SQUIRE SANDERS

Squire Sanders (US) LLP
One Tampa City Center
201 N. Franklin Street, Suite 2100
Tampa, FL 33602

O +1 813 202 1300
F +1 813 202 1313
squiresanders.com

March 6, 2012

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street
Alexandria, VA 22314

Re: MRSB Notice Number 2012-04 (Request for comment on draft interpretive notice concerning the application of MSRB Rule G-17 to bondholder consents by underwriters of municipal securities)

Dear Mr. Smith:

The law firm of Squire Sanders (US) LLP has conducted a municipal securities practice for more than 100 years. Today, our municipal securities practice includes serving as bond counsel, disclosure counsel or underwriters' counsel on approximately 350 transactions each year. We submit these comments on our own behalf and on behalf of our municipal securities clients likely to be adversely affected by the proposed interpretive notice.

In Notice 2012-04, the MSRB states its proposed interpretation that an underwriter that gives consents to amendments to bond documents may be in violation of the underwriter's "fair dealing" duties under MSRB Rule G-17. This interpretation notice would interpret Rule G-17 to prohibit an accepted market practice and would unnecessarily limit the ability of municipal securities issuers and conduit borrowers to use an accepted and cost-effective method of amending municipal bond documents.

This accepted method to effect amendments to existing bond documents is for the purchasers of new bonds issued to be deemed to have consented to proposed amendments by virtue of their purchase of the new bonds. This is accomplished by the offering document for the new bonds setting forth both (1) a description of the proposed amendment (including, in many instances, the actual text of the amendment) and (2) a conspicuous notice that purchasers of the new bonds will be deemed to consent to the amendment. Once the requisite number of consents have been (or are deemed to be) received (typically bond documents require consent from a majority of holders of outstanding bonds), the amendments become effective and binding on all holders of outstanding bonds, including holders of bonds that were issued prior to the beginning of the consent process. Notice of the effectiveness of the amendments typically is sent to existing bondholders in due course.

Virtually all municipal bond documents include provisions permitting amendments with bondholder consent. Many expressly require signed bondholder consents to amendments.

Squire Sanders (US) LLP

Some can be interpreted to permit consent to be evidenced in other ways, without the necessity for signed consents.

Amendments that do not change key financial terms of the bonds (such as the interest rate or principal or interest payment dates, for example) generally require the consent of bondholders representing a majority in principal amount of bonds outstanding in order for the amendments to become effective. In most cases, there is no contractual right of any particular bondholder to veto the approval of an amendment that is approved by the majority. Majority consent can be achieved in any number of ways; however, few issuers today actually seek written consent from existing bondholders. This is due in large part to the fact that bonds are now almost universally issued in book-entry only form. Therefore, there is no simple way to communicate with the beneficial owners of the bonds or to confirm who actually owns the bonds, except at the time an underwriter purchases bonds newly issued under existing bond documents at initial issuance and prior to the bonds being resold to the underwriter's customers.

Currently, the most common methods of effecting amendments are (1) obtaining the consent of a credit enhancer (if the bond documents provide that the credit enhancer may consent in lieu of the owners of the bonds it enhances, as is often the case) and (2) delaying the effective date of the amendment until a sufficient amount of new bonds are issued whose holders are deemed to consent in the manner described above (sometimes referred to as "springing amendments"). It is in connection with such springing amendments that underwriters are typically asked to sign consents to document amendments.

As noted above, "springing amendments" are not unusual in the market today and are routinely disclosed in offering documents. The execution of a written consent by an underwriter, as the owner of the newly issued bonds, in these situations is a ministerial matter to memorialize in a written document the deemed consent of the holders of the principal amount of new bonds being issued. As described above, consent from the buyers of the new bonds is deemed obtained by virtue of a conspicuous notice in the disclosure document for the sale of the new bonds stating that the purchase of the new bonds by the purchasers will be deemed to be their consent to the amendments described in the disclosure document. As the MSRB notes in its request for comment, the underwriter is technically the bondholder at the time the underwriter signs the written consent to the amendments. The underwriter's consent is intended to evidence the deemed consent by the ultimate purchasers, who clearly indicate their consent by their voluntary decision to purchase the new bonds, in light of disclosure of the amendments in the offering document.

Nonetheless, the MSRB draft interpretive notice states that it would be a violation of Rule G-17 for an underwriter to consent to an amendment that changed the security for the bonds unless both of the following requirements were met: "(i) the authorizing document expressly provided that an underwriter could provide bondholder consent and (ii) the offering documents for the existing securities expressly disclosed that bondholder consents could be provided by underwriters of other securities issued under the authorizing document." It is likely that neither of these conditions could be satisfied for amendments to currently existing bond documents, since the governing documents would predate the MSRB's proposed interpretation. It is the underwriter's status as the owner of bonds upon their initial issuance that allows its consent to

Squire Sanders (US) LLP

be effective under existing governing bond documents, not its status as an underwriter. We suggest alternative requirements for consideration.

If this draft interpretive notice is adopted in the proposed form, it is likely that underwriters will decline to sign such consents in the future. Municipal securities issuers and conduit borrowers will then have to find other means to document the "deemed consent" of new bond owners, which may include a requirement that underwriters require each of their customers sign an acknowledgement of the amendment or an instrument appointing the bond trustee as the new owners' agent for purposes of signing a consent, where the governing documents require a signed consent. It is unclear whether underwriters will be willing or able to obtain such written consents or acknowledgements from their customers. Neither of these alternatives is as simple and cost effective as the current practice. Further, in instances where consents simply cannot be obtained as a result of the MSRB's interpretive notice, issuers and conduit borrowers may be forced to refund or defease outstanding bonds even if not otherwise economic.

As an alternative to the two requirements stated in the proposed interpretive notice, we propose the following: It would not be a violation of Rule G-17 for an underwriter to consent to amendments to an authorizing document that would reduce the security for existing bondholders if the underwriter is giving consent as to newly issued bonds it is purchasing and the offering document for the new bonds (1) clearly describes the proposed amendments in the manner required by the authorizing document, and (2) conspicuously indicates that, by their purchase of the new bonds, the buyers are deemed to have given their consent to the amendments and to have directed and authorized the underwriter to execute, on their behalf, any written consent to the amendments which is required by the authorizing documents.

Sincerely,

Squire Sanders (US) LLP