order (the “Order”) to institute proceedings pursuant to Section 19(b)(2)(B) of the Securities Exchange Act

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

<sup>2</sup> 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.

<sup>3</sup> *See* Exchange Act Release No. 65749 (November 15, 2011), 76 FR 72013 (November 21, 2011).

<sup>4</sup> *See* Letter from Margaret C. Henry, MSRB General Counsel, Market Regulation, to Elizabeth M. Murphy, Commission Secretary, dated December 7, 2011.

of 1934 ("Exchange Act") to determine whether to approve or disapprove the Proposal.<sup>5</sup> The Commission received four comment letters in response to the Order,<sup>6</sup> in addition to a letter from the MSRB submitted on January 30, 2012.<sup>7</sup> This letter provides the MSRB's responses to these comments.

### **Role of the Underwriter/Conflicts of Interest**

#### **Disclosures Concerning the Underwriter's Role.**

GFOA supports the provisions of the Proposal requiring disclosures by underwriters to issuers about their role as compared to that of financial advisors but suggests additional modifications to the language to affirmatively note that issuers may choose to engage the services of an independent financial advisor.

The MSRB continues to believe, as it stated in its December 7, 2011 letter, 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.

SIFMA suggests an exemption from the required disclosures for syndicate members whose participation level is below 10%.

The MSRB continues to decline to create any such exemption since, as it explained in its December 7, 2011 letter, 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.

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<sup>5</sup> See Exchange Act Release No. 65918 (December 8, 2011), 76 FR 77865 (December 14, 2011).

<sup>6</sup> Comments were received from Bond Dealers of America ("BDA"), Government Finance Officers Association ("GFOA"), National Association of Independent Public Finance Advisors ("NAIPFA"), and Securities Industry and Financial Markets Association ("SIFMA").

<sup>7</sup> See Letter from Margaret C. Henry, MSRB General Counsel, Market Regulation, to Elizabeth M. Murphy, Commission Secretary, dated January 30, 2012.

SIFMA states that certain disclosures concerning the role of the underwriter are duplicative of those required by MSRB interpretive guidance under MSRB Rule G-23 and should be eliminated.

The Proposal is intended to be a comprehensive statement of the duties of underwriters to issuers of municipal securities. The MSRB, therefore, declines to remove the provision of the Proposal that would require disclosure by the underwriter to the issuer of its arm's-length role. The MSRB notes, however, that provision of the disclosure required by the Proposal would also satisfy comparable disclosure requirements under Rule G-23.

SIFMA proposes that other disclosures concerning the generalized role of the underwriter and compensation not be required for large and frequent issuers that regularly issue securities and are very familiar with the underwriting process.

The MSRB declines to modify the requirements for providing written disclosures to large and frequent issuers. Such issuers may experience turnover in finance personnel, and the MSRB notes that disclosures are required to be made to issuer representatives to inform them in their decision making.

NAIPFA states that a rejection of the Proposal would cause municipal issuers to suffer, because they would benefit from receiving disclosures relating to the nature of their relationship with an underwriter. NAIPFA also states that it hopes that the disclosures required by the Proposal will help less sophisticated, inexperienced municipal issuers better assess the potential consequences that arise in the negotiated issuance process, including, for example, the fact that an underwriter is acting in an arm's length basis in a commercial transaction and does not serve in a fiduciary capacity.

The MSRB concurs in this assessment and notes that its letter of January 30, 2012 addresses the consequences of the failure of issuer finance personnel to adequately understand the conflicts of underwriters.

#### **Timing and Manner of Disclosures.**

GFOA supports the adoption of a "plain English" standard for the disclosures required by the Proposal.

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. The MSRB's January 30, 2012 letter also notes that, while certain disclosures may be capable of standardization, page after page of complex legal jargon in small print would not satisfy this requirement.

GFOA states that the current proposed language sets a baseline standard and understanding of what is required of the underwriter, but once in place, additional discussions between the MSRB, SEC, and marketplace participants should take place to achieve the goal of the standard.

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.

SIFMA requests that the Proposal be revised to state, as provided in the MSRB's comment letter of December 7, 2011, 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.

The MSRB notes that the Proposal already would provide that:

The disclosures described in this section of this notice<sup>8</sup> must be made in writing to an official of the issuer whom the underwriter reasonably believes has the authority to bind the issuer by contract with the underwriter (i) in sufficient time before the execution of a contract with the underwriter to allow the official to evaluate the recommendation and (ii) in a manner designed to make clear to such official the subject matter of such disclosures and their implications for the issuer.

Nothing in the Proposal suggests that disclosures concerning the material financial risks and characteristics of a recommended transaction would need to be made earlier. References to earlier disclosures pertain to the role of the underwriter and its conflicts, not to the material financial risks and characteristics of a recommended transaction. The MSRB, therefore, does not consider SIFMA's requested change to the Proposal to be warranted.

### **Representations to Issuers**

SIFMA is of the view that 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.

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<sup>8</sup> This text appears in the section of the Proposal concerning the disclosure of material financial risks and characteristics of recommended transactions.

The MSRB disagrees with this comment, as the reasonableness of an underwriter's representations in an issue price certificate may have a direct effect on a key representation that an issuer makes to potential investors – that interest on its securities is tax-exempt.

### **Required Disclosures to Issuers**

GFOA supports the requirement of the Proposal that underwriters disclose the risks of financings even when issuers are represented by financial advisors and even in the case of routine financings. It does not believe that having underwriters provide such disclosures would cause undue costs or burdens to underwriters.

The MSRB agrees, as described in detail in its letter of January 30, 2012.

SIFMA believes that the various written disclosure obligations of the Proposal will be costly, and that these costs would be justified only to the extent those additional requirements result in greater issuer protection. It also expressed the view that the Proposal is overly broad and burdensome and is not likely to produce a benefit commensurate with the associated costs.

The MSRB's letter of January 30, 2012 explains its strong view that the disclosure requirements of the Proposal are essential to the protection of issuers and investors and why it considers arguments, such as SIFMA's, to be overstated.

SIFMA objects to the need to provide detailed written disclosures about "complex transactions" to large and frequent issuers that might be very familiar with those transactions. It characterized variable rate demand obligations and what it referred to as "plain vanilla interest rate swaps" as commonplace and well understood by sophisticated issuers.

As it stated in its December 7, 2011 letter, the MSRB declines to modify the requirements for providing written disclosures to sophisticated issuers. Under the Proposal, 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. Also, the MSRB disagrees with the characterization of interest rate swaps as "plain vanilla" from the perspective of an issuer of municipal securities. The MSRB expects that the issuers that faced unexpected substantial swap termination payments, as described in the MSRB's January 30, 2012 letter, would not characterize those swaps as "plain vanilla."

SIFMA requests that the Proposal provide more specific guidance regarding which issuer personnel must have the requisite level of knowledge and sophistication to trigger additional disclosure requirements. At the same time it states that it does not believe that it would be

appropriate or practicable to impose upon the underwriter the duty to assess the level of sophistication and experience of the issuer official to whom the disclosure is delivered if such official is reasonably believed to have authority to bind the issuer. It requests that the Proposal be clarified to state that underwriters may rely on a representation from such official that he or she is sufficiently sophisticated and experienced and that issuers should be responsible for ensuring that they authorize appropriate personnel to contract for them.

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. The MSRB expects that, if it were to provide the “clarification” that SIFMA requests, issuers would be provided with boilerplate language requesting that they waive this key disclosure requirement and that many of those that actually read the language would be loath to admit that they lacked sophistication or experience.

SIFMA restates its previous comment that 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.

As the MSRB stated in its November 10, 2011 letter, it does not consider it appropriate to provide a more precise definition of “complex municipal securities financing” than that already provided in the Proposal. The Proposal offers the comparison to a fixed rate financing and examples of financings that are considered to be complex, such as those involving VRDOs and swaps. If there is any doubt on the part of the underwriter as to whether a financing is complex, it should err on the side of concluding that the financing is complex and provide the requisite disclosures.

SIFMA reiterated 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 continues to be of the view expressed in its December 7, 2011 letter that, with respect to financings that are moving to completion on an accelerated timeframe, 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. The MSRB also notes that disclosures concerning the material financial risks and characteristics of a financing are typically limited to complex municipal securities financings in which the underwriter has recommended the financing. Furthermore, the Proposal also contemplates that, “The level of disclosure required may vary according to the issuer’s knowledge or experience with the proposed financing structure or similar structures, capability of evaluating the risks of the recommended financing, and financial ability to bear the risks of the recommended financing, in each case based on the reasonable belief of the underwriter.”

SIFMA states that, when 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. It also states that, 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.

The MSRB believes that the provisions relating to these disclosures are appropriate for the reasons described in its November 10, 2011 and December 7, 2011 letters, and therefore no further modifications to these provisions are warranted. Additionally, the MSRB considers it essential for issuer representatives to be the recipients of the required disclosures as they are the ones that must decide whether to accept their underwriters' recommendations. The Proposal would provide that: "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 official or its employees or agent." In such a case, the provision of disclosure to the issuer's financial advisor might supplement the disclosure to the issuer representative, not replace it.

### **New Issue Pricing and Underwriter Compensation**

#### **Fair Pricing.**

NAIPFA provides a clarification to a statement made in a prior comment letter relating to the "fair and reasonable" pricing disclosure requirement of the Proposal. Under the Proposal, underwriters would have an obligation to purchase securities from the issuer at a "fair and reasonable" price. NAIPFA said that this requirement should not create an expectation by the issuer that the underwriter is providing the "best pricing" in the market, because the underwriter has a conflict of interest due to its pricing obligation to investors.

The MSRB agrees with this comment and believes that the following disclosure required by the Proposal adequately addresses this point: "[T]he underwriter has a duty to purchase securities from the issuer at a fair and reasonable price, but must balance that duty with its duty to sell municipal securities to investors at prices that are fair and reasonable."

### **Conflicts of Interest**

#### **Payments to or from Third Parties.**

With regard to various other conflicts disclosures included in the Proposal, GFOA agrees with the portion of the Proposal that would require underwriters to disclose if third-party payments are made, although it supports the disclosure of the amount of such payments.

The MSRB notes that the purpose of the requirement of the Proposal that the underwriter disclose such third-party payments is to draw them to the issuer's attention. The issuer may then request whatever additional information about such payments it considers appropriate. If the Proposal is approved, the MSRB will monitor whether the Proposal has achieved the effect of providing issuers with adequate information about actual or potential material conflicts of interest and whether the amount of such third-party payments or other additional information should be required.

SIFMA requests that the Proposal be revised to state, as provided in the MSRB's comment letter of December 7, 2011, 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).

The MSRB does not consider such a revision to be necessary. The Proposal already requires the disclosure of third-party payments if they fall into the category of "potential or actual material conflicts of interest."

#### **Credit Default Swaps.**

GFOA supports the Proposal's provisions relating to credit default swap disclosures.

The MSRB appreciates this comment.

#### **Miscellaneous Matters**

GFOA notes its 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.

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 state and local governments."

Although outside the scope of the Proposal, the MSRB will keep this suggestion under advisement.

SIFMA states that the Proposal is premature because the Commission's rulemaking on municipal advisors remains pending. BDA states that the Commission should not approve the Proposal until it is prepared to approve a comparable notice for municipal advisors. Otherwise, in BDA's view, the disclosure required by the Proposal that municipal advisors have a federal fiduciary duty will confuse issuers that may think that municipal advisors are required to disclose conflicts. BDA said that financial advisors would impede underwriter access to their issuer clients for the purposes of making the disclosures required by the Proposal and that the Proposal should not proceed until municipal advisors were precluded from doing so.

The MSRB disagrees for the reasons described in its November 10, 2011 letter. The MSRB also notes the following comments of GFOA and NAIPFA in support of the Commission's approval of the Proposal even though the Commission's rulemaking on the definition of "municipal advisor" remains pending.

While GFOA notes that it is "vital for the SEC to act quickly and complete its work on the municipal advisor definition," GFOA recommends that the Commission act quickly to finalize the Proposal, rather than waiting until after its own rulemaking is complete, because the Proposal "would protect issuers - as well as investors - of municipal securities from potential fraudulent activity on the part of the dealer community and would help define the different roles and of underwriters and financial advisors to state and local governments."

NAIPFA urges that the Proposal be approved now, rather than delaying its adoption until the Commission's rulemaking on the definition of "municipal advisor" is complete. It notes that, "The obligations of an underwriter under Rule G-17 appear consistent with what has been proposed [by the MSRB] as municipal advisor obligations under the same Rule G-17." It also said that it could "find no rational correlation between a delay in the adoption of the Rule and the adoption of a definition of 'municipal advisor'."

SIFMA states that the MSRB should defer the Proposal until the Commodity Futures Trading Commission ("CFTC") and SEC have completed their rulemaking concerning swaps. It also states that, if the Proposal is approved by the SEC, an implementation period of longer than the proposed 90 days would be appropriate.

The MSRB notes that most of the derivatives entered into by issuers of municipal securities are interest rate swaps, which are within the jurisdiction of the CFTC. The provisions of the Proposal concerning the disclosure of the material financial risks and characteristics of complex municipal securities financings have been carefully drafted to be consistent with the provisions of the CFTC's business conduct rule, which requires very similar disclosures to those required by the Proposal. The MSRB notes that the CFTC finalized that rule on January 11, 2012.

NAIPFA reiterated some of its previous comments under the heading "Previous NAIPFA Comments On Rule G-17."

The MSRB responded to those comments in its letters of November 10, 2011 and December 7, 2011.

Sincerely,



Margaret C. Henry  
General Counsel, Market Regulation

