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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

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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

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).

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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.

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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,

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[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.

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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.

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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

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