CENTER *for* COMPETITIVE POLITICS
Congress shall make no law...

September 17, 2012

Via Electronic Submission

Municipal Securities Rulemaking Board
1900 Duke Street
Suite 600
Alexandria, VA 22314

RE: Potential Revisions to Rule G-37

Dear Sir or Madam:

I represent the Center for Competitive Politics ("CCP"), an organization dedicated to preserving our First Amendment political rights to speech, association, and petition. I am writing to comment on the proposed changes to Rule G-37, as well as the potential direction of future revisions.

Given the Board's positive outlook on how G-37 has performed as a hedge against pay-to-play corruption, CCP was not surprised to see this proposal extending certain elements of the current rules to apply to bond ballot measure campaigns. But the Board has overlooked the long-standing constitutional distinction between contributions to candidates and those given to support or oppose ballot initiatives. Simply put, ballot measure committees receive stronger constitutional protection against government regulation than do candidates.

As a result, CCP is concerned about the proposed redefinition of "contribution" in Section g(i) of the Rule. We are especially concerned that the Board may "take further action regarding dealer and dealer personnel contributions to bond ballot campaigns, up to and including a corresponding ban on business as a result of certain contributions."[1]

Since blessing the modern machinery of the campaign finance regime in *Buckley v. Valeo* in 1976, the Supreme Court has based most of its acceptance of regulations on candidate committees and political action committees (PACs) on the threat of *quid pro quo* corruption, or the appearance of such corruption

But "[t[he risk of corruption perceived in cases involving candidates...simply is not present in a popular vote on a public issue."[2] For example, even though the Court has permitted limits on the amount that individuals may contribute to a candidate, it has declared unconstitutional any limits on the amount of money that may be contributed to a ballot measure.[3]

[1] *See* MSRB Rule 37-G, Sec. b(i); proposed MSRB Sec. g(i); MSRB Notice 2012-43 (August 15, 2012).
[2] *Bellotti v. First Nat'l Bank of Boston*, 435 U.S. 765, 790 (1978).
[3] *Buckley v. Valeo*, 424 U.S. 1, 30 (1976); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

This makes sense: who is potentially corrupted by contributions to a ballot measure committee? The electorate directly votes on such measures, and the voters themselves cannot be "bought" by the advertising or campaign of those promoting a ballot measure.

Indeed, a critical part of the D.C. Circuit's analysis upholding G-37 from a constitutional challenge in 1995 rested on the fact that the Rule "constrain[ed] relations only between two potential parties to a *quid pro quo*: the underwriters and their municipal finance employees on the one hand, and officials who might influence the award of negotiated municipal bond underwriting contracts on the other.[4] The Court specifically took note that "as the Commission interprets the rule, municipal finance professions are not in any way restricted from engaging in the vast majority of political activities, including making direct expenditures for the expression of their views, giving speeches, soliciting votes, writing books or appearing at fundraising events."[5] Had the regulation been otherwise it is possible that the Court would not have found G-37 to be "closely drawn and thus avoid[ing] unnecessary abridgement of First Amendment rights."[6]

In the MSRB's Request for Comment, the agency claims they are worried about "certain practices involving possible informal understandings among election advisors, underwriters, municipal advisors, and/or issuers in which financial support of bond ballot campaigns may be linked to the retention of such parties by the issuer if the associated bond ballot measure is approved" and that underwriters and municipal advisors may make contributions or expenditures with the expectation of being reimbursed by the issuer after a bond measure wins.[7]

But this concern has nothing to do with the creation of a *quid pro quo* arrangement between the bond ballot measure *committee* and the contributors. The ballot measure committee is, under the law, an entirely separate entity from the issuer. There is no identity of interests between the person supported for election and the person making hiring and issuing decisions, as is the case in the candidate context and as the D.C. Circuit required in *Blount.*

The Board's announcement and analysis make no mention of this crucial distinction.

While the present revisions would impose only record-keeping burdens, those requirements would do little to advance the MSRB's anticorruption mission. In particular, the recordkeeping requirements for in kind contributions do little to prevent corruption, but would chill a kind of political participation – volunteer work – that is central to individuals' engagement with their communities. Similarly, by requiring recordkeeping of non *de minimis* contributions, and defining such contributions at the same rate as those for candidates, the proposed revisions conflate contributions to candidates with those to support or oppose ballot initiatives. For the reasons given above, this is improper.

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[4] *Blount v. SEC*, 61 F.3d 938, 947 (D.C. Cir. 1995).
[5] *Id.* at 948.
[6] *Id.* at 947 (internal quotation marks and citation omitted).
[7] MSRB Notice 2012-32 (August 15, 2012).

This error would be compounded by future attempts to, in effect, ban such contributions. We appreciate that the MSRB is seeking to prevent corruption between issuers on one hand and brokers, dealers and other municipal securities professionals on the other. There may well be other, constitutional, avenues to attack such a problem. But starkly limiting contributions to ballot measure committees—as opposed to candidate committees—is not one of them.

The law is clear. "Whatever may be the state interest or degree of that interest in regulating and limiting contributions to or expenditures of a candidate or a candidate's committees *there is no significant state or public interest* in curtailing debate and discussion of a ballot measure."[8] This analysis also applies to creating regulatory burdens that may chill participation in such debates.

CCP respectfully requests that the Board reconsider its proposed re-definition of the word "contribution," the definition of *de minimis* as applied to ballot measure contributions, and the burden its recordkeeping requirements for in kind contributions may have on volunteer activity. CCP also generally requests that the Board, in its present and future discussions, take into consideration the fact that ballot issue, ballot measure, and independent expenditure committees are granted far more constitutional protection than are candidate committees.[9]

Very truly yours,

Allen Dickerson
Legal Director

[8] *Citizens Against Rent Control*, 454 U.S. at 299 (emphasis added).
[9] *See Bellotti v. First Nat'l Bank of Boston*, 435 U.S. 765 (1978); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 90 (1981); *Citizens United v. FEC*, 130 S.Ct. 876 (2010); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).