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Submitted Electronically

October 30, 2009

Leslie Carey
Associate General Counsel
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA 22314

Re: MSRB Notice 2009-51 (September 16, 2009); Rule G-37 Political Contributions and Prohibitions on Municipal Securities Business

Dear Ms. Carey:

The ABA Securities Association (ABASA)[1] appreciates the opportunity to submit this letter in response to the request by the Municipal Securities Rulemaking Board (MSRB) for comments on MSRB Notice 2009-51, wherein the MSRB proposes to amend Rule G-37 to require the mandatory disclosure of dealer-affiliated bank and bank holding company political action committee (PAC) contributions to issuer officials, even if the PACs are not controlled by a dealer or municipal finance professional (MFP).

Rule G-37 Must Remain Sensitive to MSRB's Jurisdictional Limitations and First Amendment Concerns

"Rule G-37 was adopted to ensure that the high standards and integrity of the municipal securities industry are maintained by severing the connection between contributions by dealers and MFPs and the awarding of municipal securities business."[2] ABASA believes that the rule has had its intended effect in altering the political contribution practices of municipal securities dealers and opening a dialogue about the political contribution practices of the entire municipal securities industry. This reform has come with significant costs, including restrictions of MFP's abilities to contribute to political campaigns, difficult compliance and disclosure burdens, and potentially draconian

[1] ABASA is a separately chartered trade association representing those holding company members of the American Bankers Association (ABA) actively engaged in capital markets, investment banking, and broker-dealer activities.
[2] MSRB Notice 2009-51 (September 16, 2009).

penalties, even for inadvertent rule violations. In addition, the operation of Rule G-37 involves sensitive constitutional issues. Therefore, as the MSRB has often noted, any expansion of the rule can only be undertaken with full regard for and consideration of an individual's right to participate fully in our political processes. ABASA believes that the MSRB's current proposal for expansion does not respect these constitutional rights and ignores the MSRB's jurisdictional limitations by requiring disclosure by entities over which it does not have jurisdiction to regulate. From a policy perspective, the MSRB has not demonstrated that its concerns are real, not merely conjectural and has failed to recognize that there is already ample disclosure of dealer-affiliated bank and bank holding company PAC contributions. While disclosure directly to the MSRB would significantly increase dealers' compliance burdens and could subject them to arbitrary rule violation allegations, it would not serve to alleviate "perceived harms" in a direct and material way.

1. The MSRB has no jurisdiction over banks and bank holding companies.

The MSRB has requested comment on whether contributions by bank and bank holding company PACs to issuer officials should be disclosed by the affiliated dealer in its Rule G-37 filings to the MSRB. At present, the rule does not cover disclosure of contributions by bank and bank holding company PACs because they are not "dealer-controlled." Indeed, the MSRB's jurisdiction does not extend beyond the entity registered as a municipal securities dealer (either a separate corporation or a separately identifiable department of a bank) and therefore does not reach the conduct of the bank or bank holding company.

The regulation of the municipal securities market was established in 1975 in Section 15B of the Securities Exchange Act of 1934.[3] Section 15B required the Securities and Exchange Commission (SEC) to establish the MSRB to "propose and adopt rules to effect the purposes of this title with respect to transactions in municipal securities effected by brokers, dealers and municipal securities dealers."[4]

The statute further defines the term "municipal securities dealer" as

> any person (including a separately identifiable department or division of a bank) engaged in the business of buying and selling municipal securities for his own account, through a broker or otherwise, but does not include . . . a bank, unless the bank is engaged in the business of buying and selling municipal securities for its own account other than in a fiduciary capacity, through a broker or otherwise; Provided, however, That if the bank is engaged in such business through a separately identifiable department or division (as defined by the Municipal Securities Rulemaking Board in accordance with section 78o-4(b)(2)(H) of this title, the department or division and ***not the bank itself*** shall be deemed to be the municipal securities dealer.[5] [Emphasis added.]

[3] 15 U.S.C. § 78a *et seq.*
[4] 15 U.S.C. § 78o-4(b)(2).
[5] 15 U.S.C. § 78.3(a)(3). The MSRB has defined "separately identifiable department of a bank as "that unit of the bank which conducts all of the activities of the bank relating to the conduct of business as a municipal

The statute not only does not include the dealer's parent holding company or affiliates within the MSRB's jurisdiction, but also explicitly excludes banks that do not engage in municipal securities activities. Accordingly, the MSRB lacks jurisdiction over banks and bank holding companies and thus cannot apply Rule G-37's disclosure obligations to contributions made by their PACs.

2. Absent the jurisdictional issue, there would remain valid reasons for excluding disclosure of bank and bank holding company PACs from Rule G-37.

Assuming *arguendo* that the MSRB has jurisdiction over bank and bank holding company PACs, there would nonetheless be valid and sufficient reasons that contributions by bank and bank holding company PACs should not be disclosed pursuant to Rule G-37.

a. Banks and bank holding companies participate in the political process for reasons wholly unrelated to the municipal securities activities of their affiliated dealers.

Banks and bank holding companies are intermediaries offering depository, lending and related services. While their presence in the capital markets has increased in recent years, the vast majority of their products and services remain wholly unrelated to their affiliated dealer's municipal securities dealer activities. Most of the services provided by banks and bank holding companies have no connection to the issuance of municipal bonds. (In fact, in most cases municipal bond activities comprise a relatively insignificant portion of a bank or bank holding company's overall business.)

Some of the most common examples of such services include:

- Deposit accounts;
- Loans;
- Cash management;
- Payroll operations;
- Credit card services;
- Property insurance activities;
- Risk management advice;
- Deferred compensation programs;
- Asset management; and
- Operating electronic benefit payment services.

In offering these products, banks and bank holding companies also must comply with state and local laws and regulations. The quality and wisdom of candidates for state and local offices whose expertise or lack thereof can directly impact the state and local laws and regulations applicable to banks is of serious interest to them.

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securities dealer" so long as such activities are directly supervised by a responsible officer and records are maintained such that they are separately available for examination. MSRB Rule G-1.

Helping the best-qualified candidate assume office is the purpose of the contributions by bank and bank holding company PACs and the contributions would have been made regardless of whether the governmental body ever issued municipal securities. Requiring the disclosure of banks and bank holding company PAC contributions to the MSRB presumes or implies a nexus between these contributions and the municipal securities activities of the associated dealer where none exists. Moreover, if there were such a nexus, such contributions already would trigger Rule G-37's ban.[6]

b. The MSRB has not identified specific problematic dealer practices that this rule change will address.

As justification for its rule expansion, the MSRB stated that it is "concerned with the perception that certain banks and bank holding company PAC contributions to issuer officials may be a significant factor in the awarding of municipal securities business to bank-affiliated dealers." While municipal securities underwriters' campaign contributions may "self-evidently create a conflict of interest in state and local officials who have power over municipal securities contracts and a risk that they will award the contracts on the basis of benefit[s] to their campaign chests rather than to the governmental entity,"[7] there is no self-evident connection with contributions by bank and bank holding company PACs.[8] As discussed above, bank and bank holding companies have a myriad of reasons for participating in the political process that are unrelated to municipal securities business.

Moreover, as noted above, Rule G-37 already covers indirect as well as direct contributions to issuer officials. Our members are very cognizant of prior MSRB guidance and so to avoid even the appearance of conduct prohibited by Rule G-37, banking organizations have scrupulously excluded officers and employees of registered broker-dealers that engage in municipal securities activities from managing or directing those PACs. If dealers are attempting to use affiliated bank or bank holding company PAC contributions as a *quid pro quo* for the awarding of municipal securities business, then the agencies that enforce the MSRB's rules already have the ability to prosecute such conduct as a violation of Rule G-37. Requiring dealers to report bank and bank holding company PAC contributions to the MSRB will unfairly taint such contributions as related to the dealers' municipal securities business. More importantly, such disclosure also will break down information barriers that affiliated dealers have established to ensure that affiliated bank and bank holding company PAC contributions are **not** used to influence the awarding of municipal securities business. Surely, a result the MSRB does not intend.[9]

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[6] In a 2003 MSRB Notice the MSRB stated that, "[w]hile Rule G-37 was adopted to deal specifically with contributions made to officials of issuers by dealers and MFPs, and PACS controlled by dealers or MFPs, the rule also prohibits MFPs and dealers from using conduits—be they parties, PACS, consultants, lawyers, spouses or affiliates—to contribute indirectly to an issuer official if such MFP or dealer can not give directly to the issuer without triggering the ban on business." *See* MSRB Notice Concerning Indirect Rule Violations: Rules G-37 and G-38 (August 6, 2003).

[7] Blount v. SEC, 61 F.3d 938, 945 (D.C. Cir 1995)

[8] Significantly, contributions by bank holding companies were not covered by the rule when it was originally promulgated because the risk of corruption via dealer-affiliated bank and bank holding company PAC contributions was adjudged too remote to warrant restraint. Id. at 946-47.

[9] It also should be noted that the MSRB's proposed changes are inconsistent with advice provided by the MSRB to the industry in 2005 wherein the MSRB stated that, "to ensure compliance with Rule G-37(d) in connection with contributions by dealers or MFPs to non-controlled (but affiliated) PACs, the dealer might adopt information

3. There is already ample public disclosure of bank and bank holding company PAC contributions.

The MSRB asserts that the purpose of this rule change is to "increase the amount of information available to market participants and thereby increase market transparency." However, market transparency with regard to bank and bank holding company PAC contributions already has been achieved through state-sponsored reporting rules and systems. Bank and bank holding company PAC contributions can be easily found on searchable internet websites. Requiring dealers to set up systems to collect and report the required information to the MSRB in the appropriate format will serve to increase compliance burdens and will subject dealers to uncertain and potentially arbitrary allegations of rule violations **without** increasing market transparency or alleviating any perceived marketplace harms.

Conclusion

In conclusion, it is ABASA's position that the MSRB has no jurisdiction over the parent, holding company, or affiliates of a registered municipal securities dealer. Accordingly, MSRB Rule G-37 has no application to the activities of entities other than the municipal securities dealer. Moreover, there are significant policy and other reasons that contributions by bank and bank holding company PACs should not be disclosed to the MSRB pursuant to Rule G-37. Finally, an MSRB-sponsored disclosure regime for contributions by dealer-affiliated bank and bank holding company PACs would be unnecessarily duplicative of disclosure that already exists in the marketplace.

If you have any questions, please do not hesitate to contact the undersigned**.**

Sincerely,

Carolyn Walsh

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barriers between any affiliated PACs and the dealer or its MFPs." MSRB's advice specifically suggested that such information barriers include "a prohibition on identification of prior affiliated PAC contributions, planned PAC contributions or anticipated PAC contributions." MSRB Q & A III.7 (September 22, 2005).