



Remarks Of

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**Commentary on Customer Protection
Study Comments**

**Public Securities Association
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*** / The views expressed herein are those of Commissioner Roberts and do not necessarily represent those of the Commission, other Commissioners or the staff.**

**U.S. Securities and Exchange Commission
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I. Introduction

I appreciate the opportunity to participate in this Regional Issues and Answers Forum on Customer Suitability. I commend the Public Securities Association ("PSA") for holding such a forum. It strikes me as most timely since the Municipal Securities Rulemaking Board ("MSRB") is in the throes of a study, among other things, of its suitability rules. The MSRB deserves to be congratulated for conducting a customer protection study. I suspect that it would have been much easier not to undertake such a project.

The municipal securities market was an exciting and active one in 1992. The volume was recordbreaking, with a total of approximately \$275 billion of municipal securities issued.¹ However, 1993 may also prove to be an exciting and active year for the municipal market. Along those lines, I understand that a record high for January municipal volume was set last month.² Certainly the debt markets, long considered the stepchild of our capital formation system are now high profile. It is about time that the debt markets have acquired the visibility they deserve.

While 1992 was an excellent year for the municipal securities market, some nagging problems continue to exist. Reports continue to surface concerning frauds perpetrated on investors in the unrated bond area, usually involving health care facilities.³ To those that continue to state that no problems exist in the unrated area, I submit that the press apparently has no trouble finding such problems. Further, investors remain shaken by the large defaults engendered by the failures of Mutual Benefit Life, Executive Life, and Tucson Electric Power.⁴ The Richmond Unified School District of California certificates of participation ("COPs") default and the upcoming referendum on whether to terminate annual lease payments on a COPs issue in Brevard County, Florida, have called into question the credit quality of all COPs issues.⁵

In 1992, state and local governments flooded the financial markets with a tidal wave of early bond redemptions, and investors are still reeling from the "call" shock.⁶ The re-refunding of certain bonds that have already

been escrowed to maturity have raised questions both at the Commission and at the Department of the Treasury.⁷

Treasury is also apparently questioning the tax-exempt status of detachable call option rights.⁸ These detachable call option rights raise separate security issues as well. The call problem will continue and may even become more magnified in the future, since I understand that the call phenomenon will continue through 1995.

These problems, although minor in scope for the most part, peck away at the municipal securities market and undermine what is otherwise a generally trouble-free market, largely unregulated and known for its integrity. At the least, the existence of these problems should lead all municipal securities market participants to redouble efforts to improve the integrity of that market. Investors have historically viewed municipal bonds as "safe" investments, and I believe that we all wish for that view to continue.

Enthusiastic investor demand easily absorbed the 1992 record issue volume. This demand has carried forward if not

increased thus far in 1993.⁹ It has been reported that individuals purchased, directly or through their mutual funds, about 85% of the 1992 volume.¹⁰ It is clear that the municipal securities market, as a result of the Tax Reform Act of 1986, now has a much greater retail orientation.¹¹ This trend is expected to continue.¹² And if marginal tax rates increase as proposed, municipal securities will be sought after by entirely new groups of investors; and individual investor demand will increase even more. This greater retail orientation increases the necessity for municipal securities market participants to preserve and even to increase the integrity of that market. This is true both because of the potential for increasing participation in the market by individuals and because, in the Commission's experience, explosive volume in any market often leads to increased fraud and to unsuitable investment recommendations.

I am of the opinion that the MSRB's customer protection study represents an opportunity to enhance the integrity of

the municipal securities market, and the PSA should capitalize on this opportunity. This study was triggered as a result of a number of suggestions made by myself and others for the need to adjust the municipal securities customer protection rules in order to eliminate the reoccurrence of certain suitability abuses which have taken place in this market.¹³ While the comments that were filed with the MSRB on the study were of high quality, I was disappointed by the small number transmitted. However, compared to other MSRB comment requests, I understand that the response number was relatively high. It is my intention today to provide commentary on some of the comments submitted and, in particular, to focus on the comment letter submitted by the PSA.

II. PSA Comment Letter

A. Increased Enforcement

The PSA submitted an excellent comment letter, although it should surprise no one that I do not agree with that letter completely.¹⁴ I do agree with the point made that

enforcement of existing rules is probably more important than strengthening existing rules. A similar theme was expressed by the National Association of Bond Lawyers ("NABL"), the M.B. Vick & Company, Bernardi Securities, Inc., and Griffin, Kubik, Stephens & Thompson, Inc. in their comment letters.¹⁵

One of the problems in the municipal securities enforcement area is the existence of fragmented jurisdictional boundaries. It may be helpful to review the fragmented jurisdiction that currently exists. The MSRB promulgates the rules which apply to all municipal securities dealers. The National Association of Securities Dealers ("NASD") is vested with the authority to examine non-bank firms for compliance with the MSRB's rules and to sanction these firms for non-compliance. Bank municipal securities dealers are examined and sanctioned by their appropriate bank regulatory authority, including the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation. The Commission can adopt rules applicable to bank and non-bank municipal securities

dealers and can enforce Commission and MSRB rules, but the Commission historically defers to the MSRB for rulemaking and to the NASD and bank regulators for examinations and for enforcement.¹⁶

Thus, the MSRB ordinarily issues the regulations which are, in turn, enforced by the NASD and the bank regulators. The MSRB can refer potential rule violators to the NASD and bank regulators for enforcement consideration. The Commission is supposed to oversee both the MSRB and the NASD. I believe that it is clear from this review that the municipal area is a regulatory jurisdictional bramble patch -- a nightmare of sorts. I do not foresee any municipal jurisdictional consolidation occurring in the near future and look for the status quo to prevail.

Given the jurisdictional puzzle that exists, I have requested Bill Heyman, the Director of the Commission's Division of Market Regulation, and Bill McLucas, the Director of the Commission's Division of Enforcement, to review the present collective examination and enforcement efforts of the

Commission and the NASD to determine if they can be improved. It is too early to tell what, if any, improvements will result. I suspect that, at a minimum, the coordination and communication among the Commission, the MSRB, and the NASD could be enhanced. Possibly this is what the PSA and others intended by their comment letters. I know that all three organizations (the Commission, the MSRB, and the NASD) are committed to performing the best job possible under the circumstances.

B. Secondary Market Disclosure

I also agree with the point expressed in PSA's comment letter that one of the more serious problems in the area of customer protection for the municipal securities market is secondary market disclosure. A similar conclusion was reached by Southwest Securities and the National Federation of Municipal Analysts ("NFMA") in their comment letters.¹⁷ Fortunately, as I have expressed recently, some progress has been made toward improving secondary market disclosure in the municipal area.¹⁸ I encourage all municipal securities

market participants to continue to press forward with the voluntary secondary market disclosure projects and programs currently underway. I suspect that the Commission and the Congress will continue to follow the progress of these initiatives with interest.

C. MSRB Rule G-19

I do not agree with the PSA that the current customer protection regulatory scheme embodied in MSRB Rules G-17, G-19, and G-30 already require the highest professional standards in dealers' relationships with customers, as was expressed in the PSA comment letter. In fact, it is crystal clear, at least to me, that Rule G-19 does not. I will explain.

The rules of the NASD generally require that NASD members recommending securities transactions to their customers in each case must have reasonable grounds to believe that the recommendation is suitable for the customer based on information provided by the customer concerning the customer's other securities holdings, financial situation, and needs.¹⁹ Commission decisions have held that a broker-

dealer must determine the suitability of its recommendations based on what has been disclosed by the customer, and, in the absence of such disclosure, the broker-dealer cannot safely assume that a recommendation is suitable.²⁰ In addition, disciplinary action under the NASD rules has been sustained over an objection that the customer failed to disclose complete information.²¹ However, as I have outlined earlier, the MSRB's rules, not the NASD's rules, apply to most municipal securities broker-dealers.

In contrast to the NASD's rules, MSRB Rule G-19 requires municipal firms recommending securities to "inquire" as to the customer's financial background, tax status, investment objectives, and similar information. Municipal firms must either: (1) have reasonable grounds to believe that the recommendation is suitable in light of information that it knows, or (2) have no reasonable grounds to believe that the recommendation is unsuitable if all of such information is not furnished or known.²² Obviously, I have a problem with the second part of that sentence.

I agree that the NASD's general suitability rules require the highest professional standards in dealers relationships with customers. I do not agree that MSRB Rule G-19 does too. If Rule G-19 were to be amended to conform generally to the NASD's suitability requirements, then I submit that the PSA's statement would be correct. That could be done easily and quickly by deleting the "no reasonable grounds to believe . . ." phrase currently contained in Rule G-19(c)(ii)(B). This correction could be accomplished either by Commission or by MSRB rulemaking. As I indicated earlier, the Commission historically has deferred to the MSRB in developing rules for municipal securities dealers. I prefer to maintain that historical relationship, although the Commission ultimately is responsible for ensuring the protection of municipal securities investors through any means necessary.

I am unaware of any logical justification supporting the presence of the "no reasonable grounds to believe . . ." clause now contained in MSRB Rule G-19. It is interesting to

note that Merrill Lynch in its comment letter to the MSRB stated the following:

We believe it would be advisable to require broker-dealers to obtain appropriate information bearing on suitability prior to a recommendation, and would therefore support the deletion from Rule G-19 of subparagraph (c)(ii)(B).

As the Commission noted in its letter, the requirement that a broker-dealer have reasonable grounds to believe that a recommendation is suitable is currently imposed by Section 2 of Article III of the Rules of Fair Practice of the [NASD]. A similar requirement is also imposed by Rule 405 of the New York Stock Exchange, Inc.

The amendment of Rule G-19 to require that a broker-dealer have reasonable grounds to believe that a recommendation is suitable would conform the rule to requirements currently imposed on broker-dealers outside of the municipal securities market.

. . .

We believe that Rule G-17, Rule G-19 (amended as suggested above), and Rule G-30 together provide appropriate standards for fair dealing and suitable trading in the municipal securities market.²³

I could not agree more. At a minimum, I hope that the MSRB, as a result of its customer protection study, amends Rule G-19 to "conform the rule to requirements currently imposed on broker-dealers outside of the municipal securities market."²⁴ In this manner, the MSRB's suitability rule would then require the highest professional standards in dealers' relationships with customers. I understand that as a part of its study, the MSRB has recently determined to revise Rule G-19 to clarify a dealer's responsibility to ensure that suitable broker-dealer recommendations are being made. I applaud the MSRB for this determination and look forward to the publication of a proposed revised G-19 this spring.

III. Other Comment Letters

In addition to strengthening MSRB Rule G-19 in the manner described above, there have been a number of other suggestions as to how to improve customer protection safeguards in the municipal securities market. I would be disappointed if strengthening Rule G-19 as previously described is the only action resulting from the MSRB's customer protection study. While some of these suggestions are rather draconian in nature, other less burdensome ones are worth considering in my judgment. I wish to comment briefly on some of those suggestions.

In the past, I have advocated that the Commission, or the MSRB, by amendment to Rule G-19, should consider imposing an affirmative obligation to obtain specified information prior to a recommended transaction and to require that broker-dealers record in writing their determination that transactions in municipal securities are suitable prior to each trade.²⁵ This requirement would focus

the attention of the salesperson on suitability concerns at the time of the trade and would facilitate compliance reviews.

I recognize that the imposition of a general written suitability requirement on municipal securities broker-dealers may be more burdensome than necessary. I further suggested, in an attempt to lighten the burden imposed, that application of such a municipal securities suitability rule be linked to the failure to obtain a rating by a nationally recognized statistical rating organization ("NRSRO"). Of course, I am sensitive to the difficulties in linking regulatory requirements to such ratings in the absence of clearly defined criteria for qualification as a NRSRO.

In addition, it is my understanding that certain small, regional issuers that are well-known locally may not apply for a rating because of the cost involved. I acknowledge that it would be difficult to exclude such securities by definition. Thus, I further acknowledge that even a written suitability requirement limited to unrated municipal securities may be unnecessarily burdensome.

There was a great deal of comment, including that of the PSA, indicating that any regulation based upon ratings would unnecessarily tar the quality of all unrated issues.²⁶ I know that all unrated municipal bonds are not "junk," and I am sympathetic to the notion that small communities should not be denied effective access to capital.

Having stated the foregoing, I believe that the burden is on those who object to a written suitability determination requirement, predicated upon ratings, to develop an appropriate, less intrusive regulatory alternative. In the past, I have suggested, as such an alternative, that broker-dealers could be expressly required to inform customers of special risks related to an unrated security prior to or at the time of the trade.²⁷ This approach might provide information to allow the customer to protect himself or herself, rather than relying only on broker-dealer suitability determinations.

I noticed along these lines, in its comment letter, NABL indicated, if necessary, that it "would support a rule [which]

required confirmations to contain the following statement for unrated securities:

The security you have purchased has not, to our knowledge, received a rating from any national credit rating agency. Absence of a rating may involve special circumstances of which the purchaser should be aware."²⁸

Some firms apparently already include such disclosure as a matter of course.²⁹ This suggestion strikes me as a sound proposal. I understand that the MSRB may consider changes to its confirmation rules as the next step in its customer protection study.

Similarly, Chemical Securities Inc. ("CSI"), in its comment letter, was of the opinion that the disclosure requirements for both conduit and unrated municipal bonds were inadequate and suggested that those requirements be tightened. "With respect to conduit or unrated bonds, CSI believes that the present disclosure is inadequate for the average retail customer. The Official Statement provides

