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February 13, 2012

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. SR-FINRA-2011-073 – Response to Comments

Dear Ms. Murphy:

Pursuant to an order by the Securities and Exchange Commission (“SEC” or “Commission”) issued on May 11, 2011,¹ FINRA has proposed a new rule to establish a reasonable annual accounting support fee (“GASB Accounting Support Fee”) to adequately fund the annual budget of the Governmental Accounting Standards Board (“GASB”). Under the SEC GASB Order, FINRA must establish (a) a reasonable annual accounting support fee to adequately fund the annual budget of the GASB; and (b) rules and procedures, in consultation with the principal organizations representing State governors, legislators, local elected officials, and State and local finance officers, to provide for the equitable allocation, assessment, and collection of the accounting support fee from its members, and the remittance of all such accounting support fees to the Financial Accounting Foundation (“FAF”).

On December 11, 2011, FINRA filed SR-FINRA-2011-073 (the “Proposal”) with the SEC proposing to adopt Section 14 to Schedule A of the FINRA By-Laws to establish the GASB Accounting Support Fee.² The Proposal was published in the *Federal*

¹ Securities Exchange Act Release No. 64462 (May 11, 2011), 76 FR 28247 (May 16, 2011) (“SEC GASB Order”). The SEC GASB Order was issued pursuant to Section 19(g) of the Securities Act of 1933 (“Securities Act”).

² FINRA had previously published *Regulatory Notice* 11-28 in June 2011 requesting comment on the GASB Accounting Support Fee. FINRA received eleven comment letters in response to the *Notice*. FINRA’s responses to the comments raised in those letters are included in Section II.C of the Proposal. See 77 FR 1119, 1121-24 (Jan. 9, 2012).

Register on January 9, 2012, and comments were due by January 30, 2012.³

The Commission received nine comment letters on the Proposal.⁴ Of the nine commenters,⁵ four generally approved of the approach taken by FINRA;⁶ although, some of these commenters had suggestions on ways to amend it. Three commenters

³ Securities Exchange Act Release No. 66080 (Jan. 3, 2012), 77 FR 1119 (Jan. 9, 2012).

⁴ Letter from Eric Berman, Chair, Financial Management Standards Board, Association of Government Accountants (“AGA”), to Elizabeth M. Murphy, Secretary, SEC (Jan. 30, 2012) (“AGA Letter”); Letter from Michael Nicholas, Chief Executive Officer, Bond Dealers of America (“BDA”), to Elizabeth M. Murphy, Secretary, SEC (Jan. 30, 2012) (“BDA Letter”); Letter from David T. Bellaire, General Counsel and Director of Government Affairs, Financial Services Institute (“FSI”), to Elizabeth M. Murphy, Secretary, SEC (Jan. 30, 2012) (“FSI Letter”); Letter from Jeffrey L. Esser, Executive Director and Chief Executive Officer, Government Finance Officers Association, Robert O’Neill, Executive Director, International City/County Management Association, Larry E. Naake, Executive Director, National Association of Counties, Donald J. Borut, Executive Director, National League of Cities & Tom Cochran, CEO and Executive Director, United States Conference of Mayors, to Elizabeth M. Murphy, Secretary, SEC (Jan. 30, 2012) (“GFOA Letter”); Letter from Ronald L. Jones, President, National Association of State Auditors, Comptrollers and Treasurers, to Elizabeth M. Murphy, Secretary, SEC (Jan. 30, 2012) (“NASACT Letter”); Letter from John T. Hicks, President, National Association of State Budget Officers (“NASBO”), to Elizabeth M. Murphy, Secretary, SEC (Jan. 30, 2012) (“NASBO Letter”); Letter from David L. Cohen, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (“SIFMA”), to Elizabeth M. Murphy, Secretary, SEC (Jan. 30, 2012) (“SIFMA Letter”); Letter from Martin J. Benison, Comptroller, Office of the Comptroller, Commonwealth of Massachusetts, to Elizabeth M. Murphy, Secretary, SEC (Jan. 24, 2012) (“Massachusetts Letter”); and Letter from Chris Melton, Sr., to Elizabeth M. Murphy, Secretary, SEC (Jan. 19, 2012) (“Melton Letter”).

⁵ The GFOA Letter was submitted jointly by representatives of five different organizations representing the local government community. For ease of reference, FINRA will refer to the organizations as a single “commenter” and will cite to the “GFOA Letter” recognizing that it represents the views of five separate organizations.

⁶ See AGA Letter, Massachusetts Letter, NASACT Letter, NASBO Letter.

expressed strong objections to the proposed rule and urged the SEC to disapprove it.⁷ The remaining two commenters each focused on a single issue raised by the Proposal.⁸

It is important to note that many of the issues raised in the comment letters repeat comments that were submitted to FINRA in response to *Regulatory Notice* 11-28.⁹ FINRA provided detailed responses to these comments in Section II.C of the Proposal, and these responses continue to represent FINRA's views on the comments. Consequently, rather than repeating these same responses in this letter, FINRA explicitly reaffirms its views regarding those issues as set forth in the Proposal.

As was the case in the letters submitted to FINRA in response to *Regulatory Notice* 11-28, one significant issue raised by multiple commenters concerns the ability of firms subject to the GASB Accounting Support Fee to pass the fee on to customers. At the heart of this issue is the fact that, although most commenters support GASB and its mission, there is substantial disagreement over which parties must ultimately bear the cost of the GASB Accounting Support Fee. Thus, comments by broker-dealers or organizations representing broker-dealers urge the SEC to disapprove the Proposal, and SIFMA suggests an alternative proposal to make it easier for broker-dealers to pass the fee along to other parties.¹⁰ In contrast, local officials or organizations representing local officials urge the SEC to direct FINRA to prohibit members from passing the fee on to customers and, in particular, municipal issuers.¹¹

Although FINRA reaffirms the views set out in the Proposal regarding a member's ability to recover all or a portion of the GASB Accounting Support Fee by passing it on to customers, FINRA notes that it strongly disagrees that the proposed rule is somehow inconsistent with Section 19(g) of the Securities Act.¹² Several commenters assert that Section 19(g) "specifically states that the [GASB Accounting Support] Fee be paid 'from the members of the association, and the remittance of such accounting

⁷ See BDA Letter, Melton Letter, SIFMA Letter.

⁸ See FSI Letter, GFOA Letter.

⁹ Of the nine comment letters submitted to the SEC, four were submitted by parties that also submitted comment letters to FINRA in response to *Regulatory Notice* 11-28.

¹⁰ See BDA Letter, SIFMA Letter, Melton Letter.

¹¹ See GFOA Letter, NASACT Letter, NASBO Letter.

¹² Section 19(g) was added to the Securities Act by Section 978 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

support fees to the Financial Accounting Foundation.”¹³ These commenters go on to urge the SEC to “direct FINRA to adhere to the language of [Section 19(g)] and make certain that the [GASB Accounting Support] Fee is paid by the members of [FINRA] and not passed on to customers.”¹⁴ As an initial matter, Section 19(g) does not, in fact, require that the fee be “paid” by FINRA members, much less “specifically state” such a requirement; rather, the statute reads as follows: “The Commission may . . . require a national securities association registered under the Securities Exchange Act of 1934 to establish . . . rules and procedures . . . to provide for the equitable allocation, assessment, and collection of the [GASB Accounting Support] fee . . . from the members of the association, and the remittance of all such [GASB Accounting Support] fees to the Financial Accounting Foundation.”¹⁵ The Proposal does precisely what the statute and the SEC GASB Order require: it proposes a rule to allocate, assess, and collect the GASB Accounting Support Fee from FINRA members, and only from FINRA members.¹⁶ From what sources each FINRA member chooses to generate the funds necessary to cover the GASB Accounting Support Fee is within the business discretion of the individual FINRA member. On this issue, the statute is silent.

¹³ GFOA Letter; *see also* NASACT Letter (“The law specifically states that the fee be paid from the members of the association.”), NASBO Letter (“The law specifically states that the fee be paid ‘from the members of the association, and the remittance of such accounting support fees to the Financial Accounting Foundation.’”) (emphasis in original).

¹⁴ GFOA Letter; *see also* NASACT Letter (“We believe the SEC should direct FINRA to make certain the fee is paid by its members.”), NASBO Letter (“We urge the Commission to include language stating clearly that the fee is to be paid by the members of [FINRA] so that the fee is not passed on to the issuers of municipal securities.”).

¹⁵ 15 U.S.C. 77s(g)(1)(B).

¹⁶ NASBO asserts that the proposed rule does not adhere to Section 19(g) “because it does not specify that the fee be paid by the members of the association.” In fact, the proposed rule language requires that, unless the member’s assessment is less than \$25 in a particular calendar quarter, “each member shall pay an assessment to FINRA” of its portion of the GASB Accounting Support Fee. The proposed rule applies solely to FINRA members. The fact that members may choose to recoup that expenditure by either passing the fee along to customers, taking the fee out of the firm’s P&L, or raising fees in other ways is not an issue addressed by Section 19(g), the SEC GASB Order, or FINRA’s proposed rule. FINRA has no rule dictating how its member firms cover expenditures, including fees, and does not believe that any such provision is mandated by Section 19(g) or the SEC GASB Order.

Several commenters again raised concerns questioning fundamental aspects of the GASB Accounting Support Fee that, in essence, question the requirements in Section 19(g). For example, several commenters argue that broker-dealers, and more specifically FINRA members, should not shoulder the entire burden of funding GASB.¹⁷ In addition, commenters raise concerns regarding the lack of oversight of the GASB's budget.¹⁸ Although FINRA reaffirms its statements in the Proposal, FINRA believes that these issues are more properly resolved by the Commission. It is the Commission that must determine whether to continue to exercise the authority granted it by Congress in Section 19(g) in light of the concerns raised by commenters. Unless the Commission chooses to rescind the SEC GASB Order, FINRA must proceed with rulemaking pursuant to the requirements of Section 19(g) and the SEC GASB Order.

Two commenters address the proposed \$25 quarterly exemption.¹⁹ In both cases, the commenters maintain that the \$25 threshold should be increased. FSI specifically urges FINRA to consider increasing the threshold from \$25 to \$250 and "to provide clarification as to why alternative threshold levels between \$25 and \$1,000 were not considered or discussed in the Proposed Rule."²⁰ FINRA again notes that it addressed the proposed exemption amount in the Proposal and reaffirms its statements in the Proposal regarding the amount. FINRA stresses, however, several points in regard to the specific comments by BDA and FSI. First, because FINRA must collect a specific amount, any amount that one member is not assessed because it falls below the exemption threshold must be assessed to another member. For that reason, FINRA believes that the threshold should be relatively low to avoid the cumulative effect the exemption could have on those members above the threshold in a given quarter.

¹⁷ See BDA Letter, Melton Letter, SIFMA Letter. Although AGA concludes that any concerns regarding the proposed rule are outweighed by its positive effects, AGA also notes concerns with assessing GASB's costs across only a portion of stakeholders that benefit from GASB's work and providing GASB's funding from one constituency. See AGA Letter.

¹⁸ See BDA Letter, SIFMA Letter. In its letter, AGA also notes that some of its members expressed concerns about the lack of constraints as to GASB's budget and/or limits on costs. See AGA Letter. AGA represents that it discussed these concerns with "a FAF Board member" who informed them of control mechanisms in place. AGA notes that it trusts "that these mechanisms will remain in place and continue as a meaningful review and restraint on GASB's budget and costs." AGA Letter.

¹⁹ See BDA Letter, FSI Letter.

²⁰ FSI Letter. As noted in the Proposal, FINRA specifically addressed a \$1,000 threshold because that was the amount suggested in two comment letters in response to *Regulatory Notice* 11-28.

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FINRA stresses that it estimates that even a \$25 threshold will exempt over half of members reporting trades to the MSRB in a given quarter. Second, FINRA is proposing to assess the GASB Accounting Support Fee on a proportional basis, so BDA's concern about proportionality is addressed in the fee assessment itself: those firms with a higher proportional volume of reported trades (based on par value) will already pay more than members with a smaller volume (i.e., members responsible for 90 percent of reported trades (based on par value) in a particular quarter will be assessed 90 percent of the GASB Accounting Support Fee for that quarter). The exemption was intended to exempt those members with truly de minimis trading activity in a given quarter. Finally, before proposing the \$25 threshold FINRA considered other dollar levels and determined that \$25 per quarter was appropriate and fair for the reasons discussed above and in the Proposal.

If you have any questions, please feel free to contact me at (202) 728-6927.

Sincerely,



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