Two Logan Square
Suite 1600
18th & Arch Street
Philadelphia, PA 19103-2770

215 567-6100
215 567-4180 fax
www.pfm.com

November 30, 2011

Securities and Exchange Commission
100 F St NE
Washington, DC 20549
Attention: Elizabeth M. Murphy, Secretary

Re: File No. SR-MSRB-2011-09 (MSRB Rule G-17)

Dear Commissioners:

Public Financial Management, Inc. ("PFM") is a municipal advisor registered with the Commission and the Municipal Securities Rulemaking Board ("Board"). Our sole business is providing advisory services to state and local governments or their instrumentalities. PFM is independent of underwriters and brokers. We do not distribute securities or execute trades in any securities. Although PFM is not a broker, for the reasons stated below we submit the following comments with respect to the Interpretive Notice proposed by the Board with respect to Rule G-17 as applicable to brokers, which is pending before the Commission (as amended by Amendment No. 2) (the "Amended Notice") for approval pursuant to the Commission's Rulemaking authority.

The Amended Notice represents a significant improvement over the Notice which was submitted to the Commission for approval in August 2011. Among other things, the Amended Notice recognizes several of the conflicts of interest between the issuer and a broker that seeks to become the underwriter of its bonds, as well as the conflicts regarding compensation to be obtained by the underwriter for those services. In its statement to the Board with respect to the comment version of the Rule G-17 Interpretive Notice as applicable to municipal advisors, PFM pointed out that there was an unjustifiable disparity between the conflict-of-interest admonitions demanded of municipal advisors and those demanded of brokers. PFM believes that important issuer interests, which securities regulatory authorities were commanded to protect in the Dodd-Frank Act, will be better served by the Amended Notice than its earlier version. The protection of municipal issuers is the reason why PFM, which is not a broker, contributes its views to this Rulemaking which applies to brokers.

In our view, the most significant contribution of the Amended Notice is that it now is clear that the Board recognizes that the advice given by brokers in their promotion of themselves to become underwriter for the distribution of municipal securities is the advice which Congress has said makes that person (whether or not rendering the advice for compensation, as the Commission has concluded) a "municipal advisor" within the meaning of Section 15B(e) of the Exchange Act. All of the best thinking of the securities regulatory authorities and the professional securities community now is in place for the Commission to address the question which was reserved in the Commission's approval of the Rule G-23 amendments. That question is whether a broker who provides the defined advisory services to a municipal entity in the course of seeking to obtain the business of underwriting its securities is subject to the obligations of competence, thoroughness and unconflicted loyalty which are the characteristics of fiduciary duty.

PFM's answer is that of course the broker is subject to that duty and that there is no good reason to read the statute any other way. In the balance of this comment letter, we will expand upon our reasoning for that conclusion and will address other items presented by the Amended Notice that are important to the protection of issuers and which, with due respect for the efforts of the Board, we believe can be improved as a result of the guidance of the Commission in its approval process.

I.

We begin with what we believe is the threshold proposition that if a broker gives financing or securities-offering advice to a municipal entity prior to that broker's negotiating a bond purchase or placement agency agreement with the issuer to underwrite (as statutorily defined) the bond distribution, the broker is a municipal advisor within the definition of the statute. As such, the broker-municipal advisor owes to the issuer a fiduciary duty of exactly the same tenor as is owed by any other advisor that fits the definition in the Dodd-Frank Act. For obvious reasons, the broker's fiduciary duty does not attach to those transactions in which the broker and the issuer have an unavoidably adverse relationship - - the price which the broker will pay for the bonds, the agency fee, or the price of a swap that the broker proposes to sell to the issuer, for example - - but in all other respects, the broker that presumes to advise a municipal entity is a municipal advisor.

That dichotomy between a broker's advice in the design of a municipal bond offering (including reinvestment of proceeds and interest rate

management strategy), on the one hand, and transactions in which the broker and the issuer are counterparties, on the other hand, is the balance specified by Congress in the Dodd-Frank Act. The Congress exempted from the definition of municipal advisor, a broker "serving as an underwriter as defined in Section 2(a)(11) of the Securities Act."[1] Under that definition, an "underwriter" does not come into existence until a bond purchase agreement has been negotiated with the broker or the broker is authorized to commence agency distribution. That not only is what Section 2(a)(11) of the Securities Act exactly says, but this reading makes good operational sense.

Until the issuer takes definitive action to enable a broker to sell its bonds, it can't be known whether there ever will be an underwriter. The issuer may abandon or indefinitely postpone the bond offering. In that circumstance, the broker - - who may in the meantime have given the municipal entity advice as to, for example, a "municipal financial product" - - is an underwriter of nothing, whose financing advice to the issuer must be measured by the Dodd-Frank standards. Or suppose that more than one broker has been courting the municipal entity to gain the engagement to refinance a maturing debt issue. The municipal entity considers the strategies proposed by the competing brokers and selects one broker to purchase and distribute the refunding bonds. That latter broker becomes an underwriter for purposes of the distribution, as we describe above. The other broker (or brokers) is an underwriter of nothing. Can it be that that broker, who advised a municipal entity with respect to the issuance of a municipal security, is exempt from registration as a municipal advisor by reason of the fact that it rendered advice in the quest to be selected as the underwriter (all the while, one supposes, chanting "I'm an underwriter, not an advisor")? We suppose that that would be a colorable position if the Congress had said that "'municipal advisor' does not include brokers seeking to obtain engagements as underwriters (as defined in Section 2(a)(11) of the Securities Act." But Congress did not say that.

II.

PFM disagrees with the Board's proposition that the "level of disclosure [of risks and conflicts] required may vary according to the issuer's * * * financial ability to bear the risks of the recommended financing * * *." There is nothing but mischief in that standard. The modest sized school district of

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[1] Section 2(a)(11) reads in pertinent part: *"The term 'underwriter' means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security * * *."* (Emphasis added).

Erie, Pennsylvania, for example, of course has the resources to take the financial hit resulting from an improvident ladder of options recommended and sold to it by a powerful broker. The school district has taxing power, and so long as not too many taxpayers have fled, the district can come up with the money to bandage its financial wounds. And, indeed, that is true of all municipal entities with the power to tax. It is not necessary, for us to make our point, to claim that the Erie School District was wrongly advised. Our point is that the Erie School District, and all municipal entities to whom brokers give such advice as is contemplated by Dodd-Frank, should not be ineligible for advice that is competent and unimpaired by the broker's own interests simply because the government can tax the citizens to restore any loss.

It is no answer to our submission to point to the fact that the robustness of disclosure to purchasers under the Securities Act in some instances is relaxed where the prospective purchaser has substantial financial means and is assumed competent to "fend for himself". The requirements of the '33 Act are designed to protect <u>buyers</u> of securities, who rarely act under compulsion. The protections of the relevant provisions of the Dodd Frank are for the benefit of government borrowers, who rarely borrow <u>except</u> under compulsion. To dilute the protections owed the government because the government has access to the tax rolls implies a cynicism which we do not believe Congress intended.

III.

The Board's discussion under the heading "Fair Pricing" is unduly indulgent in its requirements on an underwriter. There is no component of the issuer-underwriter transaction that is of greater importance to the issuer than the price which the underwriter pays to the issuer for the issuer's bonds. The Board is prepared to acknowledge that Rule G-17 "includes an implied representation that the price an underwriter pays to an issuer is fair and reasonable" in all of the circumstances, which, the Board says, includes, as an independent component of "fairness", the underwriter's own judgment as to what is fair to him. At the same time, the Board hedges that protection of an issuer by adhering to its earlier, pre-Dodd-Frank expression of the principle that "whether an underwriter has dealt fairly with an issuer" - - the command of Rule G-17 - - depends on all "the facts and circumstances" and is not dependent solely on the price of the issue. Apparently the Board has left the rights of the issuer under Rule G-17 to receive a price that approximates the market to a principle which raises "facts and circumstances" to the second power.

PFM believes that Dodd-Frank has put that two-step to an end. We urge the Commission to insist that the Amended Notice require the underwriter expressly to represent in writing to the issuer that the price paid for the issuer's debt is fair as required by Rule G-17, and to specify the facts which support that representation.

* * *

Thank you for affording us an opportunity to express these views.

Very truly yours,

F. John White
Chief Executive Officer