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March 21, 2011

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number SR-MSRB-2011-03
Rule G-23: Activities of Financial Advisors, 76 Fed. Reg. 10,926 (Feb.28, 2011)

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to provide the Securities and Exchange Commission (the "Commission") with comments relating to File No. SR-MSRB-2011-03, the proposed amendments to Rule G-23: Activities of Financial Advisors (the "Proposed Amendments").

Although we continue to believe that the long and successful history of current Rule G-23 supports our contention that it represents a balanced approach to the issues surrounding potential conflicts of interest in the context of the underwriting activities of financial advisors to municipal entities, we have endorsed certain portions of the Proposed Amendments.[2] We also understand the many concerns and perspectives expressed through comment letters filed with the Municipal Securities Rulemaking Board ("MSRB") in connection with the Proposed Amendments. With the advent of the registration of municipal advisors and their prescribed fiduciary duties, we believe that many of these concerns will be more than adequately addressed. And, although we believe certain aspects of the Proposed Amendments may have adverse consequences to the

[1] SIFMA brings together the shared interests of more than 600 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington, D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

[2] See Letter from Leslie Norwood, Managing Director and Associate General Counsel, SIFMA, to Leslie Cary, Associate General Counsel, and Ronald W. Smith, Senior Legal Associate, Municipal Securities Rulemaking Board (Sept. 30, 2010).

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market for municipal securities and municipal issuers themselves, the most significant of which we describe below, overshadowing all of this is the fact that there remains considerable uncertainty over the scope of the fiduciary standard for advisors to municipal entities.

Understanding the scope of the fiduciary standard is critical to determining the proper scope and application of Rule G-23. For example, the notice accompanying the Proposed Amendments describes the parameters of underwriting and financial advisory relationships with municipal entities, which are not in sync with the definition of "municipal advisor" in Section 15B(e)(4) of the Securities Exchange Act of 1934, as amended, and the Commission's interpretations thereof.[3] In addition, the MSRB has proposed Rule G-36, which will govern the activities of municipal advisors' relationships with municipal entities, as well as draft interpretive notices concerning the application of MSRB Rule G-17 (collectively, the "MSRB Proposals"), all in an attempt to sort out the issues relating to the duties of persons advising municipal entities in various capacities.[4] Neither the MSRB Proposals nor the Commission's interpretations have been finalized, and both have been subject to considerable comment and debate. Moreover, we are hopeful that these standards will be appropriately harmonized, including with respect to the Commission's remaining mandate to define the fiduciary duties of municipal advisors.[5] Moving forward with the Proposed Amendments prior to such harmonization would create unnecessary confusion and uncertainty in the markets, and may well require subsequent amendments to Rule G-23. Until the fiduciary standard proposals and related definitions and interpretations of the Commission and the MSRB have been finalized, we strongly believe that any actions to revise Rule G-23 would be premature. Accordingly, we respectfully request that the Commission's consideration of the Proposed Amendments be tabled until final rules implementing and harmonizing the standards promulgated by the Commission and the MSRB are firmly in place.

Areas of Significant Concern

As mentioned above, the Proposed Amendments raise a number of significant concerns that have the potential to disrupt certain areas of the market for municipal securities and adversely impact issuers.

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[3] Registration of Municipal Advisors, Release No. 34-63576, 76 Fed. Reg. 824 (Jan. 6, 2011).

[4] MSRB Notice 2011-14, *Request for Comment on Draft MSRB Rule G-36 (On Fiduciary Duty of Municipal Advisors) and Draft Interpretive Notice* (Feb. 14, 2011); MSRB Notice 2011-12, *Request for Comment on Draft Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities* (Feb. 14, 2011); MSRB Notice 2011-13, *Request for Comment on Draft Interpretive Notice Concerning the Application of MSRB Rule G-17 to Municipal Advisors* (Feb. 14, 2011).

[5] *See* Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

1. *Competitively bid, non rated, non credit-enhanced, fixed rate bond offerings should be exempt from the Proposed Amendments.* We believe that an exemption for competitively bid transactions is necessary and appropriate to ensure continued unfettered access to the credit markets for municipal issuers. We urge the Commission to consider a narrow exemption from the Proposed Amendments for competitively bid, non rated, non credit-enhanced, fixed rate municipal debt issuances in which the issuer utilizes an electronic bidding platform.

   We are unaware of any history of abuse in this area, and no commenter of whom we are aware has cited to any actual instance of harm. Moreover, any concerns relating to potential abuse by financial advisors is more than adequately addressed through their fiduciary duties under federal and state law. Financial advisors would have no practical opportunity in these straightforward, simple contexts to structure an offering in a way that might give them some sort of competitive advantage. Prohibiting financial advisor participation in all competitively bid transactions will serve to limit competition and issuer choice, and can lead to increased costs for issuers. Given the lack of any record of abuse, the complete prohibition of former financial advisor participation in competitive transactions is not justified.

   By allowing for this narrow exemption, the Commission and the MSRB would appropriately balance their interests in protecting municipalities with their interests in ensuring a vigorous marketplace for municipal securities. It would ensure that not only will issuers not be disadvantaged by the participation of a financial advisor in competitive bidding, but issuers would have the benefit of additional bidders in the market. In addition, by including the requirement that an electronic bidding platform be used to coordinate bidding, there would no longer be any need for the services of a financial advisor once the transaction has been set up for bidding. Accordingly, we believe this narrow exemption would help preserve an important part of the municipal issuance marketplace and accomplish the goal of issuer protection.

2. *Guidance: Eliminate the Presumption.* The MSRB included in their submission of the Proposed Amendments to the Commission new interpretive guidance entitled, "Guidance on the Prohibition on Underwriting Issues of Municipal Securities for Which a Financial Advisory Relationship Exists under Rule G-23" (the "Guidance"), on which we have not previously had the opportunity to comment. The Guidance creates serious concerns for municipal underwriters and issuers of municipal securities with respect to the ability of underwriters to advise issuers in connection with an offering.

The Guidance provides that a financial advisory relationship "shall not be deemed to exist when, in the course of acting as an underwriter, a dealer provides advice to an issuer . . . ."[6] However, the Guidance goes on to say that a "dealer that provides advice to an issuer with respect to the issuance of municipal securities will be presumed to be a financial advisor with respect to that issue."[7]

In connection with the solicitation of municipal underwriting business, prospective underwriters are frequently asked by issuers to provide opinions on structuring and strategic alternatives, provide comparative analyses and general market intelligence, and share other relevant ideas based on their experience in the industry. These questions are asked in issuer Requests for Proposals and preliminary meetings, and provide an important informational foundation for many issuers in the financing process.

The inclusion in the Guidance of the presumption that dealers are financial advisors would serve to substantially chill or eliminate this pre-engagement exchange of information, as dealers will seek to avoid any actions that might otherwise be construed to substantiate the existence of an advisory relationship. This is particularly true because of the statement in the Guidance that if a dealer had properly alerted the issuer that it was acting solely as an underwriter, its subsequent course of conduct may still cause it to be considered a financial advisor and thus precluded from participating in the underwriting. This situation is further exacerbated by the deletion in the Proposed Amendments of the language relating to compensation in the first sentence of Rule G-23(b), which has historically provided a "bright line" determination as to when a person may be deemed a financial advisor based on receiving a fee for the service provided. The combination of the elimination of the bright line test and the presumption instituted in the Guidelines will cause dealers to be extremely reluctant to engage in any preliminary discussions with issuers for fear of being precluded from participation in the issuance under consideration, all to the detriment of issuers.

We strongly believe the presumption that municipal securities dealers are acting as financial advisors should be eliminated from the Guidance. Rather, the Guidance should provide the simple requirement that dealers intending to act solely as underwriters in connection with a proposed offering, make clear and unambiguous such intentions in their initial communications with the issuer. The Guidance should provide that a written agreement between the prospective underwriter and municipal issuer reflecting such

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[6] MSRB Notice 2011-10, *Proposed Rule Amendments and Interpretive Notice Filed Regarding Rule G-23 On Activities of Financial Advisors* (Feb. 9, 2011).

[7] Id. [emphasis added].

understanding would, in fact, establish a presumption that the underwriter will continue to act in such role throughout the pendency of the offering. The subsequent course of conduct of the parties should then only be relevant to the extent the underwriter acts outside the scope of the established relationship. Moreover, with the recently proposed MSRB Rule G-17 interpretative notice,[8] we are hopeful that the duties of underwriters in this context will become more clearly delineated. Thus, we believe these procedures would be more than sufficient to ensure that both issuers and dealers are fully cognizant of the underwriter's role in a proposed transaction.

3. *The Proposed Amendments Would Be Detrimental to Small Issuers in the Municipal Securities Market.* The Proposed Amendments will disproportionately impact small issuers and small issues of bonds, where there are frequently a limited number of potential underwriters. By eliminating a potential underwriter from the playing field, the Proposed Amendments will decrease competition, reduce issuer choice and likely increase costs for smaller issuers and issues. For example, of competitive transactions under $10 million, almost 42% came to market with three or fewer bidders.[9]

   These small issuances consist almost entirely of simple fixed rate bonds, without novel issues or other special structural attributes. Moreover, as stated above, we are unaware of any history of abuse in this area. In any event, any concern relating to potential abuse by financial advisors is more than adequately addressed through the fiduciary duties imposed on financial advisors under federal and state law.

   Municipal bond transactions under $10 million represented less than 2.5% of all new issue volume (based on total dollar amount) over the last ten years,[10] and regulation that leads to fewer bidders for these smaller issuances could have a significant adverse impact on such issuers, particularly in times of economic stress. We urge the Commission to consider an exemption from the provisions of the Proposed Amendments for this limited segment of the market of issuances under $10 million.

4. *Remarketing Activity Cooling-off Period.* The Proposed Amendments preclude a dealer from acting as a remarketing agent with respect to an issue for one year following the termination of an advisory relationship in connection with such issue. We believe the

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[8] MSRB Notice 2011-12, *Request for Comment on Draft Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities* (Feb. 14, 2011).

[9] *Ipreo* data for competitive bond deals between $1 million and $10 million in par value for 2000-2009. Over this period, there were at least 2,637 competitive issues in which only one bidder participated, and there were at least 13,024 competitive issues in which only two to three bidders participated.

[10] Id.

one year period is an arbitrary and unnecessarily long period of time. Given the pace of the securities markets, and the significant changes that may occur over as a little as a few months, we believe this provision is an unnecessary restraint that could detrimentally impact both issuers and dealers. Accordingly, we suggest that the period specified in Rule G-23(e) be limited to no more than three months.

5. *Grandfathering of Current Financial Advisory Relationships.* The six-month implementation period proposed by the MSRB for the Proposed Amendments is insufficient to ensure that market disruption with respect to current advisory relationships is avoided. Because some municipal securities transactions can be in the planning stage for many months, we believe the Proposed Amendments could be significantly disruptive to certain transactions if phased in on this basis. We suggest that, while the six-month implementation period should be retained to ensure that dealers and advisors have sufficient time to implement appropriate policies and procedures, current Rule G-23 should continue to apply to those financial advisory relationships in place at the time of adoption of the Proposed Amendments in connection with the issues of municipal securities that are under consideration at such time.

6. *Sunset Provision.* As stated above, Rule G-23 has a long and unblemished history of providing balanced guidance to financial advisors who seek to act as underwriters. Given the lack of any such history of abuse, we suggest that the Commission consider including a provision providing for the expiration of the Proposed Amendments two years after implementation. This would allow for a significant period in which the MSRB would be able to assess the impact of the Proposed Amendments, and would ensure reconsideration of the actual need for their continuance at such time.

We believe the areas of significant concern cited above warrant the disapproval of the Proposed Amendments by the Commission, and we urge the Commission to instruct the MSRB to re-propose amendments to Rule G-23 in keeping with these comments.

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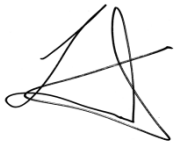
We would be pleased to discuss any of these comments in greater detail, or to provide any other assistance that would help facilitate your review of the Proposed Amendments. If you have any questions, please do not hesitate to contact the undersigned at (212) 313-1130, or Stephen P. Wink of Latham & Watkins, counsel to SIFMA in this matter, at (212) 906-1229.

Very truly yours,



Leslie M. Norwood
Managing Director and
Associate General Counsel

cc: The Honorable Mary L. Schapiro, Chairman
The Honorable Kathleen L. Casey, Commissioner
The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
Robert Cook, Director, Division of Trading and Markets

Lynnette Kelly Hotchkiss, Executive Director, Municipal Securities Rulemaking Board