MSRB
Municipal Securities
Rulemaking Board

# MSRB NOTICE 2012-04 (FEBRUARY 7, 2012)

## REQUEST FOR COMMENT ON DRAFT INTERPRETIVE NOTICE CONCERNING THE APPLICATION OF MSRB RULE G-17 TO BONDHOLDER CONSENTS BY UNDERWRITERS OF MUNICIPAL SECURITIES

The Municipal Securities Rulemaking Board ("MSRB") is requesting comment on a draft interpretive notice concerning the application of MSRB Rule G-17 to the provision of bondholder consents by underwriters of municipal securities. Comments should be submitted no later than March 6, 2012, and may be submitted in electronic or paper form. Comments may be submitted electronically by clicking here. Comments submitted in paper form should be sent to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board, 1900 Duke Street, Suite 600, Alexandria, VA 22314. All comments will be available for public inspection on the MSRB's website.[1]

Questions about this notice should be directed to Karen Du Brul, Associate General Counsel, at 703-797-6600.

**BACKGROUND**

As described in more detail in the draft notice, the MSRB is concerned that, in some cases, underwriters have consented to trust indenture or resolution amendments that affect existing parity bondholders, even though those authorizing documents and the official statements for the existing bonds did not provide expressly that underwriters could provide such consents. In some cases, those amendments have reduced the security for existing bondholders (*e.g.,* by deleting debt service reserve fund requirements) or have reduced the value of existing bonds (*e.g.,* by changing call features). The draft notice describes circumstances under which this practice would violate MSRB Rule G-17's requirements that brokers, dealers, and municipal securities dealers deal fairly with all persons in the conduct of their municipal securities activities.

While underwriters may technically be bondholders during the period between the time they purchase an issuer's bonds and the time they distribute the bonds to investors, they are still underwriters while they hold bonds with a view to distribution. As such, they will not be negatively affected by the amendments to which they consent. In fact, they may have a monetary incentive to consent to the amendments and, accordingly, a conflict of interest. If, on the other hand, the underwriting firm became an investor in the bonds and was no longer holding the bonds with a view to distribution, the firm's consent to amendments affecting their bonds would not be precluded by the notice.

The MSRB notes that the notice does not address amendments agreed to by underwriters that have no effect on existing bondholders. For example, if an underwriter agreed to amendments to variable rate demand obligations ("VRDOs") after the existing VRDOs had been subject to a mandatory tender, the amendments would have no effect on previous owners of the VRDOs. Similarly, if all of the existing bonds had been defeased prior to the underwriter's consent, the notice would not apply, because the amendments would not affect the defeased bondholders.

The MSRB decided not to propose a "material adverse effect" standard for analyzing

amendments that affect existing bondholders under Rule G-17. Such a standard might be subject to varying interpretations by different underwriters. Furthermore, while an amendment might not materially adversely affect existing bondholders at the time of the amendment (*e.g.,* the deletion of a debt service reserve fund requirement for a strong issuer credit), its significance might become apparent in the future (*e.g*., if the issuer experienced financial difficulties).

**SUMMARY OF INTERPRETIVE NOTICE**

The draft interpretive notice provides that the provision of bondholder consents by underwriters could, depending upon the facts and circumstances, be a violation of the Rule G-17 duty of dealers to deal fairly with all persons in the conduct of their municipal securities activities. The notice provides, as an example, that it would be a violation of Rule G-17 for an underwriter to consent to amendments to an authorizing document that would reduce the security for existing bondholders unless (i) the authorizing document expressly provided that an underwriter could provide bondholder consent and (ii) the offering documents for the existing securities expressly disclosed that bondholder consents could be provided by underwriters of other securities issued under the authorizing document. The notice includes examples of what is meant by "reduction in security."

**REQUEST FOR COMMENT**

The MSRB requests comments on the draft interpretive notice set forth below. If the MSRB subsequently files the draft interpretive notice with the Securities and Exchange Commission, it will request that it be given prospective application.

February 7, 2012

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**MSRB Notice 2012-__ (_____ __, 2012)**

**INTERPRETIVE NOTICE CONCERNING THE APPLICATION OF MSRB RULE G-17 TO BONDHOLDER CONSENTS BY UNDERWRITERS OF MUNICIPAL SECURITIES**

It has come to the attention of the Municipal Securities Rulemaking Board (the "MSRB") that, in some cases, an issuer of municipal securities (or an obligated person) may request that the broker, dealer, or municipal securities dealer ("dealer") that is the underwriter of those securities provide its consent ("bondholder consent") to certain changes to the trust indenture or resolution under which the securities are issued ("authorizing document") at the point in time that the securities are briefly owned by the underwriter, prior to redistribution of the securities to investors ("new bondholders").[1] In some cases, the changes may affect investors that already own securities issued under the authorizing document ("existing bondholders"), as well as the new bondholders. This may be the case, for example, if the authorizing document provides for the issuance of multiple series of securities and permits amendments to the authorizing document upon the receipt of the consent of more than 50% of the owners of the securities issued under the authorizing document, and the securities underwritten (and owned by the underwriter prior to distribution) represent more than the required 50%. The MSRB is concerned that some of the changes for which such bondholder consents are provided may reduce the security for existing bondholders or the value of their bonds.

Under MSRB Rule G-17, dealers must, in the conduct of their municipal securities activities, deal fairly with all persons and must not engage in any deceptive, dishonest, or unfair practice. This rule is most often cited in connection with duties owed by dealers to investors with which the dealers engage in municipal securities transactions.[2] However, Rule G-17 is broader in scope, because it establishes a general duty of a dealer to deal fairly with all persons in the conduct of its municipal securities activities, even in the absence of fraud.

The provision of bondholder consents by underwriters may, depending upon the facts and circumstances, be a violation of the Rule G-17 duty of dealers to deal fairly with all persons in the conduct of their municipal securities activities. For example, it would be a violation of Rule G-17 for an underwriter to consent to amendments to an authorizing document that would reduce the security for existing bondholders unless (i) the authorizing document expressly provided that an underwriter could provide bondholder consent and (ii) the offering documents for the existing securities[3] expressly disclosed that bondholder consents could be provided by underwriters of other securities issued under the authorizing document. The following are examples of what is meant by a "reduction in security" but they are not exclusive: (i) elimination of a reserve fund, a reduction in its amount, or the substitution of a surety policy for a cash-funded reserve; (ii) a reduction in the priority of debt service on existing securities in relation to other expenditures; (iii) a reduction in a minimum debt service coverage ratio that is a condition of the issuance of additional securities under the authorizing document; and (iv) the elimination or reduction in the amount of collateral for existing securities.

The MSRB is aware that underwriter provision of bondholder consents may be perceived by issuers and obligated persons to be a more cost-effective way of obtaining required bondholder consents than, for example, the defeasance of existing securities or solicitation of existing bondholders, and that, in some cases, issuers and obligated persons may face economic constraints that cause them to seek changes to the security provisions of authorizing documents. Nevertheless, the MSRB cautions dealers to consider carefully before providing such consents whether they have the potential to violate Rule G-17.

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[1] This notice would not apply to the extent a dealer purchases municipal securities for its own account without a view to distribution.

[2] *See, e.g.*, Guidance on Disclosure and Other Sales Practice Obligations to Individual and Other Retail Investors in Municipal Securities (July 14, 2009). *See also* Interpretive Notice Regarding Rule G-17, on Disclosure of Material Facts (March 20, 2002).

[3] For purposes of this notice, it is presumed that the offering document for the securities purchased by the new bondholders clearly disclosed the terms of the securities as a result of the changes. If that were not the case, the underwriter could be found to have engaged in an unfair practice under Rule G-17 with regard to the new bondholders.

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[1] Comments are posted on the MSRB website without change. Personal identifying information such as name, address, telephone number, or email address will not be

edited from submissions. Therefore, commenters should submit only information that they wish to make available publicly.

**Alphabetical List of Comment Letters on MSRB Notice 2012-04 (February 7, 2012)**

1. BondView: Letter from Robert Kane, CEO, dated March 5, 2012

2. Government Finance Officers Association: Letter from Susan Gaffney, Director, Federal Liaison Center, dated March 9, 2012

3. Haynsworth Sinkler Boyd, P.A.: Letter from Kathleen Crum McKinney and Theodore B. DuBose, dated March 5, 2012

4. Ice Miller LLP: Letter from Philip C. Genetos dated March 6, 2012

5. Indiana Housing & Community Development Authority: Letter from Blake A. Blanch, Chief Financial Officer

6. Indianapolis Airport Authority: Letter from Joseph R. Heerens, Chief Legal Officer, dated March 6, 2012

7. Los Angeles County Metropolitan Transportation Authority: Letter from Michael J. Smith, Assistant Treasurer

8. National Association of Bond Lawyers: Letter from Kristin H.R. Franceschi, President, dated March 8, 2012

9. National Federation of Municipal Analysts: Letter from Lisa Good, Executive Director, dated March 26, 2012

10. Squire Sanders LLP: Letter dated March 6, 2012

BONDVIEW
*207 Mineola Ave, Suite 217, Roslyn Heights, NY 11577, 866 261 9533, www.bondview.com*

March 5, 2012

Mr. Ronald W. Smith
Corporate Secretary
MSRB
1900 Duke Street, Suite 600
Alexandria, VA 22314

Delivered via email

Re: MSRB Notice 2012-2014 (February 7, 2012) request for Comment on Draft Interpretive Notice Concerning the of MSRB Rule G-17 to Bondholder Consents by Underwriters of Municipal Securities

**Comments from Robert Kane, CEO, Bondview**

Thank you for the opportunity to comment on the application of MSRB Rule G-17 to Bond Consents by Underwriters of Municipal Securities published on February 7, 2012.

**Who We Are**

BondView is a provider of free information to the municipal bond market. We serve both retail and professional investors by providing objective third-party estimated pricing, market ratings and commentary on municipal bonds.

**Comments on Interpretive Notice**

We would like to commend the MSRB's continued leadership in improving transparency. Retail investors do not have the same tools as institutional investors nor their professional experience in the municipal market. Therefore, it is paramount that retail investors are treated fairly and that the municipal market operates as transparently as possible.

Regarding the specific issue of *Bond Consents By Underwriters*, our suggestion is to look at the existing model for "Truth-in-Lending" standards for home mortgages which require material risks to be prominently and clearly spelled out in plain English. Municipal bond prospectuses should include the same easy to understand explanations of risks, including Bond Consents By Underwriters, stated in a highlighted section that would be required to be made known by any bond salesperson to any prospective buyer.

Bondholders should not have their security diluted through the use of actions permitted in "fine print" of the legal documents. This is special concern for retail municipal bond investors as they eventually buy and hold close to 2/3 of all outstanding bond issues. However, the realities are that retail investors are less likely to read a bond issuer's 35 page prospectus and instead primarily rely on their trusted investment advisor. Some investment advisors work for bond underwriters and therein lies a potential conflict of interest.

The general concern is the ability of an issuer to change important covenants in the bond documents, such as debt service coverage requirements, through the use of its underwriter for a new bond issue acting as a bondholder.

These actions could adversely impact other bondholders of the issuer's prior bond issues since the bondholders security interest could be diluted materially. This type of event should not be taken lightly by market regulators. The existence of this process should be made known to investors prior to their purchase of bonds. In this way bondholders can assess and price the risk they are taking when purchasing a security with such provisions.

The MSRB draft interpretive notice states that if an underwriter were to act as a bondholder and provide consent to a material dilution of security, then the underwriter would be in violation of rule G-17 that provides it deals fairly with all market participants, unless it met certain conditions. These conditions are stated as having the prior bond documents allowance for use of an Underwriter as a bondholder for the purpose of consent and having the new bond documents explicitly state that a future underwriter could act as a bondholder for consent purposes.

BondView endorses this position and also suggest that the disclosure be made upfront in plain easy-to-understand language so that prospective bondholders can understand, assess and price in this risk. We suggest the risks be made clear in the 1) Preliminary Official Statement, 2) Official Statement. 3) Within "Risks" section and if possible 4) In a separate topic heading titled Bond Consents By Underwriters. In this way investors and the municipal bond marketplace are more likely to be made aware of and understand the related risks.

Thank You

Robert Kane
CEO
Bondview.com

**Government Finance Officers Association**
1301 Pennsylvania Avenue, NW Suite 309
Washington, D.C. 20004
202.393.8020 *fax*: 202.393.0780

March 9, 2012

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA 22314

**RE: MSRB Notice 2012-04: Draft Interpretive Notice Concerning the Application of MSRB Rule G-17 to Bondholder Consents by Underwriters of Municipal Securities**

Dear Mr. Smith:

Thank you for the opportunity to submit comments on the MSRB's Notice 2012-04.

We appreciate the MSRB's efforts to ensure that abusive practices – from all market participants - are identified and eliminated in this market. As the proposed Notice points out, there may be instances where bondholder consents given by an underwriter may be unacceptable practices, that harm bondholders. However, we are concerned that the proposed Interpretative Release could have unintended consequences that would prove harmful to both issuers and investors.

At the outset, it should be recognized that obtaining bondholder consents directly from bondholders of credits with indentures covering many bond issuance over many years is very expensive, given the difficulty of identifying (because of book-entry systems) and communicating with many different bondholders. Obtaining bondholder consents through underwriters may represent the only practical and economical way to obtain such consents.

We support the Los Angeles Metropolitan Transportation Authority's example that they present in their letter to the MSRB on this proposed Notice, that clearly demonstrates that they had appropriate reasons for using an underwriter consent that was beneficial to both the issuer and the investor, yet the situation they describe appears to be included in the example provided of a practice that would violate G-17. We believe that this interpretive notice could be made much more useful by providing granularity through more examples of both unacceptable and unacceptable practices in area of obtaining bondholder consents through underwriters.

While we support MSRB efforts that benefit the market and eliminate abusive behavior, without taking into account the need for a case-by-case review of each instance where this occurs, the Interpretive Notice in practice, could cover more ground than intended, and therefore, would harm issuers and investors.

Thank you for the opportunity to comment on this important issue.

Sincerely,

Susan Gaffney

Susan Gaffney
Director, Federal Liaison Center

**COMMENTS OF**

**HAYNSWORTH SINKLER BOYD, P.A.**

**Regarding**

**DRAFT INTERPRETATION OF MSRB RULE G-17**
**RESTRICTING UNDERWRITER CONSENTS TO AMENDMENTS TO OUTSTANDING SECURITY DOCUMENTS**

March 5, 2012

On February 7, 2012, the Municipal Securities Rulemaking Board (the ***"MSRB"***) issued its Notice 2012-04 – *Request for Comment on Draft Interpretive Notice Concerning the Application of MSRB Rule G-17 to Bondholder Consents by Underwriters of Municipal Bonds* (the ***"Draft Notice"***).

If adopted, the Draft Notice would by its interpretation of MSRB Rule G-17 prohibit an underwriter in its capacity as initial owner of the bonds from consenting to amendments to the bond resolution, ordinance, or trust indenture (the ***"Bond Documentation"***), if such amendment would reduce the security for the owners of outstanding bonds unless (a) the Bond Documentation expressly provided that an underwriter (as opposed to the bondholders in general) could provide bondholder consent and (b) the offering documents for the owners of outstanding bonds expressly disclosed that bondholder consent could be provided by underwriters (as opposed to bondholders in general) of subsequently issued bonds.

Bond Documentation contains specific provisions for amendments that require the consent of all, none, or a certain percentage of bondholders. These provisions are market driven by the expectation of the bondholders and state law provisions and are matters of contract. As long as the amendment provisions are disclosed in the offering documents, the issuer and the bondholders have knowledge of the amendment provisions. The circumstances driving a consent by the bondholders to an amendment to Bond Documentation are unique to each transaction. The Draft Notice rather than protecting the issuer or the bondholders does not and really cannot take into consideration the underlying complexities of each transaction. As a result, unintended negative consequences could result from the abrogation of the contract established between the issuer and the bondholder by imposing the Draft Notice in all situations where the security is technically reduced but the financial strength of the enterprise is likely enhanced.

Since Bond Documentation does not contain such provisions specifically addressing underwriter as opposed to general bondholder consents, the Draft Notice, if adopted, would effectively preclude any amendments where there were a technical reduction in security even though the overall financial strength of the issuer could be improved by such action. The Draft Notice assumes that a reduction in security will always be a detriment to the existing bondholder without taking into account why the issuer has chosen such course and the actual benefits that may accrue. When amendments are pursued with respect to the security, there is a sound business reason for such action and such action is taken to benefit the long-term viability of the issuer or project. Inherent in the Draft Notice is the presumption that such amendments are always to the detriment of the bondholder. Such a simplistic approach will not promote the financial stability of the issuer or the enterprise to which the bonds relate.

Comments have been submitted that the Draft Notice constitutes an undue interpretation of Rule G-17, and expands the meaning of Rule G-17 to the detriment of municipal issuers whose interests the MSRB is now charged with protecting.

The following comments provide examples of where the reduction in the security are in the interests of the municipal issuer and the bondholders and argues that the disclosure of the existing Bond Documentation that addresses amendments should control the amendment process.

In bond issues where the security is real property, the issuer may need to grant an easement or right of way to a state transportation agency for road construction or release certain parcels for a multitude of valid business reasons, such as increased tax benefits to the issuer or generation of revenue that would accrue to the financial viability of the issuer. Although such easement or release of parcels could benefit the issuer or revenue-producing enterprise and thereby the bondholders, the Draft Notice would likely prohibit such reduction in security or at best create an ambiguity since the security is technically being reduced.

In healthcare financing there is often an obligated group structure where several entities pledge their gross receipts under a master trust indenture. Because of the rapid evolving changes in healthcare, it may be beneficial overall to release an entity from the master trust indenture as a result of a sale of the entity to another healthcare organization. Documents usually provide a financial test for release of such entity. However, such tests were often written over 20 years ago in a vastly different healthcare environment. Thus it is for the benefit of both the healthcare system and the present bondholders and future bondholders to amend the release tests. Conversely, it may be beneficial to bring another entity into the obligated group where the test in the existing Bond Documentation may be higher than is realistic in the present healthcare regulatory environment. If reducing the threshold to admit a new member of the obligated group cannot be amended, the overall financial strength of the obligated group could be reduced. However, the proposed Draft Notice could be interpreted as precluding either amendment since arguably lowering the financial criteria for admission to or exit from the obligated group could be viewed as a reduction of security.

Another example of the proposed Draft Notice not serving the interest of the issuer or the bondholder is where the bonds are secured by a debt service reserve fund policy and the surety ratings have fallen below investment grade. The Bond Documentation may require such policy must be replaced by cash. In today's environment it may not be in the best interest of the liquidity profile of the issuer to replace such reserve fund policy with cash and thereby risk the violation of the debt service coverage ratio or cause an operating deficit or immediate default by the municipal issuer. Such action may increase the likelihood of a default. If such situation is presented to all current bondholders and the requisite number consent, Rule G-17 should not block the bondholders' assessment of the benefit of the transaction.

The Draft Notice would cause an ambiguity in all of the above circumstances since it fails to take into consideration the entire credit analysis and looks at the "reduction in security" in isolation.

The market place is the better approach to handling these matters. Most Bond Documentation requires 100% bondholder consent to reduce the aggregate principal amount of bonds then outstanding, the consent of the holders of which is required to authorize an amendment without the consent of all bondholders. The Draft Notice will not result in an improvement but rather impose an interpretation that may not be beneficial to the financial integrity of the securities.

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March 6, 2012

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Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA 22314

Dear Mr. Smith:

We are pleased to provide comments to the draft proposal of the Municipal Securities Rulemaking Board (the "MSRB") dated February 7, 2012 (the "Proposal") that would limit the ability of an underwriter (the "Underwriter") of bonds issued in one issue (the "New Bonds") to consent to amendments of a master (or "open-ended") indenture, resolution or ordinance (the "Master Indenture") pursuant to which the New Bonds are issued, where outstanding bonds (the "Prior Bonds") will remain outstanding under the amended Master Indenture. The Proposal is to adopt an interpretative notice that would make it illegal under MSRB Rule G-17[1] for an the Underwriter to consent to an amendment of the Master Indenture if (a) the amendment reduces the security for the owners of the Prior Bonds and (b) the Master Indenture did not expressly provide that the Underwriter could consent to the amendment. For the reasons stated below, we recommend that this Proposal not be adopted by the MSRB.

The context in which we believe this issue has arisen in the past is where an issuer desires to amend (and in some cases restate) the Master Indenture to reflect new or modernized provisions that have become commonplace in the bond market for Master Indentures. In our experience, the Master Indenture typically provides a limited set of circumstances for which an amendment can be approved by the bond trustee (the "Trustee") without consent of bondholders. However, the Master Indenture importantly provides broad authority for the holders of a majority in principal amount of outstanding bonds, including the Prior Bonds and the New Bonds, to consent to any amendment (except certain specific amendments for which unanimous consent is required). There can be little question that in virtually all cases, the holders of the Prior Bonds should be fully aware of the possibility that the holders of outstanding bonds, including the New

[1] The operative language of G-17 is "each broker . . . shall deal fairly with all persons and shall not engage in any deceptive, dishonest or unfair practice."

Bonds, can consent to a broad range of amendments even if the holders of the Prior Bonds oppose the amendment, including if the amendment adversely affects the security of the Prior Bonds.

Fundamental changes have occurred in the structures, procedures, security and practices affecting the issuance of governmental bonds. The advent of different types of variable rate bonds, the use of various sources of credit enhancement, changing criteria upon which ratings are determined, just to mention a few changes, have caused many issuers, particularly those who have multiple series of parity bonds under a single Master Indenture, to modernize the Master Indenture to reflect new market conditions, structures and requirements. It is also noteworthy that in our experience the amendments most often do not reverse a limitation that was specifically drafted in the original Master Indenture, but rather add new provisions to contemplate a transaction or a financing structure that was not even contemplated as a possibility at the time the Master Indenture was executed. Further, the Trustees have become much less willing to concur in the issuer's interpretation of any aspect of the Master Indenture or for enforcement of the Master Indenture, including whether these amendments can be approved without bondholder consent. In addition, at the time a typical Master Indenture was first adopted, bonds were registered with the Trustee, so that the Trustee could easily assist the issuer in reaching the holders of the Prior Bonds to seek consent. Today, of course, with virtually all bonds registered through DTC, an issuer is often unable to solicit bondholders effectively for consent to an amendment. Indeed, in one recent experience, the issuer was never able to determine through DTC who the holders of outstanding bonds were in order to solicit their consent.

As a consequence of these market forces and the issuers' need to modernize their Master Indentures without the significant cost of refunding or defeasing bonds, the practice of having the holders of the New Bonds (and the Underwriter) consent to amendments without the defeasance of the Prior Bonds or without securing the consent of the holders of the Prior Bonds has become quite commonplace. Indeed, we believe that this practice has been used by issuers for many years to our knowledge without significant resistance from the holders of Prior Bonds, because we are unaware of any amendments that have produced or caused a reduction in the ratings assigned to the Prior Bonds or of any other controversies arising from such circumstances. To our knowledge, we are unaware of any adverse reaction or claims of "deceptive, dishonest or unfair" treatment of the holders of the Prior Bonds. As a consequence, we fear that the Proposal will cast a negative light and make illegal a practice that has been used for years with little controversy. We are very concerned that the issuers will be negatively impacted by the Proposal without adequate substantiation of the depth of the concerns. We ask that the MSRB be mindful of the impact on issuers of the Proposal. We note that the Proposal is focused on a change in "security" for the Prior Bonds. If the MSRB's concern is for those limited circumstances where the fundamental security for the Prior Bonds is reduced, the Proposal should be narrowly defined.

We recommend that the MSRB should not adopt the Proposal for the following reasons:

1. The Master Indenture permits the holders of a majority in outstanding bonds to consent to virtually any amendment. In our experience, when the Master Indenture is amended contemporaneous with the issuance of the New Bonds, the holders of the New Bonds have been considered to consent to the amendment by reason of their purchase of the New Bonds in addition to the Underwriter's consent. This deemed consent is clearly disclosed in the offer. The holders of the New Bonds have a clear right under the Master Indenture to consent to a wide variety of amendments. We see no difference between those holders consenting at the time of issuance of the New Bonds, as compared to consenting at a later date. The crucial point is that they have consented. The Master Indenture was not drafted with the intent that the amendment process was supposed to occur only when the consenting bonds were already outstanding for any given period of time or that the process be difficult or impossible. The issuer should be free to find an efficient manner to accomplish a purpose that is expressly limited under the Master Indenture. We believe the Proposal should not be adopted because it may adversely affect the process of the holders of the New Bonds consenting by purchase, as the Proposal could limit the Underwriter's ability to facilitate or participate in the consent by purchase.[2] Regulating—or even worse prohibiting—the Underwriter's role in the process of consenting may indeed limit the ability of the holders of the New Bonds to exercise a right the Master Indenture clearly grants to them. Further, the Proposal will have the MSRB dictating the process by which the issuers may amend the Master Indenture in a manner not contemplated by Rule G-17.

2. As part of the consent by purchase, as a belt and suspenders method, the issuer often has also asked the Underwriter, as the initial holder, to consent on behalf of the holders of the New Bonds and/or to consent as the authorized representative of the holders of the New Bonds. The Proposal will adversely affect the role the Underwriter can play in these additional protections for the issuer that are gained by the Underwriter's consent as the initial holder.

3. We believe that issuers and underwriters have engaged in this practice for many years without significant resistance from the holders of the Prior Bonds, and the issuers have realized the material advantages of modernizing their Master Indentures without impact on the Prior Bonds. We are unaware of any rating declines or other controversies that have resulted from the amendments. So, fundamentally, we believe the Proposal will materially and adversely impact an accepted practice that is of benefit to the issuers. Further, the interpretative notice will cast a negative light upon established practices of the Underwriters and issuers and potentially raise questions about the validity of those practices and/or raise issues of liability after the fact.

[2] We believe consent by purchase after disclosure on the New Bonds is a standard, widely-accepted practice in the market. To the extent the Underwriter is no longer permitted to participate in the consent by purchase process, the danger exists that the consent by purchase process might altogether be stifled in the market.

4. The Proposal wrongly suggests that the Underwriter of the New Bonds is "dealing" with holders of the Prior Bonds. Rule G-17 only pertains to when a broker "deals" with any other person. As the Underwriter of the New Bonds, the Underwriter is not "dealing" with the holders of the Prior Bonds. The Underwriter has no current relationship or duty to the holders of the Prior Bonds. Indeed, the Underwriter, because of the DTC system, has no accurate knowledge of who the holders of the Prior Bonds are. Adopting the Proposal would give to the term "dealing" a much broader meaning than is intended by Rule G-17.

5. The Proposal suggests that the Underwriter is consenting to an amendment that is detrimental to bondholders, including the holders of the New Bonds. The Underwriter clearly is concerned to present a bond structure that is marketable to the holders of the New Bonds, to whom the Underwriter does owe a duty of fair dealing. To adopt the Proposal suggests that this practice is deceptive, dishonest and unfair, when in fact the Underwriter is simply facilitating the issuer and the holders of the New Bonds to exercise a right to which they are entitled. How can that practice be unfair, deceptive or dishonest? Indeed, to adopt the Proposal suggests inappropriately that the Underwriters in the past have not acted fairly, when there is no evidence of which we are aware of that problem.

6. The Proposal requires a change in "security" before it applies. In the vast majority of amendments with which we have experience, the fundamental security of the Prior Bonds is not changed. If the MSRB is aware that the fundamental security for the Prior Bonds, such as a security interest in or lien on the net revenues of the issuer's utility system, has been significantly reduced by reason of amendments approved by the Underwriter, particularly to the point of jeopardizing the ratings on the Prior Bonds, without consent of the holders of the Prior Bonds, then at best the proposed notice should be narrowly drafted to affect amendments only where the fundamental security for the Prior Bonds is deleted, released or substantially reduced. As drafted, the Proposal may have much broader reach than is needed to deal with that concern. More definition would be needed to define the "security" that cannot be changed or reduced. We note, though, that the holders of a majority in principal amount of bonds, e.g., the holders of the New Bonds, could agree to such a change, if the holders of the Prior Bonds are not needed to achieve that majority, without any question as to its validity.

7. Since the context in which the Underwriter will consent to an amendment involves an existing Master Indenture, we note that the issuer has relatively little ability, absent employing the approach the Proposal wants the Underwriter to avoid, to amend the Master Indenture to include the kind of language the Proposal requires.

8. The Proposal wrongly suggests that any amendment where the documents with respect to the Prior Bonds do not fully explain the authority of the Underwriter of the New Bonds is wrong when in our experience the disclosure documents have clearly said that the holders of any bonds, including bonds to be issued in the future, can consent to amendments.

Further, the Proposal refuses to distinguish its application based upon the substance of the amendments to the Master Indenture, which in our minds does a disservice to the interests of issuers seeking to modernize the provisions of the Master Indenture without substantial impact on the holders of the Prior Bonds or the "security" of the Prior Bonds. Clearly, to the extent the Proposal has a place in protecting the interests of the holders of the Prior Bonds, some analysis of the depth of the problem must be considered and the final Proposal should be drafted narrowly to deal with the specific problems found.

9. The Proposal requires a description of the Underwriter's ability to consent in the Official Statement, leaving open the issue of where in the Official Statement summary and/or body such description would be required to be placed, which would arguably need to be consistent across the market.

10. Because the Proposal will significantly affect the Underwriter's willingness to consent to an amendment, we suspect that the adoption of the Proposal will cause issuers to refocus through DTC on the solicitation for consents from the holders of existing bonds. In our experience, because of the difficulty in verifying ownership of DTC bonds and the difficulty of effectively explaining amendments for which consent is required, the Proposal will have the effect of overwhelming holders with multiple, confusing requests for consent.

If the MSRB believes that protections of the holders of the Prior Bonds are needed, we recommend that the MSRB adopt a rule that requires a different course of action on a going-forward basis to establish a new manner of the amendment procedures and that give issuers adequate time to conform their documents to the desired new standard.

For the above reasons, we respectfully ask the MSRB to decline to adopt the Proposal. If you have any questions or want to discuss further the points made, please feel free to contact Philip C. Genetos, genetos@icemiller.com or (317) 236-2307.

ICE MILLER LLP

Ice Miller LLP

Philip C. Genetos

ihcda

Indiana Housing & Community Development Authority

Dear MSRB :

We are pleased to provide comments to the draft proposal of the Municipal Securities Rulemaking Board (the "MSRB") dated February 7, 2012 (the "Proposal") that would limit the ability of an underwriter (the "Underwriter") of bonds issued in one issue (the "New Bonds") to consent to amendments of a master (or "open-ended") indenture, resolution or ordinance (the "Master Indenture") pursuant to which the New Bonds are issued, where outstanding bonds (the "Prior Bonds") will remain outstanding under the amended Master Indenture. The Proposal is to adopt an interpretative notice that would make it illegal under MSRB Rule G-17[1] for an the Underwriter to consent to an amendment of the Master Indenture if (a) the amendment reduces the security for the owners of the Prior Bonds and (b) the Master Indenture did not expressly provide that the Underwriter could consent to the amendment. For the reasons stated below, we recommend that this Proposal not be adopted by the MSRB.

The context in which we believe this issue has arisen in the past is where an issuer such as us desires to amend (and in some cases restate) the Master Indenture to reflect new or modernized provisions that have become commonplace in the bond market for Master Indentures. In our experience, the Master Indenture typically provides a limited set of circumstances for which an amendment can be approved by the bond trustee (the "Trustee") without consent of bondholders. However, the Master Indenture importantly provides broad authority for the holders of a majority in principal amount of outstanding bonds, including the Prior Bonds and the New Bonds, to consent to any amendment (except certain specific amendments for which unanimous consent is required). There can be little question that in virtually all cases, the holders of the Prior Bonds should be fully aware of the possibility that the holders of outstanding bonds, including the New Bonds, can consent to a broad range of amendments even if the holders of the Prior Bonds oppose the amendment, including if the amendment adversely affects the security of the Prior Bonds.

Fundamental changes have occurred in the structures, procedures, security and practices affecting the issuance of governmental bonds. The advent of different types of variable rate bonds, the use of various sources of credit enhancement, changing criteria upon which ratings are determined, just to mention a few changes, have caused many issuers, particularly issuers like us who have multiple series of parity bonds under a single Master Indenture, to modernize the Master Indenture to reflect new market conditions, structures and requirements. It is also noteworthy that in our experience the amendments most often do not reverse a limitation that was specifically drafted in the original Master Indenture, but rather add new provisions to contemplate a transaction or a financing structure that was not even contemplated as a possibility at the time the Master Indenture was executed. Further, the Trustees have become much less willing to concur in the issuer's interpretation of any aspect of the Master Indenture or for enforcement of the Master Indenture, including whether these amendmentscan be approved without bondholder consent. In addition, at the time a typical Master Indenture was first adopted, bonds were registered with the Trustee, so that the Trustee could easily assist the issuer in reaching the holders of the

[1] The operative language of G-17 is "each broker . . . shall deal fairly with all persons and shall not engage in any deceptive, dishonest or unfair practice."

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Prior Bonds to seek consent. Today, of course, with virtually all bonds registered through DTC, an issuer is often unable to solicit bondholders effectively for consent to an amendment. Indeed, in one recent experience, the issuer was never able to determine through DTC who the holders of outstanding bonds were in order to solicit their consent.

As a consequence of these market forces and our need to modernize our Master Indentures without the significant cost of refunding or defeasing bonds, the practice of having the holders of the New Bonds (and the Underwriter) consent to amendments without the defeasance of the Prior Bonds or without securing the consent of the holders of the Prior Bonds has become quite commonplace. Indeed, we believe that this practice has been used by issuers such as us for many years to our knowledge without significant resistance from the holders of Prior Bonds, because we are unaware of any amendments that have produced or caused a reduction in the ratings assigned to the Prior Bonds or of any other controversies arising from such circumstances. To our knowledge, we are unaware of any adverse reaction or claims of "deceptive, dishonest or unfair" treatment of the holders of the Prior Bonds. As a consequence, we fear that the Proposal will cast a negative light and make illegal a practice that has been used for years with little controversy. We are very concerned that we, among numerous other issuers, will be negatively impacted by the Proposal without adequate substantiation of the depth of the concerns. We ask that the MSRB be mindful of the impact on issuers of the Proposal. We note that the Proposal is focused on a change in "security" for the Prior Bonds. If the MSRB's concern is for those limited circumstances where the fundamental security for the Prior Bonds is reduced, the Proposal should be narrowly defined.

We recommend that the MSRB should <u>not</u> adopt the Proposal for the following reasons:

1. The Master Indenture permits the holders of a majority in outstanding bonds to consent to virtually any amendment. In our experience, when the Master Indenture is amended contemporaneous with the issuance of the New Bonds, the holders of the New Bonds have been considered to consent to the amendment by reason of their purchase of the New Bonds in addition to the Underwriter's consent. This deemed consent is clearly disclosed in the offer. The holders of the New Bonds have a clear right under the Master Indenture to consent to a wide variety of amendments.We see no difference between those holders consenting at the time of issuance of the New Bonds, as compared to consenting at a later date. The crucial point is that they have consented. The Master Indenture was not drafted with the intent that the amendment process was supposed to occur only when the consenting bonds were already outstanding for any given period of time or that the process be difficult or impossible. We should be free to find an efficient manner to accomplish a purpose that is expressly limited under the Master Indenture. We believe the Proposal should not be adopted because it may adversely affect the process of the holders of the New Bonds consenting by purchase, as the Proposal could limit the Underwriter's ability to facilitate or participate in the consent by purchase.[2] Regulating—or even worse prohibiting—the Underwriter's

[2] We believe consent by purchase after disclosure on the New Bonds is a standard, widely-accepted practice in the market. To the extent the Underwriter is no longer permitted to participate in the consent by purchase process, the danger exists that the consent by purchase process might altogether be stifled in the market.

role in the process of consenting may indeed limit the ability of the holders of the New Bonds to exercise a right the Master Indenture clearly grants to them. Further, the Proposal will have the MSRB dictating the process by which we may amend the Master Indenture in a manner not contemplated by Rule G-17.

2. As part of the consent by purchase, as a belt and suspenders method, issuers like us often have also asked the Underwriter, as the initial holder, to consent on behalf of the holders of the New Bonds and/or to consent as the authorized representative of the holders of the New Bonds. The Proposal will adversely affect the role the Underwriter can play in our additional protections that are gained by the Underwriter's consent as the initial holder.

3. We have engaged with underwriters in this practice for many years without significant resistance from the holders of the Prior Bonds, and we have realized the material advantages of modernizing our Master Indentures without impact on the Prior Bonds. We are unaware of any rating declines or other controversies that have resulted from the amendments. So, fundamentally, we believe the Proposal will materially and adversely impact an accepted practice that is of benefit to the issuers. Further, the interpretative notice will cast a negative light upon established practices of the Underwriters and issuers and potentially raise questions about the validity of those practices and/or raise issues of liability after the fact.

4. The Proposal wrongly suggests that the Underwriter of the New Bonds is "dealing" with holders of the Prior Bonds. Rule G-17 only pertains to when a broker "deals" with any other person. As the Underwriter of the New Bonds, the Underwriter is not "dealing" with the holders of the Prior Bonds. The Underwriter has no current relationship or duty to the holders of the Prior Bonds. Indeed, the Underwriter, because of the DTC system, has no accurate knowledge of who the holders of the Prior Bonds are. Adopting the Proposal would give to the term "dealing" a much broader meaning than is intended by Rule G-17.

5. The Proposal suggests that the Underwriter is consenting to an amendment that is detrimental to bondholders, including the holders of the New Bonds. The Underwriter clearly is concerned to present a bond structure that is marketable to the holders of the New Bonds, to whom the Underwriter does owe a duty of fair dealing. To adopt the Proposal suggests that this practice is deceptive, dishonest and unfair, when in fact the Underwriter is simply facilitating the issuer and the holders of the New Bonds to exercise a right to which they are entitled. How can that practice be unfair, deceptive or dishonest? Indeed, to adopt the Proposal suggests inappropriately that the Underwriters in the past have not acted fairly, when there is no evidence of which we are aware of that problem.

6. The Proposal requires a change in "security" before it applies. In the vast majority of amendments with which we have experience, the fundamental security of the Prior Bonds is not changed. If the MSRB is aware that the fundamental security for the Prior Bonds, such as a security interest in or lien on the net revenues of the issuer's utility system, has been significantly reduced by reason of amendments approved by the Underwriter, particularly to the point of jeopardizing the ratings on the Prior

Bonds, without consent of the holders of the Prior Bonds, then at best the proposed notice should be narrowly drafted to affect amendments only where the fundamental security for the Prior Bonds is deleted, released or substantially reduced. As drafted, the Proposal may have much broader reach than is needed to deal with that concern. More definition would be needed to define the "security" that cannot be changed or reduced. We note, though, that the holders of a majority in principal amount of bonds, e.g., the holders of the New Bonds, could agree to such a change, if the holders of the Prior Bonds are not needed to achieve that majority, without any question as to its validity.

7. Since the context in which the Underwriter will consent to an amendment involves an existing Master Indenture, issuers such as us have relatively little ability, absent employing the approach the Proposal wants the Underwriter to avoid, to amend our Master Indenture to include the kind of language the Proposal requires.

8. The Proposal wrongly suggests that any amendment where the documents with respect to the Prior Bonds do not fully explain the authority of the Underwriter of the New Bonds is wrong when in our experience the disclosure documents have clearly said that the holders of any bonds, including bonds to be issued in the future, can consent to amendments. Further, the Proposal refuses to distinguish its application based upon the substance of the amendments to the Master Indenture, which in our minds does a disservice to the interests of issuers seeking to modernize the provisions of the Master Indenture without substantial impact on the holders of the Prior Bonds or the "security" of the Prior Bonds. Clearly, to the extent the Proposal has a place in protecting the interests of the holders of the Prior Bonds, some analysis of the depth of the problem must be considered and the final Proposal should be drafted narrowly to deal with the specific problems found.

9. The Proposal requires a description of the Underwriter's ability to consent in the Official Statement, leaving open the issue of where in the Official Statement summary and/or body such description would be required to be placed, which would arguably need to be consistent across the market.

10. Because the Proposal will significantly affect the Underwriter's willingness to consent to an amendment, we suspect that the adoption of the Proposal will cause issuers to refocus through DTC on the solicitation for consents from the holders of existing bonds. In our experience, because of the difficulty in verifying ownership of DTC bonds and the difficulty of effectively explaining amendments for which consent is required, the Proposal will have the effect of overwhelming holders with multiple, confusing requests for consent.

If the MSRB believes that protections of the holders of the Prior Bonds are needed, we recommend that the MSRB adopt a rule that requires a different course of action on a going-forward basis to establish a new manner of the amendment procedures and that give issuers adequate time to conform their documents to the desired new standard.

For the above reasons, we respectfully ask the MSRB to decline to adopt the Proposal.If you have any questions or want to discuss further the points made, please feel free to contact Blake Blanch, at either bblanch@ihcda.in.gov or (317) 234-2114.

Blake A. Blanch
Chief Financial Officer
Indiana Housing & Community Development Authority

Indianapolis Airport Authority

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March 6, 2012

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA 22314

Re: Response to MSRB Draft Proposal

Dear Mr. Smith:

We are pleased to provide comments to the draft proposal of the Municipal Securities Rulemaking Board ("MSRB"), dated February 7, 2012 (the "Proposal"), that would limit the ability of an underwriter (the "Underwriter") of bonds issued in one issue (the "New Bonds") to consent to amendments of a master (or "open-ended") indenture, resolution or ordinance (the "Master Indenture") pursuant to which the New Bonds are issued, where outstanding bonds (the "Prior Bonds") will remain outstanding under the amended Master Indenture. The Proposal is to adopt an interpretative notice that would make it illegal under MSRB Rule G-17[1] for an Underwriter to consent to an amendment of the Master Indenture if: (i) the amendment reduces the security for the owners of the Prior Bonds; and (ii) the Master Indenture did not expressly provide that the Underwriter could consent to the amendment. For the reasons stated below, we recommend that this Proposal not be adopted by the MSRB.

The context in which we believe this issue has arisen in the past is where an issuer, such as us, desires to amend (and in some cases restate) the Master Indenture to reflect new or modernized provisions that have become commonplace in the bond

[1] The operative language of G-17 is "each broker . . . shall deal fairly with all persons and shall not engage in any deceptive, dishonest or unfair practice."

market for Master Indentures. In our experience, the Master Indenture typically provides a limited set of circumstances for which an amendment can be approved by the bond trustee (the "Trustee") without consent of bondholders. However, the Master Indenture importantly provides broad authority for the holders of a majority in principal amount of outstanding bonds, including the Prior Bonds and the New Bonds, to consent to any amendment (except certain specific amendments for which unanimous consent is required). We note that, in virtually all cases, the holders of the Prior Bonds should be fully aware of the possibility that the holders of outstanding bonds, including the New Bonds, can consent to a broad range of amendments even if the holders of the Prior Bonds oppose the amendment, including if the amendment adversely affects the security of the Prior Bonds.

Fundamental changes have occurred in the structures, procedures, security and practices affecting the issuance of governmental bonds. The advent of different types of variable rate bonds, the use of various sources of credit enhancement, changing criteria upon which ratings are determined, just to mention a few changes, have caused many issuers, particularly issuers like us who have multiple series of parity bonds under a single Master Indenture, to modernize the Master Indenture to reflect new market conditions, structures and requirements. It is also noteworthy that, in our experience, the amendments often do not reverse a limitation that was specifically drafted in the original Master Indenture, but rather add new provisions to contemplate a transaction or a financing structure that was not even contemplated as a possibility at the time the Master Indenture was executed. Further, the Trustees have become much less willing to concur in the issuer's interpretation of any aspect of the Master Indenture or for enforcement of the Master Indenture, including whether these amendments can be approved without bondholder consent. In addition, at the time a typical Master Indenture was first adopted, bonds were registered with the Trustee, so that the Trustee could easily assist the issuer in reaching the holders of the Prior Bonds to seek consent. Today, of course, with virtually all bonds registered through DTC, an issuer is unable to solicit bondholders effectively for consent to an amendment.

As a consequence of these market forces and our need to modernize our Master Indentures without the significant cost of refunding or defeasing bonds, the practice of having the holders of the New Bonds (and the Underwriter) consent to amendments without the defeasance of the Prior Bonds or without securing the consent of the holders of the Prior Bonds has become relatively commonplace. To our knowledge, we believe this practice has been used by issuers, such as us, for many years without significant resistance from the holders of Prior Bonds. As a consequence, we are concerned the Proposal will cast a negative light and make illegal a practice that has been used for years with little controversy. We are concerned that

we, among numerous other issuers, could be negatively impacted by the Proposal without adequate substantiation of the depth of the concerns. We ask that the MSRB be mindful of the impact on issuers of the Proposal. We note that the Proposal is focused on a change in "security" for the Prior Bonds. If the MSRB's concern is for those limited circumstances where the fundamental security for the Prior Bonds is reduced, then the Proposal should be more narrowly defined.

We recommend that the MSRB should not adopt the Proposal for the following reasons:

1. The Master Indenture permits the holders of a majority in outstanding bonds to consent to virtually any amendment. In our experience, when the Master Indenture is amended contemporaneously with the issuance of the New Bonds, the holders of the New Bonds have been considered to consent to the amendment by reason of their purchase of the New Bonds in addition to the Underwriter's consent. This deemed consent is disclosed in the offer. The holders of the New Bonds have a clear right under the Master Indenture to consent to a wide variety of amendments. We see no difference between those holders consenting at the time of issuance of the New Bonds, as compared to consenting at a later date. The crucial point is that they have consented. The Master Indenture was not drafted with the intent that the amendment process was supposed to occur only when the consenting bonds were already outstanding for any given period of time or that the process be difficult or impossible. We should be free to find an efficient manner to accomplish a purpose that is expressly limited under the Master Indenture. We believe the Proposal should not be adopted because it may adversely affect the process of the holders of the New Bonds consenting by purchase, as the Proposal could limit the Underwriter's ability to facilitate or participate in the consent by purchase.[2] Regulating or prohibiting the Underwriter's role in the process of consenting could limit the ability of the holders of the New Bonds to exercise a right that the Master Indenture grants to them. Further, the Proposal will have the MSRB dictating the process by which we may amend the Master Indenture in a manner not contemplated by Rule G-17.

2. As part of the consent by purchase, as a belt and suspenders method, issuers like us often have also asked the Underwriter, as the initial holder, to consent on behalf of the holders of the New Bonds and/or to consent as the authorized representative of the holders of the New Bonds. The Proposal will adversely affect the

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[2] We believe consent by purchase after disclosure on the New Bonds is a standard, widely-accepted practice in the market. To the extent the Underwriter is no longer permitted to participate in the consent by purchase process, the danger exists that the consent by purchase process might altogether be stifled in the market.

role the Underwriter can play in our additional protections that are gained by the Underwriter's consent as the initial holder.

3. We have engaged with underwriters in this practice for years without significant resistance from holders of the Prior Bonds, and we have realized the material advantages of modernizing our Master Indentures without impact on the Prior Bonds. We are unaware of rating declines or other controversies that have resulted from the amendments. So, fundamentally, we believe the Proposal will materially and adversely impact an accepted practice that is of benefit to the issuers. Further, we believe that the interpretative notice will cast a negative light upon established practices of the Underwriters and issuers, and, potentially, raise questions about the validity of those practices and/or raise issues of liability after the fact.

4. We believe the Proposal wrongly suggests that the Underwriter of the New Bonds is "dealing" with holders of the Prior Bonds. Rule G-17 only pertains to when a broker "deals" with any other person. As the Underwriter of the New Bonds, the Underwriter is not "dealing" with the holders of the Prior Bonds. The Underwriter has no current relationship or duty to the holders of the Prior Bonds. Indeed, the Underwriter, because of the DTC system, has no accurate knowledge of who the holders of the Prior Bonds are. Adopting the Proposal would give a much broader meaning to the term "dealing" than we believe is intended by Rule G-17.

5. The Proposal suggests that the Underwriter is consenting to an amendment that is detrimental to bondholders, including the holders of the New Bonds. The Underwriter clearly is concerned to present a bond structure that is marketable to the holders of the New Bonds, to whom the Underwriter owes a duty of fair dealing. To adopt the Proposal suggests that this practice is deceptive, dishonest and unfair, when, in fact, the Underwriter is simply facilitating the issuer and the holders of the New Bonds to exercise a right to which they are entitled. How can that practice be unfair, deceptive or dishonest?

6. The Proposal requires a change in "security" before it applies. In the vast majority of amendments with which we have experience, the fundamental security of the Prior Bonds is not changed. If the MSRB is aware that the fundamental security for the Prior Bonds, such as a security interest in or lien on the net revenues of the issuer's utility system, has been significantly reduced by reason of amendments approved by the Underwriter, particularly to the point of jeopardizing the ratings on the Prior Bonds, without consent of the holders of the Prior Bonds, then the proposed notice should be narrowly drafted to affect amendments only where the fundamental security for the Prior Bonds is deleted, released or substantially reduced. As drafted, the Proposal may have much broader reach than is needed to deal with that concern.

More definition would be needed to define the "security" that cannot be changed or reduced. We note, however, that the holders of a majority in principal amount of bonds, e.g., the holders of the New Bonds, could agree to such a change, if the holders of the Prior Bonds are not needed to achieve that majority, without any question as to its validity.

7. Since the context in which the Underwriter will consent to an amendment involves an existing Master Indenture, issuers such as us have relatively little ability, absent employing the approach the Proposal wants the Underwriter to avoid, to amend our Master Indenture to include the kind of language that the Proposal requires.

8. The Proposal wrongly suggests that any amendment where the documents with respect to the Prior Bonds do not fully explain the authority of the Underwriter of the New Bonds is wrong when in our experience the disclosure documents have said that the holders of any bonds, including bonds to be issued in the future, can consent to amendments. Further, the Proposal refuses to distinguish its application based upon the substance of the amendments to the Master Indenture, which, in our minds, does a disservice to the interests of issuers seeking to modernize the provisions of the Master Indenture without substantial impact on the holders of the Prior Bonds or the "security" of the Prior Bonds. To the extent that the Proposal has a place in protecting the interests of the holders of the Prior Bonds, some analysis of the depth of the problem should be considered and the final Proposal should be drafted narrowly to deal with the specific problems found.

9. The Proposal requires a description of the Underwriter's ability to consent in the Official Statement, leaving open the issue of where in the Official Statement summary and/or body such description would be required to be placed, which would arguably need to be consistent across the market.

10. Because the Proposal will likely affect the Underwriter's willingness to consent to an amendment, we suspect that the adoption of the Proposal will cause issuers to refocus through DTC on the solicitation for consents from the holders of existing bonds. In our experience, because of the difficulty in verifying ownership of DTC bonds and the difficulty of effectively explaining amendments for which consent is required, the Proposal could likely have the effect of overwhelming holders with multiple, confusing requests for consent.

In conclusion, if the MSRB believes that protections of the holders of the Prior Bonds are needed, we recommend THAT the MSRB adopt a rule that requires a different course of action, on a going-forward basis, to establish a new manner of the

amendment procedures and that gives issuers sufficient time to conform their documents to the desired new standard.

For the above reasons, we respectfully ask the MSRB to decline to adopt the Proposal. If you have any questions or want to discuss the points made herein, please feel free to contact me at jheerens@indianapolisairport.com or (317) 487-5490.

Very truly yours,

Joseph R. Heerens
Chief Legal Officer

cc: John Clark
Marsha Stone
Jerry Wise
File

Los Angeles County
Metropolitan Transportation Authority

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Los Angeles, CA 90012-2952

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Metro

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA22314

RE: Request for comment on MSRB Notice 2012-04 concerning the application of MSRB Rule G-17 to bondholder consents by underwriters of municipal securities

Dear Mr. Smith:

The Los Angeles Metropolitan Transportation Authority ("LACMTA") appreciates the opportunity to comment on the Municipal Securities Rulemaking Board's ("MSRB") Notice 2012-04 (the "Notice"). In general, we commend the MSRB for proactively addressing potentially abusive practices in the municipal markets. If there are circumstances in which issuers are materially injuring existing bondholders through underwriter consents, then the Notice will alert the municipal markets that these kinds of practices are not acceptable. However, we want to express our concern that the Notice not be stated too broadly such that it may preclude amendments that do not treat investors unfairly even though the amendment would affect the security of the bonds, as in the example cited below.

The LACMTA is currently in the process of amending two of our sales tax bond trust agreements to resolve an ambiguity regarding whether a downgraded surety policy counts toward satisfaction of the debt service reserve requirement. Our trust agreements are silent on this matter. We are in the process of executing these amendments to the trust agreements by obtaining consents, like underwriter consents, for each series of bonds we issue until we have a sufficient percentage of bondholders under each trust agreement to approve an amendment.

The ambiguity in the trust agreements poses risk for both the LACMTA and our bondholders. The Proposition A and Proposition C bond indentures are 30 years old and 20 years old, respectively, and thus some terms are not reflective of the current market. To resolve the ambiguity, our proposed amendment will specify a reserve fund surety policy provider ratings level and, if a provider falls below that level, it will trigger a specified period within which we must replenish the reserve fund. By providing an extended time for replacement and establishing lower ratings triggers, the proposed amendment arguably reduces bondholder security slightly if one takes the position that the LACMTA already had an obligation to immediately replace a downgraded surety. However, we tested the terms of the proposed amendment by speaking with a number of large institutional investors, each of whom responded positively to the proposed changes. In addition, bondholders were willing to accept the proposed terms in exchange for adding language specifying the terms for replacement. Under the

proposed language of the Notice, a mutually beneficial amendment such as this may not be possible.

While we commend the MSRB for addressing the problem, we do believe that the Notice is too broadly stated and could preclude a productive solution like the example we have provided. The key portion of the Notice that concerns us is:

> *"For example, it would be a violation of Rule G-17 for an underwriter to consent to amendments to an authorizing document that would reduce the security for existing bondholders unless (i) the authorizing document expressly provided that an underwriter could provide bondholder consent and (ii) the offering documents for the existing securities expressly disclosed that bondholder consents could be provided by underwriters of other securities issued under the authorizing document."*

While the Notice does provide some clarification about what a reduction of security for existing bondholders would look like, we think that the facts and circumstances in day-to-day transactions are too complex and too varied to make this sweeping statement.

Consequently, we believe that the Notice is too sweeping in how it articulates the abusive practices.

The MSRB needs to keep in mind that many amendments to indentures and trust agreements may be technically material and adverse to bondholders and yet be in the best interests of everyone involved. These indentures and trust agreements may be several decades old and formal bondholder consent requests may simply not be practical or helpful for anyone involved. Accordingly, the MSRB should be sure to articulate the point so as to be clear that legitimate and helpful practices are not unintentionally stopped.

Thank you for considering these comments.

Best Regards,

Michael J. Smith
Assistant Treasurer
Los Angeles County Metropolitan Transportation Authority

National Association
of Bond Lawyers

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March 8, 2012

Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA 22314

Re: DRAFT INTERPRETATION OF MSRB RULE G-17 RESTRICTING UNDERWRITER CONSENTS TO AMENDMENTS TO OUTSTANDING SECURITY DOCUMENTS

Dear Sir/Madam:

The National Association of Bond Lawyers ("NABL") respectfully submits the enclosed response to the Municipal Securities Rulemaking Board (the "MSRB") Notice 2012-04 – Request for Comment on Draft Interpretive Notice Concerning the Application of MSRB Rule G-17 to Bondholder Consents by Underwriters of Municipal Bonds (the "Request for Comment"), requesting comments on an accompanying draft interpretive notice concerning MSRB Rule G-17 (the "Draft Notice").

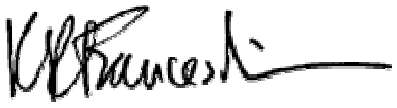
The comments were prepared by an ad hoc subcommittee of the NABL Municipal Law Committee comprised of those individuals listed on Exhibit A and were approved by the NABL Board of Directors.

NABL exists to promote the integrity of the municipal securities market by advancing the understanding of and compliance with the law affecting public finance. A professional association incorporated in 1979, NABL has approximately 2,800 members and is headquartered in Washington, DC.

If you have any questions concerning this submission, please feel free to contact me directly at (410) 580-4151 (kristin.franceschi@dlapiper.com) or Tyler Smith, (864) 240-4543 (tsmith@hsblawfirm.com).

We thank you in advance for your consideration of these comments.

Sincerely,



Kristin H.R. Franceschi
2012 NABL President

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of Bond Lawyers

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**COMMENTS OF**

**NATIONAL ASSOCIATION OF BOND LAWYERS**

**Regarding**

# DRAFT INTERPRETATION OF MSRB RULE G-17 RESTRICTING UNDERWRITER CONSENTS TO AMENDMENTS TO OUTSTANDING SECURITY DOCUMENTS

March 8, 2012

On February 7, 2012, the Municipal Securities Rulemaking Board (the "*MSRB*") issued its Notice 2012-04 – *Request for Comment on Draft Interpretive Notice Concerning the Application of MSRB Rule G-17 to Bondholder Consents by Underwriters of Municipal Bonds* (the *"Request for Comment"*), requesting comments on an accompanying draft interpretive notice concerning MSRB Rule G-17 (the "*Draft Notice*"). The Draft Notice, if adopted in its current form, would interpret Rule G-17 to make it unlawful for an underwriter (as an owner of bonds before such bonds are sold to the underwriter's customers in an offering) to exercise a right to consent to amendments to an authorizing document providing security for outstanding bonds, if any such amendment would reduce the security for the owners of the outstanding bonds, unless (a) the authorizing document expressly provides that an underwriter could provide bondholder consent and (b) the offering documents for the outstanding bonds expressly disclosed that bondholder consents could be provided by underwriters of subsequently issued bonds.

The National Association of Bond Lawyers (*"NABL"*) recommends that the Draft Notice not be filed for approval in its current form inasmuch as the Draft Notice could adversely affect municipal issuers and obligated persons and, in many instances, impair their rights under their existing bond documents. If the Draft Notice is filed and approved, Rule G-17 could be read to proscribe a broad range of routine and long accepted practices in the municipal securities marketplace to the detriment of municipal issuers and obligated persons. NABL recommends further that, if the MSRB chooses to limit underwriter participation in holder consents, the MSRB do so through a rule-making process rather than by an interpretation of Rule G-17 and limiting the prohibition to instances in which the underwriter would be assisting an issuer in breaching a contract provision or duty implied under State law.

These comments were prepared by an *ad hoc* subcommittee of the NABL Municipal Law Committee (comprising those individuals listed on Exhibit A) and have been approved by the NABL Board of Directors. NABL is an organization of approximately 2,800 public finance attorneys. Its mission is to promote the integrity of the municipal market by advancing an understanding of and compliance with laws affecting public finance. NABL respectfully provides these comments in furtherance of that mission.

**Bond Documents as a Contract with the Bondholder**

It is a basic legal principle that bonds and the terms of the related indenture, ordinance, authorizing resolution, loan and financing agreement, or other legal documents (the *"Bond Documents"*) form a contract between the issuer or any obligated person and the holders of bonds. In addition to setting out payment and covenant provisions, one of the key elements of the Bond Documents is the terms under which the issuer may make amendments to the Bond Documents without holder consent and, to the extent holder consent is required for certain changes, the level of holder consent required. A description of these relevant provisions is one of the key elements of the document summaries included as part of the Official Statement prepared in connection with the offering of the bonds. By their purchase, the holders are agreeing to be bound by the provisions, just as the issuer is agreeing to the limitations imposed by them.

**Open-Ended Bond Documents and Consent Practice**

Municipal issuers often issue bonds under (or secure bonds by pledges of conduit borrower notes secured by) open-ended indentures, ordinances, orders, resolutions, or other authorizing legislation, or other authorizing documents under which such issuers secure the bonds by pledging revenues and, sometimes, granting a lien on or mortgage of real or personal property. Under these Bond Documents, issuers commonly reserve rights (a) to issue additional bonds secured by the authorizing documents on a parity (or in some circumstances, on a senior or other) basis with outstanding bonds and (b) to amend the terms of the authorizing documents with the consent of the owners of a specified percentage in aggregate principal amount of the bonds outstanding under the authorizing documents (usually a simple majority or, in some cases a two-thirds majority). The provisions usually exclude amendments to specific payment terms and certain other provisions without the consent of all affected bondholders.[1] Typically the terms that are excluded from the majority or super-majority consent provisions encompass those set out for consent of each holder under the provisions of the Trust Indenture Act.[2] It is uncommon for consents to be limited to persons who have owned bonds for any minimum time period.[3] Thus, we believe that, where an issuer or obligated person is issuing new bonds under an open-ended authorizing document which permits amendments with the consent of the owners of a majority (or other stated percentage) in principal amount of the bonds that it benefits, and does not distinguish between owners of long standing and those who recently bought their bonds, under the express contractual provisions of the Bond Documents the issuer is free to amend the Bond Documents in reliance on consents of the owners of newly issued bonds without proceeding to conduct a solicitation from all holders.

It has been a long-standing and common practice in the municipal bond industry for underwriters to consent to amendments (as initial holders) of the bonds as described in the Draft Notice. However, the mechanics and any limitation on an issuer's right to amend the Bond Documents are governed by applicable State law and the terms of the Bond Documents, so practices vary in terms of how consents from the purchasers of new issues are obtained. In some cases, the underwriters do not themselves consent, but the bonds that they distribute provide that their purchase is a deemed consent to the amendment (or a deemed

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[1] We note that the Draft Notice mentions an amendment to a call feature of outstanding bonds effectuated through an underwriter consent process and that such changes may, depending on the actual Bond Documents, fall within the scope of changes requiring consent of all affected bondholders.

[2] *See* Trust Indenture Act of 1939 § 316(b). While generally inapplicable to municipal bonds, many terms of municipal security documents are consistent with and modeled after analogous corporate indentures.

[3] Compare, in this regard, the provisions of the Model Debenture Indenture (American Bar Association 1965) comprising Section 902 (amendments consented to by two-thirds of debenture holders, without any minimum holding period) and Section 610(e) (holders must own debentures for six months to petition for appointment of a replacement trustee).

appointment of the underwriter or a trustee to consent on behalf of the bondholders); the purchasers of the new parity bonds are willing to consent as a condition to purchase. At still other times, the underwriter merely distributes bonds secured by the pledge of a conduit borrower note to a trustee for the holders of the bonds, and the terms of the indenture securing the bonds instruct the trustee (as holder of the note) to consent to an amendment of an underlying borrower security document. In yet other cases, the underwriter merely places the new issue bonds with one or more institutional buyers whom the issuer has asked and who are committed (to the underwriter's knowledge) to consent to an amendment. In any of the foregoing scenarios, the determination of the percentage approving the amendment is made in accordance with the terms of the Bond Documents, granting equal weight to the outstanding bonds and the newly issued bonds, whether the newly issued bonds are voted by the underwriter, the trustee or by their initial holders. The selection of the appropriate method of obtaining consents is developed by the issuer and finance team in accordance with the terms of the applicable Bond Documents and State law. Furthermore, Bond Documents generally provide that any consent may be revoked by a bond owner until such time as the necessary percentage for approval is obtained.

In each case, the new bonds are issued with full disclosure of the amendment to the Bond Documents which is being made and the process for approval of the amendment. Additionally, any requisite filings under Rule 15c2-12 with respect to outstanding bonds are also made. The process is designed to be transparent to both new and existing bondholders.

As further discussed below, an issuer of debt securities generally owes no duty to the owners of its bonds under State law, except to comply with the contract to which the parties agreed when the bonds were issued. Purchasers of bonds can and usually do protect themselves with respect to the provisions they consider of such significance as to require their consent in all circumstances (e.g., various protected terms such as those discussed above requiring consent of all the affected holders). Further, purchasers of bonds may, prospectively, protect themselves from any perceived risk resulting from consents by underwriters or other short-term holders by not buying the bonds unless the Bond Documents prohibit or limit consents from those types of holders (similar to provisions limiting the rights of holders of insured or credit enhanced bonds to consent to amendments by reserving consent rights to the bond insurer or credit enhancer).[4]

The Draft Notice implies that an underwriter consent process is used in lieu of defeasance or solicitation of bondholder consents. We do not disagree that, from a cost and timing perspective, any of the consent processes described above may be cheaper and faster than a consent solicitation.[5] Additionally, due to the limitation on the number of advance refunding transactions which can be done on a tax-exempt basis, defeasance is, practically speaking, an option of limited application to an issuer and, even if permissible, may be financially prohibitive. Notwithstanding these facts, issuers should be able to obtain consents in accordance with their bargained-for rights under the Bond Documents and State law and not be obligated to pursue a lengthier and/or more expensive strategy. However, since NABL recognizes the importance of the issue of proper bondholder consent procedures to the MSRB, while not directly relevant to the Draft Notice,

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[4] It is instructive that the SEC previously issued a no action letter concluding that the staff would not recommend enforcement if a company offered to amend outstanding debentures to, among other things, reduce the price of their common stock conversion option, but only if they are owned by holders who consent to an amendment to the authorizing document that permitted the company to incur additional debt. See Magic Marker Corporation (avail. July 30, 1971).

[5] In addition, any consideration of issues of the sort raised by the Draft Notice should bear in mind that, out of the approximately $3 trillion of municipal bonds outstanding, an estimated 35% are held directly by retail investors (with a comparable percentage held, on a retail basis, indirectly through mutual funds, closed end funds or solicitations, UITs and ETFs) and that, in the instances of such retail holdings, obtaining consents through means such as tender offers is difficult if not essentially prohibitive.

attached as Exhibit B, please find some thoughts of this committee with respect to changes which could be made to DTC procedures to facilitate the consent solicitations.

**Role of the Underwriter in a Consent Amendment**

In preparing these comments, we considered the extent to which the underwriter's participation in a consent amendment should be viewed differently than from the perspective of the issuer or obligated person, as the Draft Notice focuses on the appropriateness of the underwriter's participation. Not infrequently, the underwriter on the consent transaction may be different from the firm that underwrote the outstanding transaction and the holders of the outstanding bonds may have had no customer relationship to the current underwriter, much less, to the extent of secondary market purchases, any underwriter. Those holders received, or should have received, information in the form of prior Official Statements or other information on EMMA informing them of the terms on which their bonds could be amended. Therefore, we believe that the underwriter should be viewed as assisting the issuer or obligated person effectuate a transaction for which is bargained in the Bond Documents, using a procedure which has long been utilized in the municipal marketplace and which does not violate any duty that the issuer has to its holders.

Unlike the duties of care and loyalty owed to stockholders of corporations, courts consistently refuse to extend such fiduciary duties for bondholders. Rather, the general rule is that the relationship between issuers and their bondholders is contractual, as described above, rather than fiduciary, in that the rights of bondholders are governed exclusively by the terms of the contract under which the bonds are issued.[6] Similarly, courts have held that a trustee's duties to bondholders are measured solely by the trust instrument, even if such duties are less than those required of a trustee at common law.[7] Thus, in the absence of extraordinary circumstances (*i.e.*, fraud, coercion, or bad faith) the issuer owes its bondholders no extra-contractual duties.[8]

Some courts have found an implied covenant of good faith and fair dealing in contracts under which bonds are issued. For example, in *Hackettstown National Bank v. D.G. Yuengling Brewing Co.* 74 F. 110 (2nd Cir. 1896), the court held that an agreement by what was clearly a *collusive* majority waiving conditions and postponing the payment of interest for the purpose of compelling the minority to sell out to them would not bind the minority. However, this implied covenant does *not* impose any additional obligations or duties owed by the issuer other than what is contained in the contract; instead, it ensures that the parties to the contract perform the bargained-for terms of the agreement. [9]

In *MetLife*, an oft-cited case which arose in the wake of the widely-publicized bidding war for the leveraged buy-out of RJR Nabisco, Inc. (*"RJR"*), a group of previous bond purchasers asserted that RJR's actions, occurring subsequent to such holders' purchase of the bonds, dramatically reduced the value of such bonds, such argument being advanced notwithstanding that the actions were not prohibited in the applicable bond indentures. *MetLife*, 716 F. Supp. at 1504. In addressing holders' arguments that the court impose duties akin to good faith and fair dealing in interpreting the authorizing documents, the court confirmed the following firmly established doctrines, observing that:

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[6] *See generally Metropolitan Life Ins. Co. and Jefferson-Pilot Life Ins. Co. v. RJR Nabisco, Inc. and F. Ross Johnson*, 716 F. Supp. 1504 (S.D.N.Y. 1989) (hereinafter *"MetLife"*), discussed in greater detail below.

[7] *See, e.g., MetLife*; *Hazzard v. Chase Nat. Bank,* 159 Misc. 57 (N.Y. Sup. Ct. 1936), citing *Refshauge v. Sesostris Temple A. A. O. N. of M.*, 139 Neb. 775 (Neb. 1941).

[8] *Mann v. Oppenheimer & Co.*, 517 A.2d 1056 (Del. 1986).

[9] *See Geren v. Quantum Chem. Corp.*, 832 F. Supp. 728, 732 (S.D.N.Y. 1993); *MetLife.*

> Such a covenant is implied only where the implied term is consistent with other mutually agreed upon terms in the contract. In other words, the implied covenant will only aid and further the explicit terms of the agreement and will never impose an obligation which would be inconsistent with other terms of the contractual relationship. Viewed another way, the implied covenant of good faith is breached only when one party seeks to prevent the contract's performance or to withhold its benefits. As a result, it thus ensures that parties to a contract perform the substantive, bargained-for terms of their agreement.

*Id.*, 716 F.Supp. at 1508 (multiple citations of precedent omitted; quotation marks from precedent omitted).

It is thus well established that, absent circumstances that would bring the relationship among financing parties into the narrow and limited exception to the general rule, issuers owe no fiduciary duties to holders of their bonds, as their relationship is defined purely by the terms of the contract under which the relationship exists.

Comparably, the issues addressed in the Draft Notice are of the same nature as those, commonly employed in Bond Documents, in which purchasers of bonds consent to the future incurrence of indebtedness on parity with such bonds (or, even on a senior basis when so provided) upon satisfaction of conditions contractually set forth in the authorizing documents. Hence, again in *MetLife* and after summarizing part of defendants' arguments as follows, the court ultimately sided with the defendants' contentions: certain provisions in bond indentures were known to the market and to bondholders, "who freely bought the bonds and were equally free to sell them at any time. Any attempt by this Court to create contractual terms, *post hoc* . . . not only finds no basis in the controlling law and undisputed facts of this case, but also would constitute an impermissible invasion into the free and open operation of the marketplace." *Id.*

On the other hand, the goals set forth in the Draft Notice are inconsistent with the ability of parties to financial transactions freely to negotiate, up front, what provisions, benefits, and protections are to be afforded the parties. As observed by the *MetLife* court:

> The sort of unbounded and one-sided elasticity urged by [bondholders] would interfere with and destabilize the market. And this Court, like the parties to these contracts, cannot ignore or disavow the marketplace in which the contract is performed. Nor can it ignore the expectations of that market - expectations, for instance, that the terms of an indenture will be upheld, and that a court will not, sua sponte, add new substantive terms to that indenture as it sees fit.

*Id.* at 1520.

As noted above, whether an underwriter's consent is lawful is a matter of State law. *See, e.g., Aristocrat Leisure Ltd. et al. v. Deutsche Bank Trust Company Americas, as Trustee et al.,* 2005 U.S. Dist. LEXIS 16788 (S.D.N.Y. 2005) (collecting cases in the context of interpreting holder consent provisions of a bond indenture).[10]

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[10] As summarized by the court in *Aristocrat Leisure*: "The Court interprets bond indentures pursuant to contract law. See *MetLife Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir. 1990) (applying New York contract law to review the District Court's interpretation of an indenture). So long as there is no reasonable basis for differing meanings of contractual language when viewing the contract as a whole, the contract is unambiguous. See *Fleet Capital*, 2002 U.S. Dist. LEXIS 18115, WL at *63. Where unambiguous, courts are to interpret contractual language pursuant to its plain meaning, especially when dealing with 'sophisticated, counseled business people negotiating at arm's length.' *See Vt. Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475, 807 N.E.2d 876, 879, 775 N.Y.S.2d 765 (2004); *see also Alexander & Alexander*, 136 F.3d at 86 ("If the court finds that the contract is not ambiguous it should assign the

We believe that, if the owners of outstanding bonds agreed to buy them in reliance on Bond Documents that permitted the issuer to amend them, including by an underwriter consent process, then it should be perfectly lawful for an underwriter to assist the issuer in its exercise of a right to which the owners of existing bonds had agreed.

**Recommendation**

NABL recognizes that the Draft Notice is an interpretation of its Rule G-17, which relates to the conduct of underwriters and provides that:

> In the conduct of its municipal securities or municipal advisory activities, each broker, dealer, municipal securities dealer, and municipal advisor shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice.

NABL is concerned that the Draft Notice incorrectly implies that the consents described in the Draft Notice are being obtained unfairly notwithstanding the fact that, as indicated above, such consents have long been utilized in the municipal marketplace and are in fact conducted in a manner designed to meet the conditions of the Bond Documents and applicable State law. To the extent that amendments to the Bond Documents could adversely affect the value of or security for outstanding bonds, it may be against the preference of those holders but such as possibility was within the scope of their existing contract with the issuer as set out in the Bond Documents. Thus, we do not believe that an underwriter who helps an issuer effectuate such a consent in accordance with its Bond Documents and applicable State law should be viewed as dealing unfairly with those holders or engaging in any deceptive, dishonest or unfair practice. Where the purchasers of outstanding bonds have not bargained for and received such protections, and the issuers did not agree to such protections in the authorizing documents, NABL believes that the MSRB should not effectively insert such protections into the business terms of transactions by regulatory action.

NABL is also concerned that, if an underwriter is treated as breaching its duty under Rule G-17 in the situation described in the Draft Notice, it may be hard to distinguish similar situations in which an underwriter participates in a new transaction which could adversely affect existing bondholders but which is permitted under the terms of the applicable Bond Documents.

First, as discussed above, there are several alternative structures used to effectuate holder consents. Although the underwriter's level of involvement varies from actually consenting to identifying purchasers who consent, NABL is concerned that there is no principled way to distinguish these circumstances from a direct underwriter consent. Consequently, if the Draft Notice were filed and approved, it may effectively preclude each of these practices, to the detriment of issuers and obligated persons.

Furthermore, NABL is concerned that underwritings that affect bondholders in other ways, beyond the apparent intent of the Draft Notice, could arguably also be viewed to violate Rule G-17. For example, suppose bondholders had purchased bonds issued under an open-ended bond agreement that permits the issuance of additional parity bonds when certain conditions (*e.g.*, coverage of debt service by prior year net revenues) are satisfied, and when the conditions are satisfied an underwriter buys a permitted issue of additional parity bonds, diluting (and therefore "reducing") the security afforded for the outstanding bonds. While not listed as a "reduction in security" in the Draft Notice, we are concerned that the scope of the Draft

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plain and ordinary meaning to each term and interpret the contract without the aid of extrinsic evidence."). "Language whose meaning is otherwise plain is not ambiguous merely because the parties urge different interpretations in the litigation. The court should not find the language ambiguous on the basis of the interpretation urged by one party, where that interpretation would strain the contract language beyond its reasonable and ordinary meaning." *MetLife Ins.*, 906 F.2d at 889 (quotation and citation omitted)." *Aristocrat Leisure*, 2005 U.S. Dist. LEXIS 16788, at 13.

Notice could be read broadly enough to prevent an underwriter's participation in the transaction lest it be viewed as dealing unfairly with the outstanding bondholders.

Due to the material adverse impact on issuers of outstanding parity debt that would result from finalization of Rule G-17 in its current form, NABL recommends that, if the MSRB chooses to limit underwriter participation in holder consents, then the MSRB's desired result should be sought by proposing and adopting a new rule, during which process the full impact of the proposed rule-making can be developed by all market participants and issuers and other affected parties would be afforded a better opportunity to bring issues to the attention of the MSRB and SEC.

NABL recognizes that recent Congressional action has changed the mandate of the MSRB. Specifically, since the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("*Dodd-Frank*"), the MSRB's authority encompasses the regulation of municipal advisors and, as a related concept, the protection of municipal issuers and obligated persons. In that regard, NABL is concerned as to the substantial impairment of the contract rights of municipal issuers and obligated persons that could result from the finalization of the Draft Notice, which impairment would clearly adversely affect, rather than protect, municipal issuers.

NABL believes that, if the MSRB considers proposing a rule that prohibits underwriter consents, it should weigh the impact on both issuers and investors. While the Draft Notice could be viewed as giving to outstanding bondholders an unintended benefit (hold-out value), it would simultaneously deny issuers a right for which they *had* contracted. For the reasons described above, NABL requests that the MSRB not file the Draft Notice for approval, thereby potentially imposing a restriction on underwriter consents.

**EXHIBIT A**

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## EXHIBIT B

## DTC CONSENT CONSIDERATIONS

Bond document amendments which are to become effective upon receiving the affirmative vote of a specific percentage of the holders (usually weighted by ownership amount) can only occur if the issuer (or more usually the indenture trustee) receives copies of the signed consents of such holders. Depository Trust Company (hereafter "DTC") is the registered holder of the bonds in almost all currently outstanding publicly offered municipal issues and when its consent to an amendment is sought it will execute a proxy authorizing its participants to vote through it. When those participants do follow through and file the appropriate documentation, a partial vote to the extent of the filing will be recorded.

However, while DTC, for a cost, will make available to a trustee or an issuer a list of participants currently recorded on the DTC books as entities through whom beneficial holders (the true owners) hold bonds, such a list will only show the accommodation address of participant agents for further contact. More importantly, there is no current SEC, MSRB or DTC requirement that actual notices concerning municipal issues be sent through the DTC system (that is, from DTC to interested participants, from such participants to any interested indirect participants, and from such other entities to beneficial holders). The practice is that notices will be summarized on a system for communication to participants, with the review and retransmittal of such summary information being entirely voluntary. Therefore, it is our experience that, not infrequently, beneficial holders of bonds do not receive notices through the DTC system, including the notices which relate to voting on amendments to documents. In the absence of contact from beneficial holders, DTC and its participants will not vote for amendments.

In contrast to this voluntary system, corporate entities, using the proxy statement rules, are able to force relevant notices through the DTC system. The issuers involved have to pay expenses for such but items like the required proxies for voting at the annual meeting of a '34 Act company must be delivered to the beneficial owners of the stock in time for their votes to be made and counted.

NABL believes that if municipal issuers and their trustees could do the same - force notices of their choice and at their expense to be sent all the way through the DTC system to beneficial owners - it would be significantly easier for issuers and other obligated persons to make amendments to bond documents through a holder solicitation process. At the very least, changes which would give an issuer the ability to cause a notice to be transmitted to holders of outstanding bonds describing any amendment process being undertaken by current holders might allay any concerns that others, such as underwriters, consenting on behalf of new parity holders were somehow acting adversely to such current holders. The current holders could speak for themselves or, if a holder has an existing relationship with the underwriter, contact the underwriter about the amendment process.

NABL is aware that there are commercial entities who will contact beneficial owners for issuers and trustees at a cost, including for the purpose of obtaining consents to document amendments. While we do not have comprehensive information regarding the results which have been achieved by this process, it is clear that such efforts are not always entirely successful in obtaining the desired consents or even ensuring that owners qualified to vote are informed of that ability. A mechanism for transmittal of notices and other materials through the DTC system, as with corporate entities, would provide issuers and obligated persons a more robust platform to communicate and obtain consents from their bondholders.

NFMA

March 26, 2012

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street
Alexandria, Virginia 22314

*Via Electronic Mail*

Re: MSRB Notice Number 2012-04 – Request for Comment on *Draft Interpretive Notice Concerning the Application of MSRB Rule G-17 to Bondholder Consents by Underwriters of Municipal Securities.*

Dear Mr. Smith:

The National Federation of Municipal Analysts ("NFMA") is a professional association of over 1,200 municipal research analysts with specialized knowledge of municipal finance transactions. These individuals are drawn from a broad cross-section of institutions engaged in municipal bond transactions including broker/dealers, rating agencies, insurance companies, mutual funds, large corporations, and other institutional investors. One of the main initiatives of the NFMA is to promote accurate, timely, and complete disclosure of credit information pertaining to municipal bond transactions. Beyond our efforts on education and disclosure, the NFMA seeks to act as an advocate for good practices in the municipal bond market.

We appreciate the opportunity to comment on Notice 2012-04 ("Notice"). The NFMA is supportive of the spirit of the Notice, in that it attempts to prevent instances in which a consent by underwriters, who are bondholders only because they are underwriting a bond issue, diminishes security of outstanding bondholders.

Generally speaking, municipal bond analysts are averse to changes in security provisions unless these changes are transparent and are accomplished via the intent of the bond documents. An additional consideration is that analysts representing investors frequently request other security enhancements in exchange for consenting to changes requested by an issuer or its representatives. If an underwriter were to consent to a diminution or elimination of certain financial covenants, liquidation of a reserve fund, or otherwise diminish the security or lien

position of outstanding bondholders, the outstanding bondholders' position is diminished and they have no effective recourse. As MSRB has noted, changes to bond documents may not seem immediately important, but if the credit were to deteriorate their impact increases.

Moreover, it is important to realize that in the scenario the proposed MSRB rule would address, prospective purchasers of a new bond issue have the freedom to decide whether to buy the new bonds given their security features and other factors. Existing holders of parity bonds do not have the luxury of making this decision; it is in effect forced upon them by an underwriter who holds the debt issue for a very short period.

We recognize that issuers have a legitimate need to update and modernize their bond documents, some of which may have been in operation for decades. Further, we understand the difficulty in obtaining consent of a majority of bondholders. It is important that issuers be able to operate under "state of the art" documents without having to refund all outstanding debt. We therefore suggest that more detail and guidance be provided to help define acceptable thresholds for changes to bond documents.

We thank you for consideration of these comments.

Sincerely

/s/
Lisa Good
Executive Director
NFMA

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March 6, 2012

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
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Re: MRSB Notice Number 2012-04 (Request for comment on draft interpretive notice concerning the application of MSRB Rule G-17 to bondholder consents by underwriters of municipal securities)

Dear Mr. Smith:

The law firm of Squire Sanders (US) LLP has conducted a municipal securities practice for more than 100 years. Today, our municipal securities practice includes serving as bond counsel, disclosure counsel or underwriters' counsel on approximately 350 transactions each year. We submit these comments on our own behalf and on behalf of our municipal securities clients likely to be adversely affected by the proposed interpretive notice.

In Notice 2012-04, the MSRB states its proposed interpretation that an underwriter that gives consents to amendments to bond documents may be in violation of the underwriter's "fair dealing" duties under MSRB Rule G-17. This interpretation notice would interpret Rule G-17 to prohibit an accepted market practice and would unnecessarily limit the ability of municipal securities issuers and conduit borrowers to use an accepted and cost-effective method of amending municipal bond documents.

This accepted method to effect amendments to existing bond documents is for the purchasers of new bonds issued to be deemed to have consented to proposed amendments by virtue of their purchase of the new bonds. This is accomplished by the offering document for the new bonds setting forth both (1) a description of the proposed amendment (including, in many instances, the actual text of the amendment) and (2) a conspicuous notice that purchasers of the new bonds will be deemed to consent to the amendment. Once the requisite number of consents have been (or are deemed to be) received (typically bond documents require consent from a majority of holders of outstanding bonds), the amendments become effective and binding on all holders of outstanding bonds, including holders of bonds that were issued prior to the beginning of the consent process. Notice of the effectiveness of the amendments typically is sent to existing bondholders in due course.

Virtually all municipal bond documents include provisions permitting amendments with bondholder consent. Many expressly require signed bondholder consents to amendments.

Squire Sanders (US) LLP

Some can be interpreted to permit consent to be evidenced in other ways, without the necessity for signed consents.

Amendments that do not change key financial terms of the bonds (such as the interest rate or principal or interest payment dates, for example) generally require the consent of bondholders representing a majority in principal amount of bonds outstanding in order for the amendments to become effective. In most cases, there is no contractual right of any particular bondholder to veto the approval of an amendment that is approved by the majority. Majority consent can be achieved in any number of ways; however, few issuers today actually seek written consent from existing bondholders. This is due in large part to the fact that bonds are now almost universally issued in book-entry only form. Therefore, there is no simple way to communicate with the beneficial owners of the bonds or to confirm who actually owns the bonds, except at the time an underwriter purchases bonds newly issued under existing bond documents at initial issuance and prior to the bonds being resold to the underwriter's customers.

Currently, the most common methods of effecting amendments are (1) obtaining the consent of a credit enhancer (if the bond documents provide that the credit enhancer may consent in lieu of the owners of the bonds it enhances, as is often the case) and (2) delaying the effective date of the amendment until a sufficient amount of new bonds are issued whose holders are deemed to consent in the manner described above (sometimes referred to as "springing amendments"). It is in connection with such springing amendments that underwriters are typically asked to sign consents to document amendments.

As noted above, "springing amendments" are not unusual in the market today and are routinely disclosed in offering documents. The execution of a written consent by an underwriter, as the owner of the newly issued bonds, in these situations is a ministerial matter to memorialize in a written document the deemed consent of the holders of the principal amount of new bonds being issued. As described above, consent from the buyers of the new bonds is deemed obtained by virtue of a conspicuous notice in the disclosure document for the sale of the new bonds stating that the purchase of the new bonds by the purchasers will be deemed to be their consent to the amendments described in the disclosure document. As the MSRB notes in its request for comment, the underwriter is technically the bondholder at the time the underwriter signs the written consent to the amendments. The underwriter's consent is intended to evidence the deemed consent by the ultimate purchasers, who clearly indicate their consent by their voluntary decision to purchase the new bonds, in light of disclosure of the amendments in the offering document.

Nonetheless, the MSRB draft interpretive notice states that it would be a violation of Rule G-17 for an underwriter to consent to an amendment that changed the security for the bonds unless both of the following requirements were met: "(i) the authorizing document expressly provided that an underwriter could provide bondholder consent and (ii) the offering documents for the existing securities expressly disclosed that bondholder consents could be provided by underwriters of other securities issued under the authorizing document." It is likely that neither of these conditions could be satisfied for amendments to currently existing bond documents, since the governing documents would predate the MSRB's proposed interpretation. It is the underwriter's status as the owner of bonds upon their initial issuance that allows its consent to

Squire Sanders (US) LLP

be effective under existing governing bond documents, not its status as an underwriter. We suggest alternative requirements for consideration.

If this draft interpretive notice is adopted in the proposed form, it is likely that underwriters will decline to sign such consents in the future. Municipal securities issuers and conduit borrowers will then have to find other means to document the "deemed consent" of new bond owners, which may include a requirement that underwriters require each of their customers sign an acknowledgement of the amendment or an instrument appointing the bond trustee as the new owners' agent for purposes of signing a consent, where the governing documents require a signed consent. It is unclear whether underwriters will be willing or able to obtain such written consents or acknowledgements from their customers. Neither of these alternatives is as simple and cost effective as the current practice. Further, in instances where consents simply cannot be obtained as a result of the MSRB's interpretive notice, issuers and conduit borrowers may be forced to refund or defease outstanding bonds even if not otherwise economic.

As an alternative to the two requirements stated in the proposed interpretive notice, we propose the following: It would not be a violation of Rule G-17 for an underwriter to consent to amendments to an authorizing document that would reduce the security for existing bondholders if the underwriter is giving consent as to newly issued bonds it is purchasing and the offering document for the new bonds (1) clearly describes the proposed amendments in the manner required by the authorizing document, and (2) conspicuously indicates that, by their purchase of the new bonds, the buyers are deemed to have given their consent to the amendments and to have directed and authorized the underwriter to execute, on their behalf, any written consent to the amendments which is required by the authorizing documents.

Sincerely,

Squire Sanders (US) LLP

MSRB Municipal Securities Rulemaking Board

# MSRB NOTICE 2012-36 (JULY 5, 2012)

# REQUEST FOR COMMENT ON DRAFT AMENDMENT TO LIMIT DEALER CONSENTS TO CHANGES IN AUTHORIZING DOCUMENTS FOR MUNICIPAL SECURITIES

**INTRODUCTION**

The Municipal Securities Rulemaking Board ("MSRB") is requesting comment on a draft amendment to MSRB Rule G-11 (on primary offering practices) (the "Draft Rule G-11 Amendment") concerning the practice by brokers, dealers, and municipal securities dealers ("dealers") of consenting to changes in authorizing documents for municipal securities. The Draft Rule G-11 Amendment seeks to address concerns raised in comments received by the MSRB from market participants on an earlier draft interpretive notice relating to such practice, as described below.

Comments should be submitted no later than August 13, 2012, and may be submitted in electronic or paper form. Comments may be submitted electronically by clicking here. Comments submitted in paper form should be sent to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board, 1900 Duke Street, Suite 600, Alexandria, VA 22314. All comments will be available for public inspection on the MSRB's website.[1]

Questions about this notice should be directed to Karen Du Brul, Associate General Counsel, at 703-797-6600.

**BACKGROUND**

On February 7, 2012, the MSRB published MSRB Notice 2012-04 in which it requested comment on a draft interpretive notice concerning the application of MSRB Rule G-17 to the provision of bondholder consents by underwriters of municipal securities (the "Draft Notice"). The Draft Notice would have provided that, depending upon the facts and circumstances, the practice by underwriters of consenting to amendments to bond authorizing documents, such as trust indentures and bond resolutions, could be a violation of the duty of dealers under MSRB Rule G-17 to deal fairly with all persons in the conduct of their municipal securities activities. In cases where the amendments reduced the security for the existing bondholders, the Draft Notice would have stated that the provision of consents by underwriters would be a violation of their Rule G-17 duty of fair dealing unless: (i) the authorizing document expressly provided that an underwriter could provide bondholder consent; and (ii) the offering documents for the existing securities expressly disclosed that bondholder consents could be provided by underwriters of other securities issued under the authorizing document.

In publishing the Draft Notice for comment, the MSRB cited its concern that the practice of underwriters providing consents to changes in the authorizing documents, particularly to changes that reduced the security for existing parity holders, had not been explicitly provided for in the authorizing documents, nor had it been specifically disclosed in the offering documents for the existing bonds. The MSRB was concerned that existing bondholders, while aware of the consent provisions in the authorizing documents, would not have contemplated that an owner with no prior or future economic interest in the bonds, such as an underwriter who may hold the bonds only momentarily during the initial distribution process without any investment

purpose, could provide consent in lieu of existing bondholders, who have a vested interest in assessing the potential impact of any amendment to the authorizing documents.

The MSRB also recognized the desire of some issuers or obligated persons to amend their authorizing documents in a cost effective manner. In an effort to balance the concerns of issuers and existing bondholders, the Draft Notice would have provided that underwriters would not violate their Rule G-17 duty by providing consents to changes that reduced the security for existing bondholders if the ability of an underwriter to provide such consents had been explicitly authorized and disclosed in the authorizing and offering documents for existing bonds.

**DISCUSSION OF COMMENTS ON DRAFT NOTICE**

The MSRB received 10 comment letters on the Draft Notice.[2] In summary, various commenters said that the Draft Notice was too broad and may have unintended consequences that would prove harmful to investors and issuers by prohibiting amendments that would benefit both bondholders and issuers. Some commenters said that the practice of underwriters, as initial holders, consenting to amendments is long standing and is an efficient way to modernize indentures and other authorizing documents to which there has been no significant resistance. Some commenters noted that because most bonds were issued in book entry form, there was no simple way to confirm beneficial ownership of the bonds or to communicate with beneficial owners except at the time of purchase, with another commenter suggesting changes to the Depository Trust Company (“DTC”) process to improve consent solicitations, including considering a solicitation process similar to that used for corporate issues. Various commenters said that the terms of the governing documents outline the provisions for voting and consent, and those provisions should control. Others said that the amendment process was usually fully disclosed and that prior bondholders should be aware that a majority of prior and new bondholders could consent to a broad range of amendments.

After reviewing the comment letters, the MSRB recognizes concerns on the part of commenters about the ability to identify what constitutes a reduction in security, as well as the ability to balance the short and long term consequences of certain changes and to balance the interests of bondholders and those of the issuer. The MSRB also recognizes that such evaluations could result in varying interpretations by different underwriters. The MSRB, however, remains concerned that key rights of bondholders could be seriously affected by the provision of consents by parties (such as underwriters and remarketing agents) that had no prior or future economic interest in the bonds, and that existing bondholders might not have contemplated that such a disinterested owner could provide consents as bondholders. The MSRB also appreciates that while the practice of obtaining underwriter consents may be an efficient way for an issuer to modernize its governing documents, the practice, depending on the facts and circumstances, could be considered as unfair and deceptive because it is exercising rights in a manner that the existing bondholders did not explicitly contemplate.

**DRAFT RULE G-11 AMENDMENT**

As a result of these continuing concerns, the MSRB has determined to request comment on the Draft Rule G-11 Amendment, which would establish a new section (k) of Rule G-11 to prohibit certain consents by dealers to amendments to bond authorizing documents for municipal securities, rather than providing interpretive guidance under Rule G-17 as previously proposed in the Draft Notice.

The Draft Rule G-11 Amendment would prohibit a dealer from providing bondholder consent to any amendment to authorizing documents for municipal securities, either as an underwriter, remarketing agent, or as an agent for owners, or in lieu of owners, subject to limited exceptions. The exceptions consist of consents given: (1) by a dealer for securities owned by it other than in its capacity as an underwriter or remarketing agent; (2) by a remarketing agent for all securities affected by such consent, provided that all such securities had been tendered to it as a result of a mandatory tender; and (3) by a dealer if all owners of securities that would be affected by such amendments (other than the securities for which the dealer provides its consent) had provided or would have provided consent to such amendments prior to their taking effect. The Draft Rule G-11 Amendment would not affect other methods used by issuers to obtain consents from owners of newly issued bonds, such as consents received (in writing or constructively) from bondholders upon initial purchase of the bonds, provided that the Draft Rule G-11 Amendment would prohibit the dealer from providing any such constructive or deemed consent for or in lieu of bondholders, and the MSRB expresses no opinion on the legal validity of any constructive or "deemed" consents received from bondholders under the terms of any particular authorizing document.

The Draft Rule G-11 Amendment would apply only in connection with consents that the authorizing documents state are to be provided by bond owners (including beneficial owners of bonds). Consents from dealers solely in their capacity as an underwriter or a remarking agent required or permitted under authorizing documents, and not as an agent for or in lieu of bondholders, would not be subject to the Draft Rule G-11 Amendment. For example, if an authorizing document provides that a dealer, in its role as remarketing agent, must consent to a change relating to the manner or timing for tendering bonds, the dealer serving as remarketing agent would be permitted to provide such consent. However, if the authorizing document also requires consent from bond owners to such change, the remarketing agent would not be permitted to provide consent on behalf of or in lieu of bondholders.

The first exception from the prohibition under the Draft Rule G-11 Amendment noted above would allow dealers that own securities as an investment to provide bondholder consents with respect to those securities. There would be no precise holding period established for purposes of determining whether the dealer no longer holds the securities in its capacity as underwriter or remarketing agent – rather, the dealer would look, among other things, to how its holding is treated for its other regulatory and internal risk management purposes as well as whether its own financial interests would be affected by the proposed amendment to the authorizing documents.

The second exception would allow a dealer, as a remarketing agent, to provide consents for securities that have been tendered to it as a result of a mandatory tender, provided that all securities affected by the consent had been tendered. Thus, if a bondholder elects to exercise a right to "hold" bonds subject to a mandatory tender in lieu of tendering, a dealer acting as the remarketing agent would be prohibited from providing consents to changes in the authorizing documents unless the remarketing agent also received the specific written consent of such bondholder to such change.

The third exception would allow a dealer (whether acting as underwriter or remarketing agent) to consent to an amendment to authorizing documents in circumstances where the amendment would not become effective until all bondholders affected by such amendment (other than the holders of the securities for which such dealer provides consent) had also provided consent. This might occur, for example, when an issuer may be accumulating, over time, bondholder consents from individual owners of bonds

previously outstanding under the authorizing document through traditional methods of written bondholder consents, and the amendment to the authorizing document would not become effective for all bondholders until all such existing bondholders have consented or their bonds have matured or been redeemed.

**REQUEST FOR COMMENT**

The MSRB requests comments on all aspects of the Draft Rule G-11 Amendment. In addition, the MSRB seeks comments on the following specific matters:

- The MSRB recognizes that dealers, acting in a capacity other than as underwriter or remarketing agent, may be permitted to consent to changes to bond authorizing documents that may affect bondholders. Should dealers acting in such other capacities (for example, auction agents for auction rate securities) be permitted to consent to changes under the exceptions set forth in the Draft Rule G-11 Amendment, or should the Draft Rule G-11 Amendment explicitly prohibit dealers acting in other capacities, such as auction agents, from providing consents to changes to the authorizing documents?
- Would the Draft Rule G-11 Amendment help to protect investors, and are there other benefits that would be realized from adopting the Draft Rule G-11 Amendment?
- Would the Draft Rule G-11 Amendment have any negative effects on issuers, investors or other market participants? If so, please describe in detail.
- Are issuers able to obtain consents from beneficial holders of bonds effectively and efficiently through existing mechanisms? The MSRB welcomes comments and suggestions for streamlining and improving methods of identifying and obtaining consents from bondholders, including those available through DTC and otherwise.
- What would be the burdens on issuers or other market participants of adopting a rule that limits obtaining bondholder consents in the manner contemplated by the Draft Rule G-11 Amendment?
- Are there alternative methods the MSRB should consider to providing the protections sought under the Draft Rule G-11 Amendment that would be more effective and/or less burdensome, resulting in an appropriate balance between the need for a cost effective and efficient manner of obtaining consents and the duty of dealers under Rule G-17 to deal fairly with all persons?

July 5, 2012

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**TEXT OF DRAFT RULE G-11 AMENDMENT**

**Rule G-11: Primary Offering Practices**

(a) – (j) No change.

**(k) *Prohibitions on Consents by Brokers, Dealers, and Municipal Securities Dealers.* No broker, dealer, or municipal securities dealer shall provide bond owner consent to amendments to authorizing documents for municipal securities, either in its capacity as an underwriter or remarketing agent, or as agent for or in lieu of bond owners. Notwithstanding the foregoing, a broker, dealer, or municipal securities dealer may provide bond owner consent to amendments to authorizing documents for municipal securities if:**

**(i) such securities are owned by such broker, dealer, or municipal securities dealer other than in its capacity as underwriter or remarketing**

**agent;**

**(ii) all securities affected by such amendment are held by the broker, dealer, or municipal securities dealer, acting as remarketing agent, as a result of a mandatory tender of such securities; or**

**(iii) all bond owners of securities that would be affected by such amendments, other than the securities for which the broker, dealer or municipal securities dealer provides consent, have provided or will provide consent to such amendments prior to their taking effect.**

**For purposes of this section, the term "authorizing document" shall mean the trust indenture, resolution, ordinance, or other document under which the securities are issued, and the term "bond owner consent" shall mean any consent specified in an authorizing document that may be or is required to be given by an owner of municipal securities issued pursuant to such authorizing document.**

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[1] Comments are posted on the MSRB website without change. Personal identifying information such as name, address, telephone number or email address will not be edited from submissions. Therefore, commenters should submit only information that they wish to make available publicly.

[2] Comments letters may be viewed on the MSRB website by clicking here.

**Alphabetical List of Comment Letters on MSRB Notice 2012-36 (July 5, 2012)**

1. Investment Company Institute: Letter from Dorothy Donohue, Deputy General Counsel - Securities Regulation, dated August 10, 2012

2. Municipal Electric Authority of Georgia: Letter from James E. Fuller, Senior Vice President and Chief Financial Officer, dated August 13, 2012

3. National Association of Independent Public Finance Advisors: Letter from Colette J. Irwin-Knott, President, dated August 13, 2012

4. National Federation of Municipal Analysts: Letter from Lisa Good, Executive Director, dated July 30, 2012

5. New York City Municipal Water Finance Authority: Letter from Thomas G. Paolicelli, Executive Director, dated July 24, 2012

6. Nuveen Asset Management: Letter from Cadmus Hicks, Managing Director, dated August 7, 2012

7. Rhode Island Health and Educational Building Corporation: Letter from Robert E. Donovan, Executive Director, dated July 24, 2012

8. Securities Industry and Financial Markets Association: Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, dated August 13, 2012

9. Standish Mellon Asset Management: E-mail from David Belton dated August 9, 2012

INVESTMENT COMPANY INSTITUTE

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August 10, 2012

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA 22314

Re: Request for Comment on Draft Amendment to Limit Dealer Consents to Changes in Authorizing Documents for Municipal Securities (MSRB Notice 2012-36)

Dear Mr. Smith:

The Investment Company Institute[1] is pleased to provide comments on the Municipal Securities Rulemaking Board's proposed amendment to MSRB Rule G-11 to limit the practice by brokers, dealers, and municipal securities dealers ("dealers") of consenting to changes in authorizing documents for municipal securities.[2] Limiting this practice will result in greater protection for the interests of existing bondholders, and we therefore support it. Maintaining the integrity of the $3.7 trillion municipal securities market to ensure fair and orderly markets is critical to ICI members who provide access to the 26 percent of investors—many of them retail—that invest in this market through registered investment companies.[3]

The MSRB explains that the proposal was developed to address the practice of dealers providing consents to changes in legal documents that: (i) set forth key rights of and protections for owners of municipal securities; and (ii) state that such consents are to be provided by the bondholders. Specifically, the MSRB is concerned that existing bondholders would not have contemplated that a

[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $13.1 trillion and serve over 90 million shareholders.

[2] *See Request for Comment on Draft Amendment to Limit Dealer Consents to Changes in Authorizing Documents for Municipal Securities,* MSRB Notice 2012-36 (July 5, 2012), available at http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2012/2012-36.aspx.

[3] 2012 Investment Company Fact Book, *A Review of Trends and Activity in the Investment Company Industry,* Investment Company Institute, 52nd Edition.

dealer acting as an underwriter, which may hold the bonds only momentarily during the initial distribution process of a new bond issuance without any prior or future economic or investment interest in the bonds, could consent to changes that would affect existing bondholders. To address this concern, the proposed amendment would prohibit a dealer from providing bondholder consents to any amendment to authorizing documents for municipal securities, either as an underwriter, remarketing agent, or as an agent for owners, or in lieu of owners, subject to limited exceptions.[4]

As significant investors in the municipal securities market, ICI members have a strong interest in protecting the rights of existing bondholders that are on a parity basis with owners of newly issued bonds. When purchasing municipal bonds under authorizing documents that, for example, grant security interests in specified collateral and subject the issuer to defined covenants, an investor generally expects that those protections will remain in force throughout the term of the bonds. Although authorizing documents often provide a procedure for amendments with the consent of a specified percentage of parity bondholders, investors typically view any change in those and other similar protections as the rare exception. Accordingly, funds initially investing in a municipal security would expect that such amendments would be implemented only after careful consideration and consent by both the existing investors and new investors having, as the MSRB noted, the same longer-term interests as the existing investors.

We thus support the MSRB's proposal as an important step in addressing these concerns and encouraging an approach that is more protective of the rights of existing bondholders in the municipal market.

* * * *

[4] The exceptions consist of consents given to authorizing documents (i) for municipal securities owned by the dealer as an investment; (ii) for municipal securities that the dealer holds as a result of a mandatory tender, provided all outstanding securities affected by such amendment had been tendered; and (iii) by the dealer, acting as an underwriter or remarketing agent, in circumstances where the amendment would not become effective until all bondholders affected by the amendment (except those for which the dealer was providing consent) had also consented to the amendment.

We look forward to working with the MSRB as it continues to examine these critical issues. In the meantime, if you have any questions, please feel free to contact me directly at (202) 218-3563 or Jane Heinrichs, Senior Associate Counsel, at (202) 371-5410.

Sincerely,

/s/ Dorothy Donohue

Dorothy Donohue
Deputy General Counsel—Securities Regulation

cc: Lynette Kelly, Executive Director
Municipal Securities Rulemaking Board

August 13, 2012

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, Virginia 22314

Re: Draft Amendment to MSRB Rule G-11

Dear Mr. Smith:

I am the Senior Vice President, Chief Financial Officer of the Municipal Electric Authority of Georgia ("MEAG Power") and I appreciate this opportunity to comment on the proposed amendment to Rule G-11 of the Municipal Securities Rulemaking Board (the "MSRB").

MEAG Power was created by the State of Georgia in 1975 as a "joint action agency" for the purpose of owning and operating electric generation and transmission facilities to supply bulk electric power to participating political subdivisions of the State of Georgia. MEAG Power currently owns and operates nine separate "projects" that have been financed under nine separate senior and subordinate lien bond resolutions, each of which is "open-ended" (that is, it permits the issuance of future series of parity bonds, subject only to the satisfaction of the conditions to such issuance set forth therein). As of December 31, 2011, MEAG Power had issued bonds in an aggregate principal amount of approximately $17.1 billion, of which approximately $6.5 billion remain outstanding.

MEAG Power adopted its first bond resolution in 1976 and its most recent ones in 2008. All of MEAG Power's bond resolutions contain provisions (including, particularly, operational and financial covenants) that were, we believe, in conformity with customs and practices in the municipal securities market at the respective times of their adoption. Of course, over the past three and a half decades, such customs and practices have evolved and, in certain cases, have become more liberal and issuer-friendly.

Each of MEAG Power's bond resolutions contains provisions for the making of amendments thereto. Except in the case of certain enumerated types of amendments (a) that may be made either (i) without the consent of either the holders of the bonds outstanding thereunder or the trustee for such holders or (ii) with the written consent of such trustee and (b) for which unanimous consent is required, each of MEAG Power's bond resolutions permits amendments

Municipal Electric Authority of Georgia
1470 Riveredge Parkway, NW
Atlanta, Georgia 30328-4686

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Fax 770-953-3141

thereto only with the consent of the holders of a super-majority or a simple majority in principal amount of the bonds outstanding thereunder (in the case of MEAG Power's earliest bond resolutions, the consent of the holders of two-thirds in principal amount of all bonds outstanding thereunder is required; and, in the case of MEAG Power's most recent bond resolutions, the consent of the holders of a majority in principal amount of the bonds outstanding thereunder that are affected by such amendment is required).

Given that none of MEAG Power's bond resolutions requires the unanimous consent of the holders of the bonds outstanding thereunder for the making of any amendment thereto, MEAG Power believes that bondholders must understand that, under certain circumstances, amendments to the bond resolution may be made without obtaining their individual consents thereto.

As was noted in several of the comment letters filed in response to the MSRB's Notice 2012-04 (February 7, 2012), entitled "*Request for Comment on Draft Interpretive Notice Concerning the Application of MSRB Rule G-17 to Bondholder Consents by Underwriters of Municipal Securities*" (the "February 2012 Draft Interpretive Notice"),[1] MEAG Power believes that it has been a long-standing and common practice in the municipal securities market for underwriters (as the initial holders of newly-issued bonds under open-ended bond authorizing documents) to consent to amendments to those documents, particularly in the case of amendments made for the purpose of "modernizing" the provisions of those documents.

As also was noted in several of the comment letters filed in response to the February 2012 Draft Interpretive Notice,[2] MEAG Power believes that the procedure for effecting an amendment to a bond authorizing document is a matter of both relevant state law and the terms of the bond authorizing document itself, which is a contract between the municipal issuer and the holders of the bonds issued thereunder. As such, MEAG Power believes that the effect of the proposed amendment to Rule G-11 is to impose an additional limitation on the contracts between municipal issuers and their bondholders that does not presently exist, namely, a requirement that amendments that are consented to by underwriters also be consented to by ***all*** of the owners of previously issued and outstanding bonds.

In December 2011, MEAG Power adopted "springing" amendments to its two earliest bond resolutions, for the purpose of modernizing, among other things, certain of the provisions thereof relating to the structuring of debt service and certain of the financial and operational covenants contained therein. While certain of those amendments could, in the abstract, be considered to reduce the security for existing bondholders, MEAG Power believes that the effect of those amendments, taken as a whole, will increase MEAG Power's financial and operational

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[1] *See, e.g.*, the letter, dated March 6, 2012, from the Indianapolis Airport Authority; and the letter, dated March 8, 2012, from the National Association of Bond Lawyers (hereinafter, the "NABL Letter").

[2] *See, e.g.*, the NABL Letter.

flexibility with respect to the projects financed thereunder and, as a result, actually will strengthen the credits of those projects.

In connection with the issuance of two issues of bonds under those resolutions in December 2011 and January 2012, MEAG Power obtained consents to those amendments from the underwriters of those bonds. Based upon MEAG Power's planned issuances of bonds over the coming years, MEAG Power estimated that, if it is able to continue to obtain consents to those amendments from the underwriters of those bonds, it will obtain the consents of the holders of the requisite percentages (two-thirds) of the bonds to be outstanding under those bond resolutions by 2016. If, however, MEAG Power is not permitted to obtain such consents from the underwriters, unless MEAG Power undertakes a general consent solicitation process with respect to its outstanding bonds (which, as described below, is arduous, time-consuming and expensive), those amendments will not become effective until 2026, when all of the bonds outstanding under the relevant bond resolutions as of the date of adoption of the amendments mature and are paid. Accordingly, the adoption of the proposed amendment to Rule G-11 potentially will delay, by approximately 10 years, the effectiveness of amendments that we believe actually will strengthen the credits of the projects financed under those bond resolutions.

Several of the commentators to the February 2012 Draft Interpretive Notice noted that because of the widespread use of the book-entry system of registration of The Depository Trust Company ("DTC"), the obtaining of consents from underwriters to amendments to bond authorizing documents is the only reasonable and cost-effective alternative available to municipal issuers.[3] Based upon its own experience in this area, MEAG Power concurs with that conclusion.

In 1998, when a restructuring of the electric utility industry that would have led to increased competition among wholesale and retail suppliers of electricity (such as MEAG Power and its local municipal retail electric distribution system participants, respectively) appeared imminent, MEAG embarked upon a program to reduce its costs and otherwise improve its competitive position and the competitive position of its participants. An integral part of that program consisted of the making of certain amendments to certain of MEAG Power's bond resolutions, in order to improve MEAG Power's financial and operational flexibility thereunder. However, because MEAG Power did not expect to issue a significant amount of additional bonds under those bond resolutions in the near-term, MEAG Power concluded that the use of underwriters to provide consents to the proposed amendments was not practical and would not result in the effectiveness of the proposed amendments in a timely manner. As a result, MEAG Power was forced to undertake a consent solicitation process in order to obtain the consents of the holders of the requisite percentages of its outstanding bonds. Because of the time and effort that is required to identify and communicate with beneficial holders of bonds that are held in

[3] *See, e.g.*, the NABL Letter; and the letter, dated March 9, 2012, from the Government Finance Officers Association.

book-entry-only form through DTC, the consent solicitation process was arduous, time-consuming and expensive, and MEAG was required to engage a "solicitation agent" to manage the process of identifying and communicating with the beneficial holders of its bonds. While MEAG Power ultimately was able to cause the proposed amendments to become effective and, it believes, strengthen its credit and the credit of its participants, the process took approximately fourteen months and cost MEAG Power approximately $1.05 million.

For the reasons set forth above, MEAG Power respectfully requests that the MSRB not adopt the proposed amendment to Rule G-11, since to do so would (a) put an end to a long-standing and common practice in the municipal securities market, at a time when there is no other reasonable and cost-effective alternative, (b) impose additional restrictions on the contracts between issuers and bondholders that were not bargained for by the bondholders and that do not currently exist and (c) in the case of MEAG Power, potentially delay, by approximately 10 years, the effectiveness of amendments that we believe actually will strengthen the credits of the projects financed under the bond resolutions being amended.

In making the request set forth above, we note (as was mentioned in the NABL Letter) that the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act changed the mandate of the MSRB, so that the MSRB's authority now encompasses, among other things, the protection of municipal issuers and obligated persons. As a result, while MEAG Power generally is supportive of proposals that would improve the transparency and efficiency of the municipal securities market, we think that careful balancing needs to be done in connection with any rule change that eliminates a long-standing and common practice in that market and affects the contractual relationship between municipal issuers and investors.

While MEAG Power is opposed to the adoption of the proposed amendment to Rule G-11, in the event that the MSRB does decide to adopt the amendment, we urge you to reconsider the language of clause (iii) thereof. As we read the proposed language, that clause would permit underwriters to consent to amendments with respect to a new issue of parity bonds issued under an open-ended bond authorizing document, but only if the owners of ***all*** bonds outstanding under the bond authorizing document also consent to the amendments. As was discussed above, all of MEAG Power's bond resolutions (and, we believe, the overwhelming majority of bond authorizing documents used in the municipal securities market) generally permit amendments with the consent of the holders of a majority in principal amount of the bonds outstanding thereunder (or, in certain cases, of the holders of a super-majority of such bonds). The language of clause (iii) therefore goes above and beyond the requirements of such bond authorizing documents in requiring the consent to such amendments of the holders of ***all*** of the outstanding bonds. So, we request that the language of clause (iii) be revised to permit underwriter consents to amendments in cases where consents also are obtained from the holders of the requisite percentage (as specified in the relevant bond authorizing document), rather than all, of the outstanding parity bonds. In addition, based upon MEAG Power's previous experience with the process of soliciting consents to amendments to a bond authorizing

document from the holders of outstanding bonds as described above, we think that it would be difficult in many cases for an issuer to complete a consent solicitation process with the holders of its outstanding bonds prior to the offering of a new issue of parity bonds under that bond authorizing document, so we request that the effectiveness of an underwriter's consent to amendments, rather than the ability of the underwriter to execute such a consent, be conditioned upon the receipt of consents of the holders of the requisite percentage of the bonds outstanding immediately prior to the issuance with respect to which the underwriter is providing consent.

* * * * *

Set forth below are MEAG Power's comments on the specific matters requested by the MSRB in Notice 2012-36 (July 5, 2012):

- *The MSRB recognizes that dealers, acting in a capacity other than as underwriter or remarketing agent, may be permitted to consent to changes to bond authorizing documents that may affect bondholders. Should dealers acting in such other capacities (for example, auction agents for auction rate securities) be permitted to consent to changes under the exceptions set forth in the Draft Rule G-11 Amendment, or should the Draft Rule G-11 Amendment explicitly prohibit dealers acting in other capacities, such as auction agents, from providing consents to changes to the authorizing documents?*

  In MEAG Power's experience, the role of an auction agent for auction rate securities is ministerial in nature (*i.e.*, the actual physical processing of the auction procedures) and generally is performed by the corporate trust departments of commercial banks. However, the solicitation of investors to participate in auctions usually is performed by investment banking firms in their role as a "broker-dealer." Subject to MEAG Power's more general reservations to the Draft Rule G-11 amendment expressed herein, we believe that dealers acting in the capacity of a broker-dealer for auction rate securities serve a similar role to dealers acting in the capacity of a remarketing agent for variable rate demand obligations, so we believe that exceptions similar to those that apply to remarketing agents should apply to broker-dealers for auction rate securities.

- *Would the Draft Rule G-11 Amendment help to protect investors, and are there other benefits that would be realized from adopting the Draft Rule G-11 Amendment?*

  For the reasons stated herein, MEAG Power believes that the Draft Rule G-11 Amendment, while it would limit the circumstances under which amendments to bond authorizing documents are imposed upon investors in outstanding bonds, impermissibly modifies the contracts between municipal issuers and investors in a manner that could preclude investors from realizing benefits that

could be derived from certain types of amendments to the bond authorizing documents and, therefore, harms rather than protects investors.

- *Would the Draft Rule G-11 Amendment have any negative effects on issuers, investors or other market participants? If so, please describe in detail.*

  MEAG Power believes that the Draft Rule G-11 Amendment may have negative effects on both issuers and investors. In the case of issuers, it would eliminate a long-standing and common practice in the municipal securities market, at a time when there is no other reasonable and cost-effective alternative. In that regard, the Draft Rule G-11 Amendment could force issuers desirous of making amendments to their bond authorizing documents to have to undertake uneconomical refundings in order to make such amendments. In the case of investors, as was stated above, it could preclude investors from realizing benefits that could be derived from certain types of amendments to the bond authorizing documents.

- *Are issuers able to obtain consents from beneficial holders of bonds effectively and efficiently through existing mechanisms? The MSRB welcomes comments and suggestions for streamlining and improving methods of identifying and obtaining consents from bondholders, including those available through DTC and otherwise.*

  As MEAG Power learned in connection with the consent solicitation process that it undertook in 1998 as described above, the very nature of DTC's book-entry-only system (with multiple layers of beneficial ownership) makes it difficult and prohibitively expensive to identify and communicate with the beneficial owners of outstanding bonds. As a result, we are not aware of any methods that are available to streamline and improve the process for identifying and obtaining consents from bondholders.

- *What would be the burdens on issuers or other market participants of adopting a rule that limits obtaining bondholder consents in the manner contemplated by the Draft Rule G-11 Amendment?*

  As was stated above, MEAG Power believes that the Draft Rule G-11 Amendment would eliminate a long-standing and common practice in the municipal securities market, at a time when there is no other reasonable and cost-effective alternative. In the case of MEAG Power in particular, we spent a considerable amount of money establishing a process for obtaining underwriter consents to certain proposed amendments to certain of our bond resolutions prior to the issuance of the February 2012 Draft Interpretive Notice, and the adoption of the Draft Rule G-11 Amendment would cause us no longer to be able to obtain those underwriter consents, the effect of which

likely would delay our ability to cause the proposed amendments to become effective by approximately 10 years.

- *Are there alternative methods the MSRB should consider to providing the protections sought under the Draft Rule G-11 Amendment that would be more effective and/or less burdensome, resulting in an appropriate balance between the need for a cost effective and efficient manner of obtaining consents and the duty of dealers under Rule G-17 to deal fairly with all persons?*

  MEAG Power is not aware of any alternative methods that the MSRB should consider that would be more effective and/or less burdensome than the Draft Rule G-11 Amendment. As was stated above, MEAG Power does believe that careful balancing needs to be done in connection with any rule change that eliminates a long-standing and common practice in the municipal securities market and affects the contractual relationship between municipal issuers and investors. In order to minimize the burden on issuers, MEAG Power believes that, at a minimum, the Draft Rule G-11 Amendment should be prospective in its application (*i.e.*, for bonds issued after the adoption of the amendment, an underwriter would be permitted to provide consent to amendments to a bond authorizing document only if the official statements or other disclosure documents for the bonds issued under that bond authorizing document following the adoption of the amendment specifically disclose the ability of the issuer to obtain consents from underwriters.

  MEAG Power notes that several of the commentators to the February 2012 Draft Interpretive Notice discussed situations where investors in new issues of parity bonds issued under an open-ended bond authorizing document may be deemed, by virtue of their purchase of such bonds, to have consented to amendments to the bond authorizing document.[4] Based upon the advice of its bond counsel, MEAG Power believes that such deemed consents are not permitted under its earliest bond resolutions (including the two bond resolutions for which "springing" amendments already have been adopted, as described above). As a result, MEAG Power believes that any alternative that relies upon such deemed consents would not be more effective and/or less burdensome than the Draft Rule G-11 Amendment.

* * * * *

[4] *See, e.g.*, the NABL Letter; and the letter, dated March 6, 2012, from Squire Sanders (US) LLP.

If you have any questions regarding the foregoing, please do not hesitate to telephone me at (770) 563-0522.

Very truly yours,

James E. Fuller

James E. Fuller
Senior Vice President,
Chief Financial Officer

**National Association of Independent Public Finance Advisors**
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630.896.1292 • 209.633.6265 Fax
**www.naipfa.com**

August 13, 2012

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street
Suite 600
Alexandria, VA 22314

RE: MSRB Notice 2012-36

The National Association of Independent Public Finance Advisors ("NAIPFA") appreciates this opportunity to provide suggestions to the Municipal Securities Rulemaking Board (the "MSRB") in regard to MSRB Notice 2012-36 – Request for Comment on Draft Amendment to Limit Dealer Consents to Changes in Authorizing Document for Municipal Securities (the "Notice").

NAIPFA understands the MSRB's desire to protect the interests of investors, and believes that the proposed amendments to MSRB Rule G-11 (the "Rule") adequately accomplish this objective. However, NAIPFA is concerned with regard to matters not specifically addressed within the Notice, namely, the lack of clear direction with respect to which party or parties are to bear the burden of obtaining the necessary bondholder consents.

NAIPFA believes that the majority of discussions relating to the amendment of authorizing documents are initiated by underwriters or remarketing agents, not issuers or municipal advisors, and that this is most prevalent in new, negotiated offerings of municipal securities. As such, NAIPFA is concerned that the Rule will place unnecessary and undue regulatory burdens on issuers or their municipal advisors, with possible negative impacts on these market participants as well as the public interest. These concerns stem primarily from the lack of clarity within the Notice as to who is to be the party(ies) responsible for obtaining consents and which party(ies) is to bear the cost of obtaining those consents.

The proposed revisions to the Rule seek to establish a general rule which would curtail a dealer's ability to provide consents on behalf of bondholders. However, because the proposed amendment fails to address the issue of which party is to obtain bondholder consents, NAIPFA is concerned that this responsibility will be placed upon issuers or municipal advisors. Such a result will likely increase the issuer's borrowing costs, delay the issuance of securities, possibly significantly, and negatively impact the public interest through higher costs of issuance and through a reduction in issuance efficiency. This possible outcome is all the more likely to occur due to the current lack of effective and efficient available mechanisms to be utilized for the collection of bondholder consents.

**National Association of Independent Public Finance Advisors**
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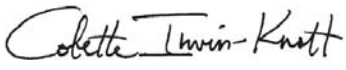
Since issuer and municipal advisors are not well positioned to undertake the task of compiling bondholder consents, NAIPFA does not believe that the responsibility of obtaining these consents should fall on the shoulders of either of these parties. Rather, the responsibility of obtaining consents should lie with the underwriter or remarketing agent as they are the party who can most expeditiously and efficiently obtain these consents.

Further, and as noted above, it is NAIPFA's understanding that in a majority of instances it is the underwriter or remarketing agent who proposes the amendments to the prior authorizing documents. Therefore, it would seem appropriate that they be the party that bears the burden of obtaining those consents. Although the costs of obtaining consents may ultimately be passed onto the issuer, NAIPFA believes that underwriters and remarketing agents are the best positioned market participants to obtain this information and at the lowest cost.

NAIPFA agrees that the protection of investor interests is an important objective and understands that the MSRB is obligated to do so. In addition, it is likely that the proposed amendments to the Rule will accomplish this goal. However, NAIPFA is concerned that the Rule's lack of clarity as to who is to obtain the bondholders' consent poses a potential risk to both issuers and municipal advisors who may unexpectedly find themselves in a position where they are obligated to undertake the task of obtaining the consent of the bondholders. This will likely increase borrowing costs and may cause securities issuances to be conducted less efficiently, which may thereby cause harm to the public interest.

Therefore, NAIPFA proposes that the Rule be further amended or that interpretive guidance be developed to clarify that, generally, the responsibility of obtaining bondholder consents to amendments to authorizing documents should lie with the underwriter or remarketing agent. Such a rule would ensure that the burden of obtaining bondholder consents is placed with the appropriate party to the transaction; this would minimize the burden on issuers and would more effectively protect the public interest, while maintaining the Notice's investor protections.

Sincerely,



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

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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

July 30, 2012

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street
Alexandria, Virginia 22314

Re: MSRB Notice Number 2012-36 – Request for Comment on *Draft Amendment to Limit Dealer Consents to Changes in Authorizing Documents for Municipal Securities*

Dear Mr. Smith:

The National Federation of Municipal Analysts ("NFMA") appreciates the opportunity to comment on Notice Number 2012-36 ("G-11 Notice"). We note that on March 26, 2012 we commented on MSRB Notice Number 2012-04 – Request for Comment on *Draft Interpretive Notice Concerning the Application of MSRB Rule G-17 to Bondholder Consents by Underwriters of Municipal Securities ("G-17 Notice").* Our comments on the G-11 Notice are consistent with our comments on the G-17 Notice.

The NFMA is supportive of the spirit of the G-11 Notice, because it prevents underwriters that are not taking an investment position in a bond from consenting to changes that diminish the security provided to outstanding bondholders. We also agree and support the MSRB's statement that it "…also appreciates that while the practice of obtaining underwriter consents may be an efficient way for an issuer to modernize its governing documents, the practice…could be considered as unfair and deceptive because it is exercising rights in a manner that existing bondholders did not explicitly contemplate."

As stated in our G-17 Notice Comments, municipal bond analysts are averse to changes in security provisions unless these changes are transparent and are accomplished via the intent of the bond documents.

We are particularly concerned with new issue and secondary disclosure practices in those instances where these types of consent are being sought. In the case of a new issue, if the security provisions can be diluted with the consent of less than 100% of the owners of the bonds,

this should be clearly stated in the body of the offering documents under both the "Security" and the "Risks" sections. Further, if the underwriter is in the process of accumulating consents with each new bond issuance to meet the requirements to effect changes, this should also be clearly stated in the body of the new bond's offering documents.

We also note that in those instances where deemed consent has been provided, and the result is a material change in security provisions, adequate and conspicuous notice should be provided via EMMA as a "material event notice". Merely publishing the new offering documents is not sufficient notice, in the opinion of the NFMA.

As a matter of practice, analysts representing investors are unlikely to consent to a dilution of their security interests unless: a) they are given something of equal or greater value in exchange and/or; b) view the changes as necessary to avoid worsening the situation of an already troubled credit.

The MSRB has stated it seeks comments on the following specific matters. Our comments follow each section:

> *Should dealers acting in such other capacities (for example, auction agents for auction rate securities) be permitted to consent to changes under the exceptions set forth in the Draft Rule G-11 Amendment, or should the Draft Rule G-11 Amendment explicitly prohibit dealers acting in other capacities, such as auction agents, from providing consents to changes to the authorizing documents?*

The NFMA is of the opinion that the exceptions set out in Draft Rule G-11 Amendments are appropriate.

> *Would the Draft Rule G-11 Amendment help to protect investors, and are there other benefits that would be realized from adopting the Draft Rule G-11 Amendment?*

The NFMA is of the opinion that Draft Rule G-11 Amendments will serve to protect investors.

> *Would the Draft Rule G-11 Amendment have any negative effects on issuers, investors or other market participants? If so, please describe in detail.*

The NFMA recognizes the need to update and modernize bond documents. As stated in our March 2012 comment on the G-17 Notice, we believe it would be desirable to differentiate between those amendments that merely modernize documents with no adverse impact on bondholder's security, and those that dilute the security provisions that Bondholders thought they could rely upon. For example, any consent that weakens or eliminates financial covenants, releases a mortgage lien, or removes a debt service reserve fund requirement is clearly not desirable for bondholders under any circumstances.

*Are issuers able to obtain consents from beneficial holders of bonds effectively and efficiently through existing mechanisms? The MSRB welcomes comments and suggestions for streamlining and improving methods of identifying and obtaining consents from bondholders, including those available through DTC and otherwise.*

The NFMA does not have an opinion on this question, but we do note that the task of identifying and obtaining consents from bondholders is not really the issue. As mentioned earlier, even if bondholders are located, it is only under the very limited circumstances discussed above that they would be likely to consent to anything that serves to undermine bond security.

*What would be the burdens on issuers or other market participants of adopting a rule that limits obtaining bondholder consents in the manner contemplated by the Draft Rule G-11 Amendment?*

The NFMA does not feel this is overly burdensome, and reiterates its call for better primary and secondary market disclosure of bondholder consents.

*Are there alternative methods the MSRB should consider to providing the protections sought under the Draft Rule G-11 Amendment that would be more effective and/or less burdensome, resulting in an appropriate balance between the need for a cost effective and efficient manner of obtaining consents and the duty of dealers under Rule G-17 to deal fairly with all persons?*

The NFMA believes that standards which address what is and is not a material dilution of security provisions can be developed, and is willing to work with other industry groups in this regard.

We thank you for consideration of these comments.

Sincerely,

/s/
Lisa Good
Executive Director
NFMA

NYW

New York City Municipal Water Finance Authority

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http://www.nyc.gov/nyw

July 24, 2012

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, Va. 22314

Re: Draft Amendment to MSRB Rule G-11

Dear Mr. Smith:

I am the Executive Director of the New York City Municipal Water Finance Authority (the "Authority") and I appreciate this opportunity to comment on your proposed amendment to Rule G-11.

The Authority was created in 1985 to finance the capital program of the New York City Water and Sewer System. We expect to issue $7 billion of bonds for new money purposes over the next five fiscal years and have approximately $27.8 billion in total debt outstanding. Because our General Resolution was drafted about 25 years ago, we have found it necessary to make changes from time to time to enable the Authority to access the market more efficiently and save money utilizing modern financing and investment techniques. We believe strongly that an exception in the proposed amendment to Rule G-11 to the "Prohibitions on Consents by Brokers, Dealers and Municipal Securities Dealers" should be provided for situations where the authorizing document expressly states that an underwriter can provide such consent and the offering documents for the existing securities expressly disclose that bondholder consents can be provided by an underwriter. We note that the MSRB's Notice 2012-04 proposed an interpretive notice on this topic that would have included this exception and respectfully request that this exception be included in the amendment to Rule G-11. Since the Authority's authorizing documents expressly provide for this method of obtaining bondholder consent, failure to include this exception will have the affect of amending the Authority's existing documents without the Authority's consent or the consent of bondholders.

The Authority's Second General Revenue Bond Resolution adopted March 30, 1994 (the "resolution"), pursuant to which the Authority currently has outstanding $19.6 billion of bonds, contains in Section 902 dealing with the Powers of Amendment the sentence "For the purposes of this Section, the holders of the Bonds may include the initial holders thereof, regardless of whether such Bonds are being held for immediate resale."

The official statements for all of the Authority's bonds issued under the Resolution contain the following paragraph:

"For purposes of Article IX of the Resolution the purchasers of the Bonds of a Series, whether purchasing as underwriters, for resale or otherwise, upon such purchase from the Authority, may consent to a modification or amendment permitted by Sections 803 and 902 of the Resolution in the manner provided in the Resolution, except that no proof of ownership shall be required, and with the same effect as a consent given by the Holder of such Bonds; *provided, however,* that, if such consent is given by a purchaser who is purchasing as an underwriter or for resale, the nature of the modification or amendment and the provisions of the purchaser consenting thereto shall be described in the official statement, prospectus, offering memorandum or other offering document prepared in connection with the primary offering of the Bonds of such Series by the Authority. *(Arts VIII and IX)"*

I do not believe that the MSRB intends to override the provisions of the Authority's Resolution which have been disclosed to bondholders. These provisions are important to the Authority because the Resolution does not provide for deemed consent from the bondholders of newly issued bonds. The Resolution requires written consent. The only reasonable way to obtain the written consent is from the underwriter as the initial purchaser.

If you have questions, do not hesitate to telephone me at 212-788-4969 or the Authority's bond counsel, Albert Simons, at 212-506-5040.

Very truly yours,

Thomas G. Paolicelli

NUVEEN
ASSET
MANAGEMENT

August 7, 2012

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street
Alexandria, Virginia 22314

Re: MSRB Notice Number 2012-36 – Request for Comment on *Draft Amendment to Limit Dealer Consents to Changes in Authorizing Documents for Municipal Securities*

Dear Mr. Smith:

Nuveen Asset Management ("NAM") is a registered investment adviser with over $85 billion of municipal securities under management. As such, we have a significant interest in ensuring that the municipal bond market operates in a manner that is fair to investors. NAM appreciates the opportunity to comment on Notice Number 2012-36 ("G-11 Notice") and is supportive of the proposal in the G-11 Notice. While enabling underwriters to provide consents to changes in authorizing documents may be efficient, it violates a sense of fundamental fairness, since such holders have no continued financial interest in the securities being affected.

NAM has reviewed the comments submitted by the National Federation of Municipal Analysts and fully endorses the views expressed in that letter.

Though not directly related to the proposal, we are also concerned with so-called "deemed consents" and the failure of bondholders being adequately notified of material changes. Merely publishing the new offering documents is not sufficient notice, in the opinion of the NAM. Thus if a deemed consent results in a material change in security provisions, MSRB should require that adequate and conspicuous notice be provided via the MSRB'S Electronic Municipal Market Access System ("EMMA") as a "material event notice" (as "modifications to rights of security holders" or "release, substitution, or sale of property securing repayment of the securities" which are events 7 and 10, respectively under rule 15c2-12(b)(5)(i)(C) of the Exchange Act of 1934).

We thank you for consideration of these comments.

Sincerely,

Cadmus Hicks (as)

Cadmus Hicks
Managing Director
Nuveen Asset Management

Rhode Island
Health And Educational
Building Corporation

July 24, 2012

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA 22314

Re: Draft Rule G-11 | Amendment to Limit Dealer Consents to Changes in Authorizing Documents for Municipal Securities

Dear Mr. Smith,

Thank you for the opportunity to comment on the proposed G-11 Amendment which will limit the ability of dealers to consent to changes in the authorizing documents and will have an impact on existing bondholders. In reviewing the Discussion of Comments and other background information provided in the notice, the MSRB is correct in its evaluation that the practice of having an underwriter, who has no prior or future economic interest in the bonds and may hold them only temporarily, provide consent to changes impacting bondholders may be unfair and deceptive. This practice in the municipal market cannot simply be justified because it is convenient, has been used for a number of years, and that there has been no significant resistance related to it.

Many authorized documents outline the process and percentage of bondholders which are needed to consent to changes. As noted in the Request, issuers are able to obtain consent from bondholders of newly issued bonds at the time of issuance if it meets the provisions of the authorizing documents. There is no need for the underwriter to perform any role in giving consent and the Amendment should be implemented. The Amendment and Exception to G-11 are sufficient so that it will not overburden issuers and will protect investors by ending a practice based more on convenience than sound market policy.

170 Westminster Street, Suite 1200, Providence, RI 02903 401-831-3770 Fax 401-421-3910

In regard to the specific matters that the MSRB is seeking comments on:

- The MSRB is correct in prohibiting dealers from acting in capacities such as auction agents and from providing consents to changes in authorizing documents. The exception provided in the Amendment adequately provides the means to modify the authorizing documents while still protecting the rights of the bondholders.

- While the Draft Rule G-11 will help to protect investors, it will also require that consent provisions in the authorizing documents be more detailed and clearer. Issuers and investors will both benefit from more certainty in the market.

- In some cases it may more be more complex for an issuer to modify authorizing documents especially as it relates to older outstanding bond issues however there are options which can allow the changes to be completed.

  The trustee, as representation of the bondholder, can consent to changes as long as a legal opinion is provided concerning the impact of the change.

  Older issues can be refunded as a standalone transaction or combined with a new money issue with the new issue's authorizing documents having the desired covenants changes.

- There are clearly advantages in being able to identify the beneficial bondholders however the current system of DTC and bonds held in the "street name" of brokerage firms makes it difficult. Even when there is a trustee serving as a representation of the bondholders, there seems to be difficulty in maintaining current records of bondholders after the initial offering.

  However, given current technology and web based sites like EMMA, investors, issuers, underwriters and the legal community could work to develop a system of notification and requests for consents to amendments of the authorizing documents from beneficial bondholders which would be especially beneficial when amending older bond documents when a new financing is not involved.

The MSRB should continue its examination of the practices that have developed in the municipal marketplace and modify them as it has done in the Amendment to G-11. Practices which have developed more out of convenience than sound policy cannot continue if the municipal market is to remain efficient and transparent.

Sincerely,

Robert E. Donovan
Executive Director

Rhode Island Health And Educational Building Corporation
170 Westminster Street, Suite 1200, Providence, RI 02903 401-831-3770 Fax 401-421-3910

sifma
Invested in America

August 13, 2012

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street
Suite 600
Alexandria, VA 22314

**Re: MSRB Notice 2012-36: Request for Comment on Draft Amendment to Limit Dealer Consents to Changes in Authorizing Documents for Municipal Securities**

Dear Mr. Smith:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates this opportunity to respond to Notice 2012-36[2] (the "Notice") issued by the Municipal Securities Rulemaking Board (the "MSRB") in which the MSRB is requesting comment on a draft amendment to limit dealer consents to changes in authorizing documents for municipal securities. We understand the MSRB's investor protection concerns, and the difficulty in balancing those concerns with the need of issuers to update or modernize bond documents or make technical amendments to such documents. We also recognize the difficulty and expense in obtaining bondholder consents through existing processes. SIFMA did not file a comment letter in response to the prior MSRB Notice on this subject, MSRB Notice 2012-04[3] (the "Prior Notice"), but does have two concerns about the potential breadth of this draft amendment to Rule G-11.

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[1] The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.

[2] MSRB Notice 2012-36 (July 5, 2012).

[3] MSRB Notice 2012-04 (February 7, 2012).

First, our primary concern with the draft amendment is that even if it is expressly disclosed in the authorizing documents for a municipal bond issue that an underwriter can provide bondholder consents, and it is also disclosed in the offering documents for the existing securities that bondholder consents could be provided by underwriters of other securities issued under the authorizing documents, such consents would be still be barred. This is a significant change from the Prior Notice, in which this scenario was covered by an explicit exception in the draft MSRB Rule G-17 Interpretive Notice. In this case, investors in outstanding bond issues have been and in future bond issues would be on notice that the underwriter is able to provide bondholder consents. Altering that express authority in the authorizing documents, some which may have been outstanding for many years, by way of this rule amendment, substantively changes the contractual rights and expectations of the parties. Elimination of this exception to a proposed rule, whether as part of an amendment to MSRB Rule G-11 or an Interpretive Notice to MSRB Rule G-17, appears to be overreaching beyond the bounds of investor protection.

SIFMA feels that a more balanced approach would be achieved by reverting to the focus in the Prior Notice on whether such bondholder consents by underwriters reduce the security for existing bondholders or the value of their bonds. SIFMA agrees with the National Federation of Municipal Analysts'[4] statement that standards which address what is and is not a material dilution of security provisions can be developed. We are willing to work with the NFMA and other industry groups towards this goal.

Second, SIFMA is also concerned that the third exception to the draft amendment is too narrow. This exception would allow a dealer to consent to an amendment to authorizing documents in circumstances where the amendment would not become effective until all bondholders affected by such amendment had also provided consent. It is too onerous to require all bondholders to consent to any such change, particularly if the bond authorizing documents only require a majority or two-thirds of bondholders to consent. Not only is this amendment likely to change the contractual agreement among the parties if less than unanimous consent is required by the bond documents, but it can be difficult to find the beneficial holders of the bonds given the limitations of the current information and systems available to DTCC and trustees. Given those limitations and as described above,

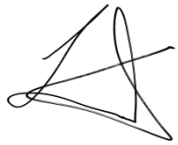
[4] *See,* letter from Lisa Good, Executive Director, National Federation of Municipal Analysts ("NFMA") to Mr. Ronald W. Smith, Corporate Secretary, MSRB, dated July, 30, 2012 ("NFMA Letter").

obtaining consents from all bondholders is an unnecessary and incredibly costly, time-consuming and labor-intensive process.[5]

* * *

We would be pleased to discuss any of these comments in greater detail, or to provide any other assistance that would be helpful. If you have any questions, please do not hesitate to contact the undersigned at (212) 313-1130.

Sincerely yours,



Leslie M. Norwood
Managing Director and
Associate General Counsel

cc: ***Municipal Securities Rulemaking Board***
Lynnette Kelly, Executive Director
Ernesto A. Lanza, Deputy Executive Director and Chief Legal Officer

[5] For example, consider the case where a beneficial owner of record has long failed to update an address with a broker-dealer after moving (increasingly common in these days of on-line statement delivery). Or the beneficial owner is recently deceased and the heirs know nothing about municipal bonds. In many cases, the need for majority bondholder consent is very time-sensitive. Requiring 100% bondholder consent, where the original offering documents did not require such consent, could **completely block** any ability to amend bond documents. It may actually be in the clear best interests of the beneficial owners to have the amendment occur, but a single missing or stubborn or recalcitrant beneficial owner can prevent such changes.

# Comment on Notice 2012-36

from David Belton, Standish Mellon Asset Management

on Thursday, August 09, 2012

Comment:

Standish Mellon Asset Management, a subsidiary of Bank of New York Mellon, is investment advisor to clients who own approximately $32 billion of municipal bonds.

On behalf of Standish, I am writing to express the firm's view of the proposed Amendment (k) to MSRB Rule G-11. This amendment would prohibit dealers from consenting to changes in bond documents as "bondholders" while acting as underwriters. We agree strongly with the aim of the Amendment; we believe bond dealers, who serve bond issuers as well as investors, do not necessarily share the latter’s interests and concerns regarding the legal provisions of municipal bond issues.

We do not agree with 2 exceptions (ki and kii) listed in the proposed Amendment. These exceptions would allow a bond dealer to consent to changes in legal documents when acting in a capacity other than as underwriter – i.e. remarketing agent owning 100% of the bonds or a long term investor. The two exceptions would allow for self definition of the bond dealer’s role in owning a municipal bond, and therefore too much discretion on the part of bond dealers in assessing their role as a bondholder. The third exception, which allows for dealers to provide consent when all other holders have given theirs, is acceptable.

Standish greatly appreciates the MSRB’s efforts on behalf of municipal bond investors and the opportunity to participate in its efforts to improve the functioning of the municipal marketplace.

MSRB Municipal Securities Rulemaking Board

# MSRB NOTICE 2012-58 (NOVEMBER 21, 2012)

# REQUEST FOR COMMENT ON EXCEPTION PROVISIONS OF DRAFT RULE AMENDMENT TO LIMIT DEALER CONSENTS TO CHANGES IN AUTHORIZING DOCUMENTS FOR MUNICIPAL SECURITIES

**INTRODUCTION**

The Municipal Securities Rulemaking Board ("MSRB") is requesting comment on a revised draft amendment to MSRB Rule G-11 on primary offering practices (the "Revised Draft Rule G-11 Amendment") concerning the practice by brokers, dealers, and municipal securities dealers ("dealers") of consenting to changes in authorizing documents for municipal securities. While the MSRB continues to consider the comments received on all aspects of the Draft Rule G-11 Amendment, published in July 2012, it has determined to seek comment on two new exceptions under the proposal, as described below.

Comments should be submitted no later than December 21, 2012, and may be submitted in electronic or paper form. Comments may be submitted electronically by clicking here. Comments submitted in paper form should be sent to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board, 1900 Duke Street, Suite 600, Alexandria, VA 22314. All comments will be available for public inspection on the MSRB's website.[1]

Questions about this notice should be directed to Karen Du Brul, Associate General Counsel, at 703-797-6600.

**BACKGROUND**

The current proposal is the MSRB's third request for comment on this topic. First, on February 7, 2012, the MSRB published MSRB Notice 2012-04 in which it requested comment on a draft interpretive notice concerning the application of MSRB Rule G-17 on fair dealing to the provision of bondholder consents by underwriters of municipal securities ("Draft Rule G-17 Notice").

The Draft Rule G-17 Notice would have provided, depending upon the facts and circumstances, that the practice by underwriters of consenting to amendments to bond authorizing documents, such as trust indentures and bond resolutions, could be a violation of the duty of dealers under MSRB Rule G-17 to deal fairly with all persons in the conduct of their municipal securities activities. In cases where the amendments reduced the security for the existing bondholders, the Draft Rule G-17 Notice stated that the provision of consents by underwriters would be a violation of their Rule G-17 duty of fair dealing unless: (i) the authorizing document expressly provided that an underwriter could provide bondholder consent; and (ii) the offering documents for the existing securities expressly disclosed that bondholder consents could be provided by underwriters of other securities issued under the authorizing document.

In publishing the Draft Rule G-17 Notice for comment, the MSRB cited its concern that the practice of underwriters providing consents to changes in the authorizing documents, particularly to changes that reduced the security for existing parity holders, had not been explicitly provided for in the authorizing documents, nor had it been specifically disclosed in the offering documents for outstanding bonds affected by the

change. The MSRB also recognized the interests of some issuers or obligated persons to amend their authorizing documents in an efficient and cost effective manner. In an effort to balance the concerns of issuers, obligated persons and existing bondholders, the Draft Rule G-17 Notice stated that underwriters would not violate their Rule G-17 duty by providing consents to changes that reduced the security for existing bondholders if the ability of an underwriter to provide such consents had been explicitly authorized in the authorizing documents and expressly disclosed in the offering documents for the existing bonds.

**DRAFT RULE G-11 AMENDMENT**

Second, the MSRB sought comment on a proposed amendment to MSRB Rule G-11 ("Draft Rule G-11 Amendment"), prohibiting certain consents by dealers to amendments to bond authorizing documents, subject to limited exceptions.[2]

The Draft Rule G-11 Amendment, developed in response to the comments on the Draft Rule G-17 Notice,[3] would have prohibited a dealer from providing bondholder consent to any amendment to authorizing documents for municipal securities, either as an underwriter, remarketing agent, or agent for owners, or in lieu of owners, subject to limited exceptions. The exceptions consisted of consents given: (1) by a dealer for securities owned by it other than in its capacity as an underwriter or remarketing agent; (2) by a remarketing agent for all securities affected by such consent, provided that all such securities had been tendered to it as a result of a mandatory tender; and (3) by a dealer if all owners of securities that would be affected by such amendments (other than the securities for which the dealer provides its consent) had provided or would have provided consent to such amendments prior to their taking effect.

The MSRB received nine comment letters on the Draft Rule G-11 Amendment.[4] Many of the commenters expressed views regarding the potential impact on the ability of issuers to amend their bond authorizing documents in an efficient, cost effective and timely manner. In addition, several commenters expressed views regarding the appropriateness and adequacy of the exceptions set out in the Draft Rule G-11 Amendment. While the MSRB continues to consider the comments received on all aspects of the Draft Rule G-11 Amendment, it has determined to seek comment on two new proposed exceptions, as described below.

**REVISED DRAFT RULE G-11 AMENDMENT**

**New Exceptions Under Revised Draft Rule G-11 Amendment.** The Revised Draft Rule G-11 Amendment includes two additional exceptions to the basic prohibition on dealers providing bondholder consents: (i) for underwriters providing consents to amendments to bond authorizing documents under circumstances where such documents and the bond offering documents expressly provide for such consent; and (ii) for underwriters providing consent to an issuer solely as agent on behalf of bondholders who had delivered to the underwriter their respective written consents to such amendments.[5]

The first new exception from the prohibition under the Revised Draft Rule G-11 Amendment would allow underwriters to provide consent to amendments to bond authorizing documents where the bond documents explicitly provided that underwriters could give such consent, and the offering documents for existing securities expressly disclosed the ability of an underwriter to provide such consent.

The second new exception would allow an underwriter to deliver an omnibus consent to an issuer representing the consents of holders who had purchased the new issue of municipal securities and had delivered corresponding written consents to the

underwriter. This might occur, for example, when an issuer requested an underwriter to collect and verify each purchaser's authority to execute and deliver such consent, thus relieving the issuer or a trustee from this obligation and allowing the issuer to rely on a single consent from the underwriter.

**Existing Exceptions from Draft Rule G-11 Amendment.** The two new exceptions described above would be in addition to the three exceptions previously included in the Draft Rule G-11 Amendment.

The first existing exception, unchanged from the Draft Rule G-11 Amendment, would allow dealers that owned securities as an investment to provide bondholder consents with respect to those securities. There would be no precise holding period established for purposes of determining whether the dealer no longer held the securities in its capacity as underwriter or remarketing agent – rather, the dealer would look, among other things, to how its holding was treated for its other regulatory and internal risk management purposes as well as whether its own financial interests would be affected by the proposed amendment to the authorizing documents.

The second existing exception, also unchanged from the Draft Rule G-11 Amendment, would allow a dealer, as a remarketing agent, to provide consent for securities that had been tendered to it as a result of a mandatory tender, provided that all securities affected by the consent had been tendered. Thus, if a bondholder elected to exercise a right to "hold" bonds subject to a mandatory tender in lieu of tendering, a dealer acting as the remarketing agent would be prohibited from providing consents to changes in the authorizing documents unless the remarketing agent had also received the specific written consent of such bondholder to such change.

The third existing exception, unchanged from the Draft Rule G-11 Amendment, would allow a dealer (whether acting as underwriter or remarketing agent) to consent to an amendment to authorizing documents in circumstances where the amendment would not become effective until all bondholders affected by such amendment (other than the holders of the securities for which such dealer provides consent) had also provided consent. This might occur, for example, when an issuer was accumulating, over time, bondholder consents from individual owners of bonds previously outstanding under the authorizing document through traditional methods of obtaining written bondholder consents. Under this exception, the amendment to the authorizing document would not become effective for all bondholders until all such existing bondholders had consented or their bonds had matured or been redeemed.

**Additional Aspects of Proposal.** The Revised Draft Rule G-11 Amendment would be effective prospectively following the effective date and would not affect consents provided by underwriters before the effective date.

The Revised Draft Rule G-11 Amendment would not affect other methods used by issuers to obtain consents from owners of newly issued bonds, such as consents received (in writing or constructively) by an issuer directly from bondholders upon initial purchase of the bonds. The Revised Draft Rule G-11 Amendment would, however, prohibit the dealer from providing any such constructive or deemed consent for or in lieu of bondholders. The second new exception under the Revised Draft Rule G-11 Amendment noted above, allowing an underwriter to deliver an omnibus consent based on actual written consents received from bondholders, would not be considered to be providing constructive or deemed consent for or in lieu of bondholders.[6]

The Revised Draft Rule G-11 Amendment would apply only in connection with consents that the authorizing documents state are to be provided by bond owners (including beneficial owners of bonds). Consents from dealers solely in their capacity

as an underwriter or a remarking agent required or permitted under authorizing documents, and not as an agent for or in lieu of bondholders, would not be subject to the Revised Draft Rule G-11 Amendment. For example, if an authorizing document provides that a dealer, in its role as remarketing agent, must consent to a change relating to the manner or timing for tendering bonds, the dealer serving as remarketing agent would be permitted to provide such consent. However, if the authorizing document also requires consent from bond owners to such change, the remarketing agent would not be permitted to provide consent on behalf of or in lieu of bondholders.

**REQUEST FOR COMMENT**

The MSRB requests comments on the proposed additional exceptions to the Revised Draft Rule G-11 Amendment, including whether such additional exceptions would result in an additional burden on issuers, and whether there are less burdensome and cost effective alternatives.

November 21, 2012

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**TEXT OF DRAFT RULE G-11 AMENDMENT** [7]

**Rule G-11: Primary Offering Practices**

(a) – (j) No change.

(k) *Prohibitions on Consents by Brokers, Dealers, and Municipal Securities Dealers.* No broker, dealer, or municipal securities dealer shall provide bond owner consent to amendments to authorizing documents for municipal securities, either in its capacity as an underwriter or remarketing agent, or as agent for or in lieu of bond owners. Notwithstanding the foregoing, a broker, dealer, or municipal securities dealer may provide bond owner consent to amendments to authorizing documents for municipal securities if:

> **(i) the indenture or bond authorizing document expressly allows an underwriter to provide bond owner consents and the offering document for the existing securities expressly disclosed that bond owner consents could be provided by underwriters of other securities issued under the indenture;**
>
> **(ii)** ~~(i)~~ such securities are owned by such broker, dealer, or municipal securities dealer other than in its capacity as underwriter or remarketing agent;
>
> **(iii)** ~~(ii)~~ all securities affected by such amendment are held by the broker, dealer, or municipal securities dealer, acting as remarketing agent, as a result of a mandatory tender of such securities; ~~or~~
>
> **(iv) the broker, dealer or municipal securities dealer provides consent solely as agent for and on behalf of bond owners delivering written consent to such amendments; or**
>
> **(v)** ~~(iii)~~ all bond owners of securities that would be affected by such amendments, other than the securities for which the broker, dealer or municipal securities dealer provides consent, have provided or will provide consent to such amendments prior to their taking effect.

For purposes of this section, the term “authorizing document” shall mean the trust

indenture, resolution, ordinance, or other document under which the securities are issued, and the term "bond owner consent" shall mean any consent specified in an authorizing document that may be or is required to be given by an owner of municipal securities issued pursuant to such authorizing document.

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[1] Comments are posted on the MSRB website without change. Personal identifying information such as name, address, telephone number or email address will not be edited from submissions. Therefore, commenters should submit only information that they wish to make available publicly.

[2] MSRB Notice 2012-36 (July 5, 2012).

[3] Comment letters received by the MSRB on Draft Rule G-17 Notice are available here.

[4] Comment letters received by the MSRB on Draft Rule G-11 Amendment are available here.

[5] In certain cases, underwriters are asked to provide an “omnibus” consent to an issuer, representing the aggregate par amount of written consents delivered by individual bondholders to the underwriter concerning such amendments.

[6] The MSRB expresses no opinion on the legal validity of any constructive or “deemed” consents received from bondholders under the terms of any particular authorizing document.

[7] Marked to show changes from the Draft Rule G-11 Amendment. Underlining indicates new language; strikethrough denotes deletions.

**Alphabetical List of Comment Letters on MSRB Notice 2012-58 (November 21, 2012)**

1. Municipal Electric Authority of Georgia: Letter from James E. Fuller, Senior Vice President and Chief Financial Officer, dated December 21, 2012

2. National Association of Independent Public Finance Advisors: Letter from Jeanine Rodgers Caruso, President, dated December 21, 2012

December 21, 2012

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, Virginia 22314

Re: Revised Draft Amendment to MSRB Rule G-11

Dear Mr. Smith:

I am the Senior Vice President, Chief Financial Officer of the Municipal Electric Authority of Georgia ("MEAG Power") and I appreciate this opportunity to comment further on the proposed amendment to Rule G-11 of the Municipal Securities Rulemaking Board (the "MSRB"). On August 13, 2012, I filed comments with you (the "Previous MEAG Power Comment Letter") to the MSRB's Notice 2012-36 (July 5, 2012). By this letter, I am submitting MEAG Power's comments to the MSRB's Notice 2012-58 (November 21, 2012), which proposes certain further changes to the draft amendment to Rule G-11.

As an initial matter, we would like to commend the staff of the MSRB for their thoughtful reconsideration of the proposed amendments to Rule G-11, particularly the addition of new clauses (k)(i) and (iv) thereto, each of which we think strikes an appropriate balance between the interests of existing bondholders and need for issuers to have a cost-effective and efficient method for effecting changes to their bond authorizing documents.

In its description of the existing exceptions under the Draft Rule G-11 Amendment (such term, and all other capitalized terms used herein without definition, having the respective meanings assigned thereto in Notice 2012-58), we note that Notice 2012-58 contains the following statement (emphasis added):

> The second existing exception, also unchanged from the Draft Rule G-11 Amendment, would allow a dealer, as a remarketing agent, to provide consent for securities that had been tendered to it as a result of a mandatory tender, provided that all securities affected by the consent had been tendered. ***Thus, if a bondholder elected to exercise a right to "hold" bonds subject to a mandatory tender in lieu of tendering, a dealer acting as the remarketing agent would be prohibited from providing consents to changes in the authorizing documents unless the remarketing agent had also received the specific written consent of such bondholder to such change.***

We note, however, that the text of clause (k)(iii) of the Revised Draft Rule G-11 Amendment provides that "all securities affected by such amendment are held by the broker, dealer, or

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municipal securities dealer, acting as remarketing agent, as a result of a mandatory tender of such securities", so we are not sure of the basis for the exception set forth in the highlighted sentence above. Accordingly, we ask that you reconsider clause (k)(iii) of the Revised Draft Rule G-11 Amendment, to add thereto an express statement of the exception set forth in the highlighted sentence above.

In the Previous MEAG Power Comment Letter, I noted that all of MEAG Power's bond resolutions (and, we believe, the overwhelming majority of bond authorizing documents used in the municipal securities market) generally permit amendments with the consent of the holders of a majority in principal amount of the bonds outstanding thereunder (or, in certain cases, of the holders of a super-majority of such bonds), so I requested that the language of the third existing exception set forth in the Draft Rule G-11 Amendment (which currently is set forth in clause (k)(v) of the Revised Draft Rule G-11 Amendment) be revised to permit underwriter consents to amendments in cases where consents also are obtained from the holders of the requisite percentage (as specified in the relevant bond authorizing document), rather than all, of the outstanding parity bonds. In addition, based upon MEAG Power's previous experience with the process of soliciting consents to amendments to a bond authorizing document from the holders of outstanding bonds as described in the Previous MEAG Power Comment Letter, we thought that it would be difficult in many cases for an issuer to complete a consent solicitation process with the holders of its outstanding bonds prior to the offering of a new issue of parity bonds under that bond authorizing document, so I requested that the effectiveness of an underwriter's consent to amendments, rather than the ability of the underwriter to execute such a consent, be conditioned upon the receipt of consents of the holders of the requisite percentage of the bonds outstanding immediately prior to the issuance with respect to which the underwriter is providing consent. Since those requests were not reflected in clause (k)(v) of the Revised Draft Rule G-11 Amendment, we ask that you reconsider including them now.

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If you have any questions regarding the foregoing, please do not hesitate to telephone me at (770) 563-0522.

Very truly yours,

James E. Fuller

James E. Fuller
Senior Vice President,
Chief Financial Officer

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December 21, 2012

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
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RE: MSRB Notice 2012-58

The National Association of Independent Public Finance Advisors ("NAIPFA") appreciates this opportunity to provide suggestions to the Municipal Securities Rulemaking Board (the "MSRB") in regard to MSRB Notice 2012-58 – Request for Comment on Exception Provisions of Draft Rule Amendment to Limit dealer Consents to Changes in Authorizing Documents for Municipal Securities (the "Notice").

NAIPFA supports the Notice's proposed additional exception provisions to the draft rule amendment limiting dealer consents to changes in authorizing documents for municipal securities. NAIPFA believes that these additional exceptions will assist in limiting the burden, both financially and administratively, that would be placed upon municipal issuers who otherwise would have to attempt to obtain bondholder consents themselves in situations requiring such consents to be obtained.

NAIPFA believes that these exceptions are productive developments that will limit the impact of the proposed amendment on municipal issuers. It is our hope that the MSRB will continue these efforts when reviewing comments submitted in connection with the prior notice (Notice 2012-36), and will revise that notice accordingly. Specifically, NAIPFA believes that the obligation to obtain consents should be placed upon the party to the transaction that recommends the bond document amendment(s), unless otherwise agreed to by the parties. It is our understanding that, generally, the individual who recommends that the issuer amend its bond documents will be the issuer's underwriter who is often the best positioned market participant to obtain such consents. Such a revision would therefore improve market efficiency and would limit the financial and administrative impact that may otherwise be felt by municipal issuers.

Sincerely,

Jeanine Rodgers Caruso

Jeanine Rodgers Caruso, CIPFA
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cc: The Honorable Elisse B. Walter, Chairman
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
The Honorable Daniel M. Gallagher, Commissioner
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Lynnette Kelly, Executive Director, Municipal Securities Rulemaking Board