BDA Bond Dealers of America

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April 11, 2011

VIA ELECTRONIC MAIL

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

Re: MSRB Notice 2011-12: Draft Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities

Dear Mr. Smith:

The Bond Dealers of America (the "BDA") is pleased to offer comments on the Municipal Securities Rulemaking Board ("MSRB") Notice 2011-12: Draft Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (the "Proposal"). The BDA is the Washington, DC based trade association representing securities dealers and banks focused primarily on the U.S. fixed income markets.

The BDA supports the MSRB's efforts to provide guidance to underwriters under Rule G-17. The BDA is concerned, however, that regulatory review and enforcement based on some aspects of the Proposal will be subject to hindsight bias. A review of the reasonableness of an underwriter's beliefs and actions after-the-fact could cause the underwriter's actions to be unfairly second-guessed despite the underwriter in fact having acted in good faith. Clarity is the best protection for issuers, underwriters and the municipal market. As further discussed below, the MSRB should clarify how underwriters may meet their "fair dealing" obligations with respect to each aspect of the Proposal.

As a general matter, the BDA questions whether the Proposal is issued prematurely given the current status of ongoing rulemakings by the Commodity Future Trading Commission ("CFTC") and Securities Exchange Commission ("SEC") regarding swaps and swap advisors and the SEC proposed rulemaking regarding municipal advisors. The Proposal should not conflict with or be duplicative of these or other regulations. Especially with respect to the duties of municipal advisors and underwriters, the Proposal should not create potentially overlapping obligations given the uncertain outcome of CFTC and SEC proposed rulemakings.

Fair Pricing

The Proposal provides that the duty of fair dealing "includes an implied representation that the price an underwriter pays to an issuer bears a reasonable relationship to the prevailing market price of the securities." Issues of municipal securities that otherwise appear to be equivalent are often priced quite differently by market participants due to distinctions that may not be readily apparent especially after the fact. If applied literally, this subjective standard is particularly problematic with respect to initial purchases from issuers because there is no prevailing market for newly issued municipal securities. Comparisons to secondary markets are difficult because of differences among issuers. Even for the same issuer differences between the securities result in different "prevailing market prices." This situation is further exacerbated if the secondary market is one that sees small and infrequent trades, which is often the case for municipal securities. Whether a dealer acted consistent with an implied representation to obtain the "best" or "most favorable" price (those terms are used, we believe, for the first time here) is a subjective determination based on multiple factors, some of which may be difficult to document. The MSRB should employ a standard that underwriters act in good faith with respect to the pricing of municipal securities.

Credit Default Swaps

The Proposal would require the disclosure to the issuer of the issuance or purchase by a dealer of credit default swaps ("CDS") for which the reference obligations are securities of the issuer for which the dealer is serving as underwriter. The MSRB should confirm that a general disclosure is sufficient rather than requiring the underwriter to specifically disclose that it is in fact engaged in such trading. A municipal underwriting desk is normally not aware of CDS trading by other desks in the institution and may be prohibited from finding out about such positions due to "information wall" policies that prohibit the sharing of such information within the firm. Accordingly, the MSRB should clarify that a general disclosure is acceptable if an underwriter notifies an issuer that the underwriter may engage in such trading from time to time.

Payment to or from Third Parties

The Proposal requires an underwriter to disclose to the issuer payments received by the underwriter in connection with its underwriting of the new issue *from* parties other than the issuer, and payments made by the underwriter in connection with such new issue *to* parties other than the issuer. The BDA notes that retail distribution and selling group agreements are normally disclosed in official statements. The BDA requests that the MSRB clarify whether there are other specific types of arrangements that the MSRB intends underwriters to disclose to issuers. The MSRB should also clarify that arrangements to issue tender option bonds and similar arrangements are not required to be disclosed to issuers by underwriters, or that generic disclosure is sufficient.

Retail Orders

The Proposal requires that underwriters take reasonable measures to ensure that retail clients are bona fide and underwriters otherwise honor agreements with issuers regarding retail order periods. Just what those "reasonable measures" are is not specified nor even an illustration given. The MSRB should provide some guidance about just what those reasonable measures are. The focus should be on the underwriter complying with the issuer's requirements with respect to retail customers and retail order periods. There must be a practical recognition of the difficulties in determining whether a purchaser intends to hold securities or to resell them. Further, underwriters rely on members of their selling groups in syndicated offerings. Accordingly, the MSRB should confirm that representations from selling group members adequately demonstrate that an underwriter took reasonable measures to ensure that retail clients are *bona fide*. As with other aspects of the Proposal, underwriters would otherwise be subject to after-the-fact second guessing.

Disclosures to the Issuer

The Proposal requires that disclosures to issuers must be made in writing to officials of the issuer with the authority to bind the issuer by contract with the underwriter. An underwriter could not truly make the determination of an official's authority without an analysis of state and local law, resolutions, delegations of authority and other such documents. BDA recommends that the MSRB clarify that an underwriter satisfies this duty if it reasonably believes that the official has the requisite authority, and in particular if the official represents that he or she has the authority to bind the issuer.

Thank you for this opportunity to present our views. Please do not hesitate to call if you have any questions.

Sincerely,

Mike Nicholas
Chief Executive Officer