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Ernesto A. Lanza
Assistant General Counsel
Municipal Securities Rulemaking Board
1150 18th Street N.W., Suite 400
Washington, D.C. 20036-2491

Dear Mr. Lanza:

PSA The Bond Market Trade Association ("The Bond Market Association" or "the Association")1 welcomes the opportunity to comment on the Municipal Securities Rulemaking Board's (the "Board" or the "MSRB") Review of the Underwriting Process as it appears in MSRB Reports, June 1997. In its review of the underwriting process, the MSRB requests comment on certain primary market disclosure practices, proposes amendments establishing disclosure standards for financial advisors and underwriters and proposes amendments to rules on syndicate practices. As stated in MSRB Reports, the municipal securities underwriting process has changed substantially in recent years. The Association agrees with the MSRB's assessment that earlier changes have been incorporated successfully and the municipal securities market continues to be the most efficient financing mechanism for states and localities. We commend the Board for reviewing the underwriting process and for attempting to improve practices for underwriting municipal securities. Before addressing the Board's specific requests for comment, we believe it important to make the following general observation.

As noted in MSRB Reports, the underwriting process involves not only municipal securities dealers but issuers and their agents, as well as investors. All of these participants play important roles in the process of underwriting municipal securities transactions. As discussed in greater detail below, we strongly oppose attempts by the MSRB to modify the behavior of entities that are not directly regulated by the MSRB through regulation of the dealer community. While we recognize that the MSRB only has authority over municipal securities dealers and cannot adopt regulations directly affecting issuers, unregulated financial advisors and customers, we believe that placing municipal securities dealers in the position of "policing" other market participants is inappropriate and should be minimized, to the extent possible, in promulgating new regulations. A municipal securities dealer should not be faced with a possible violation of MSRB rules where compliance by the dealer is dependent upon a specific action of an unregulated entity. Some of the MSRB's current proposals require an issuer's or other party's performance of some action as a prerequisite to dealer compliance. This places the dealer in an untenable position by which it can be charged with a violation of MSRB rules through no fault of its own. This is an outcome that it is undesirable both for the municipal securities dealer community and for the municipal securities market in general. Below we address the Board's specific proposals.

Primary Market Disclosure Practices

The Board requests comment on the practice of issuers selecting underwriters' counsel on transactions. The Board states that it is concerned with this practice because underwriters should be free to select counsel in whom they have confidence and who are free of the possibility of any conflict of interest. The Board also states that this could be a matter requiring disclosure to investors. While this may be an area for concern for the MSRB, we cannot determine how it can address this issue. If the Board were to adopt a rule requiring such disclosure, the rule could apply only to municipal securities dealers, not to issuers, nor to counsel. This places the onus on the municipal securities dealer to disclose information that ideally should be disclosed by issuers. As we noted above, the regulation of dealers to modify the behavior of unregulated entities should be minimized. We therefore urge the Board to refrain from adopting regulations in this area.

The Board requests comment on the contractual obligation to deliver official statements and experience with compliance with such commitments for purposes of municipal securities dealers complying with Rule G-36. As noted in MSRB Reports, SEC Rule 15c2-12 requires dealers to contract with issuers to receive final official statements within seven business days after the date of the final agreement to purchase, offer or sell municipal securities. The Board also notes that in some instances issuers do not meet that time frame, thus calling into question dealers' compliance with Rule G-36. 2 Municipal securities dealers, while entering into a contract with issuers for delivery of official statements, have very little control over the delivery of the documents. The official statement is the issuer's document, not the underwriter's. In instances where issuers do not deliver the official statement in the specified time frame, dealers are hesitant to take any legal action under the contract because of the effect on client relations and other obvious ramifications. Among the other ramifications, we would point out that commencement of legal action before completion of the transaction could harm investors, because of the significant disruption to the transaction and to the issuer's operations. We believe that the Board should seriously reconsider the structure of rules such as Rule G-36, with which a dealer may be wholly unable to comply absent another party taking action. No dealer should find itself out of compliance with an SEC or MSRB rule due to matters entirely outside of its control.

Furthermore, requiring dealers to initiate legal action to enforce the obligations will not result in issuer performance that is sufficiently timely to achieve the desired result,3 namely, dealer compliance, except where the issuer voluntarily chooses to meet its obligations. By the time a lawsuit has been prepared and filed the dealer is arguably out of compliance. The filing of a lawsuit, with its disastrous client relations impact, would do nothing to enable dealer compliance with MSRB rules or to meet the ultimate goal, which is to improve disclosure to investors.

As an alternative to the existing Rule G-36 approach to preparation and delivery of official statements, we would suggest the MSRB consider a more streamlined structure. One possibility would be a change to the corresponding portion of Rule 15c2-12, to require a contractual undertaking by issuers to prepare official statements and submit

them directly to the MSRB and the underwriters within seven business days following execution of the agreement to sell the securities. The onus of making the MSRB filing would be moved to the issuer. No benefit is produced by requiring the underwriter to be involved in that process. This approach would also avoid the problems inherent in the approach suggested by the MSRB in 1987, which would have involved SEC regulation of issuers requiring submission of official statements to a repository. Another approach would be to adopt a recommendation made by the Association in our formal commentary in 1989 where we expressed concerns about Rule G-36 and suggested that any official statement delivery requirement hinge upon receipt of the document by the dealer.4

Disclosure Standards for Financial Advisors and Underwriters

Financial Advisors

Proposed amendments to Rule G-23 would require, among other things, that a financial advisor that is also a municipal securities dealer disclose to issuers any other payments received or expected to be received in connection with the transaction. While the Association realizes that the Board does not have the authority to regulate financial advisors that are not registered with the MSRB ("unregulated financial advisors"), we remain opposed to a bifurcated approach to the regulation of financial advisors in the municipal securities market. Financial advisors, whether regulated or unregulated, are heavily involved in the structure, timing, pricing, designation, allocation, and all other aspects of municipal securities issuance. Unregulated financial advisors, however, do not incur the costs of complying with MSRB regulations and therefore are at a competitive advantage *vis a vis* regulated financial advisors. In addition, regulations adopted that would apply solely to regulated financial advisors simply do not target the entities that dominate the market for financial advisory services. It is important to note that out of the top ten financial advisors, only three are regulated entities.5 The other seven financial advisors are unregulated. We therefore urge the MSRB to pursue with the SEC the feasibility of including unregulated financial advisors under the same regulatory framework that applies to financial advisors who are registered with the MSRB as municipal securities dealers. While we agree with the spirit of the amendments to Rule G-23, we cannot support additional regulations being placed on financial advisors that are currently registered with the MSRB while unregulated financial advisors remain free from any regulatory burden.6 If the Board decides nonetheless to proceed with these regulations, we wish to note that state laws may require some or all of the additional proposed disclosures. We encourage the MSRB to avoid unnecessary duplicative regulation.

Financial Advisors Acting as Remarketing Agents

Additional amendments to Rule G-23 would require a dealer acting as both financial advisor and remarketing agent to resign its financial advisory relationship prior to engaging in a remarketing for the issuer. The Association is opposed to these amendments. The Board states that it is proposing these amendments because a financial advisor that also acts as a remarketing agent may present a potential conflict of interest

for the financial advisor because its advice regarding the type of issue, i.e., variable rate, and the issue's timing and terms may be called into question by the fees it expects to receive as remarketing agent. Implicit in these amendments is a notion that issuers are unsophisticated with regard to the type of securities issue best suited for them and that dealers are motivated solely by their pecuniary self-interest. We do not believe either characterization to be accurate. We also believe that the issuer is well positioned to determine whether or not this conflict of interest exists.

Disclosures for Underwriters

Amendments to Rule G-32 would require, among other things, underwriters to disclose any understanding to receive or any compensation received from third parties, or any payments made by the underwriter to any person, in connection with a transaction. The Association supports these amendments and believes that underwriters should disclose any of these payments to the issuer. We suggest, however, that the amendments be drafted as narrowly as possible. For example, the phrase "in connection with" does not provide sufficient guidance to underwriters. The phrase has been seen in other securities law contexts to have potentially very broad application, and may unnecessarily raise a host of issues for underwriters. There are many transactions which are 'related' to underwritings, in the sense that they could not take place were it not for the underwriting. For example, bonds may be purchased in one underwriting as well as others, then packaged for reoffering as derivative products. The amendments as proposed may require the underwriter to disclose the compensation it expects to receive for its role in that transaction. The Association believes that a derivative transaction of this type is not sufficiently related to the underwriting to require disclosure, and that such disclosure is not necessary for the protection of issuers or investors. In addition, it is unclear whether the amendments to Rule G-32 would include payments made to consultants. We do not believe it is appropriate to include these payments as underwriters are already required to disclose this information under Rule G-38 (c). It is also unclear whether the amendments would apply to compensation of employees of the dealer. We do not believe that the Board intends for this to be the case. In addition, we suggest that for compliance purposes evidence of written correspondence containing the disclosures from the municipal securities dealer to the issuer should be sufficient. Such correspondence should be directed to an issuer official deemed to be appropriate by the dealer.

In this regard, we wish to stress to the MSRB the arm's length nature of the relationship between an issuer and a municipal securities dealer during the underwriting process. An underwriter is not an agent of the issuer and does not, therefore, generally have any duty to disclose information of the type or nature that fiduciaries would be obliged to disclose.

Syndicate Practices

Issuer Requirements

The Board proposes amendments to Rule G-8 which would require the managing underwriter to maintain and record all issuer requirements involving syndicate formation,

order review, designation policies and bond allocations. If these requirements are not published, the managing underwriter would be required to prepare a written statement of such requirements and maintain it in its records. Amendments to Rule G-11 (f) would require the managing underwriter to provide a copy of the published guidelines or underwriter prepared statement of issuer syndicate requirements to syndicate members prior to the first offer of any securities to the syndicate. The Board is proposing this due to greater issuer involvement in the syndicate process. The Association supports greater disclosure of issuer requirements which will benefit all syndicate members. However, we strongly oppose any requirement that underwriters be involved in documenting issuer requirements. It is not productive for an underwriter to spend the substantial amount of time that could be involved in preparing such a statement and obtaining the approval of the issuer and its advisors. Issuers seeking to impose their requirements on syndicates must take the initiative to enunciate such requirements, in writing, and publish them so they are available to all who are involved, or considering becoming involved, in a syndicate for that issuer. Although the Association favors public dissemination of this information by the issuer, we would not oppose a requirement that the lead underwriter notify syndicate members of its availability, and provide copies upon request.

Completion of Allocations

Due to complaints that sometimes allocations are delayed, the Board is proposing an amendment to Rule G-11 (g) that would require senior syndicate managers to complete the allocation of securities within 24 hours of the sending of the commitment wire. The Board also urges issuers and their financial advisors to review orders and proposed allocations as soon as possible so as not to delay allocation information to investors. The Association supports prompt completion of allocations, but, for reasons stated above, strongly opposes the amendment as drafted under which the lead manager's compliance would be wholly dependent upon the timely performance by financial advisors and issuers. Dealers should not be subject to compliance lapses due to matters totally outside their control.

Disclosure of Designations & Allocations

The Association supports amendments to Rule G-11 (g) which would require disclosure to syndicate members of all designations to members. We however believe that the five-business-day requirement following the date of sale is too stringent and we request that the time frame be extended to the later of ten business days after the date of sale, or three business days following receipt by the senior manager of the information. Oftentimes the information is not available in five business days and an extension does not detract from the primary purpose of the amendments, namely the disclosure to members of the syndicate of all designations. The amendments would also require disclosure to syndicate members by final settlement of the syndicate account, a summary statement by maturity of all bonds allocated to each member. We strongly oppose this amendment. It is the responsibility of the senior manager to allocate the bonds to each member of the syndicate. This is a business decision based on priority of orders and based on the judgment of the senior manager. Disclosure of allocations to each member of the

syndicate would not provide any value to members of the syndicate or to the public, but could prove, in the final analysis, to be disruptive to the operation of the syndicate and to dealer relationships. In addition, promulgation of this amendment could have the inadvertent effect of limiting the number of dealers included in the syndicate by the lead manager, thus potentially reducing the syndicate's distribution capabilities.

Issuer Take-Down Set-Asides

Because a small number of issuers are setting aside a portion of the take-down to direct to syndicate members at their discretion, the Board is proposing an amendment to Rule G-11 (g) requiring the senior manager to disclose to syndicate members in writing within ten business days following the date of sale, the amount of any portion of the take-down that is directed to each member of the syndicate by the issuer. The Association supports this amendment but would recommend that the time frame be extended to the later of fifteen business days following the date of sale, or three business days following receipt by the senior manager of notification of such set-asides. The extension of the time frame is related to our recommendation of extending the disclosure of designations from five business days to ten business days. The Association agrees with the Board and believes this part of the take-down should be disclosed to syndicate members in the same manner as customer designations.

Payment of Designations & Settlement of Syndicate

The Board is proposing amendments to G-12 (k) which would move the deadline for payment of designations from 30 business days following delivery of the securities to the customer, to 30 calendar days after the issuer delivers the securities to the syndicate. The Association supports these amendments and believes they will greatly streamline the underwriting process. The Board is also proposing an amendment to Rule G-12 (j) that would move the final settlement of syndicate accounts from 60 calendar days following the date all securities have been delivered by the syndicate to syndicate to members, to 30 calendar days after the issuer delivers the securities to the syndicate. The Association strongly opposes this amendment. The 30-calendar-day time frame would prove very difficult to comply with because many pieces of information necessary to settle the syndicate accounts are not available including legal fees, travel expenses, computer time expenses, etc. We believe that the 60-calendar-day requirement should remain in effect for these reasons.

Conclusions

The Association believes that many of the proposed amendments will serve to improve the underwriting process for municipal securities given its evolution in recent years. We reiterate our position that regulation of the dealer community in an attempt to effect behavioral changes for unregulated entities should be minimized. We also believe that unregulated financial advisors should come under the same regulatory framework as that of financial advisors who are registered with the MSRB as municipal securities dealers. We again commend the Board for its review of the underwriting process for municipal

securities. Please do not hesitate to contact the undersigned with any comments or questions.

Sincerely,

/s/
George Brakatselos
Vice President

1 PSA is the Bond Market Trade Association, representing approximately 220 securities firms and banks that underwrite, trade and sell debt securities. As previously announced, our official name changes September 29, 1997, and we wish to be known henceforth as The Bond Market Association.

2 We wish to note that some states, such as Texas, mandate a state-level approval process for official statements that can delay their completion and distribution beyond the period required in the issuer's undertaking made pursuant to SEC Rule 15c2-12.

3 For example, we understand that specific performance, mandamus and similar remedies may not be available in some jurisdictions, and that doctrines such as sovereign immunity may affect damage recovery and other measures of relief.

4 See letter to Jonathan G. Katz, Secretary, SEC from Ralph Horn, Chairman, PSA, December 27, 1989.

5 Securities Data Corporation, Financial Advisor's Ranking, January 1, 1996 - June 30, 1997.

6 The Board states that "independent" financial advisors may wish to consider adopting similar requirements as voluntary standards and that it plans to discuss this issue with issuers and "independent" financial advisor groups. We would look forward to participating in such an effort.