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December 23, 2009

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

Re: MSRB Notice of Filing of Proposed Rule Change Consisting of Amendments to Rule G-8, Rule G-9, Rule G-11, a Proposed Interpretation of Rule G-17, and Deletion of a Previous Rule G-17 Interpretive Notice (File No. SR-MSRB-2009-17)

Dear Ms. Murphy:

The Investment Company Institute¹ supports the Municipal Securities Rulemaking Board's proposed rule changes and interpretive notice regarding the priority of customer orders in primary offerings.² We believe the proposal would improve access to new issues by investors. In concert with this issue, we believe it is important for the MSRB to review generally the concept of "retail order periods" and define the term "retail" for these periods. Maintaining the integrity of the \$2.7 trillion municipal securities market to ensure fair and orderly markets is critical to Institute members who provide access to the 33 percent of investors—many of them retail—that invest in this market through mutual funds.³

¹ The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$11.33 trillion and serve almost 90 million shareholders.

² See SEC Release No. 34-61110 (December 3, 2009); see also MSRB Notice 2009-59, *Rule Amendments and Interpretive Notice Filed Regarding Priority of Orders in Primary Offerings* (November 18, 2009).

³ 2009 Investment Company Fact Book, *A Review of Trends and Activity in the Investment Company Industry*, Investment Company Institute, 49th Edition, at 11.

MSRB Proposal on Priority of Orders in Primary Offerings

MSRB's proposal would amend Rule G-11 to: (1) expand the scope of the rule to cover all primary market offerings, not just those for which syndicates are formed; (2) provide that, unless otherwise agreed to by an issuer, the syndicate managers give priority to customer orders over orders for their own, affiliated, or related accounts; and (3) include new definitions for the terms "affiliate" and "related account." The proposed interpretive notice, which would provide that a violation of G-11 would be a violation of the fair dealing principles of Rule G-17, would update and supersede a 1987 interpretive notice on priority of orders.⁴

The MSRB explains that the proposal was developed to address concerns expressed by institutional investors that their orders were sometimes not filled in whole or in part during a primary offering, yet the bonds become available shortly thereafter, at higher prices, in the secondary market. They attributed the problem to two causes: (1) some retail dealers were allowed to place orders in retail order periods without "going away" orders and (2) 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 also was 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 Institute supports the MSRB's efforts to tighten the gaps surrounding the priority of customer orders in primary offerings. We recognize that the allocation of securities involves a balance of competing interests. The MSRB principles of fair dealing in Rule G-17, however, generally require a syndicate manager to give priority to customer orders over orders for its own account, an affiliated, or a related account consistent with the orderly distribution of securities in a primary offering. We believe the proposal would help address uncertainty surrounding Rule G-17. The experience of our members has demonstrated that industry practice over the previous year has allowed for the regular disregard of these provisions. We believe the MSRB's proposal serves a useful purpose by reminding market participants of their fair dealing obligations with respect to customers. In addition, we support the extension of the priority rule to cover all primary market offerings. There is no reason to disadvantage, or allow for the appearance of disadvantaging, retail customers in primary offerings because the offering does not use a syndicate.

⁴ 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.

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Definition of “Retail”

Issuers often designate “retail order periods” in an effort to accumulate retail interest to fill a primary offering in the municipal bond market. These orders are attractive to issuers because most individual retail investors do not have the ability to evaluate the pricing in the same manner as larger institutional investors. Institutional investors, on the other hand, are frequently closed out of “retail order periods” as a matter of course because the institution itself is viewed as the buyer and therefore classified as “institutional” order flow. This classification persists regardless of whether an institution is trading for a proprietary account or representing the interests of millions of retail investors who choose to gain access to the municipal markets through its mutual funds. As a result, retail investors are excluded from the retail order periods if they choose to make their municipal bond investments through mutual funds. Indeed, these retail investors often are the smaller or less sophisticated investors who do not have the necessary assets to purchase bonds on their own. With the current new issue process, individuals can buy new issue bonds in their brokerage accounts if they have enough assets to purchase the minimum denomination or through separately managed accounts if they have enough assets to meet the minimum balance. If they are smaller investors who do not have enough assets or investors without enough assets to diversify their investments through the purchase of several individual bonds, they are only able to purchase bonds through a mutual fund.

A failure by the MSRB to define “retail” for these purposes and to include within that definition institutions trading on behalf of retail investors results in a disservice to many retail investors. If institutional investors are, with regularity, unable to acquire in primary offerings the municipal bonds required to service their mutual funds, retail investors relying on those funds could be harmed. This is particularly problematic in the case of single state funds, in which there is an even more limited pool of municipal bonds available to investors. We therefore urge the MSRB to consider defining “retail” for purposes of “retail order periods” in a way that recognizes that retail investors access the municipal market through a variety of ways, including mutual funds.

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We look forward to working with the SEC as it continues to examine these critical issues. In the meantime, if you have any questions, please feel free to contact me directly at (202) 326-5815 or Jane Heinrichs, Senior Associate Counsel, at (202) 371-5410.

Sincerely,

/s/ Karrie McMillan

Karrie McMillan
General Counsel

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cc: James Brigagliano, Acting Director
Daniel Gallagher, Acting Director
Martha Mahan Haines, Chief, Office of Municipal Securities
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U.S. Securities and Exchange Commission

Peg Henry, Associate General Counsel
Municipal Securities Rulemaking Board