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August 29, 2011

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F. St., NE
Washington, DC 20549

Comment letter in regard to File No. SR-MSRB-2011-08 (Release No. 34-65015)

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the Municipal Securities Rulemaking Board's ("MSRB") Notice of Filing of Proposed New Rule A-11, on Municipal Advisor Assessments, and New Form A-11-Interim (File No. SR-MSRB-2011-08) (the "proposed rule" or the "MSRB proposal").

The MSRB has proposed to levy an assessment on municipal advisors in order to partially defray the costs of regulating municipal advisors under the MSRB's authority provided by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") (P.L. 111-203). While SIFMA supports the notion of allocating the MSRB's expenses fairly across all regulated entities, including brokers, dealers, municipal securities dealers and municipal advisors, we have several serious concerns with the MSRB proposal. We urge the Commission to withhold approval of the proposed rule in its current form until these concerns are addressed. Our opposition to the proposed rule stems from several issues:

1. The proposed new assessments would not shift a sufficient portion of the MSRB's expenses to municipal advisors that are not brokers, dealers or municipal securities dealers ("non-dealer advisors").

[1] The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to develop policies and practices which strengthen financial markets and which encourage capital availability, job creation and economic growth while building trust and confidence in the financial industry. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.

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2. The proposed rule would introduce the concept of "assessable professional"—based on the notion of "engaging in municipal advisory business"—before the definition of municipal advisor is finalized in the context of proposed new SEC Rules 15Ba1-1 through 15Ba1-7 related to registration of municipal advisors.

3. Completing proposed MSRB Form A-11-Interim (as well as the MSRB's proposed Form A-11-Survey, which is not the subject of this comment letter) would impose a substantial burden on dealer advisors, especially given that for 2011, Form A-11-Interim would be retroactive and apply to a period before the proposed rule was in effect.

The proposed rule would not result in a fair allocation of the MSRB's expenses.

The proposed rule and the assessments it would impose would apply to both non-dealer advisors and to brokers, dealers and municipal securities dealers (collectively, "dealers") who are also registered as municipal advisors ("dealer advisors"). In this regard, the new fee for dealer advisors would be in addition to the many fees these firms already pay to the MSRB by virtue of their status as dealers. Dealers registered with the MSRB now pay a $.03 per $1,000 new issue underwriting assessment, a $.01 per $1,000 assessment on bond sales to customers or other dealers, and a "technology fee" of $1 per transaction on sales to customers and other dealers in addition to a $500 per year registration fee. In total, dealers paid the MSRB nearly $21 million in the fiscal year that ended September 30, 2010. Total assessments paid by dealers will be even higher in 2011 because the "technology fee" was not in place in 2010.

As the MSRB recognizes in its release accompanying the proposed rule, even if the new advisor assessment were levied as proposed, fees imposed exclusively on dealers would comprise well over 90 percent of the MSRB's total revenue. It is not clear from the language of proposed Rule A-11, particularly in light of pending questions regarding the definition of "municipal advisor," what kinds of activities would be covered by the proposed rule. In that regard, we urge the Commission to ensure that any activities of dealer advisors for which firms already pay MSRB assessments are not also covered by the advisor assessment in proposed Rule A-11. It would not be appropriate or fair for dealer advisors to pay the MSRB twice for the same activities.

Furthermore, the MSRB has argued that the proposed $300 annual municipal advisor assessment for each assessable professional is designed to defray a portion of the MSRB's expenses, "in particular the increased costs and expenses attributable to the regulation of municipal advisors." It is not appropriate or fair that the MSRB has not structured the proposed assessment so that non-dealer advisors would pay their fair share of expenses associated with initiatives not directly associated with advisor regulation, such as the development and operation of the Electronic Municipal Market

Access ("EMMA") system and other big-ticket projects. Non-dealer advisors use and benefit from these systems extensively, and it is appropriate for non-dealer advisors to bear a portion of their cost.

"Municipal advisor" has not yet been clearly defined.

On January 6, 2011 the Commission published Release No. 34–63576, including proposed new rules 15Ba1–1 through 15Ba1–7 and proposed new Forms MA, MA–I, MA–W, and MA–NR governing the registration of municipal advisors with the Commission ("proposed registration rules"). A key question in the proposed registration rules is the definition of municipal advisor. That question is still unresolved, and the MSRB should not impose an assessment on advisors until the Commission has finalized that definition. The MSRB itself has recognized this problem in another rule proposal before the Commission.

On August 22, 2011 the MSRB filed with the Commission proposed new Rule G-44 and other rule changes related to the supervision of municipal advisory activities, books and records, and preservation of records.[2] In Notice 2011-47 announcing these proposed changes, the MSRB stated that it "has requested that the proposed rule change be made effective on the date that rules defining the term 'municipal advisor' under the Securities Exchange Act of 1934…are first approved by the SEC or such later date as the SEC approves the proposed rule change." In other words, the MSRB has recognized that it is not appropriate to impose new Rule G-44 governing municipal advisor-related activity until the SEC has finalized the definition "municipal advisor." In the same manner, it is not appropriate for the MSRB to assess fees related to "municipal advisory business"—as in proposed Rule A-11—until after the SEC has finalized its definition of municipal advisor. In this context, that which applies to proposed new Rule G-44 should also apply to proposed new Rule A-11.

Moreover, the MSRB's proposed definition of "municipal advisory business" on which the new municipal advisor assessment would rest is unclear and non-specific. The MSRB has proposed to define "municipal advisory business" as "the provision of advice to or on behalf of a municipal entity or an obligated person with respect to municipal financial products or the issuance of municipal securities." However, the proposed new rule fails to define "provision of advice" or other key terms necessary to fully implement the rule. MSRB Rule D-13 attempts to define "Municipal Advisory Activities" based on the statutory definitions of the Dodd-Frank Act. However, given the questions raised by the Commission's proposed municipal advisor registration rules, the definitions the MSRB has provided are not clear enough for dealer advisors to discern the scope of proposed Rule A-11. MSRB notices have not provided a clear answer. A broad interpretation of the MSRB's proposed definition of "municipal

[2] See MSRB Notice 2011-47. SIFMA will submit separate comments to the Commission on proposals embodied in MSRB Notice 2011-47.

advisory business" could capture activities (whether conducted by dealers or others) that go far beyond what market participants generally think of as municipal advisory functions.

In addition, various references to "municipal advisor," "advisory activities" and related terms in adopted and proposed MSRB rules are creating inconsistent and conflicting definitions. MSRB Rules G-23 and D-13 include separate and inconsistent definitions of "financial advisory relationship" and "municipal advisor." Proposed Rules A-11 and G-44 would impose two yet additional concepts of "municipal advisory business" and "municipal advisory activities." These various definitions and descriptions, all referencing approximately the same activities, would make compliance with proposed Rule A-11 difficult at best.

Also, if the SEC's final definition of "municipal advisor" is inconsistent with the MSRB's definition of "municipal advisory business," the result could be too much or too little assessments being levied on municipal advisors. Because the MSRB's proposal would require advisors, including dealer advisors, to file Form A-11-Interim by November 30, 2011—quite possibly before the Commission has finalized the rules proposed in Release No. 34–63576 related to municipal advisor registration—it is possible that municipal advisors could report more or fewer assessable professionals than would be consistent with the Commission's forthcoming final definition.

The MSRB has proposed to define "municipal advisory activities" in the context of proposed new Rule G-44 related to the supervision of municipal advisory activities (MSRB Notice 2011-47). Under proposed Rule G-44 "municipal advisory activities" would mean "those municipal advisory activities not otherwise subject to supervision pursuant to Rule G-27." If the SEC chooses to act on proposed Rule A-11, we urge the Commission to mandate an amendment such that "municipal advisory business" would be limited to those advisory activities not otherwise subject to supervision pursuant to MSRB Rule G-27. As an alternative to the definition in proposed Rule G-44, the MSRB could reference activities undertaken under "financial advisory relationships" as defined in MSRB Rule G-23 (as approved by the Commission on May 27, 2011) as a basis for the activities covered under proposed Rule A-11. Either approach would provide a greater degree of clarity than the current proposed rule and would help ensure consistency with other approaches to defining advisory activity.

Filing Form A-11-Interim would be overly burdensome.

Proposed MSRB Rule A-11 would require advisors to file form A-11-Interim (the "proposed form") with the MSRB by November 30 of each year, including 2011. Form A-11-Interim would require advisors to report to the MSRB the number of "assessable professionals" active during the preceding period October 1-September

30, which would form the basis of the proposed assessment of $300 per assessable professional.

Providing the information requested on proposed Form A-11-Interim would be much more difficult than it might appear. The proposed form itself is complex and difficult to understand, particularly in light of the various definitions of advisor-related terms in SEC and MSRB rules and proposals. The proposed form appears to have been designed with not-otherwise-regulated non-dealer advisors in mind. Because such non-dealer advisors do not engage in investment banking, underwriting, trading or other activities typical of dealers, their relationships with issuer clients are relatively homogenous, making it easy to complete the form. Dealer advisors and their affiliates, on the other hand, can relate to issuer clients in several different ways, as advisors, bankers, underwriters or dealers, adding significant complexity to completing the form. The MSRB is likely to end up with many different and inconsistent interpretations from various dealer advisors charged with completing the form.

One of the biggest problems with the proposed form relates to timing and the retroactive nature of proposed Rule A-11. The proposed rule will not have been in effect during most or all of the period October 1, 2010-September 30, 2011, and the final definition of "municipal advisor" is still in limbo. As a result, dealer advisors and their affiliates have not had in place internal systems to monitor and track the activities of employees for the purpose of complying with proposed Rule A-11.

For many dealers and their affiliates, providing municipal advisory services is a very small component of their overall municipal businesses. In order to provide the information requested on proposed Form A-11-Interim for the October 1, 2010-September 30, 2011 period, many dealer advisors and their affiliates would need to undertake audits of their staffs' activities during the period to determine who meets the definition of "assessable professional." These audits would need to include analyses of not only which personnel were engaged in municipal advisory business, but also determinations of which personnel received $10,000 or more of compensation attributable to covered activities, which personnel provided research or analytical services in support of municipal advisory business, and other factors. For many dealer advisors and their affiliates, the cost of retroactively examining their staffs' activities would far exceed the total assessment due to the MSRB.

While this burden would not be as acute for years in which proposed Rule A-11 was in effect for the entire year—giving firms the opportunity to track their employees' activities from October 1 onward—requesting backward-looking information for the purpose of levying relatively small assessments is inefficient and overly burdensome. Proposed Rule A-11 represents retroactive regulation, since for the MSRB's 2011 fiscal year, the proposed rule would apply to activities during a period before the rule was in effect or even in circulation in draft or proposed form. The retroactive nature

of the proposed rule should motivate the Commission at a minimum to postpone the application of the rule so that it can have been in place for the entire period it is proposed to cover.

Alternative approaches.

We urge the Commission to withhold action on the MSRB's proposed assessments on municipal advisors until the important questions surrounding the definition of municipal advisor are settled. There are simply too many open and important issues regarding who is a municipal advisor and what is advice that will not be settled until the Commission finalizes its advisor registration rules. The MSRB has recognized that they anticipate collecting relatively little revenue from the proposed new assessment in their fiscal year 2012, so tabling the proposal for now should not present a financial hardship to the MSRB.

Short of withholding action on the MSRB's proposal, we urge the Commission to ensure that the new assessment would not apply to activities for which dealer advisors already pay MSRB assessments. Dealer advisors already pay substantial amounts to the MSRB, and double-taxing activities that might be covered under the definition of "municipal advisory business" would be unfair and inappropriate.

In addition, we urge the SEC to mandate a key amendment that would ease the compliance burden for dealer advisors. The most burdensome aspect of the MSRB's proposal, related to its retroactive nature, would be completing proposed Form A-11-Interim, particularly for the period October 1, 2010-September 30, 2011 when proposed Rule A-11 will not have been in effect. As a simplification measure, we request that the Commission mandate an alternative assessment scheme for dealer advisors for whom advisory work comprises a small portion of their business. As an alternative to completing Form A-11-Interim, firms would have the choice of paying some fixed amount—say, $5,000, the equivalent of an assessment for approximately 17 assessable professionals under the proposed rule. For many dealer advisors, this amount would equal or exceed the assessment they would end up paying under the proposed rule but would be well below the cost they would incur to complete proposed Form A-11-Interim. Moreover, we urge the Commission to mandate an amendment to proposed Rule A-11 such that "municipal advisory business" would be limited to those advisory activities not otherwise subject to supervision pursuant to MSRB Rule G-27 or be based on activities provided under "municipal advisory relationships" as defined in MSRB Rule G-23. This change would provide clarity and consistency to the kinds of municipal advisory activities subject to regulation and assessment.

Finally, we urge the MSRB to take a hard look at its overall fee structure. The current hodgepodge of fees and assessments levied by the MSRB has evolved over decades and is not necessarily fair or reasonable. These weaknesses become more apparent

as the MSRB seeks a means to assess municipal advisors, many of whom are relatively small businesses. The MSRB should consider abandoning its existing system of assessments in favor of a single tax on dealers and advisors that is based on an equalizing factor such as gross revenue derived from municipal-related businesses. The Financial Industry Regulatory Authority ("FINRA") derives a substantial portion of its revenue from a Gross Income Assessment based on its members' top-line revenue from broker-dealer businesses.

Summary

We support the MSRB's goal of ensuring that non-dealer advisors pay their fair share of the MSRB's expenses. For the reasons cited, however, we oppose the MSRB's proposed approach. Because key definitional questions regarding the municipal advisor provisions of the Dodd-Frank Act have not yet been settled, it would be inappropriate at this time for the MSRB to impose an assessment scheme based on the concept of "municipal advisory business." Moreover, the proposal would not shift a large enough share of the MSRB's expenses to non-dealer advisors, and for many dealer advisors, compliance costs would far exceed assessment amounts.

The complexities and vagaries associated with proposed Rule A-11 add to the compliance uncertainties many dealer advisors face generally with regard to the municipal advisor provisions of the Dodd-Frank Act. Eventually, these uncertainties will have the effect of driving some dealer advisors from the municipal advisory business altogether, resulting in less competition and higher costs for state and local issuers.

We urge the Commission to withhold action on the MSRB's proposal. Short of that, we urge the Commission to mandate the changes we have described. We appreciate the opportunity to comment. Please contact us if you have any questions.

Sincerely,

Michael Decker
Managing Director and Co-Head of Municipal Securities

cc: Lynnette Hotchkiss, Executive Director, MSRB