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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No. SR - 2009 - 17
Amendment No.

Proposed Rule Change by Municipal Securities Rulemaking Board

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial	Amendment	Withdrawal	Section 19(b)(2)	Section 19(b)(3)(A)	Section 19(b)(3)(B)
☑	☐	☐	☑	☐	☐

Rule

☐ 19b-4(f)(1) ☐ 19b-4(f)(4)
☐ 19b-4(f)(2) ☐ 19b-4(f)(5)
☐ 19b-4(f)(3) ☐ 19b-4(f)(6)

Pilot ☐

Extension of Time Period for Commission Action ☐

Date Expires

Exhibit 2 Sent As Paper Document ☐

Exhibit 3 Sent As Paper Document ☐

Description

Provide a brief description of the proposed rule change (limit 250 characters).

Proposed rule change consisting of amendments to Rules G-8, G-9 and G-11, a proposed interpretation of Rule G-17 regarding priority of orders, and the deletion of a previous Rule G-17 interpretive notice

Contact Information

Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name: Peg
Last Name: Henry
Title: Deputy General Counsel
E-mail: phenry@msrb.org
Telephone: (703) 797-6600
Fax: (703) 797-6700

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

Municipal Securities Rulemaking Board

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized officer.

Date: 11/18/2009

By: Ronald W. Smith
(Name)

Corporate Secretary
(Title)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Ronald Smith, rsmith@msrb.org

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

Form 19b-4 Information Add Remove View	The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.
Exhibit 1 - Notice of Proposed Rule Change Add Remove View	The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)
Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications Add Remove View Exhibit Sent As Paper Document ☐	Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.
Exhibit 3 - Form, Report, or Questionnaire Add Remove View Exhibit Sent As Paper Document ☐	Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.
Exhibit 4 - Marked Copies Add Remove View	The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.
Exhibit 5 - Proposed Rule Text Add Remove View	The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.
Partial Amendment Add Remove View	If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of Proposed Rule Change

(a) The Municipal Securities Rulemaking Board (the "MSRB" or "Board") is hereby filing with the Securities and Exchange Commission (the "SEC" or "Commission") a proposed rule change (the "proposed rule change") consisting of (i) amendments to Rule G-8, on books and records to be made by brokers, dealers and municipal securities dealers, Rule G-9, on preservation of records, and Rule G-11, on new issue syndicate practices; (ii) a proposed interpretation (the "proposed interpretive notice") of Rule G-17, on conduct of municipal securities activities; and (iii) the deletion of a previous Rule G-17 interpretive notice on priority of orders dated December 22, 1987 (the "1987 interpretive notice"). The MSRB requests that the proposed rule change become effective for new issues of municipal securities for which the Time of Formal Award (as defined in Rule G-34(a)(ii)(C)(1)(a)) occurs more than 60 days after approval of the proposed rule change by the SEC. The proposed rule change is as follows:[1]

Rule G-8: Books and Records to be Made by Brokers, Dealers and Municipal Securities Dealers

(a) Description of Books and Records Required to be Made. Except as otherwise specifically indicated in this rule, every broker, dealer and municipal securities dealer shall make and keep current the following books and records, to the extent applicable to the business of such broker, dealer or municipal securities dealer:

(i) – (vii) No change.

(viii) Records **Concerning Primary Offerings** [of Syndicate Transactions].

(A) For each primary offering for which a syndicate has been [With respect to each syndicate, joint or similar account] formed for the purchase of municipal securities, records shall be maintained by **the syndicate manager** [a managing underwriter designated by the syndicate or account to maintain the books and records of the syndicate or account,] showing the description and aggregate par value of the securities[,]**;** the name and percentage of participation of each member of the syndicate [or account,]**;** the terms and conditions governing the formation and operation of the syndicate [or account (including,]**;** a [separate] statement of all terms and conditions required by the issuer[)] **(including whether the issuer has required a retail order period and the issuer's definition of "retail," if applicable);** all orders received for the purchase of the securities from the syndicate [or account (except bids at other than syndicate price),]; all allotments of securities and the price at which sold[,]**; those instances in which the syndicate manager allocated securities in a manner other than in accordance with**

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[1] Underlining signifies additions; brackets signify deletions.

the priority provisions or accorded equal or greater priority over other orders to orders by syndicate members for their own accounts or their respective related accounts; and the specific reasons why it was in the best interests of the syndicate to do so; the date and amount of any good faith deposit made to the issuer[,]**;** the date of settlement with the issuer[,]**;** the date of closing of the account[,]**;** and a reconciliation of profits and expenses of the account.

(B) For each primary offering for which a syndicate has not been formed for the purchase of municipal securities, records shall be maintained by the sole underwriter showing the description and aggregate par value of the securities; all terms and conditions required by the issuer (including whether the issuer has required a retail order period and the issuer's definition of "retail," if applicable); all orders received for the purchase of the securities from the underwriter; all allotments of securities and the price at which sold; the date and amount of any good faith deposit made to the issuer; and the date of settlement with the issuer.

(ix) - (xxiii) No change.

(xxiv) Records of Secondary Market Trading Account Transactions. With respect to each secondary market trading account formed for the purchase of municipal securities, records shall be maintained by the broker, dealer, or municipal securities dealer designated by the account to maintain the books and records of the account, showing the description and aggregate par value of the securities; the name and percentage of participation of each member of the account; the terms and conditions governing the formation and operation of the account; all orders received for the purchase of the securities from the account; all allotments of securities and the price at which sold; the date of closing of the account; and a reconciliation of profits and expenses of the account.

(b) - (e) No change.

(f) Compliance with Rule 17a-3. Brokers, dealers and municipal securities dealers other than bank dealers which are in compliance with rule 17a-3 of the Commission will be deemed to be in compliance with the requirements of this rule, provided that the information required by subparagraph (a)(iv)(D) of this rule as it relates to uncompleted transactions involving customers; paragraph (a)(viii); and paragraphs (a)(xi) through [(a)(xxiii)] **(a)(xxiv)** shall in any event be maintained.

(g) No change.

* * * * *

Rule G-9: Preservation of Records

(a) Records to be Preserved for Six Years. Every broker, dealer and municipal securities dealer shall preserve the following records for a period of not less than six years:

(i) – (iii) No change.

(iv) the records **concerning primary offerings** [of syndicate transactions] described in rule G-8(a)(viii), provided, however, that [(1)] such records need not be preserved for a syndicate [or similar account] **or by a sole underwriter** [which] **that, in either case,** is not successful in purchasing an issue of municipal securities[, and (2) information concerning orders received by a syndicate or similar account to which securities were not allocated by such syndicate or account need not be preserved after the date of final settlement of the syndicate or account];

(v) – (x) No change.

(xi) the records concerning secondary market trading account transactions described in rule G-8(a)(xxiv), provided, however, that such records need not be preserved for a secondary market trading account which is not successful in purchasing municipal securities.

(b) – (g) No change.

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Rule G-11: Primary Offering [New Issue Syndicate] Practices

(a) Definitions. For purposes of this rule, the following terms have the following meanings:

(i)-(iv) No change.

(v) The term "order period" means the period of time, if any, announced by a syndicate **or, when no syndicate has been formed, a sole underwriter,** during which orders will be solicited for the purchase of securities [held in syndicate] **in a primary offering**.

(vi) No change.

(vii) [The term "related portfolio," when used with respect to a broker, dealer or municipal securities dealer, means a municipal securities investment portfolio of such broker, dealer or municipal securities dealer or of any person directly or indirectly controlling, controlled by or under common control with such broker, dealer or municipal securities dealer.] **** Reserved for future use ****

(viii)-(ix) No change.

(x) The term "affiliate" means a person controlling, controlled by, or under common control with a syndicate member or, when no syndicate has been formed, a sole underwriter.

(xi) In the case of a primary offering for which a syndicate is formed for the purchase of municipal securities, the term "related account" includes a municipal securities investment portfolio of a syndicate member or an affiliate, an arbitrage account of a syndicate member or an affiliate, a municipal securities investment trust sponsored by a syndicate member or an affiliate, or an accumulation account established in connection with such a municipal securities investment trust. In the case of a primary offering for which a syndicate has not been formed, the term "related account" includes a municipal securities investment portfolio of the sole underwriter or an affiliate, an arbitrage account of the sole underwriter or an affiliate, a municipal securities investment trust sponsored by the sole underwriter or an affiliate, or an accumulation account established in connection with such a municipal securities investment trust.

(b) Disclosure of Capacity. Every broker, dealer or municipal securities dealer [which is a member of a syndicate] that submits an order to a sole underwriter or syndicate or to a member of a syndicate for the purchase of municipal securities held by the syndicate shall disclose at the time of submission of such order if the securities are being purchased for its dealer account or[,] for [the account of] a related account [portfolio] of such broker, dealer or municipal securities dealer[, for a municipal securities investment trust sponsored by such broker, dealer or municipal securities dealer, or for an accumulation account established in connection with such a municipal securities investment trust].

(c) Confirmations of Sale. Sales of securities held by a syndicate to a related **account** [portfolio, municipal securities investment trust or accumulation account referred to in section (b) above] shall be confirmed by the syndicate manager directly to such related **account** [portfolio, municipal securities investment trust or accumulation account] or for the account of such related **account** [portfolio, municipal securities investment trust or accumulation account to the broker, dealer or municipal securities dealer] submitting the order. Nothing herein contained shall be construed to require that sales of municipal securities to a related **account** [portfolio, municipal securities investment trust or accumulation account] be made for the benefit of the syndicate.

(d) No change.

(e) Priority Provisions.

(i) In the case of a primary offering for which a syndicate has been formed, [Every] **the** syndicate shall establish priority provisions and, if such priority provisions may be changed,

the procedure for making changes. For purposes of this rule, the requirement to establish priority provisions shall not be satisfied if a syndicate provides only that the syndicate manager or managers may determine in the manager's or managers' discretion the priority to be accorded different types of orders. **Unless otherwise agreed to with the issuer, such priority provisions shall give priority to customer orders over orders by members of the syndicate for their own accounts or orders for their respective related accounts, to the extent feasible and consistent with the orderly distribution of securities in the offering.** Notwithstanding the preceding sentence, a syndicate may include a provision permitting the syndicate manager or managers on a case-by-case basis to allocate securities in a manner other than in accordance with the priority provisions, if the syndicate manager or managers determine in its or their discretion that it is in the best interests of the syndicate. In the event any such allocation is made, the syndicate manager or managers shall have the burden of justifying that such allocation was in the best interests of the syndicate.

(ii) In the case of a primary offering for which a syndicate has not been formed, unless otherwise agreed to be the issuer, the sole underwriter shall give priority to customer orders over orders for its own account or orders for its related accounts, to the extent feasible and consistent with the orderly distribution of securities in the offering.

(f) - (g) No change.

(h) Disclosure of Syndicate Expenses and Other Information. At or before the final settlement of syndicate account, the senior syndicate manager shall furnish to the other members of the syndicate:

(i) No change.

(ii) a summary statement showing:

(A) the identity of each related **account** **[**portfolio, municipal securities investment trust, or accumulation account referred to in section (b) above**]** submitting an order to which securities have been allocated as well as the aggregate par value and maturity date of each maturity so allocated;

(B) – (C) No change.

(i) – (j) No change.

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Interpretation on Priority of Orders for Securities in a Primary Offering under Rule G-17

On December 22, 1987, the MSRB published a notice interpreting the fair practice principles of Rule G-17 as they apply to the priority of orders for new issue securities (the "1987 notice"). The MSRB wishes to update the guidance provided in the 1987 notice due to changes in the marketplace and subsequent amendments to Rule G-11.

Rule G-11(e) requires syndicates to establish priority provisions and, if such priority provisions may be changed, to specify the procedure for making changes. The rule also permits a syndicate to allow the syndicate manager, on a case-by-case basis, to allocate securities in a manner other than in accordance with the priority provisions if the syndicate manager determines in its discretion that it is in the best interests of the syndicate. Under Rule G-11(f), syndicate managers must furnish information, in writing, to the syndicate members about terms and conditions required by the issuer,[1] priority provisions and the ability of the syndicate manager to allocate away from the priority provisions, among other things. Syndicate members must promptly furnish this information, in writing, to others upon request. This requirement was adopted to allow prospective purchasers to frame their orders to the syndicate in a manner that would enhance their ability to obtain securities since the syndicate's allocation procedures would be known.

In addition to traditional priority provisions found in syndicate agreements, municipal securities underwriters frequently agree to other terms and conditions specified by the issuer of the securities relating to the distribution of the issuer's securities. Such provisions include, but are not limited to, requirements concerning retail order periods. MSRB Rule G-17 states that, in the conduct of its municipal securities business, each broker, dealer, and municipal securities dealer ("dealer") shall deal fairly with all persons and shall not engage in any deceptive, dishonest or unfair practice. These requirements specifically apply to an underwriter's activities conducted with a municipal securities issuer, including any commitments that the underwriter makes regarding the distribution of the issuer's securities. An underwriter may violate the duty of fair dealing by making such commitments to the issuer and then failing to honor them. This could happen, for example, if an underwriter fails to accept, give priority to, or allocate to retail orders in conformance with the provisions agreed to in an undertaking to provide a retail order period. A dealer who wishes to allocate securities in a manner that is inconsistent with an issuer's requirements must not do so without the issuer's consent.

Principles of fair dealing generally will require the syndicate manager to give priority to customer orders over orders for its own account, orders by other members of the syndicate for their own accounts, orders from persons controlling, controlled by, or under common control with any syndicate member ("affiliates") for their own accounts, or orders for their respective related accounts,[2] to the extent feasible and consistent with the orderly distribution of securities in a primary offering. This principle may affect a wide range of dealers and their related accounts given changes in organizational structures due to consolidations, acquisitions, and other corporate actions that have, in many cases, resulted in increasing numbers of dealers, and their

related dealer accounts, becoming affiliated with one another.

Rule G-17 does not require the syndicate manager to accord greater priority to customer orders over orders submitted by non-syndicate dealers (including selling group members). However, prioritization of customer orders over orders of non-syndicate dealers may be necessary to honor terms and conditions agreed to with issuers, such as requirements relating to retail orders.

The MSRB understands that syndicate managers must balance a number of competing interests in allocating securities in a primary offering and must be able quickly to determine when it is appropriate to allocate away from the priority provisions, to the extent consistent with the issuer's requirements. Thus, Rule G-17 does not preclude the syndicate manager or managers from according equal or greater priority to orders by syndicate members for their own accounts, affiliates for their own accounts, or their respective related accounts if, on a case-by-case basis, the syndicate manger determines in its discretion that it is in the best interests of the syndicate. However, the syndicate manager shall have the burden of justifying that such allocation was in the best interests of the syndicate. Syndicate managers should ensure that all allocations, even those away from the priority provisions, are fair and reasonable and consistent with principles of fair dealing under Rule G-17.

It should be noted that all of the principles of fair dealing articulated in this notice extend to any underwriter of a primary offering, whether a sole underwriter, a syndicate manager, or a syndicate member.

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[1] The requirements of Rule G-11(f) with respect to issuer requirements were adopted by the MSRB in 1998. *See* Exchange Act Release No. 40717 (November 27, 1998) (File No. SR-MSRB-97-15).

[2] "Related account" has the meaning set forth in Rule G-11(a)(xi).

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[Notice of Interpretation Concerning Priority of Orders for New Issue Securities: Rule G-17

December 22, 1987

The Board is concerned about reports that senior syndicate managers may not always be mindful of principles of fair dealing in allocations of new issue securities. In particular, the Board believes that the principles of fair dealing require that customer orders should receive priority

over similar dealer or certain dealer-related account[1] orders, to the extent that this is feasible and consistent with the orderly distribution of new issue securities.

Rule G-11(e) requires syndicates to establish priority provisions and, if such priority provisions may be changed, to specify the procedure for making changes. The rule also permits a syndicate to allow the senior manager, on a case-by-case basis, to allocate securities in a manner other than in accordance with the priority provisions if the senior manager determines in its discretion that it is in the best interests of the syndicate. Senior managers must furnish this information, in writing, to the syndicate members. Syndicate members must promptly furnish this information, in writing, to others upon request. This requirement was adopted to allow prospective purchasers to frame their orders to the syndicate in a manner that would enhance their ability to obtain securities since the syndicate's allocation procedures would be known.

The Board understands that senior managers must balance a number of competing interests in allocating new issue securities. In addition, a senior manager must be able quickly to determine when it is appropriate to allocate away from the priority provisions and must be prepared to justify its actions to the syndicate and perhaps to the issuer. While it does not appear necessary or appropriate at this time to restrict the ability of syndicates to permit managers to allocate securities in a manner different from the priority provisions, the Board believes senior managers should ensure that all allocations, even those away from the priority provisions, are fair and reasonable and consistent with principles of fair dealing under rule G-17.[2] Thus, in the Board's view, customer orders should have priority over similar dealer orders or certain dealer-related account orders to the extent that this is feasible and consistent with the orderly distribution of new issue securities. Moreover, the Board suggests that syndicate members alert their customers to the priority provisions adopted by the syndicate so that their customers are able to place their orders in a manner that increases the possibility of being allocated securities.

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[1] A dealer-related account includes a municipal securities investment portfolio, arbitrage account or secondary trading account of a syndicate member, a municipal securities investment trust sponsored by a syndicate member, or an accumulation account established in connection with such a municipal securities investment trust.

[2] Rule G-17 provides that:

> [i]n the conduct of its municipal securities business, each broker, dealer, and municipal securities dealer shall deal fairly with all persons and shall not engage in any deceptive, dishonest or unfair practice.]

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(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was adopted by the MSRB at its October 15-16, 2009 meeting. Questions concerning this filing may be directed to Peg Henry, Deputy General Counsel, at (703) 797-6600.

3. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

(a) The proposed amendments to Rule G-11 would: (1) apply the rule to all primary offerings, not just those for which a syndicate is formed; (2) require that all dealers (not just syndicate members) disclose whether their orders are for their own account or a related account; and (3) require that priority be given to orders from customers over orders from syndicate members for their own accounts or orders from their respective related accounts, to the extent feasible and consistent with the orderly distribution of securities in the offering, unless the issuer otherwise agrees or it is in the best interests of the syndicate not to follow that order of priority.

The proposed amendments to Rules G-8 and G-9 would require that records be retained for all primary offerings of: (1) all orders, whether or not filled; (2) whether there was a retail order period and, if so, the issuer's definition of "retail;" and (3) those instances when the syndicate manager allocated bonds other than in accordance with the priority provisions of Rule G-11 and the specific reasons why it was in the best interests of the syndicate to do so.

The proposed interpretive notice would provide that violation of these priority provisions would be a violation of Rule G-17, subject to the same exceptions as provided in proposed amended Rule G-11. It also would provide that Rule G-17 does not require that customer orders be accorded greater priority than orders from dealers that are not syndicate members or their respective related accounts. The proposed interpretive notice also would provide that it would be a violation of Rule G-17 for a dealer to allocate securities in a manner that is inconsistent with an issuer's requirements for a retail order period without the issuer's consent. Issuance of the notice, in addition to the amendments to Rule G-11, is consistent with previous guidance issued by the Board that all activities of dealers must be viewed in light of the basic fair dealing principles of Rule G-17, regardless of whether other MSRB rules establish additional requirements on dealers.[2]

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[2] MSRB Notice 2009-42 (July 14, 2009) – Guidance on Disclosure and Other Sales Practice Obligations to Individual and Other Retail Investors in Municipal Securities.

The guidance set forth in the proposed interpretive notice arose out of the Board's on-going review of its General Rules as well as concerns expressed by institutional investors that their orders were sometimes not filled in whole or in part during a primary offering, yet the bonds became available shortly thereafter in the secondary market. They attributed that problem to two causes: first, some retail dealers were allowed to place orders in retail order periods without going away orders and second, syndicate members, their affiliates, and their respective related accounts were allowed to buy bonds in the primary offering for their own account even though other orders remained unfilled. There was also concern that these two factors could contribute to restrictions on access to new issues by retail investors, in a manner inconsistent with the issuer's intent.

The MSRB had last addressed the priority of orders in the 1987 interpretive notice.[3] That guidance interpreted Rule G-17 to require generally that customer orders be filled before orders from dealers and dealer-related accounts. Dealer-related accounts were defined to "include a municipal securities investment portfolio, arbitrage account, or secondary trading account of a syndicate member, a municipal securities investment trust sponsored by a syndicate member, or an accumulation account established in connection with such a municipal securities investment trust." The notice did not limit the ability of the syndicate manager to allocate away from the priority provisions of the syndicate if to do so would be in the best interests of the syndicate. The Board determined to update the guidance provided in the 1987 interpretive notice due to changes in the marketplace and subsequent amendments to Rule G-11. The proposed interpretive notice will supersede the 1987 interpretive notice, which will be deleted as part of the proposed rule change.

(b) The MSRB has adopted the proposed rule change pursuant to Section 15B(b)(2)(C) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), which provides that MSRB's rules shall:

> be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.

The MSRB believes that the proposed rule changes and proposed interpretive notice are consistent with the Exchange Act because they will prevent fraudulent and manipulative acts and

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3 The 1987 interpretive notice was filed with the SEC on December 22, 1987 for immediate effectiveness. *See* File No. SR-MSRB-1987-14.

practices and protect investors and the public interest.

4. Self-Regulatory Organization's Statement on Burden on Competition

The MSRB does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act since it would apply equally to all dealers.

5. Self-Regulatory Organization's Statement on Comments Received on the Proposed Rule Change by Members, Participants, or Others

On August 11, 2009, the MSRB published for comment the proposed amendments and proposed interpretive notice that comprise the proposed rule change.[4] The MSRB received comments from five commentators.[5]

First Southwest Letter.

First Southwest supported the proposed amendments to Rule G-11, in particular: (1) the change that would require all dealers to disclose whether their orders are for their own accounts or related accounts and (2) the changes that would require that underwriters give priority to customer orders. It characterized the practice of filling dealer orders or related account orders before customer orders as "front running" and supported the changes to Rule G-11 to strengthen the prohibition against front running.

First Southwest assumed that one of the Board's goals in publishing Notice 2009-47 was to address flipping and said that the Board should go further by addressing flipping by non-syndicate members, hedge funds, investment advisors, mutual funds, bank portfolios, tender option bond (TOB) programs, and institutional investors. They suggested that the Board undertake a thorough study of flipping and, if appropriate, make recommendations for the regulation of this practice. They suggested that the following questions be addressed: (1) Do

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4 *See* MSRB Notice 2009-47 (August 11, 2009).

5 Letters from: Carl Giles, Managing Director, First Southwest Company ("First Southwest"), to Peg Henry, MSRB, dated September 10, 2009; Letter from Lynn Hampton, Vice President for Finance and Chief Financial Officer, Metropolitan Washington Airports Authority ("MWAA"), to Ronald A. Stack, MSRB Chair, dated August 18, 2009; Letter from Michael Decker and Mike Nicholas, Co-Chief Executive Officers, Regional Bond Dealers Association ("RBDA"), to Ms. Henry, dated September 11, 2009; Letter from Leon J. Bijou, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association ("SIFMA"), to Ms. Henry, dated September 11, 2009; and Letter from Napoleon Brandford, III, Chairman, Siebert Brandford Shank & Co., L.L.C. ("Siebert"), to Ms. Henry, dated September 8, 2009.

purchasers of bonds from a primary offering have the right to sell their bonds at any time? (2) Do purchasers of bonds from a primary offering have a right to take an immediate profit when possible? (3) Do flippers provide liquidity to the municipal marketplace? (4) Is flipping a case of demand being greater than supply thereby creating price discovery?

MWAA Letter.

MWAA was supportive of the proposals regarding retail order periods in the proposed interpretive notice. They said that they enforce their retail order periods and, in particular, check for flipping. They said that they prefer that retail firms participate in the selling group, rather than buying during the institutional sales order period and marking up the bonds for their retail clients. Their letter did not address the proposed rule amendments.

Siebert Letter.

Siebert commented on the proposed interpretive notice, stating that the retail order period process had broken down because few issuers were enforcing it. They said that some syndicate members submit large orders that they describe as bundled retail orders and that some institutional investors characterize their orders as retail, when in fact they probably are not. They said that some underwriting firms (primary book-runners) have formed arrangements with other firms to "funnel" bonds at the full, or split, takedown out of the syndicate, characterizing these orders as retail, rather than more appropriately as selling group orders. They said they were in full support of the concerns expressed by institutional investors and of enforcement of the underwriting rules governing fair dealing.

RBDA Letter.

RBDA assumed that the proposed interpretive notice and proposed amendments to Rule G-11 were directed at flipping and said that much flipping is done by institutional investors, which the proposed interpretive notice would not address. They said that a dealer that submits retail orders during a retail order period without *bona fide* orders from retail customers already violates Rule G-17, which it said may be enforced through strict enforcement of existing rules and interpretations. They said that it is not always possible for a dealer to know whether an order is truly retail, for example if it comes from a bank trust department or a third party asset manager.

RBDA said that the proposed definition of "affiliate" and "related account" were too broad and would capture investor accounts that might be sufficiently independent to warrant treatment similar to unaffiliated customers. They suggested that the Board consider an alternative definition based on Rule G-14, such that if a trade would be required to be reported to RTRS without a special trade indicator, the investor would not be considered an affiliate or related account.

They also said that the proposed amendments would establish new recordkeeping rules for secondary market trading accounts.

SIFMA Letter.

SIFMA opposed the proposed amendments to Rule G-11, arguing that they would disrupt the process of allocating securities. They objected to a rule that is focused only on underwriters, their affiliates, and related accounts, which they said would not eliminate front running and the "placing of phantom [retail] orders." They said that the proposed amendments would add nothing that is not already prohibited under Rule G-17, which applies to all dealers, whether they are syndicate members or not. They said that dealers maintain records of orders, allotments, trade reporting data, and trade confirmations, which are used by FINRA to audit violations of Rule G-17. They "urge[d] FINRA to vigorously enforce existing laws and regulations to prevent front running, placing phantom orders and all other deceptive, dishonest or unfair practices."

SIFMA said that the proposed amendments to Rule G-11 would have detrimental effects on the process of allocating securities. They said that the amendments would reduce competition and result in higher borrowing costs. They said that the proposed amendments would interfere with the discretion afforded to syndicate managers by current Rule G-11.

SIFMA also said that the proposed amendments would not be consistent with FINRA's proposed rule on fixed price offerings, which they said would permit sales to affiliates as long as the sale was not at a discount.

SIFMA supported the proposed interpretive notice, which they characterized as providing more flexibility than the proposed rule changes.

Response to Comment Letters.

Most of the commentators assumed that the purpose of the proposed rule change was the prevention of flipping.[6] Some of the commentators[7] then objected to the proposed amendments and, in RBDA's case, the proposed interpretive notice, on the grounds that they would not successfully eliminate flipping. Some of the commentators[8] also stated that the filling of dealer orders in advance of customer orders constituted front-running and was already prohibited under SEC rules. The Board's objective in proposing the rule change is the broader distribution of municipal securities, rather than the elimination of flipping. Rule G-11 was designed to address the concerns expressed by Congress that the "economic power accruing to banks by virtue of their role as major consumers as well as underwriters of new issue municipals has led to a loose set of syndicate rules which permit banks to be underwriter distributors of new issues of

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6 *See* letters from First Southwest, MWAA, RBDA, and SIFMA.

7 *See* letters from RBDA and SIFMA.

8 *See* letters from First Southwest and SIFMA.

municipal bonds and in the same issue give their own investment portfolio the prerogatives and priorities of public institutional orders."[9] Although Congress specifically focused on bank-related portfolios, the MSRB saw no reason to distinguish for purposes of Rule G-11 between such portfolios, on the one hand, and affiliated investment trusts or related portfolios of securities firms, on the other.[10] The Board determined that it was appropriate to address potential abuses in the allocation of securities to customers at this time and that the Board would consider the other issues raised by the commentators as noted above in the context of its broader ongoing review of its fair practice and other rules.

Only two of the comment letters expressly addressed the proposed amendments to Rule G-8 and Rule G-9. SIFMA suggested that existing recordkeeping rules were adequate to permit enforcement of Rule G-17 if vigorously enforced by FINRA. However, existing Rule G-9 does not require retention of records of unfilled orders, which limits the ability of FINRA to effectively surveil for compliance with these requirements. The Board determined that the proposed amendments to G-8 and G-9 are necessary to permit proper enforcement of the proposed rule change. Although RBDA commented that the proposed rule change would impose new recordkeeping requirements on secondary market trading accounts, the proposed rule change would merely move the existing recordkeeping requirements for such accounts to a new subsection of Rule G-8.

The Board determined that the RBDA proposal to define "affiliate" based on Rule G-14 trade reporting concepts was not advisable, because it would result in a weakening of existing guidance in that a dealer's proprietary account would be considered "related," while a dealer's TOB account would not.

The Board did not agree with the SIFMA comment letter that the proposed interpretive notice is more flexible than the proposed amendments to Rule G-11, noting that the language in the proposed interpretive notice supposedly providing more flexibility -- "to the extent feasible and consistent with the orderly distribution of securities in a primary offering" -- is also contained in the proposed amendments to Rule G-11. The Board also did not agree that the proposed amendments to Rule G-11 would have detrimental effects on the process of allocating securities or that the amendments would reduce competition and result in higher borrowing costs. The Board also did not agree that the proposed amendments would interfere with the discretion afforded to syndicate managers by current Rule G-11, noting that neither the proposed amendments to Rule G-11 nor the proposed interpretive notice would preclude the allocation of

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[9] S. Rep. No. 94-75, at 49 (1975).

[10] *See* Notice of Filing of Proposed Rule G-11 on Syndicate Practices – MSRB Rule G-11, [1977 -1987 Transfer Binder] MSRB Manual (CCH) at 10,363.

securities to underwriters for their own accounts or their related accounts, because exceptions are provided if the issuer consents or the syndicate manager concludes that it is in the best interests of the syndicate to do so and properly documents that decision. Finally, with regard to SIFMA's comment on the proposed FINRA fixed price offering rule, there is no comparable fixed price offering rule for municipal securities.

6. Extension of Time Period for Commission Action

The MSRB declines to consent to an extension of the time period specified in Section 19(b)(2) of the Exchange Act.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Exhibits

1. Federal Register Notice

2. Notice and comment letters

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- ; File No. SR-MSRB-2009-17)

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Proposed Rule Change by the Municipal Securities Rulemaking Board Consisting of (i) Amendments to Rule G-8 (Books and Records to be Made by Brokers, Dealers and Municipal Securities Dealers), Rule G-9 (Preservation of Records), and Rule G-11 (New Issue Syndicate Practices); (ii) a Proposed Interpretation of Rule G-17 (Conduct of Municipal Securities Activities); and (iii) the Deletion of a Previous Rule G-17 Interpretive Notice

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on November 18, 2009, the Municipal Securities Rulemaking Board (the "MSRB") filed with the Securities and Exchange Commission (the "Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The MSRB has filed with the Commission a proposed rule change consisting of (i) proposed amendments to Rule G-8 (books and records to be made by brokers, dealers and municipal securities dealers), Rule G-9 (preservation of records), and Rule G-11, (new issue syndicate practices); (ii) a proposed interpretation (the "proposed interpretive notice") of Rule G-17 (conduct of municipal securities activities); and (iii) the deletion of

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

a previous Rule G-17 interpretive notice on priority of orders dated December 22, 1987 (the "1987 interpretive notice"). The MSRB requested that the proposed rule change become effective for new issues of municipal securities for which the Time of Formal Award (as defined in Rule G-34(a)(ii)(C)(1)(a)) occurs more than 60 days after approval of the proposed rule change by the SEC.

The text of the proposed rule change is available on the MSRB's web site at www.msrb.org/msrb1/sec.asp, at the MSRB's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

In its filing with the Commission, the MSRB included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The MSRB has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

1. Purpose

The proposed amendments to Rule G-11 would: (1) apply the rule to all primary offerings, not just those for which a syndicate is formed; (2) require that all dealers (not just syndicate members) disclose whether their orders are for their own account or a related account; and (3) require that priority be given to orders from customers over orders from syndicate members for their own accounts or orders from their respective related accounts, to the extent feasible and consistent with the orderly distribution of

securities in the offering, unless the issuer otherwise agrees or it is in the best interests of the syndicate not to follow that order of priority.

The proposed amendments to Rules G-8 and G-9 would require that records be retained for all primary offerings of: (1) all orders, whether or not filled; (2) whether there was a retail order period and, if so, the issuer's definition of "retail;" and (3) those instances when the syndicate manager allocated bonds other than in accordance with the priority provisions of Rule G-11 and the specific reasons why it was in the best interests of the syndicate to do so.

The proposed interpretive notice would provide that violation of these priority provisions would be a violation of Rule G-17, subject to the same exceptions as provided in proposed amended Rule G-11. It also would provide that Rule G-17 does not require that customer orders be accorded greater priority than orders from dealers that are not syndicate members or their respective related accounts. The proposed interpretive notice also would provide that it would be a violation of Rule G-17 for a dealer to allocate securities in a manner that is inconsistent with an issuer's requirements for a retail order period without the issuer's consent. Issuance of the notice, in addition to the amendments to Rule G-11, is consistent with previous guidance issued by the Board that all activities of dealers must be viewed in light of the basic fair dealing principles of Rule G-17, regardless of whether other MSRB rules establish additional requirements on dealers.[3]

The guidance set forth in the proposed interpretive notice arose out of the Board's on-going review of its General Rules as well as concerns expressed by institutional

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[3] MSRB Notice 2009-42 (July 14, 2009) – Guidance on Disclosure and Other Sales Practice Obligations to Individual and Other Retail Investors in Municipal Securities.

investors that their orders were sometimes not filled in whole or in part during a primary offering, yet the bonds became available shortly thereafter in the secondary market. They attributed that problem to two causes: first, some retail dealers were allowed to place orders in retail order periods without going away orders and second, syndicate members, their affiliates, and their respective related accounts were allowed to buy bonds in the primary offering for their own account even though other orders remained unfilled. There was also concern that these two factors could contribute to restrictions on access to new issues by retail investors, in a manner inconsistent with the issuer's intent.

The MSRB had last addressed the priority of orders in the 1987 interpretive notice.[4] That guidance interpreted Rule G-17 to require generally that customer orders be filled before orders from dealers and dealer-related accounts. Dealer-related accounts were defined to "include a municipal securities investment portfolio, arbitrage account, or secondary trading account of a syndicate member, a municipal securities investment trust sponsored by a syndicate member, or an accumulation account established in connection with such a municipal securities investment trust." The notice did not limit the ability of the syndicate manager to allocate away from the priority provisions of the syndicate if to do so would be in the best interests of the syndicate. The Board determined to update the guidance provided in the 1987 interpretive notice due to changes in the marketplace and subsequent amendments to Rule G-11. The proposed interpretive notice will supersede the 1987 interpretive notice, which will be deleted as part of the proposed rule change.

2. Statutory Basis

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[4] The 1987 interpretive notice was filed with the SEC on December 22, 1987 for immediate effectiveness. *See* File No. SR-MSRB-1987-14.

The MSRB has adopted the proposed rule change pursuant to Section 15B(b)(2)(C) of the Exchange Act, which provides that MSRB's rules shall:

> be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.

The MSRB believes that the proposed rule changes and proposed interpretive notice are consistent with the Exchange Act because they will prevent fraudulent and manipulative acts and practices and protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The MSRB does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act since it would apply equally to all dealers.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

On August 11, 2009, the MSRB published for comment the proposed amendments and proposed interpretive notice that comprise the proposed rule change.[5] The MSRB received comments from five commentators.[6]

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[5] *See* MSRB Notice 2009-47 (August 11, 2009).

[6] Letters from: Carl Giles, Managing Director, First Southwest Company ("First Southwest"), to Peg Henry, MSRB, dated September 10, 2009; Letter from Lynn Hampton, Vice President for Finance and Chief Financial Officer, Metropolitan Washington Airports Authority ("MWAA"), to Ronald A. Stack, MSRB Chair, dated August 18, 2009; Letter from Michael Decker and Mike Nicholas, Co-Chief Executive Officers, Regional Bond Dealers Association ("RBDA"), to Ms. Henry, dated September 11, 2009; Letter from Leon J. Bijou, Managing Director and

(continued . . .)

First Southwest Letter.

First Southwest supported the proposed amendments to Rule G-11, in particular: (1) the change that would require all dealers to disclose whether their orders are for their own accounts or related accounts and (2) the changes that would require that underwriters give priority to customer orders. It characterized the practice of filling dealer orders or related account orders before customer orders as “front running” and supported the changes to Rule G-11 to strengthen the prohibition against front running.

First Southwest assumed that one of the Board’s goals in publishing Notice 2009-47 was to address flipping and said that the Board should go further by addressing flipping by non-syndicate members, hedge funds, investment advisors, mutual funds, bank portfolios, tender option bond (TOB) programs, and institutional investors. They suggested that the Board undertake a thorough study of flipping and, if appropriate, make recommendations for the regulation of this practice. They suggested that the following questions be addressed: (1) Do purchasers of bonds from a primary offering have the right to sell their bonds at any time? (2) Do purchasers of bonds from a primary offering have a right to take an immediate profit when possible? (3) Do flippers provide liquidity to the municipal marketplace? (4) Is flipping a case of demand being greater than supply thereby creating price discovery?

MWAA Letter.

(. . . continued)

Associate General Counsel, Securities Industry and Financial Markets Association (“SIFMA”), to Ms. Henry, dated September 11, 2009; and Letter from Napoleon Brandford, III, Chairman, Siebert Brandford Shank & Co., L.L.C. (“Siebert”), to Ms. Henry, dated September 8, 2009.

MWAA was supportive of the proposals regarding retail order periods in the proposed interpretive notice. They said that they enforce their retail order periods and, in particular, check for flipping. They said that they prefer that retail firms participate in the selling group, rather than buying during the institutional sales order period and marking up the bonds for their retail clients. Their letter did not address the proposed rule amendments.

<u>Siebert Letter</u>.

Siebert commented on the proposed interpretive notice, stating that the retail order period process had broken down because few issuers were enforcing it. They said that some syndicate members submit large orders that they describe as bundled retail orders and that some institutional investors characterize their orders as retail, when in fact they probably are not. They said that some underwriting firms (primary book-runners) have formed arrangements with other firms to "funnel" bonds at the full, or split, takedown out of the syndicate, characterizing these orders as retail, rather than more appropriately as selling group orders. They said they were in full support of the concerns expressed by institutional investors and of enforcement of the underwriting rules governing fair dealing.

<u>RBDA Letter</u>.

RBDA assumed that the proposed interpretive notice and proposed amendments to Rule G-11 were directed at flipping and said that much flipping is done by institutional investors, which the proposed interpretive notice would not address. They said that a dealer that submits retail orders during a retail order period without *bona fide* orders from retail customers already violates Rule G-17, which it said may be enforced through strict

enforcement of existing rules and interpretations. They said that it is not always possible for a dealer to know whether an order is truly retail, for example if it comes from a bank trust department or a third party asset manager.

RBDA said that the proposed definition of "affiliate" and "related account" were too broad and would capture investor accounts that might be sufficiently independent to warrant treatment similar to unaffiliated customers. They suggested that the Board consider an alternative definition based on Rule G-14, such that if a trade would be required to be reported to RTRS without a special trade indicator, the investor would not be considered an affiliate or related account.

They also said that the proposed amendments would establish new recordkeeping rules for secondary market trading accounts.

SIFMA Letter.

SIFMA opposed the proposed amendments to Rule G-11, arguing that they would disrupt the process of allocating securities. They objected to a rule that is focused only on underwriters, their affiliates, and related accounts, which they said would not eliminate front running and the "placing of phantom [retail] orders." They said that the proposed amendments would add nothing that is not already prohibited under Rule G-17, which applies to all dealers, whether they are syndicate members or not. They said that dealers maintain records of orders, allotments, trade reporting data, and trade confirmations, which are used by FINRA to audit violations of Rule G-17. They "urge[d] FINRA to vigorously enforce existing laws and regulations to prevent front running, placing phantom orders and all other deceptive, dishonest or unfair practices."

SIFMA said that the proposed amendments to Rule G-11 would have detrimental effects on the process of allocating securities. They said that the amendments would reduce competition and result in higher borrowing costs. They said that the proposed amendments would interfere with the discretion afforded to syndicate managers by current Rule G-11.

SIFMA also said that the proposed amendments would not be consistent with FINRA's proposed rule on fixed price offerings, which they said would permit sales to affiliates as long as the sale was not at a discount.

SIFMA supported the proposed interpretive notice, which they characterized as providing more flexibility than the proposed rule changes.

Response to Comment Letters.

Most of the commentators assumed that the purpose of the proposed rule change was the prevention of flipping.[7] Some of the commentators[8] then objected to the proposed amendments and, in RBDA's case, the proposed interpretive notice, on the grounds that they would not successfully eliminate flipping. Some of the commentators[9] also stated that the filling of dealer orders in advance of customer orders constituted front-running and was already prohibited under SEC rules. The Board's objective in proposing the rule change is the broader distribution of municipal securities, rather than the elimination of flipping. Rule G-11 was designed to address the concerns expressed

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7 *See* letters from First Southwest, MWAA, RBDA, and SIFMA.

8 *See* letters from RBDA and SIFMA.

9 *See* letters from First Southwest and SIFMA.

by Congress that the "economic power accruing to banks by virtue of their role as major consumers as well as underwriters of new issue municipals has led to a loose set of syndicate rules which permit banks to be underwriter distributors of new issues of municipal bonds and in the same issue give their own investment portfolio the prerogatives and priorities of public institutional orders."[10] Although Congress specifically focused on bank-related portfolios, the MSRB saw no reason to distinguish for purposes of Rule G-11 between such portfolios, on the one hand, and affiliated investment trusts or related portfolios of securities firms, on the other.[11] The Board determined that it was appropriate to address potential abuses in the allocation of securities to customers at this time and that the Board would consider the other issues raised by the commentators as noted above in the context of its broader ongoing review of its fair practice and other rules.

Only two of the comment letters expressly addressed the proposed amendments to Rule G-8 and Rule G-9. SIFMA suggested that existing recordkeeping rules were adequate to permit enforcement of Rule G-17 if vigorously enforced by FINRA. However, existing Rule G-9 does not require retention of records of unfilled orders, which limits the ability of FINRA to effectively surveil for compliance with these requirements. The Board determined that the proposed amendments to G-8 and G-9 are necessary to permit proper enforcement of the proposed rule change. Although RBDA commented that the proposed rule change would impose new recordkeeping requirements

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[10] S. Rep. No. 94-75, at 49 (1975).

[11] *See* Notice of Filing of Proposed Rule G-11 on Syndicate Practices – MSRB Rule G-11, [1977 -1987 Transfer Binder] MSRB Manual (CCH) at 10,363.

on secondary market trading accounts, the proposed rule change would merely move the existing recordkeeping requirements for such accounts to a new subsection of Rule G-8.

The Board determined that the RBDA proposal to define "affiliate" based on Rule G-14 trade reporting concepts was not advisable, because it would result in a weakening of existing guidance in that a dealer's proprietary account would be considered "related," while a dealer's TOB account would not.

The Board did not agree with the SIFMA comment letter that the proposed interpretive notice is more flexible than the proposed amendments to Rule G-11, noting that the language in the proposed interpretive notice supposedly providing more flexibility -- "to the extent feasible and consistent with the orderly distribution of securities in a primary offering" -- is also contained in the proposed amendments to Rule G-11. The Board also did not agree that the proposed amendments to Rule G-11 would have detrimental effects on the process of allocating securities or that the amendments would reduce competition and result in higher borrowing costs. The Board also did not agree that the proposed amendments would interfere with the discretion afforded to syndicate managers by current Rule G-11, noting that neither the proposed amendments to Rule G-11 nor the proposed interpretive notice would preclude the allocation of securities to underwriters for their own accounts or their related accounts, because exceptions are provided if the issuer consents or the syndicate manager concludes that it is in the best interests of the syndicate to do so and properly documents that decision. Finally, with regard to SIFMA's comment on the proposed FINRA fixed price offering rule, there is no comparable fixed price offering rule for municipal securities.

IV. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

The MSRB requested that the proposed rule change become effective for new issues of municipal securities for which the Time of Formal Award (as defined in Rule G-34(a)(ii)(C)(1)(a)) occurs more than 60 days after approval of the proposed rule change by the SEC.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-MSRB-2009-17 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities

and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090. All submissions should refer to File Number SR-MSRB-2009-17. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://ww.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. Copies of such filing also will be available for inspection and copying at the principal office of the MSRB. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MSRB-2009-17 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[12]

Elizabeth M. Murphy
Secretary

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[12] 17 CFR 200.30-3(a)(12).

EXHIBIT 2

MSRB Notice 2009-47 (August 11, 2009)

Request for Comment Regarding Priority of Orders in Primary Offerings

The Municipal Securities Rulemaking Board (the "MSRB") is requesting comment on draft amendments to Rule G-11, on new issue syndicate practices, Rule G-8, on books and records, and Rule G-9, on preservation of records. The draft amendments to Rule G-11 would expand the rule to cover all primary market offerings, not just those for which syndicates are formed. They would also provide that, in general, unless otherwise agreed to by the issuer, the syndicate manager or the sole underwriter (as the case may be) shall give priority to customer orders over orders for its own account, orders from an affiliate for its account, or orders for their respective related accounts. The draft amendments to Rule G-8 would require dealers to maintain records necessary for the enforcement of revised Rule G-11, and the draft amendments to Rule G-9 would provide for the preservation of such records for a period of six years.

These proposals are in response to concerns expressed by some institutional investors, who have told the MSRB that their orders are sometimes not filled in whole or in part during a primary offering, yet the bonds become available shortly thereafter in the secondary market, at higher prices. They attribute this to two causes: first, they believe that some retail dealers place orders in retail order periods without going away orders and second, they believe that syndicate members, their affiliates, and their respective related accounts sometimes buy bonds in the primary offering for their own account even though other orders remain unfilled. These two factors can also contribute to more limited access to new issues by retail investors, in a manner inconsistent with the issuer's intent. The MSRB published interpretive guidance[1] on the priority of orders in primary offerings in 1987. The Board considers it desirable to update the 1987 guidance to reflect subsequent changes to Rule G-11 and industry practices.

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[1] MSRB Notice of Interpretation Concerning Priority of Orders for New Issue Securities: Rule G-17, *reprinted in* MSRB Rule Book, available at http://www.msrb.org/MSRB1/rules/notg17.htm.

Thus, the MSRB is also requesting comment on a draft Rule G-17 interpretive notice concerning priority of orders.

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Comments on the draft amendments and draft interpretive notice should be submitted to the MSRB by September 11, 2009, and may be directed to Peg Henry, Associate General Counsel. Written comments will be available for public inspection on the MSRB website.[2]

August 11, 2009

TEXT OF DRAFT AMENDMENTS[3]

Rule G-8: Books and Records to be Made by Brokers, Dealers and Municipal Securities Dealers

(a) Description of Books and Records Required to be Made. Except as otherwise specifically indicated in this rule, every broker, dealer and municipal securities dealer shall make and keep current the following books and records, to the extent applicable to the business of such broker, dealer or municipal securities dealer:

(i) – (vii) No change.

(viii) Records **<u>Concerning Primary Offerings</u>** [of Syndicate Transactions].

<u>(A) For each primary offering for which a syndicate has been</u> [With respect to each syndicate, joint or similar account] formed for the purchase of municipal securities, records shall be maintained by **<u>the syndicate manager</u>** [a managing underwriter designated by the syndicate or account to maintain the books and records of the syndicate or account,] showing the description and aggregate par value of the securities[,]**<u>;</u>** the name and percentage of participation of each member of the syndicate [or account,]**<u>;</u>** the terms and conditions governing the formation and operation of the syndicate [or account, (including,]**<u>;</u>** a [separate] statement of all terms and conditions required by the issuer[)] **<u>(including whether the issuer has required a retail order period and the issuer's definition of "retail," if applicable);</u>** all orders received for the purchase of the securities from the syndicate [or account (except bids at other than

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[2] All comments received will be made publicly available without change. Personal identifying information, such as names or e-mail addresses, will not be edited from submissions. Therefore, commentators should submit only information that they wish to make available publicly.

[3] Underlining indicates additions; brackets indicate deletions.

syndicate price),]; all allotments of securities and the price at which sold[,]**; those instances in which the syndicate manager allocated securities in a manner other than in accordance with the priority provisions or accorded equal or greater priority over other orders to orders by syndicate members for their own accounts, affiliates for their own accounts, or their respective related accounts; and the specific reasons why it was in the best interests of the syndicate to do so;** the date and amount of any good faith deposit made to the issuer[,]**;** the date of settlement with the issuer[,]**;** the date of closing of the account[,]**;** and a reconciliation of profits and expenses of the account.

(B) For each primary offering for which a syndicate has not been formed for the purchase of municipal securities, records shall be maintained by the sole underwriter showing the description and aggregate par value of the securities; all terms and conditions required by the issuer (including whether the issuer has required a retail order period and the issuer's definition of "retail," if applicable); all orders received for the purchase of the securities from the underwriter; all allotments of securities and the price at which sold; the date and amount of any good faith deposit made to the issuer; and the date of settlement with the issuer.

(ix) - (xxiii) No change.

(xxiv) Records of Secondary Market Trading Account Transactions. With respect to each secondary market trading account formed for the purchase of municipal securities, records shall be maintained by the broker, dealer, or municipal securities dealer designated by the account to maintain the books and records of the account, showing the description and aggregate par value of the securities; the name and percentage of participation of each member of the account; the terms and conditions governing the formation and operation of the account; all orders received for the purchase of the securities from the account; all allotments of securities and the price at which sold; the date of closing of the account; and a reconciliation of profits and expenses of the account.

(b) – (g) No change.

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Rule G-9: Preservation of Records

(a) *Records to be Preserved for Six Years. Every* broker, dealer and municipal securities dealer shall preserve the following records for a period of not less than six years:

(i) – (iii) No change.

(iv) the records **concerning primary offerings** [of syndicate transactions] described in rule G-8(a)(viii), provided, however, that [(1)] such records need not be

preserved for a syndicate [or similar account] **or by a sole underwriter** [which] that**, in either case,** is not successful in purchasing an issue of municipal securities[, and (2) information concerning orders received by a syndicate or similar account to which securities were not allocated by such syndicate or account need not be preserved after the date of final settlement of the syndicate or account];

(v) - (viii) No change.

(ix) the records regarding information on gifts and gratuities and employment agreements required to be maintained pursuant to rule G-8(a)(xvii); [and]

(x) the records required to be maintained pursuant to rule G-8(a)(xviii)[.]**; and**

(xi) the records concerning secondary market trading account transactions described in rule G-8(a)(xxi), provided, however, that such records need not be preserved for a secondary market trading account which is not successful in purchasing municipal securities.

(b) – (g) No change.

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Rule G-11: Primary Offering [New Issue Syndicate] Practices

(a) *Definitions.* For purposes of this rule, the following terms have the following meanings:

(i) - (iv) No change.

(v) The term "order period" means the period of time, if any, announced by a syndicate **or, when no syndicate has been formed, a sole underwriter,** during which orders will be solicited for the purchase of securities [held in syndicate] **in a primary offering.**

(vi)-(ix) No change.

(x) The term "affiliate" means a person controlling, controlled by, or under common control with a syndicate member or, when no syndicate has been formed, a sole underwriter.

(xi) In the case of a primary offering for which a syndicate is formed for the purchase of municipal securities, the term "related account" includes a related portfolio, municipal securities investment portfolio, or arbitrage account of a syndicate member or an affiliate, a municipal securities investment trust sponsored by a syndicate member or an affiliate, or an accumulation account established in connection with such a municipal securities investment trust. In the case of a

primary offering for which a syndicate has not been formed, the term "related account" includes a related portfolio, municipal securities investment portfolio or arbitrage account of the sole underwriter or an affiliate, a municipal securities investment trust sponsored by the sole underwriter or an affiliate, or an accumulation account established in connection with such a municipal securities investment trust.

(b) *Disclosure of Capacity*. Every broker, dealer or municipal securities dealer [which is a member of a syndicate] that submits an order to a **sole underwriter or** syndicate or to a member of a syndicate for the purchase of municipal securities held by the syndicate shall disclose at the time of submission of such order if the securities are being purchased for its dealer account **or**[,] for [the account of] a related **account** [portfolio] of such broker, dealer or municipal securities dealer[, for a municipal securities investment trust sponsored by such broker, dealer or municipal securities dealer, or for an accumulation account established in connection with such a municipal securities investment trust].

(c) *Confirmations of Sale*. Sales of securities held by a syndicate to a related **account** [portfolio, municipal securities investment trust or accumulation account referred to in section (b) above] shall be confirmed by the syndicate manager directly to such related **account** [portfolio, municipal securities investment trust or accumulation account] or for the account of such related **account** [portfolio, municipal securities investment trust or accumulation account to the broker, dealer or municipal securities dealer] submitting the order. Nothing herein contained shall be construed to require that sales of municipal securities to a related **account** [portfolio, municipal securities investment trust or accumulation account] be made for the benefit of the syndicate.

(d) No change.

(e) *Priority Provisions*.

(i) In the case of a primary offering for which a syndicate has been formed, [Every] **the** syndicate shall establish priority provisions and, if such priority provisions may be changed, the procedure for making changes. For purposes of this rule, the requirement to establish priority provisions shall not be satisfied if a syndicate provides only that the syndicate manager or managers may determine in the manager's or managers' discretion the priority to be accorded different types of orders. **Unless otherwise agreed to with the issuer, such priority provisions shall give priority to customer orders over orders by members of the syndicate for their own account, orders from affiliates for their own account, or orders for their respective related accounts, to the extent feasible and consistent with the orderly distribution of securities in the offering.** Notwithstanding the preceding sentence, a syndicate may include a provision permitting the syndicate manager or managers on a case-by-case basis to allocate securities in a manner other than in accordance with the priority provisions, if the syndicate manager or managers determine in its or their discretion that it is in the best interests of the syndicate. In the event any such allocation is made, the syndicate manager

or managers shall have the burden of justifying that such allocation was in the best interests of the syndicate.

(ii) In the case of a primary offering for which a syndicate has not been formed, unless otherwise agreed to by the issuer, the sole underwriter shall give priority to customer orders over orders for its own account, orders from an affiliate for its account, or orders for their respective related accounts.

(f) - (g) No change.

(h) *Disclosure of Syndicate Expenses and Other Information.* At or before the final settlement of a syndicate account, the senior syndicate manager shall furnish to the other members of the syndicate:

(i) No change.

(ii) a summary statement showing:

(A) the identity of each related **account** [portfolio, municipal securities investment trust, or accumulation account referred to in section (b) above] submitting an order to which securities have been allocated as well as the aggregate par value and maturity date of each maturity so allocated;

(B) - (C) No change.

(i) - (j) No change.

* * * * *

TEXT OF DRAFT INTERPRETIVE NOTICE ON PRIORITY OF ORDERS

Notice of Interpretation Concerning Priority of Orders for Securities in a Primary Offering: Rule G-17

On December 22, 1987, the MSRB published a notice[1] interpreting the fair practice principles of Rule G-17 as they apply to the priority of orders for new issue securities (the "1987 notice"). The MSRB wishes to update the guidance provided in the 1987 notice due to changes in the marketplace and subsequent amendments to Rule G-11.

Rule G-11(e) requires syndicates to establish priority provisions and, if such priority provisions may be changed, to specify the procedure for making changes. The rule also permits a syndicate to allow the syndicate manager, on a case-by-case basis, to allocate securities in a manner other than in accordance with the priority provisions if the syndicate manager determines in its discretion that it is in the best interests of the syndicate. Under Rule G-11(f), syndicate managers must furnish information, in writing, to the syndicate members about terms and conditions required by the issuer,[2] priority

provisions and the ability of the syndicate manager to allocate away from the priority provisions, among other things. Syndicate members must promptly furnish this information, in writing, to others upon request. This requirement was adopted to allow prospective purchasers to frame their orders to the syndicate in a manner that would enhance their ability to obtain securities since the syndicate's allocation procedures would be known.

In addition to traditional priority provisions found in syndicate agreements, municipal securities underwriters frequently agree to other terms and conditions specified by the issuer of the securities relating to the distribution of the issuer's securities. Such provisions include, but are not limited to, requirements concerning retail order periods. Rule G-17 states that, in the conduct of its municipal securities business, each broker, dealer, and municipal securities dealer ("dealer") shall deal fairly with all persons and shall not engage in any deceptive, dishonest or unfair practice. These requirements specifically apply to an underwriter's activities conducted with a municipal securities issuer, including any commitments that the underwriter makes regarding the distribution of the issuer's securities. An underwriter may violate the duty of fair dealing by making such commitments to the issuer and then failing to honor them. This could happen, for example, if an underwriter fails to accept, give priority to, or allocate to retail orders in conformance with the provisions agreed to in an undertaking to provide a retail order period. A dealer who wishes to allocate securities in a manner that is inconsistent with an issuer's requirements must not do so without the issuer's consent.

Principles of fair dealing generally will require the syndicate manager to give priority to customer orders over orders for its own account, orders by other members of the syndicate for their own accounts, orders from persons controlling, controlled by, or under common control with any syndicate member ("affiliates") for their own accounts, or orders for their respective related accounts,[3] to the extent feasible and consistent with the orderly distribution of securities in a primary offering. This principle may affect a wide range of dealers and their related accounts given changes in organizational structures due to consolidations, acquisitions, and other corporate actions that have, in many cases, resulted in increasing numbers of dealers, and their related dealer accounts, becoming affiliated with one another.

Rule G-17 does not require the syndicate manager to accord greater priority to customer orders over orders submitted by non-syndicate dealers (including selling group members). However, prioritization of customer orders over orders of non-syndicate dealers may be necessary to honor terms and conditions agreed to with issuers, such as requirements relating to retail orders.

The MSRB understands that syndicate managers must balance a number of competing interests in allocating securities in a primary offering and must be able quickly to determine when it is appropriate to allocate away from the priority provisions, to the extent consistent with the issuer's requirements. Thus, Rule G-17 does not preclude the syndicate manager or managers from according equal or greater priority to orders by syndicate members for their own accounts, affiliates for their own accounts, or their

respective related accounts if, on a case-by-case basis, the syndicate manger determines in its discretion that it is in the best interests of the syndicate. However, the syndicate manager shall have the burden of justifying that such allocation was in the best interests of the syndicate. Syndicate managers should ensure that all allocations, even those away from the priority provisions, are fair and reasonable and consistent with principles of fair dealing under Rule G-17.

It should be noted that all of the principles of fair dealing articulated in this notice extend to any underwriter of a primary offering, whether a sole underwriter, a syndicate manager, or a syndicate member.

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[1] MSRB Notice of Interpretation Concerning Priority of Orders for New Issue Securities: Rule G-17, *reprinted in* MSRB Rule Book, available at http://www.msrb.org/MSRB1/rules/notg17.htm.

[2] The requirements of Rule G-11(f) with respect to issuer requirements were adopted by the MSRB in 1998. *See* Exchange Act Release No. 40717 (November 27, 1998) (File No. SR-MSRB-97-15).

[3] Related account has the meaning set forth in Rule G-11(a)(xi).

Alphabetical List of Comment Letters on MSRB 2009-47(August 11, 2009) Regarding Priority of Orders in Primary Offerings

1. First Southwest Company: Letter from Carl Giles, Managing Director, dated September 10, 2009
2. Metropolitan Washington Airports Authority: Letter from Lynn Hampton, CPA, Vice President for Finance and Chief Financial Officer, dated August 18, 2009
3. Regional Bond Dealers Association: Letter from Michael Decker, Co-Chief Executive Officer, and Mike Nicholas, Co-Chief Executive Officer, dated September 11, 2009
4. Securities Industry and Financial Markets Association: Letter from Leon J. Bijou, Managing Director and Associate General Counsel, dated September 11, 2009
5. Siebert Brandford Shank & Co., LLC: Letter from Napoleon Brandford, III, Chairman, dated September 8, 2009

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Carl Giles
Managing Director

cgiles@firstsw.com

September 10, 2009

Peg Henry
Associate General Counsel
Municipal Securities Rulemaking Board
1900 Duke Street
Suite 600
Alexandria, VA 22314

Re: Notice 2009-47: Request for Comment Regarding Priority of Orders in Primary Offerings

Dear Ms. Henry:

First Southwest Company, notably its municipal syndicate desk, wishes to comment on the Municipal Securities Rulemaking Board's proposed rules regarding the priority of orders in primary offerings and the Board's draft Interpretive Notice on Priority of Orders. As direct market participants in municipal underwriting syndicates as Senior Manager, Co-Manager, or Member, we would like the Board to consider our views on this matter.

In its request for comment, the MSRB stated that its proposals are in response to "...some institutional investors who have told the MSRB that their orders are sometimes not filled in whole or in part during a primary offering, yet the bonds become available shortly thereafter in the secondary market, at higher prices". In the industry, this practice is commonly referred to as "flipping".

In its notice, the MSRB attributes this flipping to two causes: (1) that some retail dealers place orders in retail order periods without having going away orders and (2) that some syndicate members fill orders for themselves, their affiliates or their respective related accounts *before* other orders are filled.

Concerning the first item, FSC believes that requiring every broker, dealer or municipal securities dealer who submits an order to a syndicate to disclose if the order is for its dealer account or a related account will help us fulfill our obligation to issuers, to the syndicate, and to the investing public. Knowing whether the purchaser is a dealer inventory or truly a retail purchaser, FSC will be able to allocate bonds for retail order periods more in accordance with the issuer's wishes and the MSRB's requirement for fair dealing. Please know therefore, that FSC supports the Board's proposed rule changes for Rule G-11, specifically the amendment related to Disclosure of Capacity.

> *(Proposed Rule Change: Disclosure of Capacity. Every broker, dealer or municipal securities dealer that submits an order to a sole underwriter or syndicate or to a member of a syndicate shall disclose at the time of submission of such order if the securities are being purchased for its dealer account or for a related account of such broker, dealer or municipal securities dealer.)*

Concerning the second item, FSC believes that it has always been the rule that customer orders have priority over dealer orders or related accounts orders. Rule G-17 expresses fair dealing with customers. Known also as "front running" customer orders, as you know, this has long been a prohibited practice in the securities industry. FSC supports the MSRB's proposed changes to Rule G-11 to strengthen the language regarding front running. However, FSC questions whether the draft rule amendments successfully achieves the MSRB's addressing of flipping i.e., curtailing the practice of where "...orders are sometimes not filled in whole or in part during a primary offering, yet the bonds become available shortly thereafter in the secondary market, at higher prices".

Flipping is a controversial and complicated issue.

As described by the MSRB in its request for comment, flippers can be retail dealers or syndicate members and their related accounts. FSC would like to express the view that flippers can also be non-syndicate members or customers such as hedge funds, investment advisors, mutual funds, bank portfolios, TOB programs, and even some institutional investors. Anyone who is allocated bonds in a primary offering has the potential to sell the bonds in the secondary market.

The issue of flipping poses several questions. Do purchasers of bonds from a primary offering have the right to sell their bonds at any time? Do purchasers of bonds from a primary offering have a right to take an immediate profit when possible? Do flippers provide liquidity to the municipal marketplace? Is flipping a case of demand being greater than supply thereby creating price discovery?

FSC believes that flipping is more widespread than just retail dealers and syndicate members or their related accounts and many questions need to be answered. FSC respectfully suggests to the MSRB that it undertake a thorough study of flipping and, if warranted, make appropriate recommendations for the regulation of this practice.

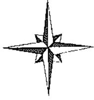
Conclusion

We thank the MSRB for its efforts and appreciate this opportunity to express our views on these proposed rule and interpretive notice changes. Should you have any questions, please do not hesitate to contact us. I can be reached at 214-953-4191.

Sincerely,

Carl Giles
Managing Director
Capital Markets

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY



August 18, 2009

Mr. Ronald A. Stack, Chair
Municipal Securities Rule Making Board
1900 Duke Street
Alexandria, VA 22314

RE: MSRB NOTICE 2009-47
Request for Comment Regarding Priority of Orders in Primary Offerings

Dear Chairman Stack:

I am writing in response to the Municipal Securities Rulemaking Board (MSRB) request for comments on a draft Rule G-17 Interpretive Notice concerning the priority of orders, together with related changes to other rules to provide enforcement of the Interpretation. I am pleased that the MSRB is considering that an issuer's request for a retail order period should be included in the priority of orders as addressed by MSRB Rule G-17 and changes to other rules to assure adequate reporting.

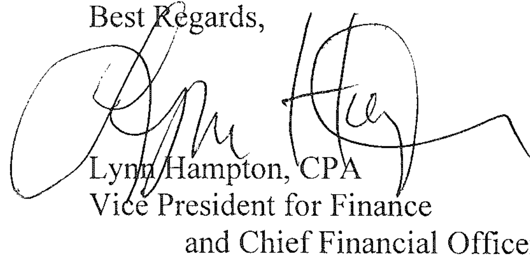
The Metropolitan Washington Airports Authority (Airports Authority) is a major issuer of municipal bonds. For 18 years, the Airports Authority has instructed its syndicate managers to reserve one or two days prior to the final pricing for retail orders from residents of Virginia and the District of Columbia. Our policy has been to assure that retail investors have an opportunity to get the best price for our bonds. The Airports Authority believes that residents have an interest in the development of their local airports and should be given the first opportunity to participate in a bond sale. We like to believe we treat our investors as "stockholders" in our Airports' development. The suggested Interpretation would provide clear guidance to underwriters that the issuer's requirement to prioritize retail orders is fair and reasonable and consistent with the fair dealing principles under Rule G-17.

Following a sale, the Airports Authority analyzes MSRB transaction data to confirm our request for retail priority and to determine whether there has been any "flipping", resulting in a retail buyer possibly paying a higher price than at original issue. We want to be certain that the Airports Authority's request to prioritize retail orders has been followed. Additionally, as the Airports Authority's Chief Financial Officer, I discuss the after sale process and analysis with the underwriters prior to the sale, and have generally been pleased with the results. For example, in one instance I discovered that a large retail sales firm bought in the institutional sales market and then marked the bonds up for their retail clients. I discussed this with our underwriters and expressed the opinion that I would prefer this firm participate in the retail order period. In

subsequent sales, that retail firm was added to the selling group and is now, at our request, participating in the retail order period.

I want to thank the MSRB for taking its proposed change to include retail order periods as priority orders in a municipal bond sale. I look forward to the implementation of the Interpretation.

Best Regards,



Lynn Hampton, CPA
Vice President for Finance
and Chief Financial Officer

LH:dt

cc: Members, Municipal Securities Rule Making Board

500 New Jersey Ave., NW
Sixth Floor
Washington, DC 20001
202-509-9515

September 11, 2009

Ms. Margaret "Peg" Henry
Associate General Counsel
Municipal Securities Rulemaking Board
1900 Duke Street
Suite 600
Alexandria, VA 22314

Comments in regard to MSRB Notice 2009-47

Dear Ms. Henry,

The Regional Bond Dealers Association ("RBDA") is pleased to offer comments on MSRB Notice 2009-47, "Request for Comment Regarding Priority of Orders in Primary Offerings" (the "Notice"). The RBDA is the association for regional securities firms active in the U.S. bond markets.

We commend the MSRB's attention to the trend sometimes observed in the municipal bond market where bonds from primary market offerings that were oversubscribed become available in the secondary market soon after the initial offering at prices higher than the offering price. We believe it is appropriate for the MSRB to review its "Notice of Interpretation Concerning Priority of Orders for New Issue Securities: Rule G-17," initially published in 1987, to ensure it remains relevant and up-to-date. We also recognize that the MSRB needs to be sensitive to the concerns of investors that underwriters may not fill all investors' orders at the offering price and then offer the bonds in the secondary market at higher prices, a behavior sometimes referred to as "flipping."

However, in our observation, it is often the case that when bonds from a recent primary market offering appear in the secondary market at prices higher than the offering price, those trades often originate from opportunistic institutional investors whose orders were filled at the offering price and who sell bonds back to the market when prices rise. In recent years, new categories of institutional investors have emerged in the municipal bond market who are focused more on short-term trading profits than on "buy-and-hold" strategies. This is not necessarily an unwelcome trend, because by exploiting value opportunities, active traders can help eliminate pricing inefficiencies. However, one effect of this trend may be that prices adjust quickly after bonds are initially offered. A similar trend can sometimes be observed in other sectors of the capital markets such as the markets for equities or corporate bonds. While there may be occasions when dealers withhold customer orders in order to retain bonds for themselves with

the intention of "flipping" them in the secondary market, we believe most flipping activity arises from investor accounts, sometimes even those who are traditionally buy-and-hold investors.

Among other amendments, the MSRB's draft rule changes in the Release would specify that "unless otherwise agreed to with the issuer," new issue underwriting syndicates "shall give priority to customer orders over orders by members of the syndicate for their own account, orders from affiliates for their own account, or orders for their respective related accounts." Syndicate managers would need to maintain records of allocations that diverged from this prioritization and reasons why. The Release would also establish a similar regime for secondary market trading accounts. For purposes of this provision, an "affiliate" would mean "a person controlling, controlled by, or under common control with a syndicate member or, when no syndicate has been formed, a sole underwriter." A "related account" would mean "a related portfolio, municipal securities investment portfolio, or arbitrage account of a syndicate member or an affiliate, a municipal securities investment trust sponsored by a syndicate member or an affiliate, or an accumulation account established in connection with such a municipal securities investment trust."

The Release also contains a draft "Notice of Interpretation Concerning Priority of Orders for Securities in a Primary Offering: Rule G-17" (the "Notice"). The draft Notice states, among other points, that compliance with MSRB Rule G-17 dictates that underwriters must honor commitments to an issuer regarding the distribution of the issuer's securities. The Notice states that an underwriter's failure "to accept, give priority to, or allocate to retail orders in conformance with the provisions agreed to in an undertaking to provide a retail order period" without the issuer's consent could be a violation of Rule G-17.

The proposed rule changes in the Release are designed in part to address circumstances where underwriters fail to fill customer orders for securities in order to buy securities for their own account. The Notice is designed to address, in part, circumstances where underwriters submit retail orders during a retail order period when securities are actually intended to be bought for their own accounts or distributed to institutional customers.

While the RBDA supports the intent of both the draft rule changes and the draft Notice contained in the Release, we question whether these proposals will be successful in preventing circumstances where secondary market prices of newly issued securities rise shortly after the initial offering. First, as we stated, we believe that in many cases, secondary market trades at prices above the offering price of an issue are often initiated by sales of securities by institutional investors, not by dealers' selling from their own accounts. Clarifying that dealers must fill the orders of investor customers before retaining securities in their own accounts will not prevent those investors from selling securities at higher prices after the initial offering. Second, we believe that a dealer submitting retail orders during a retail order period when that dealer has no *bona fide* orders from retail customers is already a violation of Rule G-17 and can be addressed through strict enforcement of existing rules and interpretations. Rule G-17 states that dealers "shall not engage in any deceptive, dishonest, or unfair practice." We believe that the act of submitting retail orders when none exists is already prohibited under that standard.

Moreover, the line between retail and institutional orders can sometimes be difficult to distinguish. This is especially true for orders that come from bank trust departments or third party asset managers who are submitting orders on behalf of their customers. It is not appropriate or possible for dealers to determine in all cases whether the orders submitted by asset managers as retail orders are truly for the benefit of retail customers.

With regard to the definition of "affiliate" and "related account," we are concerned that the proposed definition is too broad and would capture investor accounts that may be sufficiently independent to warrant treatment similar to unaffiliated customers. We are also concerned that the proposed definition of affiliate and related account would capture such a large volume of municipal market investors that market liquidity could be severely hampered, since orders from affiliates and related accounts could not be filled until all other customer orders were filled.

The MSRB may want to consider alternative definitions of "affiliate" and "related account" for the purposes of the proposed order prioritization provisions of Rule G-11 and the related books and records requirements of Rules G-8 and G-9. One approach the MSRB may want to consider would use definitions from Rule G-14 and related interpretations. Under this approach, if an order from an account is required to be reported to the MSRB's Real-Time Transaction Reporting System ("RTRS") without any special condition indicator—as described in the MSRB's "Specifications for Real-time Reporting of Municipal Securities Transactions" and other interpretations related to the RTRS—that investor would not be considered to be an affiliate or a related account. This approach may be useful because it provides a basis for identifying "arm's-length transactions"[1] that presumably take place at legitimate market prices.

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

Sincerely,

/s/	/s/
Michael Decker Co-Chief Executive Officer	Mike Nicholas Co-Chief Executive Officer

[1] As referred to, for example, in Municipal Securities Rulemaking Board, "Reporting of Transactions in Certain Special Trading Situations: Rule G-14," January 2, 2008.

September 11, 2009

Peg Henry, Esquire
Associate General Counsel
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA 22314

Re: MSRB Notice 2009-47: Request for Comment Regarding Priority of Orders in Primary Offerings

Dear Ms. Henry:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates this opportunity to respond to Notice 2009-47[2] ("Notice") issued by the Municipal Securities Rulemaking Board ("MSRB") on proposed amendments to Rule G-11 on new issue syndicate practices, Rule G-8 on books and records and Rule G-9 on preservation of records.

Introduction

The MSRB is responding to the concerns of institutional investors, whose orders are not filled in whole or in part during a primary offering and, soon thereafter, see those same bonds become available in the secondary market at higher prices. The two causes cited by these investors in the Notice are: (i) retail dealers that place phantom orders during a retail sales period; and (ii) syndicate members, their affiliates and their related accounts that purchase bonds for their own account while other orders remain unfilled.

The solution proposed in the Notice is threefold; it would: (i) require that, unless otherwise agreed to by an issuer, the syndicate managers give priority to customer orders over orders for their own account, orders from an affiliate for its own account or orders for their

[1] The Association, or "SIFMA," brings together the shared interests of more than 650 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] MSRB Notice 2009-47 (August 11, 2009)

New York ▪ Washington ▪ London ▪ Hong Kong
120 Broadway ▪ New York, NY 10271 ▪ P 212.313.1000 ▪ F 212.313.1026 ▪ www.SIFMA.org

respective related accounts; (ii) expand the ambit of Rule G-11 to include all primary offerings (and not only syndicated transactions); and (iii) add new definitions for the terms "affiliate" and "related account."

Given SIFMA's efforts to enhance the public's trust and confidence in the municipal securities market, we are sympathetic to investors whose orders are not fulfilled. To that end, SIFMA supports the Notice of Interpretation Concerning Priority for Orders in a Primary Offering: Rule G-17 ("Interpretive Notice"). We do not, however, support the proposed amendments in the Notice as they would disrupt the process of allocating securities as discussed in greater detail below.

Unfilled Orders

As a threshold matter, the allocation of municipal securities or any other securities in an original issuance is a zero sum game governed by the principles of supply and demand. Consequently, when securities with a value in the marketplace are sold, there will always be frustrated potential investors whose orders are not filled.

The Notice insinuates that syndicate members are responsible for placing phantom retail orders and front running and then selling the securities in the secondary market for a profit to the detriment of institutional investors. The MSRB's response is to propose a solution directed solely at syndicate members, their affiliates and related accounts.

Placing phantom orders and front running may contribute to this situation, but they are not the sole contributing factors. In reality, unfilled orders and the sale of bonds in the secondary market at a profit often result from legitimate actions taken by those who are not syndicate members. In SIFMA's view, the proposed amendments would not prevent these activities but, instead, would impede the ability of syndicate members to distribute securities in an orderly fashion.

An institutional investor's order may not be filled because, for example, its broker is a member of the syndicate but received a small allocation of securities, the price it offers for the securities is not competitive with the offers of other investors, the tranches of the securities it wants to purchase may not fit in with the overall plan of distribution, it wants to purchase non-callable bonds that the issuer does not want to sell, it cannot compete with the balance sheet of professional managers and hedge funds, the issuer has an extended retail order period that limits the allocations to institutional investors or a combination of these reasons. None of these activities, however, would be prohibited by the proposed amendments.

Securities in the Secondary Market

Just as market forces not related to syndicate members can result in an investor's unfilled order, market participants other than syndicate members may offer their securities in the secondary market for a profit. Such sellers can include any municipal market participant - retail customers as well as institutional accounts. Municipal securities are not restricted securities and are not subject to any minimum hold periods. It should go without saying, that once a syndicate member sells a security to any customer, the seller does not have any responsibility for the actions taken by the purchaser. As a result, creating a solution that is focused only on syndicate members, their affiliates and related accounts does not address the concerns contained in the Notice.

Front Running and Placing Phantom Orders are Already Illegal Activities

If the intention of the proposed amendments is to prevent front running and placing phantom orders, it is difficult to see what is added by the proposed amendments because both activities are already prohibited under MSRB Rule G-17, which applies to all broker dealers regardless of their status in the syndicate. Moreover, under the current regulatory requirements, broker dealers retain records of orders, allotments, trade reporting data and trade confirmations, which are used by Financial Industry Regulatory Authority ("FINRA") to audit enforcement with Rule G-17. SIFMA urges FINRA to vigorously enforce existing laws and regulations to prevent front running, placing phantom orders and all other deceptive, dishonest or unfair practices.

The Proposed Amendments

Not only would the proposed amendments not accomplish the goals stated in the Notice, they would also have several detrimental effects on the process of allocating securities.

Increased Borrowing Costs

If enacted, the proposed amendments would isolate a very large group of active municipal market investors and, because they are affiliated with or related to the syndicate manager, subordinate them to other investors. In creating a tier of second class investors, the proposed amendments would significantly decrease the number of buyers and reduce competition for securities, which could result in issuers paying higher borrowing costs. We are certain that it is not the intention of the proposed amendments to create a regulatory preference in the allocation of securities that would unfairly favor investors at the expense of issuers.

Contravention of Rule G-11

The proposed amendment would also contravene the intention of Rule G-11. The MSRB is well aware that the allocation of securities involves a balance of competing interests. Syndicate managers must balance the needs of their issuer clients to get the widest possible distribution of securities at the lowest borrowing cost with the demands of their many investor clients for securities. Syndicate managers must also balance the needs of their various investor clients, all of whom want their orders filled. Because of the tension among these factors, the current Rule G-11 provides discretion to syndicate managers, who may include a provision in the priority provisions allowing them, on a case-by-case basis, to allocate securities in a manner that is different from the priority provisions if doing so would be "in the best interests of the syndicate..." This discretion, however, is coupled with accountability (impliedly, to the issuer and regulators): when an allocation is made that is not in accordance with the priority provisions, "the syndicate manager...shall have the burden of justifying that such allocation was in the best interests of the syndicate."

Even though the proposed amendments include the phrases, "Unless otherwise agreed to with the issuer" and "to the extent feasible and consistent with the orderly distribution of securities in the offering," if enacted, they would, nonetheless, interfere with the discretion granted to syndicate members by requiring them to comply with the regulatory priority.

A Failure to Harmonize Regulation

The proposed amendments also represent a lost opportunity to increase regulatory harmony between the MSRB and FINRA rulebooks. The Notice was published one week after FINRA published Regulatory Notice 09-45 that was intended to simplify the rules regarding corporate fixed price offerings. One of the most important proposals of Regulatory Notice 09-45 would permit a member of a selling syndicate to sell fixed price securities to an affiliated person, provided, that the sale was not at a discount, thus creating a regulatory model that is the exact opposite of the MSRB's proposed amendments.

In this era of regulatory reform, one of the most often repeated goals is to achieve regulatory harmonization wherever possible. Such cooperation, of course, would minimize the confusion and burdens that result from separate regulatory schemes. From our perspective, it would appear that the rules pertaining to the allocation of municipal securities and fixed price offerings would be fertile ground for such harmonization. If, enacted, though, the proposed amendments would require divergent enforcement by FINRA of similar instruments sold in different markets.

The Interpretive Notice

In SIFMA's view, the Interpretive Notice is a balanced and reasonable application of the fair play principles of Rule G-17 to the allocation of securities, without mandating priorities. The Interpretive Notice recognizes that syndicate mangers should give priority to customers while taking into account the need for flexibility. For example, the Interpretive Notice states:

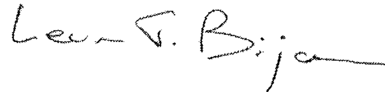
> Principles of fair dealing *generally* will require the syndicate manager to give priority to customer orders over orders for its own account, orders by other members of the syndicate for their own accounts, orders from persons controlling, controlled by or under common control with any syndicate member ("affiliates") for their own accounts, or orders for their respective related accounts...*to the extent feasible and consistent with the orderly distribution of securities in a primary offering* (emphasis added).

Conclusion

For all the reasons cited in this letter, SIFMA supports the Interpretive Notice, which applies the principles of Rule G-17 to the priority of orders in allocating securities but SIFMA does not support the proposed amendments in the Notice.

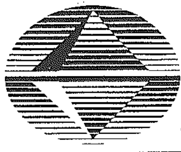
We appreciate this opportunity to comment on this proposed rule change. If you have any questions concerning these comments, please contact me at 212.313.1149 or at lbijou@sifma.org.

Respectfully,



Leon J. Bijou
Managing Director
and Associate General Counsel

cc: ***Securities Industry and Financial Markets Association***
Municipal Executive Committee
Municipal Legal Advisory Committee
Municipal Credit, Research, Strategy and Analysis Committee
Municipal Syndicate & Trading Committee
Municipal Operations Committee
Regional Dealers Fixed Income Committee



Siebert Brandford Shank & Co., L.L.C.

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September 8, 2009

Peg Henry
Associate General Counsel
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA 22314

Re: MSRB Notice 2009-47 — Proposed Amendment to Rule G-17

Dear Ms. Henry:

Siebert Brandford Shank & Co., LLC ("Siebert Brandford Shank") appreciates this opportunity to respond to the notice ("Notice") issued by the Municipal Securities Rulemaking Board ("MSRB") on August 11, 2009 (Notice 2009-47) in which the MSRB requests comment on draft rule changes to Rule G-17 regarding fair dealing in primary market offerings. Rule G-17 requires that each broker, dealer, and municipal securities dealer shall deal fairly with all persons and "shall not engage in any deceptive, dishonest or unfair practice."

At the heart of the current debate is the sporadic breakdown of syndicate procedures for filling bona fide "retail" orders. Prior to the financial crisis faced by many Wall Street firms, issuers and their financial advisors were quite diligent in demanding verification on true retail orders submitted during the retail order period. This verification practice was abandoned in early 2008 as issuers became more concerned with getting their deal completed quickly than maintaining the integrity of the order taking process that they had put in place to ensure fair dealing by the underwriters. Without the requirement for verifying compliance with syndicate retail priority rules, underwriting syndicates soon abandoned any pretense of "retail".

Syndicate members were allowed to combine numerous "small retail" orders into one "large retail" order. On large transactions with high investor demand, syndicate members with began submitting large orders of several million dollar bond orders and claim that these orders constitute bundled "retail" orders. Without any requirement for verification, institutional investors know that they can only get bonds if they submit their orders as "retail." For underwriters in the syndicate, they know that the only way to get their institutional orders filled is to get ahead of the line like everyone else. While the MSRB may try in earnest to correct this breakdown in compliance with well established syndicate rules, underwriting firms are already developing other methods to circumvent the syndicate rules with respect to fair dealing.

More and more underwriting firms have formed arrangements with other firms in order to funnel bonds at the full, or split, takedown out of the syndicate. Typically, this arrangement can work only with the book-running underwriter. By having another firm that is not formally a member of the syndicate, the book-runner can allocate a large amount of "retail" bonds to this non-syndicate firm at the full takedown. Since there is no requirement for verification, bonds can be allocated away from other syndicate underwriters under the pretense of "retail orders."

The only proper way to treat these "retail" firms without violating any syndicate rules is to add them as selling group members for the retail order period. The true institutional investors have a right to be angry when large blocks of "retail" going-away bonds somehow show up the next day in the secondary market.

Without enforcement there will be disregard of the underwriting rules governing fair dealing. Lack of enforcement will always receive token compliance by people too busy making more money. We are in full support of the position taken by the institutional investor community regarding the retail order periods that have run amok.

We appreciate the opportunity to comment on this rulemaking. If you have any questions concerning these comments, or would like to discuss these comments further, please feel free to contact me at 510-645-2245.

Respectfully submitted,

Napoleon Brandford, III
Chairman