

Proposed Rule Change by Municipal Securities Rulemaking Board
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

<input type="checkbox"/> Initial	<input checked="" type="checkbox"/> Amendment	<input type="checkbox"/> Withdrawal	<input checked="" type="checkbox"/> Section 19(b)(2)	<input type="checkbox"/> Section 19(b)(3)(A)	<input type="checkbox"/> Section 19(b)(3)(B)
			Rule		
<input type="checkbox"/> Pilot	<input type="checkbox"/> Extension of Time Period for Commission Action	<input type="text" value=""/> Date Expires	<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
			<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)	

<input type="checkbox"/> Exhibit 2 Sent As Paper Document	<input type="checkbox"/> Exhibit 3 Sent As Paper Document
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Description
Provide a brief description of the proposed rule change (limit 250 characters).

Contact Information
Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name	<input type="text" value="Ernesto"/>	Last Name	<input type="text" value="Lanza"/>
Title	<input type="text" value="Senior Associate General Counsel"/>		
E-mail	<input type="text" value="elanza@msrb.org"/>		
Telephone	<input type="text" value="(703) 797-6600"/>	Fax	<input type="text" value="(703) 797-6700"/>

Signature
Pursuant to the requirements of the Securities Exchange Act of 1934,
Municipal Securities Rulemaking Board
has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date	<input type="text" value="12/07/2005"/>
By	<input type="text" value="Ronald W. Smith"/>
	(Name)
	<input type="text" value="Corporate Secretary"/>
	(Title)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

Form 19b-4 Information

Add Remove View

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit 3 - Form, Report, or Questionnaire

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

Add Remove View

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

Add Remove View

If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of Proposed Rule Change

(a) The Municipal Securities Rulemaking Board (the “MSRB”) is hereby filing with the Securities and Exchange Commission (the “Commission”) an amendment to File No. SR-MSRB-2005-11, originally filed on June 8, 2005 with respect to a proposed rule change consisting of an interpretive notice relating to the definition of solicitation for purposes of Rules G-37 and G-38 (the “original interpretive notice”). This amendment amends and restates the original interpretive notice (the “amended and restated interpretive notice”). The changes made by the amended and restated interpretive notice to the original interpretive notice are indicated in Exhibit 4. The text of the amended and restated interpretive notice is as follows:

INTERPRETIVE NOTICE ON THE DEFINITION OF SOLICITATION UNDER RULES G-37 AND G-38

Municipal Securities Rulemaking Board (“MSRB”) Rule G-38, on solicitation of municipal securities business, defines “solicitation” as any direct or indirect communication with an issuer for the purpose of obtaining or retaining municipal securities business. This definition is important for purposes of determining whether payments made by a broker, dealer or municipal securities dealer (“dealer”) to persons who are not affiliated persons of the dealer are prohibited under Rule G-38.¹ In addition, the definition is central to determining whether communications by dealer personnel would result in such personnel being considered municipal finance professionals (“MFPs”) of the dealer for purposes of Rule G-37, on political contributions and prohibitions on municipal securities business. This notice provides interpretive guidance relating to the status of certain types of communications as solicitations for purposes of Rules G-37 and G-38.

Purpose of Communication

The concept of solicitation under Rules G-37 and G-38 includes as a central element the notion that the communication occurs with the purpose of obtaining or retaining municipal securities business. The determination of whether a particular communication is a solicitation is dependent upon the specific facts and circumstances relating to such communication. As a general proposition, any communication made under circumstances reasonably calculated to obtain or retain municipal securities business for the dealer may be considered a solicitation unless the circumstances otherwise indicate that the communication does not have the purpose of obtaining or retaining municipal securities business. This notice provides examples of circumstances in which a communication may or may not be considered a solicitation. These examples are illustrative only and are not the only instances in which a solicitation may be deemed to have or have not occurred.

¹ The term “affiliated person” is defined in Rule G-38(b)(ii).

Limited Communications with Issuer Representative

If an issuer representative asks an affiliated person of a dealer whether the dealer has municipal securities capabilities, such affiliated person generally would not be viewed as having solicited municipal securities business if he or she provides a limited affirmative response, together with either providing the issuer representative with contact information for an MFP of the dealer or informing the issuer representative that dealer personnel who handle municipal securities business will contact him or her. Similarly, if an issuer representative is discussing governmental cash flow management issues with an affiliated person of a dealer who concludes, in his or her professional judgment, that an appropriate means of addressing the issuer's needs may be through an issue of municipal securities, the affiliated person generally would not be viewed as having solicited business if he or she provides a limited communication to the issuer representative that such alternative may be appropriate, together with either providing the issuer representative with contact information for an MFP or informing the issuer representative that dealer personnel who handle municipal securities business will contact him or her.

In the examples above, if the affiliated person receives compensation such as a finder's or referral fee for such business or if the affiliated person engages in other activities that could be deemed a solicitation with respect to such business (for example, attending presentations of the dealer's municipal finance capabilities or responding to a request for proposals), the affiliated person generally would be viewed as having solicited the municipal securities business.²

Promotional Communication

The MSRB understands that an affiliated person of a dealer may provide information to potential clients and others regarding the general capabilities of the dealer through either oral or written communications. Any such communication that is not made with the purpose of obtaining or retaining municipal securities business would not be considered a solicitation. Thus, depending upon the specific facts and circumstances, a communication that merely lists the significant business lines of a dealer without further descriptive information and which does not give the dealer's municipal securities practice a place of prominence within such listing generally would not be considered a solicitation unless the facts and circumstances indicate that it was aimed at obtaining or retaining municipal securities business. To the extent that a communication, such as a dealer brochure or other promotional materials, contains more than a mere listing of business lines, such as brief descriptions of each business line (including its municipal securities capabilities), determining whether such communication is a solicitation depends upon whether the facts and circumstances indicate that it was undertaken for the purpose of obtaining or retaining municipal securities business. The nature of the information

² See Rule G-37 Questions and Answers IV.10-13, *reprinted in MSRB Rule Book*.

provided and the manner in which it is presented are relevant factors to consider. Although no single factor is necessarily controlling in determining whether a communication was undertaken for the purpose of obtaining or retaining municipal securities business, the following considerations, among others, may often be relevant: (i) whether the municipal securities practice is the only business line included in the communication that would reasonably be of interest to an issuer representative; (ii) whether the portions of the communication describing the dealer's municipal securities capabilities are designed to garner more attention than other portions describing different business lines; (iii) whether the communication contains quantitative or qualitative information on the nature or extent of the dealer's municipal securities capabilities that is promotional in nature (*e.g.*, quantitative or qualitative rankings, claims of expertise, identification of specific transactions, language associated with "puffery," etc.); and (iv) whether the dealer is currently seeking to obtain or retain municipal securities business from the issuer.

Work-Related Communications

Communications that are incidental to undertaking tasks to complete municipal securities business for which the dealer has already been engaged generally would not be solicitations. For example, if a dealer has engaged an independent contractor as a cash flow consultant to provide expert services on a negotiated underwriting for which the dealer has already been selected and the contractor communicates with the issuer on cash flow matters relevant to the financing, such communication would not be a solicitation under Rule G-38. Similarly, if a dealer has already been selected to serve as the underwriter for an airport financing and a non-MFP affiliated person of the dealer who normally works on airline corporate matters is used to provide his or her expertise to complete the financing, communications in this regard by the affiliated person with the issuer would not be a solicitation under Rule G-38. In addition, the fact that the work product of persons such as those described above may be used by MFPs of the dealer in their solicitation activities would not make the producer of the work product a solicitor unless such person personally presents his or her work to the issuer in connection with soliciting the municipal securities business.

Communications with Conduit Borrowers

The MSRB understands that dealers often work closely with private entities on their capital and other financing needs. In many cases, this work may evolve into a conduit borrowing through a conduit issuer. Although the ultimate obligor on such a financing is the private entity, if the dealer acts as underwriter for a financing undertaken through a conduit issuer on other than a competitive bid basis, it is engaging in municipal securities business for purposes of Rule G-37. The selection of the underwriter for such a financing frequently is made by the conduit borrower. While in many cases conduit issuers have either formal procedures or an informal historical practice of accepting the dealer selected by the conduit borrower, some conduit issuers may set minimum standards that dealers must meet to qualify to underwrite a conduit issue, and other conduit issuers may have a slate of dealers selected by the conduit issuer from which the

conduit borrower chooses the underwriter for its issue. Still other conduit issuers may defer to the conduit borrower's selection of lead underwriter but may require the underwriting syndicate to include additional dealers selected by the issuer or selected by the conduit borrower from a slate of issuer-approved underwriters, often with the purpose of ensuring participation by local dealers or historically disadvantaged dealers. A smaller number of conduit issuers retain more significant control over which dealers act as underwriters, either by making the selection for the conduit borrower or by considering the conduit borrower's selection to be merely a suggestion which in some cases the conduit issuer does not follow. However, in virtually all cases, the conduit issuer will maintain ultimate power to control which dealer underwrites a conduit issue since the conduit issuer has discretion to withhold its agreement to issue the securities through any particular dealer.

From a literal perspective, any communication by a dealer with a conduit borrower that is intended to cause the borrower to select the dealer to serve as underwriter for a conduit issue could be considered a solicitation of municipal securities business. This is because the conduit borrower eventually communicates its selection of the dealer to act as underwriter to the conduit issuer for approval. This series of communications would, by its terms, constitute an indirect communication by the dealer through the conduit borrower to the conduit issuer for the purpose of obtaining or retaining municipal securities business.

However, the MSRB believes that a dealer's communication with a conduit borrower generally should not be deemed an indirect solicitation of the issuer unless a reasonable nexus can be established between the making of contributions to officials of the conduit issuer within the meaning of Rule G-37 and the selection of the underwriter for such conduit financing. A determination of whether such a reasonable nexus could exist depends on the specific facts and circumstances.

Further, if an affiliated person of a dealer who is providing investment banking services and corporate financing advice to a private company concludes, in his or her professional judgment, that an appropriate financing alternative may be a conduit financing, a limited communication to the company by the affiliated person that such financing alternative may be appropriate, together with the provision to the company of contact information for an MFP of the dealer, generally would not be presumed to be a solicitation. Alternatively, the affiliated person could inform the company that dealer personnel who handle municipal securities business will contact it. In addition, if a dealer has already been selected by the conduit borrower to serve as the underwriter for a conduit financing and a non-MFP affiliated person of the dealer communicates with the conduit borrower in furtherance of the financing, such communications by the affiliated person would not be a solicitation under Rule G-38.

Communications by Non-Affiliated Professionals

So long as non-affiliated persons providing legal, accounting, engineering or other professional services in connection with specific municipal securities business are not being paid

directly or indirectly by a dealer for communicating with an issuer for the purpose of obtaining or retaining municipal securities business for the dealer (*i.e.*, they are paid solely for their provision of legal, accounting, engineering or other professional services with respect to the business), they would not become subject to Rule G-38. Dealers are reminded that the term “payment” as used in Rules G-37 and G-38 refers to anything of value and can, depending on the specific facts and circumstances, include *quid pro quo* arrangements whereby a non-affiliated person solicits municipal securities business for the dealer in exchange for being hired by the dealer to provide other unrelated services.

* * * * *

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

This amendment was adopted by the MSRB at its November 10-11, 2005 meeting. Questions concerning this filing may be directed to Ernesto A. Lanza, Senior Associate General Counsel, at (703) 797-6600.

3. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

The MSRB previously filed the original interpretive notice to provide guidance on the definition of “solicitation” as used in Rule G-37, on political contributions and prohibitions of municipal securities business, and Rule G-38, on solicitation of municipal securities business. This definition is important for purposes of determining whether payments by a broker, dealer or municipal securities dealer (“dealer”) to non-affiliated persons³ of the dealer would be prohibited under Rule G-38. In addition, the definition is central to determining whether communications by dealer personnel would result in such personnel being considered municipal finance professionals⁴ of the dealer for purposes of Rule G-37.

³ Rule G-38(b)(ii) generally defines an affiliated person of a dealer as an employee or other personnel of the dealer or of an affiliated company of the dealer.

⁴ The term “municipal finance professional” is defined in Rule G-37(g)(iv).

The original interpretive notice stated that intent is a necessary element in determining whether a communication is a solicitation. Based on conversations with Commission staff, the MSRB is filing this amendment to clarify that the central element in determining whether a communication is a solicitation is whether the communication occurs with the purpose of obtaining or retaining municipal securities business.⁵ To avoid potential ambiguity, the amended and restated interpretive notice replaces references to “intent” with terminology that more closely tracks the language of the definition of solicitation in several portions of the notice.

In addition, the original interpretive notice included numerous examples of circumstances where a communication may or may not be considered a solicitation, from which it was clear that a communication could be inferred to have been made for the purposes of obtaining or retaining municipal securities business based on the specific facts and circumstances of such communication. The amended and restated interpretive notice makes this standard explicit by providing that, as a general proposition, a communication made under circumstances reasonably calculated to obtain or retain municipal securities business could be considered a solicitation unless the circumstances indicate otherwise.

The original interpretive notice stated the general proposition that, so long as non-affiliated persons of a dealer providing legal, accounting, engineering or other professional services are not being paid directly or indirectly for their solicitation activities (*i.e.*, they are paid solely for providing legal, accounting, engineering or other professional services for the business), they would not become subject to Rule G-38. The original interpretive notice then provided an example of a joint venture created by a dealer with other professionals seeking to engage in municipal securities business, noting that such professionals would not be viewed as soliciting on behalf of the dealer if they were seeking a bona fide role on the financing, so long as no payments were made by or on behalf of the dealer to such professionals separate from the payments they receive for actual professional services rendered in connection with the issue.

The example of a joint venture was not intended to establish a standard distinct from the general standard regarding non-affiliated professionals but rather to illustrate the application of such general standard. To avoid potential ambiguity, this example has been removed from the amended and restated interpretive notice. In general, regardless of whether a formal or informal joint venture has been formed, so long as non-affiliated persons providing legal, accounting, engineering or other professional services (*e.g.*, another dealer serving as a syndicate member) in connection with specific municipal securities business are not being paid directly or indirectly by a dealer for communicating with an issuer for the purpose of obtaining or retaining municipal securities business for the dealer (*i.e.*, they are paid solely for their provision of legal, accounting, engineering or such other professional services with respect to the business), they would not become subject to Rule G-38.

⁵ The term “municipal securities business” is defined in Rule G-37(vii).

Finally, the amended and restated interpretive notice includes language reminding dealers that the term “payment” under MSRB rules is broadly defined and can include, depending on the facts and circumstances, *quid pro quo* arrangements whereby a non-affiliated person solicits municipal securities business for the dealer in exchange for being hired by the dealer to provide other unrelated services.⁶

(b) Statutory Basis

The MSRB has adopted the proposed rule change, as modified by this amendment, pursuant to Section 15B(b)(2)(C) of the Securities Exchange Act of 1934, as amended (the “Act”), which provides that MSRB rules shall:

be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.

The MSRB believes that the proposed rule change, as modified by this amendment, is consistent with the Act because it will further investor protection and the public interest by ensuring that dealers understand their obligations under MSRB rules designed to maintain standards of fair practice and professionalism, thereby helping to maintain public trust and confidence in the integrity of the municipal securities market.

4. Self-Regulatory Organization’s Statement on Burden on Competition

The MSRB does not believe that the proposed rule change, as modified by this amendment, will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act since it would apply equally to all dealers.

5. Self-Regulatory Organization’s Statement on Comments Received on the Proposed Rule Change by Members, Participants, or Others

Written comments on this amendment were neither solicited nor received.

⁶ See MSRB Notice 2004-32 (September 29, 2004).

6. Extension of Time Period for Commission Action

The MSRB declines to consent to an extension of the time period specified in Section 19(b)(2) of the Act.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Exhibits

1. Revised Federal Register notice.

4. Text of amended and restated interpretive notice, marked to indicate additions to and deletions from original interpretive notice.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION

(RELEASE NO. 34- ; File No. SR-MSRB-2005-11)

SELF-REGULATORY ORGANIZATIONS

Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Definition of Solicitation Under MSRB Rules G-37 and G-38

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1) (the “Act”), notice is hereby given that on June 8, 2005, the Municipal Securities Rulemaking Board (the “MSRB”) filed with the Securities and Exchange Commission (the “Commission”) a proposed rule change. Subsequently, on December 7, 2005, the MSRB filed with the Commission an amendment to the proposed rule change. The proposed rule change, as amended (hereinafter referred to as the “proposed rule change”), is described in Items I, II, and III below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. SELF-REGULATORY ORGANIZATION’S STATEMENT OF THE TERMS OF SUBSTANCE OF THE PROPOSED RULE CHANGE

The MSRB has filed with the Commission a proposed rule change consisting of an interpretive notice relating to the definition of solicitation for purposes of Rules G-37 and G-38. The proposed rule change is as follows:

INTERPRETIVE NOTICE ON THE DEFINITION OF SOLICITATION UNDER RULES G-37 AND G-38

Municipal Securities Rulemaking Board (“MSRB”) Rule G-38, on solicitation of municipal securities business, defines “solicitation” as any direct or indirect communication with an issuer for the purpose of obtaining or retaining municipal securities business. This definition is important for purposes of determining whether payments made by a broker, dealer or municipal securities dealer (“dealer”) to persons who are not affiliated persons of the dealer are prohibited under Rule G-38.¹ In addition, the definition is central to determining whether communications by dealer personnel would result in such personnel being considered municipal finance professionals (“MFPs”) of the dealer for purposes of Rule G-37, on political contributions and prohibitions on municipal securities business. This notice provides interpretive guidance relating to the status of certain types of communications as solicitations for purposes of Rules G-37 and G-38.

Purpose of Communication

The concept of solicitation under Rules G-37 and G-38 includes as a central element the notion that the communication occurs with the purpose of obtaining or retaining municipal securities business. The determination of whether a particular communication is a solicitation is dependent upon the specific facts and circumstances relating to such communication. As a general proposition, any communication made

under circumstances reasonably calculated to obtain or retain municipal securities business for the dealer may be considered a solicitation unless the circumstances otherwise indicate that the communication does not have the purpose of obtaining or retaining municipal securities business. This notice provides examples of circumstances in which a communication may or may not be considered a solicitation. These examples are illustrative only and are not the only instances in which a solicitation may be deemed to have or have not occurred.

Limited Communications with Issuer Representative

If an issuer representative asks an affiliated person of a dealer whether the dealer has municipal securities capabilities, such affiliated person generally would not be viewed as having solicited municipal securities business if he or she provides a limited affirmative response, together with either providing the issuer representative with contact information for an MFP of the dealer or informing the issuer representative that dealer personnel who handle municipal securities business will contact him or her. Similarly, if an issuer representative is discussing governmental cash flow management issues with an affiliated person of a dealer who concludes, in his or her professional judgment, that an appropriate means of addressing the issuer's needs may be through an issue of municipal securities, the affiliated person generally would not be viewed as having solicited business if he or she provides a limited communication to the issuer representative that

(. . . continued)

¹ The term "affiliated person" is defined in Rule G-38(b)(ii).

such alternative may be appropriate, together with either providing the issuer representative with contact information for an MFP or informing the issuer representative that dealer personnel who handle municipal securities business will contact him or her.

In the examples above, if the affiliated person receives compensation such as a finder's or referral fee for such business or if the affiliated person engages in other activities that could be deemed a solicitation with respect to such business (for example, attending presentations of the dealer's municipal finance capabilities or responding to a request for proposals), the affiliated person generally would be viewed as having solicited the municipal securities business.²

Promotional Communication

The MSRB understands that an affiliated person of a dealer may provide information to potential clients and others regarding the general capabilities of the dealer through either oral or written communications. Any such communication that is not made with the purpose of obtaining or retaining municipal securities business would not be considered a solicitation. Thus, depending upon the specific facts and circumstances, a communication that merely lists the significant business lines of a dealer without further descriptive information and which does not give the dealer's municipal securities practice a place of prominence within such listing generally would not be considered a solicitation unless the facts and circumstances indicate that it was aimed at obtaining or

² See Rule G-37 Questions and Answers IV.10-13, *reprinted in MSRB Rule Book.*

retaining municipal securities business. To the extent that a communication, such as a dealer brochure or other promotional materials, contains more than a mere listing of business lines, such as brief descriptions of each business line (including its municipal securities capabilities), determining whether such communication is a solicitation depends upon whether the facts and circumstances indicate that it was undertaken for the purpose of obtaining or retaining municipal securities business. The nature of the information provided and the manner in which it is presented are relevant factors to consider. Although no single factor is necessarily controlling in determining whether a communication was undertaken for the purpose of obtaining or retaining municipal securities business, the following considerations, among others, may often be relevant:

- (i) whether the municipal securities practice is the only business line included in the communication that would reasonably be of interest to an issuer representative;
- (ii) whether the portions of the communication describing the dealer's municipal securities capabilities are designed to garner more attention than other portions describing different business lines;
- (iii) whether the communication contains quantitative or qualitative information on the nature or extent of the dealer's municipal securities capabilities that is promotional in nature (*e.g.*, quantitative or qualitative rankings, claims of expertise, identification of specific transactions, language associated with "puffery," etc.); and
- (iv) whether the dealer is currently seeking to obtain or retain municipal securities business from the issuer.

Work-Related Communications

Communications that are incidental to undertaking tasks to complete municipal securities business for which the dealer has already been engaged generally would not be solicitations. For example, if a dealer has engaged an independent contractor as a cash flow consultant to provide expert services on a negotiated underwriting for which the dealer has already been selected and the contractor communicates with the issuer on cash flow matters relevant to the financing, such communication would not be a solicitation under Rule G-38. Similarly, if a dealer has already been selected to serve as the underwriter for an airport financing and a non-MFP affiliated person of the dealer who normally works on airline corporate matters is used to provide his or her expertise to complete the financing, communications in this regard by the affiliated person with the issuer would not be a solicitation under Rule G-38. In addition, the fact that the work product of persons such as those described above may be used by MFPs of the dealer in their solicitation activities would not make the producer of the work product a solicitor unless such person personally presents his or her work to the issuer in connection with soliciting the municipal securities business.

Communications with Conduit Borrowers

The MSRB understands that dealers often work closely with private entities on their capital and other financing needs. In many cases, this work may evolve into a conduit borrowing through a conduit issuer. Although the ultimate obligor on such a financing is the private entity, if the dealer acts as underwriter for a financing undertaken

through a conduit issuer on other than a competitive bid basis, it is engaging in municipal securities business for purposes of Rule G-37. The selection of the underwriter for such a financing frequently is made by the conduit borrower. While in many cases conduit issuers have either formal procedures or an informal historical practice of accepting the dealer selected by the conduit borrower, some conduit issuers may set minimum standards that dealers must meet to qualify to underwrite a conduit issue, and other conduit issuers may have a slate of dealers selected by the conduit issuer from which the conduit borrower chooses the underwriter for its issue. Still other conduit issuers may defer to the conduit borrower's selection of lead underwriter but may require the underwriting syndicate to include additional dealers selected by the issuer or selected by the conduit borrower from a slate of issuer-approved underwriters, often with the purpose of ensuring participation by local dealers or historically disadvantaged dealers. A smaller number of conduit issuers retain more significant control over which dealers act as underwriters, either by making the selection for the conduit borrower or by considering the conduit borrower's selection to be merely a suggestion which in some cases the conduit issuer does not follow. However, in virtually all cases, the conduit issuer will maintain ultimate power to control which dealer underwrites a conduit issue since the conduit issuer has discretion to withhold its agreement to issue the securities through any particular dealer.

From a literal perspective, any communication by a dealer with a conduit borrower that is intended to cause the borrower to select the dealer to serve as

underwriter for a conduit issue could be considered a solicitation of municipal securities business. This is because the conduit borrower eventually communicates its selection of the dealer to act as underwriter to the conduit issuer for approval. This series of communications would, by its terms, constitute an indirect communication by the dealer through the conduit borrower to the conduit issuer for the purpose of obtaining or retaining municipal securities business.

However, the MSRB believes that a dealer's communication with a conduit borrower generally should not be deemed an indirect solicitation of the issuer unless a reasonable nexus can be established between the making of contributions to officials of the conduit issuer within the meaning of Rule G-37 and the selection of the underwriter for such conduit financing. A determination of whether such a reasonable nexus could exist depends on the specific facts and circumstances.

Further, if an affiliated person of a dealer who is providing investment banking services and corporate financing advice to a private company concludes, in his or her professional judgment, that an appropriate financing alternative may be a conduit financing, a limited communication to the company by the affiliated person that such financing alternative may be appropriate, together with the provision to the company of contact information for an MFP of the dealer, generally would not be presumed to be a solicitation. Alternatively, the affiliated person could inform the company that dealer personnel who handle municipal securities business will contact it. In addition, if a dealer has already been selected by the conduit borrower to serve as the underwriter for a

conduit financing and a non-MFP affiliated person of the dealer communicates with the conduit borrower in furtherance of the financing, such communications by the affiliated person would not be a solicitation under Rule G-38.

Communications by Non-Affiliated Professionals

So long as non-affiliated persons providing legal, accounting, engineering or other professional services in connection with specific municipal securities business are not being paid directly or indirectly by a dealer for communicating with an issuer for the purpose of obtaining or retaining municipal securities business for the dealer (*i.e.*, they are paid solely for their provision of legal, accounting, engineering or other professional services with respect to the business), they would not become subject to Rule G-38.

Dealers are reminded that the term “payment” as used in Rules G-37 and G-38 refers to anything of value and can, depending on the specific facts and circumstances, include *quid pro quo* arrangements whereby a non-affiliated person solicits municipal securities business for the dealer in exchange for being hired by the dealer to provide other unrelated services.

II. SELF-REGULATORY ORGANIZATION'S STATEMENT OF THE PURPOSE OF, AND STATUTORY BASIS FOR, THE PROPOSED RULE CHANGE

In its filing with the Commission, the MSRB included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The MSRB has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The MSRB has recently amended Rule G-38, on solicitation of municipal securities business, to prohibit brokers, dealers and municipal securities dealers (“dealers”) from making direct or indirect payments to any persons who are not affiliated persons³ of the dealers for solicitations of municipal securities business⁴ on behalf of the dealers. The proposed rule change provides interpretive guidance on the definition of “solicitation” as used in Rule G-38 and in Rule G-37, on political contributions and prohibitions of municipal securities business. This definition is important for purposes of determining whether dealer payments to non-affiliated persons of the dealer would be prohibited under Rule G-38. In addition, the definition is central to determining whether communications by dealer personnel would result in such personnel being considered municipal finance professionals of the dealer for purposes of Rule G-37.

The proposed rule change makes clear that the central element in determining whether a communication is a solicitation is whether the communication occurs with the purpose of obtaining or retaining municipal securities business. As a general proposition, the proposed rule change provides that a communication made under circumstances

³ Rule G-38(b)(ii) generally defines an affiliated person of a dealer as an employee or other personnel of the dealer or of an affiliated company of the dealer.

⁴ Municipal securities business is defined in Rule G-37 as the purchase of a primary offering from the issuer on other than a competitive bid basis (*e.g.*, negotiated underwriting), the offer or sale of a primary offering on behalf of an issuer (*e.g.*, private placement or offering of municipal fund securities), and the provision of financial advisory, consultant or remarketing agent services to an issuer for a primary offering in which the dealer was chosen on other than a competitive bid basis.

reasonably calculated to obtain or retain municipal securities business could be considered a solicitation unless the circumstances indicate otherwise. The proposed rule change provides numerous examples of circumstances where a communication may or may not be considered a solicitation, including guidance on communications with issuer representatives, promotional communications, work-related communications, communications with conduit borrowers, and communications by non-affiliated professionals.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act, which provides that the MSRB's rules shall:

be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.

The MSRB believes that the proposed rule change is consistent with the Act because it will further investor protection and the public interest by ensuring that dealers understand their obligations under MSRB rules designed to maintain standards of fair practice and professionalism, thereby helping to maintain public trust and confidence in the integrity of the municipal securities market.

B. Self-Regulatory Organization's Statement on Burden on Competition

The MSRB does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act since it would apply equally to all dealers.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The MSRB published notices for comment on draft amendments to Rule G-38 on April 5, 2004 (the "April 2004 Notice")⁵ and September 29, 2004 (the "September 2004 Notice").⁶ The April 2004 Notice sought comments on draft amendments limiting payments by a dealer for the solicitation of municipal securities business on its behalf solely to its associated persons, and also provided certain guidance on the definition of solicitation. The MSRB received comments from 28 commentators, eight of which provided comments on the definition of solicitation.⁷ The September 2004 Notice sought

⁵ See MSRB Notice 2004-11 (April 5, 2004).

⁶ See MSRB Notice 2004-32 (September 29, 2004), as modified by MSRB Notice 2004-33 (October 12, 2004).

⁷ Letters commenting on the definition of solicitation consisted of letters from Jerry L. Chapman ("Mr. Chapman"), to Ernesto A. Lanza, Senior Associate General Counsel, MSRB, dated April 22, 2004; Maud Daudon, Managing Director, Investment Banking, and John Rose, President & CEO, Seattle-Northwest Securities Corporation ("Seattle-Northwest") to Christopher A. Taylor, MSRB Executive Director, dated May 19, 2004; Gordon Reis III, Managing Principal, Seasongood & Mayer, LLC ("Seasongood") to Mr. Taylor, dated May 20, 2004; Bruce Moland, Vice President & Assistant General Counsel, Wells Fargo & Company ("Wells Fargo"), to Mr. Lanza dated June 2, 2004; Sarah A. Miller, General Counsel, ABA Securities Association ("ABASA"), to Mr. Lanza dated

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comments on revised draft amendments to Rule G-38 prohibiting a dealer from making payments for the solicitation of municipal securities business on its behalf to any person who is not an associated person of the dealer. The September 2004 Notice also provided more detailed guidance on the definition of solicitation. The MSRB received comments from 19 commentators, five of which provided comments on the definition of solicitation.⁸ The comments received on the April and September 2004 Notices relating to the definition of solicitation are discussed below.⁹

Communications with Conduit Borrowers

In the April 2004 Notice, the MSRB asked whether a communication with a conduit borrower to hire a dealer as an underwriter for a private activity bond issue where the issuer ultimately must approve the underwriter for the issue should be considered an indirect communication with the issuer. In the September 2004 Notice, the MSRB stated

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June 4, 2004; Lynette Kelly Hotchkiss, Senior Vice President and Associate General Counsel, Bond Market Association (“BMA”), to Mr. Lanza dated June 4, 2004; Robyn A. Huffman, Vice President and Associate General Counsel, Goldman Sachs & Co. (“Goldman”), to Mr. Lanza dated June 4, 2004; and James S. Keller, Chief Regulatory Counsel, PNC Capital Markets, Inc. (“PNC”), to Mr. Lanza dated June 4, 2004.

⁸ Letters commenting on the definition of solicitation consisted of letters from Ms. Daudon and Mr. Rose, Seattle-Northwest, to Mr. Lanza dated December 13, 2004; Mr. Moland, Wells Fargo, to Mr. Lanza dated December 15, 2004; Ms. Hotchkiss, BMA, to Mr. Lanza dated December 15, 2004; Ms. Huffman, Goldman, to Mr. Lanza dated December 15, 2004; and Ms. Miller, ABASA, to Mr. Lanza dated December 17, 2004.

that, from a literal perspective, any communication by a dealer with a conduit borrower intended to cause the borrower to select the dealer to serve as underwriter for a conduit issue could be considered a solicitation of municipal securities business. This is because the conduit borrower eventually communicates its selection of the dealer to the conduit issuer for approval, with the result that this series of communications becomes an indirect communication by the dealer through the conduit borrower to the conduit issuer with the intent of obtaining municipal securities business. However, if the dealer can establish that no reasonable nexus could exist between the making of contributions to officials of the conduit issuer and the selection of the underwriter for such conduit financing, then a communication with the borrower would be deemed not to be a solicitation for purposes of Rule G-38. For example, if a conduit issuer historically defers to its conduit borrowers' selections of underwriters without influencing the selection, communications with the conduit borrower to obtain the underwriting assignment would not be treated as a solicitation, even if that communication is relayed by the conduit borrower to the conduit issuer.

Comments Received. Several commentators stated that communications with conduit borrowers should not be considered solicitations, or that the circumstances under which they are so considered should be narrowly drawn. ABASA, BMA, PNC and Wells

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⁹ The remaining comments received on the April and September 2004 Notices were discussed in SR-MSRB-2005-04. *See* Exchange Act Release No. 34-51561.

Fargo stated that communications with conduit borrowers generally should not be considered solicitations, whereas Mr. Chapman stated that communications should be treated as solicitations. The ABA noted that, in conduit financings, typically a complete package (including the underwriter) is presented to the selected conduit issuer, with the issuer either accepting or rejecting the package. BMA stated that in a conduit deal, if an employee is only communicating with a private obligor and not with the issuer, then there is no possibility that a contribution made by that employee to an official of such issuer would influence the underwriter selection process. ABASA and Wells Fargo asked, in the alternative, that the MSRB provide more specific guidance on what would cause a communication to be a solicitation.

ABASA and BMA characterized the MSRB's guidance in the September 2004 Notice as creating a presumption that a communication with a conduit borrower is a solicitation which can be rebutted only under narrowly drawn circumstances. They also observed that many communications with conduit borrowers occur before the identity of the issuer has been determined. As a result, they suggested that a dealer often cannot know if a communication with a conduit borrower might later be considered a solicitation since the dealer does not know if the issuer ultimately used will meet the requirements for rebutting the presumption that a communication with the borrower is a solicitation.

MSRB Response. The MSRB believes that ABASA and BMA incorrectly implied that the only way for a dealer to rebut the presumption that a communication with a conduit borrower is a solicitation is by establishing that a conduit issuer

historically defers to its conduit borrowers' selections of underwriters. The September 2004 Notice provided that a communication would not be considered a solicitation if there is no reasonable nexus between the making of contributions to officials of a conduit issuer and the selection of the underwriter for a conduit financing. The method mentioned by ABASA and BMA was simply one example of how a dealer could establish that there was no such reasonable nexus.

Nonetheless, the MSRB agrees that a dealer's communication with a conduit borrower generally should not be deemed an indirect solicitation of the issuer unless a reasonable and material nexus can be established between the making of contributions to officials of the conduit issuer within the meaning of Rule G-37 and the selection of the underwriter for such conduit financing. A determination of whether such a reasonable and material nexus could exist depends on the specific facts and circumstances. The proposed rule change reflects this position.

Inform and Refer

In the April 2004 Notice, the MSRB noted that, where an issuer representative asks an associated person of a dealer whether the dealer has municipal securities capabilities, a limited affirmative response by the associated person, together with the provision to the issuer representative of contact information for dealer personnel who handle municipal securities business, generally would not be presumed to be a solicitation by such associated person. In the September 2004 Notice, the MSRB provided further elaboration and additional examples, noting in particular that the

associated person could have an MFP of the dealer contact the issuer representative directly in response to such an inquiry. In both notices, the MSRB stated that, if the associated person receives compensation such as a finder's or referral fee for such business, the associated person generally would be viewed as having solicited the business.

Comments Received. In response to the April 2004 Notice, ABASA stated that, in a bank holding company, bankers should be free to inform issuers that affiliated dealers have municipal securities capabilities and provide contact information without such communication being deemed a solicitation. PNC stated that the draft amendment would "negatively impact the ability of affiliated companies to conduct banking business and make referrals. It would require dealers to disassemble the structures and controls that have been created to address requirements of the rule."

ABASA appreciated the clarification of the "inform and refer" concept provided in the September 2004 Notice. However, ABASA continued to object that the MSRB viewed the receipt of a finder's fee or referral fee as causing a communication to be considered a solicitation. ABASA stated that this would significantly add to the regulatory burden of bank dealers and, at a minimum, the MSRB should exempt any referral fees permitted under the Gramm-Leach-Bliley Act. PNC stated that dealer personnel should be permitted to approach issuer representatives to inform them of the dealer's municipal securities capabilities without such communication being considered a solicitation, but Mr. Chapman disagreed.

MSRB Response. The MSRB believes that the guidance provided in the September 2004 Notice on this topic is appropriate and has not made any further changes.

Technical Experts

Comments Received. BMA, Goldman and Seattle-Northwest requested that the MSRB explicitly exempt communications by attorneys, accountants, engineers and legislative lobbyists with issuers from the definition of solicitation. They noted that such technical experts were exempted from former Rule G-38 relating to consultants¹⁰ and argued that such exclusion should be continued in revised Rule G-38. BMA argued that “the MSRB’s broad interpretation of the meaning of solicitation means that broker-dealers would be prohibited from hiring outside persons to perform necessary services given that they would have to, as a practical matter, attend ... meetings with issuers and will ultimately make the broker-dealer more appealing to the issuer by doing a good job.” PNC stated that including conversations through or with secondary participants of an issue would not serve to enhance the goal of the rule. Seasongood stated that all contact by or through third parties should be considered a solicitation.

MSRB Response. The proposed rule change makes clear that, so long as non-affiliated persons providing legal, accounting, engineering or other professional

¹⁰ Attorneys, accountants and engineers were excluded from the definition of consultant under former Rule G-38 only so long as their sole basis of compensation from the dealer was the actual provision of legal, accounting or engineering services on the municipal securities business that the dealer is seeking. As BMA noted, the rule did not exempt legislative lobbying; rather, the MSRB had noted in a Question and Answer guidance that the activity of lobbying legislators for legislation granting an issuer authority to issue certain types of municipal securities would not, by itself, result in the lobbyist being considered a
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services¹¹ are not being paid directly or indirectly for their solicitation activities,¹² they would not become subject to Rule G-38. The MSRB believes that this language adequately addresses the concerns raised by the commentators.

III. DATE OF EFFECTIVENESS OF THE PROPOSED RULE CHANGE AND TIMING FOR COMMISSION ACTION

Within 35 days of the publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. SOLICITATION OF COMMENTS

Interested persons are invited to submit written data, views, and arguments

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consultant. *See* Rule G-38 Question & Answer #5, dated February 28, 1996, published in *MSRB Rule Book*.

¹¹ The proposed rule change does not enumerate all professional services that may be provided in connection with municipal securities business but makes clear that such services are not strictly limited to legal, accounting and engineering services (*e.g.*, another dealer serving as a syndicate member).

¹² The proposed rule change reminds dealers that the term “payment” under MSRB rules is broadly defined and can include, depending on the facts and circumstances, *quid pro quo* arrangements whereby a non-affiliated person

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concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form

(<http://www.sec.gov/rules/sro.shtml>) or

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-MSRB-2005-11 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-MSRB-2005-11. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld

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solicits municipal securities business for the dealer in exchange for being hired by the dealer to provide other unrelated services.

from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the MSRB. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MSRB-2005-11 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

Jonathan G. Katz
Secretary

¹³ 17 CFR 200.30-3(a)(12).

EXHIBIT 4**INTERPRETIVE NOTICE ON THE DEFINITION OF SOLICITATION UNDER RULES G-37 AND G-38***

Municipal Securities Rulemaking Board (“MSRB”) [Revised] Rule G-38, on solicitation of municipal securities business, [recently adopted by the Municipal Securities Rulemaking Board (“MSRB”)] defines “solicitation” as any direct or indirect communication with an issuer for the purpose of obtaining or retaining municipal securities business. This definition is important for purposes of determining whether payments made by a broker, dealer or municipal securities dealer (“dealer”) to persons who are not affiliated persons of the dealer **are** [would be] prohibited under [revised] Rule G-38.¹ In addition, the definition is central to determining whether communications by dealer personnel would result in such personnel being considered municipal finance professionals (“MFPs”) of the dealer for purposes of Rule G-37, **on political contributions and prohibitions on municipal securities business.** This notice provides interpretive guidance relating to the status of certain types of communications as solicitations for purposes of Rules G-37 and G-38.

Purpose of Communication [Intent]

The concept of solicitation under Rules G-37 and G-38 includes **as a central** [the] element **the notion** [of intent in] that the communication **occurs with the** [must have a] purpose of obtaining **or retaining** municipal securities business. The determination of whether a particular communication is a solicitation is dependent upon the specific facts and circumstances relating to such communication. **As a general proposition, any communication made under circumstances reasonably calculated to obtain or retain municipal securities business for the dealer may be considered a solicitation unless the circumstances otherwise indicate that the communication does not have the purpose of obtaining or retaining municipal securities business. This notice provides examples of circumstances in which a communication may or may not be considered as a solicitation.** These examples [described below] are illustrative **only** and are not the only instances in which a solicitation may be deemed to have or have not occurred.

Limited Communications with Issuer Representative

If an issuer representative asks an affiliated person of a dealer whether the dealer has municipal securities capabilities, such affiliated person generally would not be viewed as having solicited municipal securities business if he or she provides a limited affirmative response, together with either providing the issuer representative with contact information for an MFP of

* Underlining indicates additions made by the amended and restated interpretive notice to the original interpretive notice; brackets indicate deletions made by the amended and restated interpretive notice from the original interpretive notice.

¹ The term “affiliated person” is defined in [revised] Rule G-38(b)(ii).

the dealer or informing the issuer representative that dealer personnel who handle municipal securities business will contact him or her. Similarly, if an issuer representative is discussing governmental cash flow management issues with an affiliated person of a dealer who concludes, in his or her professional judgment, that an appropriate means of addressing the issuer's needs may be through an issue of municipal securities, the affiliated person generally would not be viewed as having solicited business if he or she provides a limited communication to the issuer representative that such alternative may be appropriate, together with either providing the issuer representative with contact information for an MFP or informing the issuer representative that dealer personnel who handle municipal securities business will contact him or her.

In the examples above, if the affiliated person receives compensation such as a finder's or referral fee for such business or if the affiliated person engages in other activities that could be deemed a solicitation with respect to such business (for example, attending presentations of the dealer's municipal finance capabilities or responding to a request for proposals), the affiliated person generally would be viewed as having solicited the municipal securities business.²

Promotional Communication

The MSRB understands that an affiliated person of a dealer may provide information to potential clients and others regarding the general capabilities of the dealer through either oral or written communications. Any such communication that is not made with the purpose of obtaining or retaining municipal securities business would not be considered a solicitation. Thus, depending upon the specific facts and circumstances, a communication that merely lists the significant business lines of a dealer without further descriptive information and which does not give the dealer's municipal securities practice a place of prominence within such listing generally would not be considered a solicitation unless the facts and circumstances indicate that it was aimed at obtaining or retaining municipal securities business. To the extent that a communication, such as a dealer brochure or other promotional materials, contains more than a mere listing of business lines, such as brief descriptions of each business line (including its municipal securities capabilities), determining whether such communication is a solicitation depends upon whether the facts and circumstances indicate that it was undertaken for the purpose of obtaining or retaining municipal securities business. The nature of the information provided and the manner in which it is presented are relevant factors to consider. Although no single factor is necessarily controlling in determining **whether a communication was undertaken for the purpose of obtaining or retaining municipal securities business**, [intent,] the following considerations, among others, may often be relevant: (i) whether the municipal securities practice is the only business line included in the communication that would reasonably be of interest to an issuer representative; (ii) whether the portions of the communication describing the dealer's municipal securities capabilities are designed to garner more attention than other portions describing different business lines; (iii) whether the communication contains quantitative or qualitative information on the nature or extent of the dealer's municipal securities capabilities that is promotional in nature (*e.g.*, quantitative or qualitative rankings, claims of expertise, identification of specific transactions, language associated with "puffery," etc.); and

² See Rule G-37 Questions and Answers IV.10-13, *reprinted in MSRB Rule Book*.

(iv) whether the dealer is currently seeking to obtain or retain municipal securities business from the issuer.

Work-Related Communications

Communications that are incidental to undertaking tasks to complete municipal securities business for which the dealer has already been engaged generally would not be solicitations. For example, if a dealer has engaged an independent contractor as a cash flow consultant to provide expert services on a negotiated underwriting for which the dealer has already been selected and the contractor communicates with the issuer on cash flow matters relevant to the financing, such communication would not be a solicitation under [revised] Rule G-38. Similarly, if a dealer has already been selected to serve as the underwriter for an airport financing and a non-MFP affiliated person of the dealer who normally works on airline corporate matters is used to provide his or her expertise to complete the financing, communications in this regard by the affiliated person with the issuer would not be a solicitation under [revised] Rule G-38. In addition, the fact that the work product of persons such as those described above may be used by MFPs of the dealer in their solicitation activities would not make the producer of the work product a solicitor unless such person personally presents his or her work to the issuer in connection with soliciting the municipal securities business.

Communications with Conduit Borrowers

The MSRB understands that dealers often work closely with private entities on their capital and other financing needs. In many cases, this work may evolve into a conduit borrowing through a conduit issuer. Although the ultimate obligor on such a financing is the private entity, if the dealer acts as underwriter for a financing undertaken through a conduit issuer on other than a competitive bid basis, it is engaging in municipal securities business for purposes of Rule G-37. The selection of the underwriter for such a financing frequently is made by the conduit borrower. While in many cases conduit issuers have either formal procedures or an informal historical practice of accepting the dealer selected by the conduit borrower, some conduit issuers may set minimum standards that dealers must meet to qualify to underwrite a conduit issue, and other conduit issuers may have a slate of dealers selected by the conduit issuer from which the conduit borrower chooses the underwriter for its issue. Still other conduit issuers may defer to the conduit borrower's selection of lead underwriter but may require the underwriting syndicate to include additional dealers selected by the issuer or selected by the conduit borrower from a slate of issuer-approved underwriters, often with the purpose of ensuring participation by local dealers or historically disadvantaged dealers. A smaller number of conduit issuers retain more significant control over which dealers act as underwriters, either by making the selection for the conduit borrower or by considering the conduit borrower's selection to be merely a suggestion which in some cases the conduit issuer does not follow. However, in virtually all cases, the conduit issuer will maintain ultimate power to control which dealer underwrites a conduit issue since the conduit issuer has discretion to withhold its agreement to issue the securities through any particular dealer.

From a literal perspective, any communication by a dealer with a conduit borrower that is intended to cause the borrower to select the dealer to serve as underwriter for a conduit issue

could be considered a solicitation of municipal securities business. This is because the conduit borrower eventually communicates its selection of the dealer to act as underwriter to the conduit issuer for approval. This series of communications would, by its terms, constitute an indirect communication by the dealer through the conduit borrower to the conduit issuer **for the purpose** [with the intent] of obtaining **or retaining** municipal securities business.

However, the MSRB believes that a dealer's communication with a conduit borrower generally should not be deemed an indirect solicitation of the issuer unless a reasonable nexus can be established between the making of contributions to officials of the conduit issuer within the meaning of Rule G-37 and the selection of the underwriter for such conduit financing. A determination of whether such a reasonable [and material] nexus could exist depends on the specific facts and circumstances.

Further, if an affiliated person of a dealer who is providing investment banking services and corporate financing advice to a private company concludes, in his or her professional judgment, that an appropriate financing alternative may be a conduit financing, a limited communication to the company by the affiliated person that such financing alternative may be appropriate, together with the provision to the company of contact information for an MFP of the dealer, generally would not be presumed to be a solicitation. Alternatively, the affiliated person could inform the company that dealer personnel who handle municipal securities business will contact it. In addition, if a dealer has already been selected by the conduit borrower to serve as the underwriter for a conduit financing and a non-MFP affiliated person of the dealer communicates with the conduit borrower in furtherance of the financing, such communications by the affiliated person would not be a solicitation under [revised] Rule G-38.

Communications by **Non-Affiliated** [Joint Venturers and Other] Professionals

So long as non-affiliated persons providing legal, accounting, engineering or other professional services in connection with specific municipal securities business are not being paid directly or indirectly **by a dealer for communicating with an issuer for the purpose of obtaining or retaining municipal securities business for the dealer** [for their solicitation activities] (*i.e.*, they are paid solely for their provision of legal, accounting, engineering or other professional services with respect to the business), they would not become subject to [revised draft] Rule G-38. **Dealers are reminded that the term "payment" as used in Rules G-37 and G-38 refers to anything of value and can, depending on the specific facts and circumstances, include *quid pro quo* arrangements whereby a non-affiliated person solicits municipal securities business for the dealer in exchange for being hired by the dealer to provide other unrelated services.** [Similarly, in the case of joint ventures created by a dealer with other professionals seeking to engage in municipal securities business, so long as the members of the joint venture are making good faith efforts to be engaged to undertake bona fide roles in the business, the MSRB would view any communications by a member of the joint venture with the issuer as being made on its own behalf and not on behalf of the dealer. However, if payments are being made by or on behalf of the dealer to such other professionals separate from the payments they may receive for actual professional services rendered in connection with an issue, their communications with the issuer could be considered solicitations on behalf of the dealer.]