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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