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January 30, 2012

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

RE: File Number SR-MSRB-2011-09

Dear Ms. Murphy:

The Bond Dealers of America (the "BDA") is pleased to offer comments to the Securities and Exchange Commission (the "Commission") on File Number SR-MSRB-2011-09 regarding a proposed interpretive notice concerning the application of MSRB Rule G-17 (Conduct of Municipal Securities and Municipal Advisory Activities) to underwriters of municipal securities (the "Notice"). The BDA is the only Washington DC-based organization that represents securities dealers and banks primarily active in the U.S. fixed income markets. The BDA's members include dealers that also are some of the nation's leading municipal financial advisors.

The BDA has provided comments on the Notice earlier and we reiterate those comments, particularly those of December 1, 2011. I have attached those comments for your reference.

There is one comment, however, that we want to emphasize in the strongest terms. We believe that the Commission should not move forward with this Notice until it is prepared to announce contemporaneously a similar notice for municipal advisors that implements their duties.

Over two years ago, in October 2009, Commissioner Elisse Walter gave a speech where she said she found the conduct of some municipal advisors "alarming" and that they were engaging in "pay to play" practices, that there were undisclosed conflicts of interest, that advice was rendered by advisors without adequate training or qualifications, and there was a failure to place the duty of loyalty to their clients ahead of their own interests. Unregulated, independent municipal advisors have been in the middle of some of the well-publicized recent problems in municipal finance, such as the bankruptcy of Jefferson County, Alabama, the problems of Harrisburg, Pennsylvania and bid rigging and wire fraud convictions of former employees of CDR Financial Products.

Commissioner Walter asked for the authority to regulate these independent municipal advisors and in Dodd-Frank the Commission got the authority.

Now, a year and a half later, there has been no progress resolving the problems that alarmed Commissioner Walter. The first step is to put out a definition of municipal advisor focused on those who advise on the issuance of municipal bonds and on the investment of bond proceeds. Until that happens, the Commission can't regulate independent municipal advisors to stop pay to play, require conflicts to be disclosed, or impose adequate professional standards. The obligations of the independent municipal advisors should be the same as the obligations of broker-dealer municipal advisors. That should be the focus of the Commission's actions and this Notice should be delayed until that is accomplished and then this Notice should be coordinated with the obligations of municipal advisors.

A great many issuers use both municipal advisors and underwriters. The smooth functioning of the market and the protection of issuers can't be accomplished by regulating one group of participants and not the other. In fact, given that underwriters are already subject to regulatory oversight, the step that would provide greater protection to issuers is to bring the unregulated municipal advisors under a regulatory regime. Municipal advisors and underwriters interact with each other and they interact with issuers. Issuers are in an uncertain position if one is regulated but not the other.

In fact, we believe that the current Notice would actually mislead issuers and would not be dealing fairly with them because the notice requires a reference to the statutorily-imposed fiduciary duty of municipal advisors.

It is not enough to simply assert that municipal advisors have a fiduciary duty. Although Dodd-Frank requires municipal advisors to be fiduciaries, as noted above there are no requirements to disclose conflicts of interest or guidance to delineate what those conflicts might be. For instance, a municipal advisor may have, or may arrange for, a number of other services it offers to its issuer clients such as investment advice, swap advisory services, arbitrage rebate services and recruiting services for municipal professionals, which it may or may not disclose and which have the potential to influence its advice. A municipal advisor may also be compensated on a contingent basis, which the Notice defines as a conflict when engaged in by underwriters. An independent municipal advisor may also contribute to political campaigns without limitation.

The statement that municipal advisors have a fiduciary duty would naturally lead an issuer to conclude that municipal advisors do not engage in whatever that particular issuer may believe is a conflict (as well as actions that the Commission has determined are conflicts for underwriters) when in fact municipal advisors may engage such conflicts and there is no rule that would oblige the independent advisor to disclose them. One of the principal reasons for regulations is to clarify issues that otherwise might be interpreted differently by different parties. The Commission should define what behavior by a municipal advisor creates a conflict (and is inconsistent with a fiduciary responsibility) and then require that municipal advisors disclose that they don't have any such conflicts.

Further, the Notice would require underwriters to evaluate the expertise of issuer personnel and make disclosures directly to the issuer and get a written response from the issuer. Among the disclosures that would be required are disclosures about the risks of specific transactions that might be recommended. This requirement can only work if underwriters are able to judge directly the sophistication of issuer personnel and communicate directly with them. Increasing the flow of information among the participants in an issuance should be a goal.

However, the experience of many of our members is that when a financial advisor is involved, direct communications with the issuer can become difficult as the advisor seeks to "protect" the relationship they have with the issuer. The underwriter could not, in such an instance, fulfill its obligations under the Notice. Therefore, in order to assure that the underwriter is able to fulfill its obligation under the Notice, there need to be a parallel and contemporaneous requirement that financial advisors not hinder the underwriter's access to the issuer.

The "alarming" behavior the Commission is and has been aware of was identified by Commissioner Walter and the Congress as being the priority. We strongly believe that the Commission should not expend staff time on this Notice or other notices in the municipal area until it has finalized the definition of municipal advisor. That is the single most important action currently in front of the Commission that it could take to improve the municipal markets and would do more to protect issuers than the fine-tuning of disclosures to issuers from already-regulated underwriters.

Sincerely,

Michael Nicholas
Chief Executive Officer

Bond Dealers of America

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December 1, 2011

VIA ELECTRONIC MAIL

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

Re**:** File Number SR-MSRB-2011-09

Dear Ms. Murphy:

The Bond Dealers of America (the "BDA") is pleased to offer comments to the Securities and Exchange Commission (the "Commission") with respect to File Number SR-MSRB-2011-09 regarding the proposed interpretive notice to Municipal Securities Rulemaking Board ("MSRB") Rule G-17: concerning the application of Rule G-17 to underwriters of municipal securities (the "Proposed Notice"). The BDA is the only Washington, DC-based organization that represents securities dealers and banks primarily active in the U.S. fixed income markets. The BDA's members include dealers that also are some of the nation's leading municipal financial advisors.

BDA believes that all participants in the municipal market benefit from clearly stated roles and expectations. Moreover, BDA believes that fair dealing is not only a requirement of MSRB rules, but also an indispensable element of successful business practice.

In many ways, therefore, BDA believes that the Proposed Notice restates the obvious. We do, however, have some concerns with some of the specifics of the disclosures required.

Let me first say that the BDA welcomes the limitation of the Proposed Notice to negotiated offerings and also welcomes a number of the changes reflected in the amendment, such as recognizing that disclosures should be based on the reasonable belief of underwriters and that amounts of third party payments need not be disclosed.

BDA believes that the disclosure proposed in item (iii) under "Disclosures Concerning the Underwriter's Role" that *"unlike a municipal advisor"* (emphasis added) an underwriter does not have a fiduciary duty misplaces the responsibility for defining roles. It is not the role of an underwriter to define or characterize the obligations of other parties, or to contrast them with its own obligations. The other parties are entirely capable, and it is more appropriate, for them to do so on their own. It is appropriate for an underwriter to disclose its responsibilities and obligations, but not those of others. We urge that the requirement for an underwriter to compare and contrast its obligations with those of other participants be dropped.

We expect that when the SEC and the MSRB finally get around to writing requirements for municipal advisors, that one of those will be that municipal advisors will be required to provide analysis of potential conflicts and of the risks of various financing structures.

The disclosure proposed under "Disclosures Concerning the Underwriter's Role," item (iv), also would require underwriters to say that they "must balance" a fair and reasonable price for issuers with a fair and reasonable price for investors. A better and more accurate statement would be that the underwriter has a duty to obtain a fair and reasonable price for both investors and issuers. The way the disclosure is phrased in the Proposed Notice implies an opposition between the underwriter's obligation to issuers and to investors, as if there is no fair and reasonable price for both issuers and investors.

The BDA also objects to the characterization of contingent fee arrangements as necessarily resulting in a conflict of interest with issuers. The Proposed Notice would require an underwriter to "disclose that compensation that is contingent on the closing of a transaction or the size of a transaction presents a conflict of interest…". Such an arrangement may or may not present a conflict, as the Proposed Notice itself recognizes when it goes on to say that a contingent arrangement "*may* cause the underwriter to recommend a transaction that it is unnecessary or to recommend that the size of the transaction be larger than is necessary." (emphasis added) Any disclosure on contingent fees should state that they *may* present a conflict of interest or that they *may have the potential* to present a conflict. While there may be a potential conflict, in fact, decisions on the size of an issue are rarely under the control of an underwriter. If an issuer wants to build a project, the cost of the project defines the size of the issue. In many cases the underwriter tries to reduce the size of an issue to demonstrate good service to a client.

BDA also believes that it is appropriate for syndicate managers to make disclosures on behalf of the syndicate with more particularized disclosures being made by other underwriters as necessary. However, there are frequently underwriters who do not have a role in the development or implementation of the financing structure or other aspects of the issue. We believe that disclosures should not be required of such firms.

BDA agrees that an underwriter should not recommend that an issuer not retain a municipal advisor. However, we continue to be concerned that issuers remain exposed to municipal advisors who are not subject to professional standards, continuing education, licensing or other requirements or a prohibition against making political contributions.

There are several problems with the section on the timing and manner of disclosures. First, the disclosure must be made to an official that the underwriter reasonably believes *"has"* the authority to bind the issuer by contract. At the time the disclosures are required to be made, there may be no such official with that authority because that authority may not be conferred on an official until a later time by a governing board. We believe that the disclosures should be made to an official that the underwriter reasonably believes *"has or will have"* the requisite authority.

The Proposed Notice repeats the language in the guidance that accompanies the new Rule G-23, that disclosures about the arm's length nature of the relationship must be made "at the earliest stages of the underwriter's relationship with the issuer with respect to an issue" followed by two examples. More than any other aspect of the new Rule G-23, this language has proved to be confusing. We believe that the Proposed Notice (and guidance under Rule G-23) should provide a clear and unambiguous statement about when these disclosures are required. BDA believes that the Proposed Notice (and guidance under Rule G-23) should state that the disclosure must be made "in a response to a request for proposals or in promotional materials provided to an issuer" rather than the uncertain "at the earliest stages" language. The use of the plural "stages" rather than the singular "stage" highlights the ambiguous and uncertain nature of the regulatory requirement.

We also note that the section on timing and manner of disclosures refers to the arm's length disclosure being made at one point in time (if the plural "stages" can be thought of as a single point in time) and disclosures concerning the underwriter's role and compensation when the underwriter is engaged to perform underwriting services. The Proposed Notice then goes on to say that "[o]ther conflicts disclosures must be made at the same time...". We assume that by "same time", the Proposed Notice refers to the time at which disclosures concerning the underwriter's role and compensation are made, but clarification of that point would be helpful.

Under the section on Acknowledgement, if no written acknowledgment is obtained and the official agrees to proceed, the underwriter would be required to document "*with specificity why* it was unable to obtain such written acknowledgement." (emphasis added) Except in rare cases, documenting with specificity (or even without specificity) the motivations of an official who does not respond with a written acknowledgement will be impossible. The underwriter should only be required to document facts - that the disclosures were made and whether an acknowledgment was received or not. The decision of the issuer to go ahead after the disclosures have been made should create a presumption that the issuer has consented.

BDA agrees that profit sharing arrangements with investors should be disclosed. We are, however, concerned that the wording in the notice might be read to cover legitimate trading, such as when an underwriter sells a bond, the bond increases in value (perhaps over a short period of time), the purchaser offers it for sale and the broker-dealer that underwrote the bond purchases it. This operation of the markets clearly should not be considered a conflict that must be disclosed. There is no "arrangement" in this situation. Concerns over whether a situation is a conflict that must be disclosed (or prohibited under Rule G-25(c)) may cause dealers to refrain from bidding, thus harming investors and reducing liquidity. The Proposed Notice should make clear that these situations are not covered.

In the section on retail order periods, an underwriter must not accept an order "that is framed as a qualifying retail order but in fact represents an order that does not meet the qualification requirements to be treated as a retail order (*e.g.*, an order by a retail dealer without "going away" orders from retail customers, when such orders are not within the issuer's definition of "retail")." Earlier in the section on retail order periods, the standard applied is that an underwriter may not "knowingly" accept an order that is framed as a retail order when it is not. The Proposed Notice should not contain two different standards for essentially the same situation. The standard should be that the underwriter not knowingly accept orders that do not meet the requirements of the retail order period. The underwriter cannot be held responsible for things it does not know, including whether a retail dealer does or does not in fact have going away orders.

Thank you for the opportunity to comment on the Proposed Notice.

Sincerely,

Michael Nicholas
CEO

Bond Dealers of America

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Washington, DC 20036

September 30, 2010

VIA ELECTRONIC MAIL

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F. Street, NE
Washington, DC 20549-1090

RE: File Number SR-MSRB-2011-09
Rule G-17: Conduct of Municipal Securities and Municipal Advisory Activities, to Underwriters of Municipal Securities

Dear Ms. Murphy:

The Bond Dealers of America (the "BDA") is pleased to offer comments to the Securities and Exchange Commission (the "Commission") with respect to File Number SR-MSRB-2011-09 regarding the proposed interpretive guidance to Municipal Securities Rulemaking Board ("MSRB") Rule G-17: Conduct of Municipal Securities and Municipal Advisory Activities, to Underwriters of Municipal Securities (the "Proposed Guidance"). The BDA is a Washington, DC-based organization that represents securities dealers and banks primarily active in the U.S. fixed income markets. The BDA's members include dealers that also are some of the nation's leading municipal financial advisors.

The Proposed Guidance submitted by the MSRB is significantly improved over the version originally proposed. However, the BDA believes that the Proposed Guidance can be improved further.

A regulatory requirement for disclosure, especially for routine transactions, should be imposed only if the underwriter has *reason to believe* that the issuer does not have the knowledge or experience available to it to understand the transaction. As the Commission and the MSRB have made plain in the context of MSRB Rule G-23, they view the underwriter and the issuer to be on opposite sides of the table in these transactions. The SEC and the MSRB should not confuse the matter, and the parties, by imposing fiduciary-like duties on underwriters through G-17 and any disclosure requirements must be narrowly drawn to avoid conceptual and practical inconsistencies that would only confuse the parties as to their roles and responsibilities.

Under the Proposed Guidance when issuer personnel lack knowledge or experience even with routine structures, the underwriter must provide disclosures on the material aspects of such structures. However, an underwriter cannot be certain of the level of expertise of all issuer personnel. Disclosures by the underwriter, especially regarding the structures of routine transactions, should be required only when the underwriter has *reason to believe* that the issuer personnel lack the knowledge or experience. In other words, the underwriter should not be required to guess at the issuer personnel's absolute level of knowledge or experience, but disclosures should only be required of the underwriter when the underwriter has reason to believe that, for instance, the issuer personnel have not before been involved in such transactions.

The guidance uses two terms "issuer personnel responsible for the issuance of municipal securities" and "an official of the issuer whom the underwriter reasonably believes has the authority to bind the issuer by contract with the underwriter." These are not the same. The Proposed Guidance should clarify that these regulatory requirements are imposed on the underwriter only if the underwriter has reason to believe that issuer personnel do not have the knowledge and experience, regardless of whether the particular official that the underwriter reasonably believes to have the legal authority to contractually bind the issuer can be reasonably thought to have the knowledge and experience. Similarly, if the issuer has engaged a financial advisor, the underwriter disclosures should not be a regulatory requirement.

BDA also believes that this proposal is premature given the status of ongoing rulemakings by the Commodity Future Trading Commission ("CFTC") and Securities Exchange Commission ("SEC") regarding swaps and swap advisors. The Proposed Guidance would require certain disclosures for complex transactions, which include swaps. The SEC and the CFTC are in the midst of preparing regulations for swap advisors to special entities, which include municipalities. There is therefore, considerable overlap between the MSRB proposed requirements and the subject of the SEC and CFTC rulemakings. Although the MSRB maintains this proposal will be consistent with the above rulemakings once they come out, they also suggest they might have to adjust accordingly, should there be any discrepancies. We believe that, at a minimum, this portion of the Proposed Guidance should not move forward until the SEC and the CFTC have completed their rulemaking in this area.

Thank you for the opportunity to present our views on the Proposed Guidance. Please do not hesitate to call if you have any questions or would like to discuss further any of these comments.

Sincerely,

Mike Nicholas
Chief Executive Officer