BDA Bond Dealers of America

21 Dupont Circle, NW • Suite 750
Washington, DC 20036
202.204.7900
www.bdamerica.org

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