



**Testimony on Enhanced Investor Protection After the Financial Crisis—
MSRB’s Implementation of the Dodd-Frank Wall Street Reform and
Consumer Protection Act and Investor Protection**

By Lynnette Kelly Hotchkiss
Municipal Securities Rulemaking Board

July 12, 2011

Good morning Chairman Johnson, Ranking Member Shelby and members of the Committee. I appreciate the invitation to testify today on behalf of the Municipal Securities Rulemaking Board.

Since the MSRB was created by Congress in 1975 as the principal regulator for the municipal securities market, the MSRB has placed investors front-and-center in all of our market initiatives. Through our rulemaking over municipal market intermediaries as well as our groundbreaking market information systems, we have put in place protections for the significant U.S. retail market for municipal securities.¹

While the MSRB’s original jurisdictional authority was limited to the regulation of broker-dealers and banks that buy, sell, trade and underwrite municipal bonds (referred to herein as “dealers”) with the principal purpose of protecting investors, Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) greatly expanded our ability to protect investors and increased our responsibilities to the marketplace by vesting us with the duties of regulating municipal advisors and protecting state and local government issuers, public pension plans and obligated persons. Over the past year, the MSRB has undertaken substantial rulemaking and transparency efforts to promote high standards of professional conduct and market disclosure aimed at creating conditions for fair, well-informed financial decisions by all market participants.

The MSRB cannot act as a guarantor against poor decisions by either investors or issuers, or guard against the occurrence of adverse events in the market. However, we believe that a principles-based approach to regulating market intermediaries leads to the best possible

¹ The size of the municipal market is approximately \$3.7 trillion. See Bloomberg L.P., *Municipal Market: Bloomberg Brief* (June 21, 2011). It is estimated that approximately two-thirds of the municipal market is comprised, directly or indirectly, of retail investors. See SIFMA Statistics, U.S. Municipal Securities Holders, Quarterly Data to Q1 2011.

outcome in terms of market fairness and efficiency. Key elements to ensuring such a fair and efficient market are such principles as suitability, disclosure, pricing and liquidity for investors. These elements also can have a substantial impact on the taxpayer's wallet and the public's confidence in the municipal market.

Since Dodd-Frank was signed into law, the MSRB has been operating under the leadership of its first majority-public Board of Directors, which represents the interests of the public and municipal market investors and issuers, in addition to regulated entities. This public Board has moved decisively but carefully to put in place safeguards that more fully protect the municipal market that is so fundamental to the public interest.

Since last October, MSRB rulemaking initiatives have addressed fiduciary duty, fair dealing, municipal advisor registration, pay-to-play, gift-giving and supervision. We are also developing municipal advisor professional qualifications requirements, including appropriate licensing examinations, and have enhanced our Electronic Municipal Market Access (EMMA) website to allow investors unprecedented access to market data and disclosures. These are the initiatives I would like to discuss with you today.

The Dodd-Frank Act and the Municipal Market

First, I would like to address the impact of the Dodd-Frank Act on the municipal market. This piece of legislation represents the most significant change affecting the municipal market since 1986—including key changes in the regulatory landscape for municipal advisors,² asset-backed securities,³ credit rating agencies⁴ and derivatives.⁵ Furthermore, to our knowledge, this is the first time Congress has enacted a law to protect issuers of securities.⁶

The MSRB's expanded authority falls under Title IX of the Dodd-Frank Act, which covers investor protections and improvements to the regulation of securities intermediaries. The Dodd-Frank Act granted the MSRB regulatory jurisdiction over municipal advisors.⁷ It also provides that MSRB rules for municipal advisors are to, among other things: (1) promote fair dealing, the prevention of fraudulent and manipulative acts and practices, and the protection of investors, municipal entities, and obligated persons; (2) prescribe means reasonably designed to prevent acts, practices, and courses of business that are not consistent with a municipal advisor's fiduciary duty to its municipal entity clients; (3) prescribe professional standards; (4) provide

² Pub. L. No. 111-203 §975, 124 Stat. 1917 (2010).

³ Pub. L. No. 111-203 §§942–943, 124 Stat. 1897 (2010).

⁴ Pub. L. No. 111-203 §932, 124 Stat. 1872–1888 (2010).

⁵ Pub. L. No. 111-203 §764, 124 Stat. 1785 (2010).

⁶ Pub. L. No. 111-203 §975, 124 Stat. 1918 (2010).

⁷ Pub. L. No. 111-203 §975, 124 Stat. 1917 (2010).

continuing education requirements; (5) provide for periodic examinations; (6) provide for recordkeeping and record retention; and (7) provide for reasonable fees and charges necessary or appropriate to defray the costs and expenses of operating and administering the Board.⁸

The establishment of a comprehensive set of rules for the activities of municipal advisors will provide significant protections to state and local governments and other municipal entities and will greatly enhance the existing protections afforded to investors beyond the protections already provided by the MSRB's longstanding investor protection rules covering broker-dealers and banks. By way of illustration, the MSRB has previously established a series of investor protection rules covering the activities of brokers marketing 529 college savings plans, which are investments sold exclusively to parents, grandparents and other retail investors, many of whom may have little or no prior experience as investors. With the enactment of Dodd-Frank, the MSRB now has authority to adopt a more comprehensive set of rules that go beyond the brokers marketing 529 plans to professionals that advise the states on the structure and related fundamental matters relating to the operation of such 529 plans that have a direct impact on investors and beneficiaries of the plans.

The MSRB has undertaken its Dodd-Frank responsibilities in a deliberate and thorough manner, recognizing that many of these financial professionals and products are falling under regulation for the first time. With respect to the Dodd-Frank provisions that affect the municipal market, but that come under the purview of other federal regulators, the MSRB has provided input and coordinated with other municipal market authorities to create consistent and well thought-out regulatory decisions.⁹ We would especially like to recognize the Securities and Exchange Commission (SEC), the Financial Industry Regulatory Authority and the Commodity Futures Trading Commission in these coordination efforts.

Fiduciary Duty

I would now like to turn our attention to MSRB rulemaking efforts since the Dodd-Frank Act became effective. The Dodd-Frank Act has fundamentally altered the relationship of municipal advisors and municipal entities. As of October 1, 2010, municipal advisors owe a federal fiduciary duty to their municipal entity clients under the Dodd-Frank Act. The MSRB has proposed a rule and interpretive guidance to provide the underpinning for this fiduciary duty.¹⁰ The MSRB's interpretive guidance would provide that a municipal advisor has a duty of loyalty to its municipal entity client, which requires the municipal advisor to deal honestly and in good faith with the municipal entity and to act in the municipal entity's best interests. This duty of loyalty would also require municipal advisors to make clear, written disclosure of all material

⁸ Pub. L. No. 111-203 §975, 124 Stat. 1919 (2010).

⁹ See, e.g., MSRB Comment Letter Re: SEC Proposed Rules on Registration of Municipal Advisors, File No. S7-45-10 (February 22, 2011).

¹⁰ MSRB Notice 2011-14 (February 14, 2011).

conflicts of interest and to receive written, informed consent from appropriate officials of the municipal entity.

The MSRB's interpretive guidance would also require municipal advisors to exercise due care in performing their responsibilities to municipal entity clients. That means that a municipal advisor should not undertake a municipal advisory engagement for which the advisor does not possess the degree of knowledge and expertise needed to provide the municipal entity with informed advice. For example, a municipal advisor should not undertake a swap advisory engagement or security-based swap engagement for a municipal entity unless it has sufficient knowledge to evaluate the transaction and its risks, as well as the pricing and appropriateness of the transaction.¹¹

We believe investors will benefit from ensuring that municipal advisors act in their clients' best interest. Municipal securities offerings borne from self-interested advice or in the context of conflicting interests or undisclosed payments to third-parties are much more likely to be the issues that later experience financial or legal stress or otherwise perform poorly as investments, resulting in significant harm to investors and increased costs to taxpayers.

Importantly, under the Dodd-Frank Act, "municipal advisor" was defined to include guaranteed investment contract (GIC) brokers.¹² That means that GIC brokers now have a federal fiduciary duty to their municipal entity clients and a duty of fair dealing to other clients, as described below. The proposed MSRB interpretive guidance on fiduciary duty would provide that they could not receive payments from other parties in return for giving them favorable treatment in what is supposed to be a competitive bidding process, even if they disclosed such payments. This is a major increase in the arsenal of enforcement agencies that, until now, have had to address this conduct through their anti-fraud jurisdiction.

We believe that the new federal fiduciary duty, and the MSRB's proposed guidance with respect to that duty arising from our new grant of authority under Dodd-Frank, would have squarely addressed much of the wrongdoing uncovered by the SEC, Internal Revenue Service and Department of Justice in their major GIC bid rigging investigation¹³ had this Dodd-Frank

¹¹ Section 4s(h)(5) of the Commodity Exchange Act, as amended by the Dodd-Frank Act, requires that a swap dealer with a special entity client (including states, local governments and public pension funds) must have a reasonable basis to believe that the special entity has an independent representative that satisfies these criteria, among others. Section 15F(h)(5) of the Exchange Act, as amended by the Dodd-Frank Act, imposes the same requirements with respect to security-based swaps.

¹² Pub. L. No. 111-203 §975, 124 Stat. 1922 (2010).

¹³ SEC Complaint ¶ 1, SEC v. J.P. Morgan Securities LLP, Case No. 2:11-cv-03877 (D.N.J. July 7, 2011) (alleging fraudulent bidding practices by J.P. Morgan Securities in at least 93 municipal bond reinvestment transactions); SEC Litigation Release No. 21956, Securities and Exchange Commission v. UBS Financial Services Inc. (May 4, 2011) (alleging fraudulent bidding practices

provision been in place when the wrongdoing occurred. In light of these allegations concerning the conduct of GIC brokers, the MSRB Board of Directors will discuss whether additional guidance specifically directed at such conduct is warranted.

Fair Dealing

MSRB Rule G-17 provides that, in the conduct of its municipal securities and municipal advisory activities, each dealer and municipal advisor must deal fairly with all persons and may not engage in any deceptive, dishonest or unfair practice. This “fair dealing” rule is key to defining the relationships of dealers and municipal advisors with investors and issuers, and has served as the basis for numerous enforcement actions.¹⁴ The MSRB’s rule goes further than SEC Rule 10b-5¹⁵ in that it imposes an affirmative duty to supply investors and issuers with disclosure about their transactions. This duty exists under the MSRB’s rule even in the absence of fraud.

Last fall, the MSRB reminded dealers of their fair dealing obligations,¹⁶ including their duty to disclose to customers all material facts known by the dealer and those reasonably accessible to the market prior to or at the time of sale of a municipal security. The MSRB also stated that firms must analyze and disclose credit risks and other material information about a bond, such as redemption options or features that would affect its tax status, in order to meet their fair dealing obligations. For example, if the credit rating of a municipal issuer was recently downgraded, the dealer must provide an investor with this information. The MSRB made clear to the dealer community the critical importance of sharing with investors such key information so they are able to make the best possible decision based on their individual circumstances and risk tolerance.

As I mentioned earlier, Congress expressly directed the MSRB in the Dodd-Frank Act to protect municipal entities.¹⁷ As one of the MSRB’s initial municipal advisor rules, the MSRB extended its fair dealing rule, MSRB Rule G-17, to cover the actions of municipal advisors.¹⁸ The MSRB has proposed two pieces of interpretive guidance under Rule G-17, which apply this basic principle

by UBS Financial Services in at least 100 municipal bond reinvestment transactions); In the Matter of Banc of America Securities LLP, Exchange Act Release No. 63451 (December 7, 2010) (alleging fraudulent bidding practices by Banc of America Securities in at least three municipal bond reinvestment transactions) [hereinafter Bid Rigging Enforcement Actions].

¹⁴ See, e.g., In the Matter of J.P. Morgan Securities Inc., SEC File No. 3-13673 (October 7, 2010) (providing a plan of final distribution for the disgorgement and civil penalty paid by J.P. Morgan Securities for violating MSRB Rule G-17 and other federal securities laws).

¹⁵ 17 C.F.R. § 240.10b-5, 15 U.S.C. 78j (2010).

¹⁶ MSRB Notice 2010-37 (September 20, 2010).

¹⁷ Pub. L. No. 111-203 §975, 124 Stat. 1918 (2010).

¹⁸ MSRB Notice 2010-59 (December 23, 2010).

of fair dealing to municipal advisors and to underwriters of municipal securities in their interactions with municipal entities, as well as with organizations such as hospitals and colleges that borrow through municipal entities (referred to in the statute as “obligated persons”).

The MSRB’s proposed interpretive guidance on fair dealing obligations for underwriters¹⁹ states that representations made by underwriters to issuers of municipal securities in connection with municipal securities underwritings must be truthful and accurate. It also requires an underwriter of a negotiated issue that recommends a complex municipal securities financing (e.g., a financing involving a swap) to disclose all material risks and characteristics of the financing, as well as any incentives for the underwriter to recommend the financing and any other conflicts of interest. The guidance also contains pricing and compensation standards.

We note that, if true, the fraudulent and deceptive conduct of some major underwriters alleged to have occurred in actions brought by the SEC and Department of Justice as a result of their GIC bid rigging investigation²⁰ would be considered a clear violation of Rule G-17 under this proposed interpretive guidance.

The MSRB’s proposed interpretive guidance on fair dealing obligations for municipal advisors²¹ covers a municipal advisor’s duties to obligated persons in a municipal securities or financial product transaction, as well as duties to municipal entities (such as public pension funds) when the advisor is soliciting business from a municipal entity on behalf of a third party. This guidance contains disclosure and competency requirements, as well as prohibitions on engaging in municipal advisory business in certain conflict of interest situations, such as those involving kickbacks. This interpretive guidance would offer protections to market participants when a stronger fiduciary duty does not exist.

A dealer’s or municipal advisor’s compliance with its fair dealing obligations to municipal entities creates uniform practices and fair pricing methods that improve market efficiency and have cascading benefits to investors in terms of receiving a fair return on their investment. We believe our revised fair dealing rule to be a pillar in investor protection.

Pay to Play

As the first regulator to adopt a “pay to play” rule,²² the MSRB recognized the potential for market abuse that can arise as a result of market professionals using political contributions to

¹⁹ MSRB Notice 2011-12 (February 14, 2011).

²⁰ Bid Rigging Enforcement Actions, *supra* note 13.

²¹ MSRB Notice 2011-13 (February 14, 2011).

²² MSRB Rule G-37 was adopted by the MSRB in 1994 due to concerns about the opportunity for abuses and the problems associated with political contributions by dealers in connection

influence the award of business by public officials. The MSRB has curbed potential abuses by underwriters of municipal securities that made political contributions to win business and is seeking to do the same for municipal advisors.

Municipal advisors that seek to influence the award of business by government officials by making or soliciting political contributions to those officials distort and undermine the fairness of the process by which government business is awarded. These practices can harm municipal entities and their citizens by resulting in inferior services and higher fees, as well as contributing to the violation of the public trust of elected officials. The MSRB has proposed a rule that would, for the first time, regulate pay to play activities of firms and individuals that advise municipal entities, such as state and local governments and public pension plans, on municipal securities and municipal financial products, including derivatives.²³ The rule would also cover firms and individuals that solicit investment advisory business from municipal entities, such as public pension plans, on behalf of others.

Draft MSRB Rule G-42 would require quarterly disclosure of certain campaign contributions and would prohibit a municipal advisor from:

- Engaging in “municipal advisory business” with a municipal entity for compensation for a period of time beginning on the date of a non-*de minimis* political contribution to an “official of the municipal entity” and ending two years after all municipal advisory business with the municipal entity has been terminated; and
- Soliciting third-party business from a municipal entity for compensation, or receiving compensation for the solicitation of third-party business from a municipal entity, for two years after a non-*de minimis* political contribution to an “official of the municipal entity.”

Furthermore, draft MSRB Rule G-42 would prohibit municipal advisors and municipal advisor professionals from:

- Soliciting contributions, or coordinating contributions, to officials of municipal entities with which the municipal advisor is engaging or seeking to engage in municipal advisory business or from which the municipal advisor is soliciting third-party business;
- Soliciting payments, or coordinating payments, to political parties of states or localities with which the municipal advisor is engaging in, or seeking to engage in, municipal advisory business or from which the municipal advisor is soliciting third-party business; and

with the award of municipal securities business, known as “pay to play.” See MSRB Reports, Volume 14, Number 3 (June 1994).

²³ MSRB Notice 2011-04 (January 14, 2011).

- Committing indirect violations of Rule G-42.

MSRB pay to play restrictions have served as a model for federal and state regulators imposing restrictions on pay to play activities in other areas and play a vital role in preserving market integrity. The MSRB has served as a key resource to such other regulators as they have developed and administered their rules.

Gifts

Gifts to employees controlling the award of municipal securities business by market professionals can similarly harm investors. The MSRB limits these gifts by dealers and recently proposed to extend the restrictions of MSRB Rule G-20 to municipal advisors.²⁴ Just as the existing rule helps to ensure that dealers' municipal securities activities are undertaken in arm's length, merit-based transactions in which conflicts of interest are minimized, amendments to Rule G-20 would help to ensure that engagements of municipal advisors, as well as engagements of dealers, municipal advisors, and investment advisers for which municipal advisors serve as solicitors, are awarded on the basis of merit and not as a result of gifts made to employees controlling the award of such business.

Supervision

The establishment of a basic supervisory structure for municipal advisors is particularly important as the MSRB adopts new rules for municipal advisors that municipal advisors must understand and comply with in order to avoid possible enforcement actions and to effectively put in place practices that serve to protect investors. The MSRB recently requested comment on a supervisory rule, draft MSRB Rule G-44, to require that each municipal advisor firm establish a supervisory structure to oversee compliance with applicable MSRB and SEC rules.²⁵

Draft Rule G-44 would require a municipal advisor to establish and maintain a system to supervise the municipal advisory activities of each associated person designed to achieve compliance with applicable rules. Draft Rule G-44 would also require municipal advisors to adopt, maintain and enforce written supervisory procedures designed to ensure that the conduct of the municipal advisory activities of the municipal advisor and its associated persons are in compliance with applicable rules.

²⁴ MSRB Notice 2011-16 (February 22, 2011).

²⁵ MSRB Notice 2011-28 (May 25, 2011).

Board of Directors

The new composition of the MSRB's Board of Directors has assisted us in carrying out our regulatory actions over the past year. The Dodd-Frank Act requires the MSRB's governing Board to be majority-public and to include municipal advisors.²⁶

On October 1, 2011, the MSRB seated a 21-member Board with a majority of public members, including three municipal advisors.²⁷ The Board also includes representatives of issuers and investors, as well as members representing securities firms and banks. We have a newly structured majority-public Nominating Committee chaired by a public member.

We believe this Board of Directors reflects the benefits of a self-regulatory organization and, at the same time, the wisdom of increasingly diverse and public membership. Our rulemaking—and the public's interest—has benefited from the many perspectives offered by our Board members. The Board vigorously debates issues, carefully considers the experience and insight of each of its members and then proceeds with the best possible course of action. We believe the progress we have made over the last nine months in further protecting the market has been unprecedented.

The rules I have mentioned are just a small part of the regulatory backbone that helps support a fair and efficient municipal market.

Professional Qualifications

It is vital to our mission that municipal market professionals can competently provide their services to investors and municipal entities. The MSRB Professional Qualification Program fosters competency of municipal professionals and compliance with MSRB rules through required examinations and continuing education. The Dodd-Frank Act requires the MSRB to set standards of professional qualification for municipal advisors.²⁸ The MSRB has been conducting outreach events and focus groups to gather input from municipal advisors and others about the development of a professional qualification examination to assess the competency of entry-level municipal advisors.

The MSRB recently organized a municipal advisor examination working group to consider all comments received by the MSRB, assess commonalities in municipal advisory activities and provide additional input. The working group expects to survey registered municipal advisors about the proposed examination content in late 2011 and use the results of the survey to

²⁶ Pub. L. No. 111-203 §975, 124 Stat. 1917 (2010).

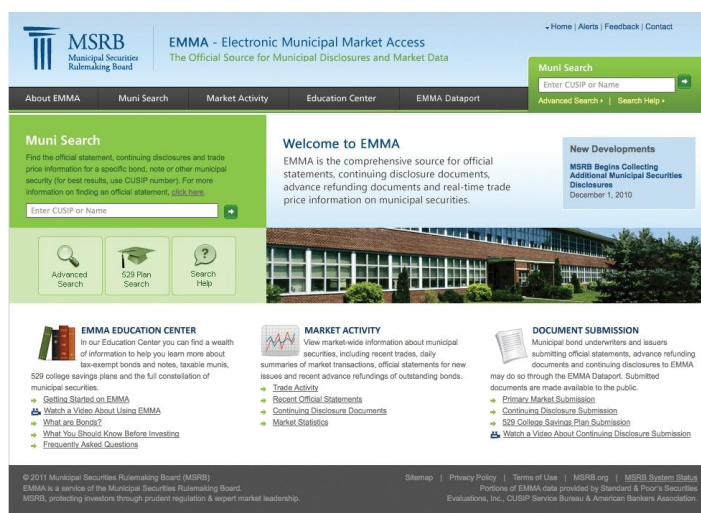
²⁷ MSRB Press Release, MSRB Assumes Expanded Mission and Establishes Public Majority Board of Directors (October 1, 2010).

²⁸ Pub. L. No. 111-203 §975, 124 Stat. 1919 (2010).

prepare a draft examination content outline. We will continue to keep interested parties apprised of our progress in this area as we proceed.

EMMA and Market Transparency

I would now like to discuss another top priority of the MSRB—market transparency. Beginning as a pilot program in 2008, our EMMA system, at www.emma.msrb.org, has transformed the transparency of the municipal market. Any investor can now access from anywhere hundreds of thousands of disclosure documents and real-time trading information on 1.5 million outstanding municipal bonds. We provide all of this information to the public for free.



www.emma.msrb.org

EMMA was created for the purpose of providing retail investors with easy access to key market information that was previously unavailable or difficult to find. Retail investors are heavily involved in the municipal market, with retail trades (generally viewed as trades of \$100,000 or less) accounting for over 80% of the approximately 7.3 million customer transactions in municipal securities over the past year.²⁹ The MSRB's EMMA website supports well-informed decision making by these investors.

Over the past year, the MSRB has greatly expanded the amount and type of information available to investors on EMMA. The MSRB began providing interest rate information on EMMA about auction rate securities (ARS) and variable rate demand obligations (VRDO) in 2009, after instability in these markets raised significant disclosure and market transparency concerns. Today EMMA remains the only source of current, market-wide interest rates for variable rate securities available to the general public. In May 2011, the MSRB enhanced EMMA to provide public access to key ARS auction and VRDO liquidity information, including actual copies of liquidity documents such as a letter of credit. Providing investors with easy access to these

²⁹ This statistical information may be found by searching EMMA's Market Statistics tab at <http://emma.msrb.org/MarketActivity/ViewStatistics.aspx>.

documents and data increases their ability to make informed decisions about investing. The MSRB testified before you in 2009 regarding our plans to increase the information and documents available about ARS and VRDOs³⁰ and I am happy to report that this increased transparency has been accomplished.

EMMA also is a tool for issuers to communicate important information about their bonds and their finances to investors. The MSRB received requests from state and local government issuers to provide the ability for issuers to voluntarily post preliminary official statements to EMMA. We are happy to announce that, as of May 2011, we have made this possible. Preliminary official statements can provide potential investors with the details of a new issue before it comes to market. Issuers in several states have already taken advantage of this new EMMA feature—including South Carolina, Utah, Kentucky, Florida and Wisconsin—and we expect its use to increase over time.

As part of its investor protection rules, the MSRB requires timely disclosure by our regulated entities and promotes good continuing disclosure practices by issuers. Issuers provide some types of continuing disclosure information under SEC Rule 15c2-12. The MSRB has added the ability for issuers to submit numerous voluntary disclosures that go beyond this SEC baseline. Most recently, the MSRB enhanced EMMA to allow issuers to submit information about the timing and accounting standard used to prepare annual financials. This helps investors acquire a more complete picture of the issuers and issues in which they are investing. As EMMA provides a centralized location for disclosures, investors and others interested in the disclosure practices of issuers and trading activity of bonds can easily use EMMA to access and compare the available information.

The MSRB will continue to improve EMMA. This fall, EMMA will display credit ratings from one or more of the Nationally Recognized Statistical Rating Organizations. These ratings will be available on the EMMA website, for free, and updated in real-time.

Conclusion

The municipal market funds much of this nation's health, education and transportation infrastructure. It is the MSRB's role to balance and protect the competing interests in this public-purpose market. Where we have the jurisdiction and ability to act, the MSRB has raised the bar on professional conduct by financial professionals and advanced market transparency in many significant ways. The benefits of these efforts ultimately flow to the investor and taxpayer.

³⁰ *Transparency and Regulation in the Municipal Securities Market Hearing Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs* (2009) (statement of Ronald A. Stack, Chair, Municipal Securities Rulemaking Board).

The MSRB is dedicated to a thoughtful, thorough rulemaking process that involves significant input from municipal market participants. We depend on input from investors, issuers, industry members and others to ensure MSRB rules are timely and appropriate. We believe that this widespread participation in rulemaking makes both the process and the product at the MSRB as balanced as possible and in the best interests of investors and municipal entities.

We believe we not only have a responsibility to write regulations and provide transparency, but also a corresponding responsibility to educate market participants on the progress of these efforts. Since the Dodd-Frank Act, the MSRB has conducted outreach events across the country to provide a forum for education and input regarding our new mission and jurisdiction. We appreciate the opportunities provided by the Dodd-Frank Act to improve the municipal market and look forward to continuing to work with Congress, industry members, issuers and investors with this goal in mind.

I thank you again for the invitation to speak today and will take any questions you may have.