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Invested in America

September 30, 2011

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File Number SR-MSRB-2011-09 - MSRB's Proposed Interpretive Notice Applying MSRB Rule G-17 to Underwriters of Municipal Securities

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("**SIFMA**")[1] appreciates the opportunity to provide the Securities and Exchange Commission (the "**Commission**" or the "**SEC**") with comments on the Municipal Securities Rulemaking Board's ("**MSRB**") proposed rule change consisting of a proposed interpretive notice applying MSRB Rule G-17 to underwriters of municipal securities (the "**Proposed Interpretive Notice**").

SIFMA strongly supports the principle of fair dealing embodied in MSRB Rule G-17. The fair dealing standard is critical to ensuring that municipal underwritings are conducted with commercial honor and according to high ethical principles, and has served to protect issuers, investors and the municipal securities market. However, SIFMA has concerns about the timing of the Proposed Interpretive Notice, as well as the prescriptive manner in which it would impose on underwriters open-ended, duplicative and potentially conflicting obligations. Moreover, the written risk disclosure requirements in the Proposed Interpretive Notice do not take into account the proper allocation of responsibilities between

[1] 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).

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underwriters and financial advisors. The MSRB has made clear in its rules that expert financial advisors must have the requisite skills to carry out their roles and heightened obligations to municipal issuers. Underwriters should not be required to provide comprehensive written risk disclosures to municipal issuers who have retained a financial advisor in relation to a transaction.

With regard to timing and procedural considerations, SIFMA believes that noticing the Proposed Interpretive Notice for comment is premature given that the Commission has not yet adopted a final definition of municipal advisor[2] and given the recent withdrawal by the MSRB of its municipal advisor rule proposals.[3] To the extent that the Proposed Interpretive Notice may be applicable to the underwriting activities of municipal advisors, it must be evaluated at the same time as these other rules. Specifically, some underwriters may, and some may not, be municipal advisors, depending upon the Commission's final rules. In addition, given the withdrawal of the MRSB's rule proposals, the requirements that will be applicable to underwriters that are also municipal advisors are unknown and unknowable. To the extent that underwriters may ultimately become subject to duplicative or inconsistent (but as yet unknown) obligations relating to the same or similar activities, it is extremely difficult for them to comment on the Proposed Interpretive Notice. In some cases, it is not possible to know if a firm even has an interest in commenting. Therefore, SIFMA believes that the rule filing for the Proposed Interpretive Notice should be withdrawn and reproposed once the Commission's municipal advisor rules are finalized and the MSRB's municipal advisor rules are refiled with the Commission. It would be unreasonable and unfair for the Proposed Interpretive Notice to go into effect before definitional municipal advisor rules have been adopted.

In the event the Commission does not request the MSRB to withdraw this proposal, we would strongly urge the Commission to disapprove it. Certain aspects of the Proposed Interpretive Notice are seriously flawed. Among our key concerns are:

- The Proposed Interpretive Notice transforms the duty of fair dealing into a fiduciary-type obligation, imposing affirmative obligations that are burdensome, expensive and unnecessary. Among other things, written disclosure of all material risks and characteristics of recommended financings is particularly

[2] Exchange Act Release No. 63576 (Dec. 20, 2010) (the "**Pending SEC Proposal**").

[3] MSRB Notice 2011-51 (Sept. 12, 2011).

unjustified where the municipal issuer has retained a financial advisor.

- The Proposed Interpretive Notice imposes duplicative requirements to which underwriters currently are, or will soon become, subject. For example, subjecting underwriters to disclosure obligations when recommending a derivative instrument risks duplicating—and potentially conflicting with — the obligations underwriters will have under business conduct standards to be adopted by the SEC and the Commodity Futures Trading Commission ("**CFTC**").

- Overall, the Proposed Interpretive Notice would subject underwriters to significant additional burdens and potential incremental liabilities that are not commensurate with the benefits that would accrue to issuers. We urge the Commission to consider carefully the costs and benefits of this proposal, none of which were adequately analyzed in the MSRB's filing.

We discuss each of these points in greater detail below.

I. Underwriters That May Also Be Municipal Advisors Will Not Be Able To Properly Evaluate This Notice Until Related Municipal Advisor Rules and Interpretations Have Been Finalized

On September 12, 2011, the MSRB withdrew pending municipal advisor rule proposals, including SR-MSRB-2011-14 (Proposed Rule G-36, on Fiduciary Duty of Municipal Advisors, and a Proposed Interpretive Notice Concerning the Application of Proposed Rule G-36 to Municipal Advisors) and SR-MSRB-2011-15 (Proposed Interpretive Notice Concerning the Application of Rule G-17, on Conduct of Municipal Securities and Municipal Advisory Activities, to Municipal Advisors), until such time as the Commission adopts a final municipal advisor rule.[4]

Given these uncertainties, noticing the Proposed Interpretive Notice for comment at this time is premature. Many underwriters do not know yet whether they will be municipal advisors and how the obligations imposed under the Proposed Interpretive Notice will dovetail with their obligations under the MSRB's municipal advisor rules. Among other concerns, it has not yet been

[4] MSRB Notice 2011-51 (Sept. 12, 2011).

determined what constitutes "advice" in various contexts, which communications and activities incidental to underwriting will be covered by the underwriting exclusion from the definition of municipal advisor, and what specific duties will apply to advice and other communications in various contexts. It is not possible to submit comprehensive and fully informed comments under these circumstances. Moreover, some stakeholders may be disinclined to comment at all on the proposal given the uncertainties. Under these circumstances, we believe that it would be fair and reasonable for the Commission to request the MSRB to withdraw the Proposed Interpretive Notice until related definitions and interpretations of the Commission and the MSRB have been finalized. In the event that the Proposed Interpretive Notice is not withdrawn, we respectfully request the Commission to disapprove the proposal, for the reasons discussed below.

II. MSRB Rule G-17 Should Not Be Interpreted to Impose Fiduciary Obligations on Underwriters

Section 975 ("**Section 975**") of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "**Dodd-Frank Act**") creates a new category of municipal advisors that are subject to fiduciary duty when rendering advice to municipal entities under certain circumstances. By contrast, absent special circumstances, broker-dealers acting as underwriters are not subject to a fiduciary duty when they act as underwriters. Under Rule G-17, an underwriter of municipal securities is required to "deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice." In the Proposed Interpretive Notice, the MSRB acknowledges that underwriters of municipal securities are "arm's length counterparties to issuers of municipal securities" and purports to expound upon the duties implied by "simple principles of fair dealing."[5] In fact, however, the Proposed Interpretive Notice goes far beyond requiring underwriters to deal fairly and imposes on underwriters of municipal securities a heightened standard of duty more akin to a type of fiduciary duty. Creating a de facto fiduciary standard for underwriters would not only potentially subject underwriters to significant regulatory claims, but also potentially establish standards of behavior that might be inappropriately referenced in private civil actions under state law.

[5] See 76 Fed. Reg. 55989, at 55993, first column.

A. The Proposed Written Risk Disclosure Requirements Are Overbroad and Vague

The Proposed Interpretive Notice would impose certain disclosure obligations on underwriters where "issuer personnel" lack sufficient knowledge and experience. For example, even in the case of typical fixed rate offerings, if the "issuer personnel . . . lack knowledge or experience with such structures, the underwriter must provide disclosures on the material aspects of such structures." The Proposed Interpretive Notice would further require that, where an underwriter of a negotiated issue recommends a "complex" financing – one that is structured in a "unique, atypical or otherwise complex manner" – an underwriter must disclose, in a particularized fashion, "all material risks and characteristics" of the complex financing. While the disclosure must apparently be made regardless of the sophistication of the issuer, the level of disclosure may vary according to the issuer's knowledge and experience. The disclosure must be made in writing to an official of the issuer whom the underwriter reasonably believes has the authority to bind the issuer. If the underwriter does not reasonably believe that the official is capable of independently evaluating the disclosures, the underwriter must make additional efforts to inform the official or its employees or agent.

In order to comply with these disclosure requirements, (i) in the case of "plain vanilla" financings, the underwriter must make a determination whether "issuer personnel" have a certain level of knowledge and experience with the structure proposed, (ii) in the case of "complex" financings, the underwriter must make a determination of the issuer's knowledge and experience with the proposed structure or similar structures, and (iii) in the case of all financings, the underwriter must determine the capacity of the issuer official to whom a written disclosure is delivered to evaluate the disclosures.

As a threshold matter, while SIFMA believes that underwriters who follow best practices in their dealings with municipal issuers already engage in an open dialogue with the issuers concerning the risks of the transactions being underwritten, the written risk disclosure requirements in the Proposed Interpretive Notice are too broad and vague, and do not properly take into account the role of the issuer's financial advisor, if there is one. SIFMA believes that, at a minimum, where the municipal entity has engaged a financial advisor or has internal analytical resources with the requisite expertise (such as internal financial professionals with securities issuance experience), it should be the role of those professionals, not the underwriter, to provide the municipal entity with an analysis of the material risks and characteristics of the transaction. This approach would ensure that the roles of underwriter and advisor remain appropriately separate and distinguishable and that underwriters are not burdened with duties that are already being performed by professionals acting in a financial advisory capacity.

If the municipal entity has no financial advisor and does not have an internal financial department serving that role, any written disclosure requirement on an underwriter should not be triggered unless the municipal issuer informs the underwriter that the issuer lacks knowledge or experience with such structures and specifically requests such written disclosure in writing.

If the Commission determines that written risk disclosures are required, it needs to provide more guidance on the specifics of the disclosure required and clarify a number of significant ambiguities, including the following:

- References in the Proposed Interpretive Notice to "atypical or complex" elements are vague and insufficient to give underwriters notice or certainty as to when the special disclosures for "complex" transactions will be required. The Proposed Interpretive Notice states that "examples of complex municipal securities financings include variable rate demand obligations and financings involving derivatives (such as swaps)." These examples do not provide adequate guidance on the types of transactions that would be considered "complex." For example, municipal financings that have integrally related derivative components, such as an interest rate swap, are neither novel nor atypical. These types of transactions have become commonplace and are well understood by issuers. The municipal securities market has a history of transaction structures that were originally thought of as "complex" becoming extremely routine over the course of time. Requiring underwriters to provide detailed written disclosures about commonly understood transactions would entail considerable work, legal and other expenses and potential liability for underwriters. In particular, SIFMA believes that municipal underwriters may feel that such written disclosures may require detailed review by counsel in order to ensure that all risks are properly disclosed and that appropriate caveats are included in the disclosure. SIFMA believes that these potentially costly additional requirements will not provide any significant additional protection for municipal entity issuers. SIFMA urges the Commission to carefully consider these costs and weigh them against the potential benefits, none of which are properly considered in the MSRB's proposal.

- The Proposed Interpretive Notice would require that underwriters provide particularized disclosures of "all material risks and characteristics of the complex municipal securities financing." This requirement is overly broad and would potentially cover subject areas in which underwriters do not have the requisite

expertise. For example, an underwriter should not have to provide risk disclosures on legal issues that would more appropriately be covered by a bond counsel's opinion. We believe that if a requirement to disclose all material risks and characteristics of a complex transaction were to be implied by the interpretive notice, at most it should relate to disclosures about material *financial* risks and characteristics of the transaction.

- There should be more specific guidance regarding which issuer personnel must have the requisite level of knowledge and sophistication: the issuer's finance staff? the issuer's governing body? the issuer's staff principally charged with the execution of the transaction? all of the above? SIFMA believes that if the issuer has a financial advisor or an internal department serving a similar role, underwriters should be relieved of any obligation to provide written disclosure of all material risks. Moreover, any risk disclosure, whether written or oral, should be made to that professional and the underwriter should have no further duty to evaluate the level of knowledge and sophistication of the issuer. The financial advisor that receives the disclosure should be responsible for presenting the disclosure to its client and for ensuring that it is communicated to the proper decision makers within the issuer in a manner that is appropriate to the municipal entity's level of sophistication. Moreover, it should be the responsibility of the financial advisor to request additional disclosures and information from the underwriter as he or she deems necessary.

- If the issuer has no financial advisor or internal personnel serving in a similar role, SIFMA believes that the issuer's finance staff is probably the most appropriate group as to which the underwriter could make a determination of knowledge and experience with the relevant transaction structure or similar structures. The underwriter should be permitted to assume without further inquiry that the finance staff will use its expertise to communicate the disclosures in an appropriate manner to other decision makers at the issuer. Also, SIFMA does not believe that it would be appropriate or practical to impose upon the underwriter the duty to assess the level of sophistication and experience of the issuer official to whom the disclosure is delivered, if such official is reasonably believed to have authority to bind the issuer. Issuers should be responsible for ensuring that they authorize appropriate personnel to contract for them.

- Finally, if risk disclosure is mandated, the Proposed Interpretive Notice should clarify that the risks required to be disclosed are those material risks that are known to the underwriter and reasonably foreseeable at the time of the disclosure.

B. Underwriters Should Not Be Required To Disclose Their Hedging and Risk Management Strategies and Activities

The Proposed Interpretive Notice would require that if an underwriter, in its dealer capacity, issues or purchases credit default swaps ("**CDS**") that reference the obligations of the municipal entity issuer, the underwriter must disclose those activities to the issuer. We do not believe these typical hedging activities are prejudicial to issuers. We note that, while the MSRB has stated that "trading in such municipal credit default swaps … has the potential to affect the pricing of the reference obligations," an analysis by the California State Treasurer of trading by six major underwriters in CDS that referenced California general obligation bonds found that "CDS trading's [sic] effect on bond prices is not significant enough to cause concern at this time."[6]

Moreover, the MSRB requirement gives these hedging and risk management activities an undue prominence that may prove prejudicial. Disclosure in this fashion could unduly deter use of CDSs for risk management, and potentially compromise counterparty relationships. Even without this requirement, if a municipal entity issuer believes this type of disclosure is useful, the municipal entity issuer can request it, and prospective underwriters can determine whether they are willing to provide such information.[7]

In the event the MSRB requires disclosure of underwriters' hedging and risk management activities, the MSRB should confirm that generalized disclosures that put the issuer on notice of the possibility that the underwriter may, from time to time, engage in such dealing should be sufficient. Underwriters should not have an obligation to disclose any specifics relating to such activities, which could reveal counterparty information or the underwriter's confidential hedging and risk management strategies. The MSRB's statement that underwriters are not required to disclose "information about specific trades or

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[6] See News Release, California State Treasurer Bill Lockyer, Treasurer Lockyer Releases Data on Major Banks' Trading of Derivatives Linked to California Bonds (Apr. 22, 2010), available at http://www.treasurer.ca.gov/news/releases/2010/20100422.pdf.

[7] We understand that a very small number of municipal issuers have, in fact, chosen to require this information be disclosed

confidential counterparty information," while helpful, does not go far enough.[8] To the extent any disclosure of underwriters' risk management activities are required, the Proposed Interpretive Notice should be revised to state clearly that generalized disclosures that put the issuer on notice of the possibility that the underwriter may, from time to time, engage in risk management activities are sufficient.

C. More Guidance Is Needed On the Level Of Detail Required In Disclosures On Payments To Or From Third Parties; Payments Among Affiliates Should Not Be Subject To The Disclosure Requirement

The Proposed Interpretive Notice requires underwriters to disclose to the issuer the details of any third-party arrangements for the marketing of the issuer's securities, such as retail distribution and selling group arrangements. The MSRB states that "if such arrangements are already disclosed in official statements, this requirement of the Notice should not impose an additional burden on underwriters."[9] The MSRB should clarify the extent of the "details" regarding any third-party arrangements for the marketing of the issuer's securities that the underwriter must disclose to the issuer and, whether the information and level of detail typically disclosed in the official statement would be sufficient.

The Proposed Interpretive Notice states in a parenthetical that payments to and from affiliates of the underwriter are within the scope of the disclosure requirement. Internal payments or other internal credits among the underwriter and its affiliates should not be deemed a "third-party payment" that needs to be disclosed, as they would not raise the same risks of coloring a party's judgment that are concerns where payments are made between true third parties.

To the extent that aspects of an inter-affiliate arrangement or relationship would create incentives for an underwriter to recommend a particular financing or create other conflicts of interest, that issue is more directly addressed by language in the "Required Disclosures to Issuers" section of the Proposed Interpretive Release, which requires disclosure of conflicts of interest, than it is by a requirement to disclose inter-affiliate credits and payments.

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[8] See 76 Fed. Reg. 55989, at 55993, third column.

[9] Id. at 55993, second column.

III. Requiring Disclosure Regarding Derivatives is Duplicative and May Be Inconsistent with Swaps Regulations

As discussed above, the Proposed Interpretive Notice would require underwriters that recommend "complex" financing transactions, such as those that include related swaps, to provide municipal entity issuers with disclosure regarding the material risks and characteristics of the swap.

As noted by the MSRB in the proposed rule change, there are pending rulemakings by the CFTC and the SEC that will apply to dealers recommending swaps or security-based swaps to municipal entities.[10] These activities will be the subject of detailed requirements to be established by the CFTC and the SEC pursuant to requirements adopted by Congress in Title VII of the Dodd-Frank Act.[11] For example, Commodity Exchange Act §4s(h)(5) requires a swap dealer that enters into a swap with a "special entity" (which includes municipal entities) to have a reasonable basis to believe that the special entity has an independent representative that, among other things, has sufficient knowledge to evaluate the transaction and risks, makes appropriate disclosures and provides written representations to the special entity regarding fair pricing and the appropriateness of the transaction. Commodity Exchange Act §4s(h)(4)(B) requires any swap dealer that acts as an advisor to a special entity to act in the "best interests" of the special entity.

If adopted, the Proposed Interpretive Notice potentially would layer additional requirements on swap dealers and security-based swap dealers that could create multiple, duplicative and potentially conflicting obligations. In fact, in its comments to the Proposed Interpretive Notice, the MSRB appears to acknowledge that the adoption of this proposal may create inconsistencies that may require additional rulemaking to ensure consistency in the future.[12] We believe the rational course of action under these circumstances would be for the MSRB to defer the imposition of any disclosure requirements or other business

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[10] See 76 Fed. Reg. 55989, at 55994, first column.

[11] See Commodity Exchange Act § 4s(h)(3) (adopted under Section 731 of the Dodd-Frank Act) ("Business conduct requirements adopted by the [CFTC] shall … require disclosure by the swap dealer or major swap participant … information about the material risks and characteristics of the swap…."); Securities Exchange Act § 15F(h)(3) (adopted under Section 764 of the Dodd-Frank Act); see also CFTC Proposed Rule, Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 75 Fed. Reg. 80638 (Dec. 22, 2010).

[12] See 76 Fed. Reg. 55989, at 55994, first column.

conduct standards relating to swaps and security-based swaps until related CFTC and SEC rules have been finalized.

IV. Underwriter "Reasonable Basis" Diligence Obligations

A. Evaluating The Reasonableness Of An Issue Price Certificate Is Better Left To The Tax Authorities

Under the Proposed Interpretive Notice, an underwriter would be required to have a "reasonable basis" for providing representations and material information in a certificate that will be relied upon by the municipal entity issuer or other relevant parties to an underwriting (e.g., an issue price certificate). Evaluating an underwriter's substantive basis for its provision of an issue price certificate is a matter more appropriately left to the tax authorities. Existing tax laws assure that underwriters do not provide issue price certificates without a reasonable basis, and sufficient penalties already exist if an underwriter were to do so. For example, an underwriter could be subject to substantial penalties under Section 6700 of the Internal Revenue Code if, in connection with facilitation of a municipal bond offering, it makes a statement that will be relied on for determining the tax-exempt status of the bonds that it knew or should have known was false.[13] Underwriters could also potentially be liable for misstatements under wire fraud statutes or under state laws. Because this is an area already well regulated under other regulatory schemes and by other regulators with the required substantive expertise, it does not need, and it is not appropriate for the MSRB to impose, additional regulation. The MSRB should revise the Proposal to remove this obligation.

B. The Proposed Interpretive Notice Should Be Revised to Clarify the "Reasonable Basis" Obligation Relating To Underwriter Representations and Other Material Information

The Proposed Interpretive Notice would require, as part of an underwriter's duty of fair dealing to municipal entity issuers, that the underwriter have "a reasonable basis for the representations it makes, and other material information it provides … in connection with the preparation by the issuer of its disclosure documents." SIFMA believes that this requirement is unreasonably

[13] See, e.g., Office of Chief Counsel, Internal Revenue Service, Memorandum No. 200610018, Application of Section 6700 Penalty with Respect to Various Participants in Tax-Exempt Bond Issuance (Feb. 3, 2006), available at http://www.irs.gov/pub/irs-wd/0610018.pdf.

broad and open-ended and may discourage an underwriter from providing financial analysis that may be useful to the issuer (such as providing cash flows based upon various hypothetical assumptions) even if the issuer has not assumed the cost of, and the underwriter has not assumed the responsibility for, detailed verification by the underwriter of the assumptions or facts.

The Proposed Interpretive Notice should be revised to clarify that an underwriter may limit its responsibility for information provided by disclosing to the issuer any limitations on the scope of its analysis and factual verification it performed. In addition, any duty should extend only to *material* information provided by the underwriter and not to all information and analysis.

V. The Proposed Implementation Period of 90 Days Is Not Sufficient

The Proposed Interpretive Notice would obligate underwriters to comply with detailed and specific requirements to which they are not currently subject. Many of these requirements, depending on whether they are adopted as proposed, will require significant lead time in order for underwriters to create policies, procedures, forms and systems to ensure compliance. The MSRB has requested a 90 day implementation period, which SIFMA believes would not provide underwriters sufficient time. SIFMA believes that an implementation period of not less than six months would be more appropriate.

VI. Conclusion

While SIFMA supports the MSRB in its efforts to provide guidance to underwriters regarding their duties to municipal entity issuers, given the interrelationship between this interpretive notice and the Pending SEC Proposal, and the recent withdrawal by the MSRB of its rule proposals relating to municipal advisors, SIFMA believes the Proposed Interpretive Notice should be withdrawn from consideration at this time. We believe that principles of fairness, reasonableness and efficiency require that this proposal be considered in tandem with the MSRB's rule proposals on municipal advisors and *after* the Commission has adopted final municipal advisor rules. This would ensure a more informed and comprehensive comment process and the necessary coordination with related rules and interpretations.

In the event this proposal is not withdrawn, we respectfully request the Commission to disapprove it. As discussed above, the Proposed Interpretive Notice is seriously flawed in a number of respects and would benefit from further industry input to address these fundamental issues, as well as from a careful cost-

benefit analysis of the various requirements the MSRB proposes to impose on underwriters of municipal securities.

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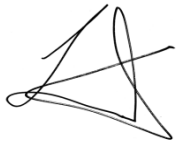
SIFMA appreciates this opportunity to comment upon the MSRB's Proposed Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities. SIFMA would welcome the opportunity to further discuss our comments with you. Please do not hesitate to contact me with any questions at (212) 313-1130; or Robert L.D. Colby and Lanny A. Schwartz, of Davis Polk & Wardwell LLP, at (202) 962-7121 and (212) 450-4174, respectively.

Sincerely yours,



Leslie M. Norwood
Managing Director and
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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

Lynnette Kelly Hotchkiss, Executive Director, Municipal Securities Rulemaking Board