

## COMMENTS OF

HAYNSWORTH SINKLER BOYD, P.A.

Regarding

### DRAFT INTERPRETATION OF MSRB RULE G-17 RESTRICTING UNDERWRITER CONSENTS TO AMENDMENTS TO OUTSTANDING SECURITY DOCUMENTS

March 5, 2012

On February 7, 2012, the Municipal Securities Rulemaking Board (the “**MSRB**”) issued its Notice 2012-04 – *Request for Comment on Draft Interpretive Notice Concerning the Application of MSRB Rule G-17 to Bondholder Consents by Underwriters of Municipal Bonds* (the “**Draft Notice**”).

If adopted, the Draft Notice would by its interpretation of MSRB Rule G-17 prohibit an underwriter in its capacity as initial owner of the bonds from consenting to amendments to the bond resolution, ordinance, or trust indenture (the “**Bond Documentation**”), if such amendment would reduce the security for the owners of outstanding bonds unless (a) the Bond Documentation expressly provided that an underwriter (as opposed to the bondholders in general) could provide bondholder consent and (b) the offering documents for the owners of outstanding bonds expressly disclosed that bondholder consent could be provided by underwriters (as opposed to bondholders in general) of subsequently issued bonds.

Bond Documentation contains specific provisions for amendments that require the consent of all, none, or a certain percentage of bondholders. These provisions are market driven by the expectation of the bondholders and state law provisions and are matters of contract. As long as the amendment provisions are disclosed in the offering documents, the issuer and the bondholders have knowledge of the amendment provisions. The circumstances driving a consent by the bondholders to an amendment to Bond Documentation are unique to each transaction. The Draft Notice rather than protecting the issuer or the bondholders does not and really cannot take into consideration the underlying complexities of each transaction. As a result, unintended negative consequences could result from the abrogation of the contract established between the issuer and the bondholder by imposing the Draft Notice in all situations where the security is technically reduced but the financial strength of the enterprise is likely enhanced.

Since Bond Documentation does not contain such provisions specifically addressing underwriter as opposed to general bondholder consents, the Draft Notice, if adopted, would effectively preclude any amendments where there were a technical reduction in security even though the overall financial strength of the issuer could be improved by such action. The Draft Notice assumes that a reduction in security will always be a detriment to the existing bondholder without taking into account why the issuer has chosen such course and the actual benefits that may accrue. When amendments are pursued with respect to the security, there is a sound business reason for such action and such action is taken to benefit the long-term viability of the issuer or project. Inherent in the Draft Notice is the presumption that such amendments are always to the detriment of the bondholder. Such a simplistic approach will not promote the financial stability of the issuer or the enterprise to which the bonds relate.

Comments have been submitted that the Draft Notice constitutes an undue interpretation of Rule G-17, and expands the meaning of Rule G-17 to the detriment of municipal issuers whose interests the MSRB is now charged with protecting.

The following comments provide examples of where the reduction in the security are in the interests of the municipal issuer and the bondholders and argues that the disclosure of the existing Bond Documentation that addresses amendments should control the amendment process.

In bond issues where the security is real property, the issuer may need to grant an easement or right of way to a state transportation agency for road construction or release certain parcels for a multitude of valid business reasons, such as increased tax benefits to the issuer or generation of revenue that would accrue to the financial viability of the issuer. Although such easement or release of parcels could benefit the issuer or revenue-producing enterprise and thereby the bondholders, the Draft Notice would likely prohibit such reduction in security or at best create an ambiguity since the security is technically being reduced.

In healthcare financing there is often an obligated group structure where several entities pledge their gross receipts under a master trust indenture. Because of the rapid evolving changes in healthcare, it may be beneficial overall to release an entity from the master trust indenture as a result of a sale of the entity to another healthcare organization. Documents usually provide a financial test for release of such entity. However, such tests were often written over 20 years ago in a vastly different healthcare environment. Thus it is for the benefit of both the healthcare system and the present bondholders and future bondholders to amend the release tests. Conversely, it may be beneficial to bring another entity into the obligated group where the test in the existing Bond Documentation may be higher than is realistic in the present healthcare regulatory environment. If reducing the threshold to admit a new member of the obligated group cannot be amended, the overall financial strength of the obligated group could be reduced. However, the proposed Draft Notice could be interpreted as precluding either amendment since arguably lowering the financial criteria for admission to or exit from the obligated group could be viewed as a reduction of security.

Another example of the proposed Draft Notice not serving the interest of the issuer or the bondholder is where the bonds are secured by a debt service reserve fund policy and the surety ratings have fallen below investment grade. The Bond Documentation may require such policy must be replaced by cash. In today's environment it may not be in the best interest of the liquidity profile of the issuer to replace such reserve fund policy with cash and thereby risk the violation of the debt service coverage ratio or cause an operating deficit or immediate default by the municipal issuer. Such action may increase the likelihood of a default. If such situation is presented to all current bondholders and the requisite number consent, Rule G-17 should not block the bondholders' assessment of the benefit of the transaction.

The Draft Notice would cause an ambiguity in all of the above circumstances since it fails to take into consideration the entire credit analysis and looks at the "reduction in security" in isolation.

The market place is the better approach to handling these matters. Most Bond Documentation requires 100% bondholder consent to reduce the aggregate principal amount of bonds then outstanding, the consent of the holders of which is required to authorize an amendment without the consent of all bondholders. The Draft Notice will not result in an improvement but rather impose an interpretation that may not be beneficial to the financial integrity of the securities.

Haynsworth Sinkler Boyd, P.A.  
Kathleen Crum McKinney  
75 Beattie Place, 11<sup>th</sup> Floor  
Greenville, SC 29601  
Email: [kmckcinney@hsblawfirm.com](mailto:kmckcinney@hsblawfirm.com)

Haynsworth Sinkler Boyd, P.A.  
Theodore B. DuBose  
1201 Main Street, 22<sup>nd</sup> Floor  
Columbia, SC 29201