OMB APPROVAL	
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Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 14

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No.* SR - 2011 - * 03
Amendment No. (req. for Amendments *) 1

Proposed Rule Change by Municipal Securities Rulemaking Board

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial *	Amendment *	Withdrawal	Section 19(b)(2) *	Section 19(b)(3)(A) *	Section 19(b)(3)(B) *
☐	☑	☐	☑	☐	☐

Pilot ☐

Extension of Time Period for Commission Action * ☐

Date Expires *

Rule

☐ 19b-4(f)(1) ☐ 19b-4(f)(4)
☐ 19b-4(f)(2) ☐ 19b-4(f)(5)
☐ 19b-4(f)(3) ☐ 19b-4(f)(6)

Exhibit 2 Sent As Paper Document ☐

Exhibit 3 Sent As Paper Document ☐

Description

Provide a brief description of the proposed rule change (limit 250 characters, required when Initial is checked *).

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 * Peg Last Name * Henry

Title * Deputy General Counsel

E-mail * phenry@msrb.org

Telephone * (703) 797-6600 Fax (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 officer.

Date 05/26/2011

By Ronald W. Smith
(Name *)

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.

Ronald Smith, rsmith@msrb.org

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

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

Form 19b-4 Information (required)

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 (required)

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

Add Remove View

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

Add Remove View

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

Add Remove View

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.

The Municipal Securities Rulemaking Board ("MSRB") is filing this partial amendment ("Amendment No. 1") to File No. SR-MSRB-2011-03, originally filed with the Securities and Exchange Commission (the "Commission") on February 9, 2011, with respect to a proposed rule change (the "original proposed rule change" and, as amended by Amendment No. 1, the "proposed rule change") concerning Rule G-23 on activities of financial advisors.

The original proposed rule change consists of (i) proposed amendments to Rule G-23 (on activities of financial advisors) and (ii) a proposed interpretation of Rule G-23 (the "original proposed interpretive notice"). The original proposed rule change arose out of the Board's concern that the ability of a broker, dealer, or municipal securities dealer ("dealer") to underwrite the same issue of municipal securities for which it had been the financial advisor presented a conflict that was too significant for the disclosure and consent provisions of existing Rule G-23 to cure. Even in the case of a competitive underwriting, the perception on the part of issuers and investors that such a conflict might exist was sufficient to cause concern by the MSRB that permitting such role switching was not consistent with "a free and open market in municipal securities," which the MSRB is mandated to perfect. The imposition by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank")[1] of a fiduciary duty upon municipal advisors,[2] which includes financial advisors, made the existence of such a conflict a greater concern.

Amendment No. 1 partially amends the text of the original proposed interpretive notice to: (i) clarify that Rule G-23 is solely a conflicts rule; (ii) eliminate the rebuttable presumption that a dealer providing certain advice is a financial advisor; (iii) emphasize that Rule G-23(b) does not require a writing in order for a financial advisory relationship to exist; (iv) provide additional clarity as to when a dealer will be deemed to be "acting as an underwriter" and not as a financial advisor for purposes of Rule G-23(b); and (v) provide guidance on certain activities (in addition to underwriting activities) in which a dealer may engage without violating Rule G-23(d). In addition, the MSRB discusses the comment letters received by the Commission in response to the notice for comment on the original proposed rule change published in the Federal

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1 Pub.L. 111-203.

2 Dodd-Frank amended Section 15B(c)(1) of the Securities Exchange Act of 1934 ("Exchange Act") to provide that:

> A municipal advisor and any person associated with such municipal advisor shall be deemed to have a fiduciary duty to any municipal entity for whom such municipal advisor acts as a municipal advisor, and no municipal advisor may engage in any act, practice, or course of business which is not consistent with a municipal advisor's fiduciary duty or that is in contravention of any rule of the Board.

Register.[3]

The MSRB is proposing the revision to the original proposed rule change described in clause (i) of the description of Amendment No. 1 above, because the MSRB considers it important to clarify that Rule G-23 is only a conflicts-of-interest rule and does not set normative standards for dealer conduct. In particular, Rule G-23, as amended, would not address whether the provision of any of the advice permitted by Rule G-23 would subject the dealer to a fiduciary duty as a "municipal advisor."

The MSRB is proposing the deletion from the original proposed rule change described in clause (ii) of the description of Amendment No. 1 above, and the insertion of language on when a financial advisory relationship will be deemed to exist, because the amended language is more consistent with the language of Rule G-23(b).

The MSRB is proposing the revision to the original proposed rule change described in clause (iii) of the description of Amendment No. 1 above to reiterate what Rule G-23 has always provided: It is not necessary to have a writing in order for a financial advisory relationship to exist. Instead, Rule G-23(c) provides that a writing must be entered into prior to, upon or promptly after the inception of the financial advisory relationship.

As more fully described below, the MSRB is proposing the revisions to the original proposed rule change described in clause (iv) of the description of Amendment No. 1 above in response to comments received asking for clarity as to the "acting as an underwriter" provisions of the original proposed interpretive notice.

As more fully described below, the MSRB is proposing the revisions to the original proposed rule change described in clause (v) of the description of Amendment No. 1 above in order to provide guidance on certain activities (in addition to underwriting activities) in which a dealer may engage without violating Rule G-23(d).

The MSRB requests that the proposed rule change become effective six months after approval of the proposed rule change by the Commission.

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[3] See Release No. 34-63946 (December 3, 2009), 76 FR 10926 (February 28, 2011).

Amendment to Text of Original Proposed Rule Change

The changes made by Amendment No. 1 to the original proposed rule change are indicated below:[4]

* * * * * * * * *

Rule G-23: Activities of Financial Advisors

Rule G-23(a) No change.

Rule G-23(b) *Financial Advisory Relationship*. For purposes of this rule, a financial advisory relationship shall be deemed to exist when a broker, dealer, or municipal securities dealer renders or enters into an agreement to render financial advisory or consultant services to or on behalf of an issuer with respect to the issuance of municipal securities, including advice with respect to the structure, timing, terms and other similar matters concerning such issue. For purposes of this rule, a financial advisory relationship shall not be deemed to exist when, in the course of acting as an underwriter and not as a financial advisor, a broker, dealer or municipal securities dealer renders advice to an issuer, including advice with respect to the structure, timing, terms and other similar matters concerning the issuance of municipal securities.

Rule G-23(c)-(i) No change.

* * * * * * * * *

Guidance on the Prohibition on Underwriting Issues of Municipal Securities for Which a Financial Advisory Relationship Exists Under Rule G-23

MSRB Rule G-23 establishes certain basic requirements applicable to a broker, dealer, or municipal securities dealer ("dealer") acting as a financial advisor with respect to the issuance of municipal securities. MSRB Rule G-23(d) provides that a dealer that has a financial advisory relationship with respect to the issuance of municipal securities is precluded from acquiring all or any portion of such issue, directly or indirectly, from the issuer as principal, either alone or as a participant in a syndicate or other similar account formed for that purpose. A dealer is also precluded from arranging the placement of an issue with respect to which it has a financial advisory relationship. This notice refers to both of these activities as "underwritings" and provides interpretive guidance on when a dealer may be precluded by Rule G-23(d) from underwriting an issue of municipal securities due to having served as financial advisor with

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[4] Underlining indicates additions made by Amendment No. 1 to the original proposed rule change; brackets indicate deletions made by Amendment No. 1 from the original proposed rule change.

respect to that issue. Rule G-23 is solely a conflicts rule. Accordingly, this notice does not address whether provision of the advice permitted by Rule G-23 would cause the dealer to be considered a "municipal advisor" under the Exchange Act and the rules promulgated thereunder.

Rule G-23(b) provides, among other things, that a financial advisory relationship shall be deemed to exist for purposes of Rule G-23 when a dealer [provides] renders or enters into an agreement to provide financial advisory or consultant services to or on behalf of an issuer with respect to the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such issue or issues. Rule G-23(b) also provides, however, that a financial advisory relationship shall not be deemed to exist when, in the course of acting as an underwriter and not as a financial advisor, a dealer provides advice to an issuer, including advice with respect to the structure, timing, terms, and other similar matters concerning the issuance of municipal securities.

[For purposes of Rule G-23, a dealer that provides advice to an issuer with respect to the issuance of municipal securities will be presumed to be a financial advisor with respect to that issue.] Although Rule G-23(c) requires a financial advisory relationship to be evidenced by a writing, a financial advisory relationship will be deemed to exist whenever a dealer renders the types of advice provided for in Rule G-23(b), regardless of the existence of a written agreement. However,[that presumption may be rebutted if the] a dealer that clearly identifies itself in writing as an underwriter and not as a financial advisor from the earliest stages of its relationship with the issuer with respect to that issue[.] (*e.g.*, in a response to a request for proposals or in promotional materials provided to an issuer) will be considered to be "acting as an underwriter" under Rule G-23(b) with respect to that issue. The writing must make clear that the primary role of an underwriter is to purchase, or arrange for the placement of, securities in an arm's-length commercial transaction between the issuer and the underwriter and that the underwriter has financial and other interests that differ from those of the issuer. The dealer must not engage in a course of conduct that is inconsistent with an arm's-length relationship with the issuer in connection with such issue of municipal securities or the dealer will be deemed to be a financial advisor with respect to that issue and precluded from underwriting that issue by Rule G-23(d). Thus, a dealer providing advice to an issuer with respect to the issuance of municipal securities (including the structure, timing, and terms of the issue and other similar matters, [such as the investment of bond proceeds, a municipal derivative, or other matters] when integrally related to the issue being underwritten) [generally] will not be viewed as a financial advisor for purposes of Rule G-23, if such advice is rendered in its capacity as underwriter for such issue. [Nevertheless, a dealer's subsequent course of conduct (e.g.,] In addition to engaging in underwriting activities, it shall not be a violation of Rule G-23(d) for a dealer that states that it is acting as an underwriter with respect to the issuance of municipal securities to provide advice with respect to the investment of the proceeds of the issue, municipal derivatives integrally related to the issue, or other similar matters concerning the issue. [representing to the issuer that it is acting only in the issuer's best interests, rather than as an arm's length counterparty, with respect to that issue) may cause the dealer to be considered a financial advisor with respect to that issue. In that case, the dealer will be precluded from underwriting that issue by Rule G-

23(d).]

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Statement on Comments Received

Comment letters on the original proposed rule change were received from the following 18 commenters: AGFS, Letter from Robert Doty, dated March 10, 2011 ("Mr. Doty"); BMO Capital Markets, Letter from Robert J. Stracks, Counsel, dated March 22, 2011 ("BMO"); Bond Dealers of America, Letter from Michael Nichols, CEO, dated March 21, 2011 ("BDA"); Eastern Bank, Letter from Patricia E. Bowen, Vice President, Municipal Finance Department, dated March 2, 2011 ("Eastern Bank"); Ehlers and Associates, E-mail from David A. Wagner, Sr. V.P. and Financial Advisor, dated March 21, 2011 ("Ehlers/Mr. Wagner"); Ehlers and Associates, Letter from Steve Apfelbacher, President, dated March 21, 2011 ("Ehlers/Mr. Apfelbacher"); Fieldman, Rolapp & Associates, Letter from Thomas M. DeMars, CIPFA, Managing Principal, dated March 23, 2011 ("Fieldman"); First Southwest Company, Letter from Hill A. Feinberg, Chairman and CEO, dated March 16, 2011 ("First Southwest"); Carl Giles, Letter dated March 16, 2011 ("Giles"); Government Finance Officers Association, Letter from Susan Gaffney, Director, Federal Liaison center, dated March 21, 2011 ("GFOA"); Kidwell & Company Inc., Letter from Larry W. Kidwell, CIPFA, President, dated March 21, 2011 ("Kidwell"); National Association of Independent Public Finance Advisors, Letter from Colette J. Irwin-Knott, CIPFA, President dated March 21, 2011 ("NAIPFA"); Public Financial Management, Inc, Letter from F. John White, Chief Executive Officer, dated February 25, 2011 ("PFM"); RBC Capital Markets, Letter from Christopher Hamel, Head, Municipal Finance, dated March 21, 2011 ("RBC"); Robert W. Baird & Co. Incorporated, Letter from Keith Kolb, Managing Director, Director of Baird Public Finance, dated March 18, 2011 ("Baird"); Securities Industry and Financial Markets Association, Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, dated March 21, 2011 ("SIFMA"); WM Financial Strategies: Letter from Joy A. Howard, Principal, dated February 21, 2011 ("WM Financial/Ms. Howard"); and WM Financial Strategies: Letter from Nathan R. Howard, Esq., dated March 21, 2011 ("WM Financial/Mr. Howard "). A discussion of the comment letters follows.

I. <u>Proposed Interpretive Notice</u>. A majority of the comments related to the original proposed interpretive notice and are discussed below.

A. *Comments related to the rebuttal presumption provisions.*

SIFMA stated that the inclusion of a rebuttable presumption in the proposed interpretive notice would substantially chill or eliminate the pre-engagement exchange of information because a dealer would seek to avoid any actions that might be construed as giving rise to a financial advisory relationship. BMO stated, "Underwriter conduct is clearly discernible as such transactions are formally concluded by a bond purchase agreement. No presumption as to status

should be imposed." Fieldman suggested having such rebuttals provided in writing and acknowledged by the issuer. Fieldman also stated that the timing and content of the rebuttal of a municipal advisor relationship must be well defined and requested clarity regarding the meaning of "earliest stages." WM Financial/Ms. Howard expressed concerns related to: (a) what would constitute "rebutted" for purposes of the presumption; and (b) how would a dealer clearly identify itself as an underwriter. She also said that the proposed interpretive guidance should make it clear that a dealer that provides advice to an issuer with respect to the issuance of municipal securities will be deemed a financial advisor regardless of whether the financial advisory relationship has been evidenced by a writing, which, she said, is consistent with the Dodd-Frank Act.

NAIPFA commented that, if the presumption is rebuttable, dealers should be required to make affirmative disclosures of the conflicts inherent in their role as underwriter. BDA stated that clarity in the guidance related to the rebuttable presumption, "evaporates when the Guidance goes on to provide that an underwriter could still be considered a financial advisor based upon unspecified subsequent actions." BDA also stated that rather than employing presumptions, "there should be a single and clear rule that, if a party is engaged by an issuer as a financial advisor, it is a financial advisor. If a party is engaged by an issuer as an underwriter, it is an underwriter" and that the Commission could prescribe disclosures that make the difference clear, rather than an interpretive notice. SIFMA said that the presumption together with the elimination of the requirement that the financial advisor be compensated would make dealers reluctant to engage in any preliminary discussions with an issuer for fear of being precluded from underwriting the issue under consideration.

MSRB Response: Amendment No. 1 would amend the original proposed interpretive notice by removing the rebuttable presumption language and replacing it with language that a financial advisory relationship will be deemed to exist whenever a dealer renders the types of advice provided for in Rule G-23(b), because the revised language is more consistent with the language of Rule G-23(b). Therefore, the comments regarding the presumption language are moot. Amendment No. 1 would also amend the original proposed interpretive notice to provide clarity on what is meant by the earliest stages of the relationship by providing the following examples: a response to a request for comment and promotional materials provided to an issuer. The comments concerning required disclosures concerning a dealer's role with respect to an issue are addressed below under "Comments related to the "acting as an underwriter" provisions."

B. *Comments related to the "acting as an underwriter" provisions.*

NAIPFA suggested that the proposed interpretive guidance make clear that the phrase "in the course of acting as an underwriter" means, "that the firm has either been retained by an issuer to purchase and distribute its securities, or is responding to requests for proposals or requests for qualifications from a potential issuer seeking an underwriter." NAIPFA stated in all other instances, "providing "advice with respect to the structure, timing, terms and other similar

matters concerning the issuance of municipal securities" would constitute financial advisory activities for purposes of Rule G-23." NAIPFA suggested that dealers providing advice to issuers must disclose, in no uncertain terms the following: (i) that they are not acting as advisors but as underwriters; (ii) that they are not fiduciaries; (iii) that they have conflicts with issuers because they present the interests of investors; and (iv) that they have no continuing obligations to the issuer. WM Financial/Mr. Howard stated that to clarify the language of Rule G-23 and to avoid contradiction with the Exchange Act, "the Rule must make a distinction between the services that a broker-dealer registered and acting as a financial advisor can provide, versus the types of services that a broker-dealer acting as an underwriter can provide."

Mr. Doty suggested removing the word "subsequent" from the proposed interpretive notice as it relates to a dealer's course of conduct because of the possibility that a dealer may make representations or engage in conduct at the very outset of a relationship, not just subsequently, that could lead a municipal entity or obligated person to believe that the dealer (even though labeled "underwriter") is providing such advice in the municipal entity's or obligated person's best interest. Further, Mr. Doty said that the use of the word "only" is excessively restrictive because the advice provided by the dealer may have additional subsidiary, incidental or other functions in addition to being offered in an issuer's best interests. Finally, Mr. Doty suggested adding the phrase, "or making other statements or engaging in conduct leading the issuer to believe" after the words "representing the issuer." Mr. Doty stated, "Even if a direct explicit representation is not made, there are a variety of words and conduct that may lead vulnerable municipal entities and obligated persons to believe that an underwriter's advice places their interests first and is provided in their best interests."

SIFMA suggested that the proposed interpretive notice provide a simple requirement that, "dealers intending to act solely as underwriters in connection with a proposed offering, make clear and unambiguous such intentions in their initial communications with the issuer."

Ehlers/Mr. Apfelbacher stated, "Underwriters do not recognize the role of the financial advisor or recognize that their role is different than that of a Financial Advisor" and that having underwriters telling issuers that underwriters are providing similar services to those offered by financial advisors is not the intent of the Dodd-Frank Act. Ehlers/Mr. Wagner stated "in the spirit of transparency and meaningful disclosure, a firm should disclose in writing whether it will be working either as a broker-dealer or as a municipal advisor, prior to beginning any work for a municipal issuer."

GFOA stated, "The financial advisor has a fiduciary responsibility in both a competitive and negotiated sale to its issuer client. An underwriter's fiduciary responsibility is to the investor – not the issuer. Prohibiting role switching ensures that the issuer is represented throughout the transaction by a financial advisor whose sole responsibility is to the issuer itself." GFOA suggested that, at the very least, the proposed interpretive guidance should require the underwriter to disclose that they are not serving as the issuer's financial advisor and has no fiduciary obligation to act in the best interest of the issuer. Ehlers/Mr. Wagner said that a

municipality should know, in advance, whether or not it will be receiving advice on the structuring and method of sale of its bonds from someone who has a fiduciary duty to the municipality.

PFM commented that the proposed interpretive guidance, "offers to underwriters a license to attempt to avoid fiduciary duty to their clients for the advice which the Dodd-Frank Act and the Commission specifically recognize as a non-exempt municipal advisory activity" and should be eliminated. NAIPFA commented that, "Underwriters would still be able to provide the same advice as a municipal advisor without a fiduciary duty to the issuer" because the proposed rule change exempts from the definition of a municipal advisor all underwriters that render "advice to an issuer, including advice with respect to the structure, timing, terms and other similar matters concerning the issuance of municipal securities." Mr. Doty stated that large numbers of issuers do not know the difference between an "underwriter" and a "financial advisor" and that it would be better if the dealer informs the issuer affirmatively that advice provided by the dealer is not offered in a fiduciary capacity, with an explanation of what that means. Fieldman suggested that the underwriter should state that it has neither a fiduciary duty to the issuer nor the duties of loyalty and care. Mr. Doty suggested that the Commission adopt the following views recommended by SIFMA[5] for dealers serving as underwriters: (a) require explicit discussions with issuers underscoring the non-fiduciary character of typical underwriter-issuer relationships; and (b) require explicit recognition in bond purchase agreements of atypical facts and circumstances in which underwriters do assume fiduciary roles.

In contrast, Baird said that the proposed amendments to Rule G-23 are unnecessary because of the imposition of the fiduciary standard on municipal advisors. Baird suggested that a reasonable alternative to the proposed rule change would be to require better, more robust written disclosure about the conflict and what ending the financial advisory relationship means and to require the written consent of an authorized municipal official. BDA stated that, "The MSRB's concerns that the role switching currently permitted under Rule G-23 is inconsistent with a dealer financial advisor's fiduciary duty to its issuer client is better addressed by more clearly defining the role of a municipal advisor and the scope of its fiduciary duty." BMO said that, "Federal fiduciary duty or not, conflicts can be appropriately resolved through disclosure and consent."

MSRB Response: Amendment No. 1 would amend the original proposed interpretive notice to reiterate what Rule G-23 has always provided: It is not necessary to have a writing in order for a financial advisory relationship to exist. Instead, Rule G-23(c) provides that a writing must be entered into prior to, upon, or promptly after the inception of the financial advisory relationship. However, in order for a dealer to be considered to be acting as an underwriter

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[5] Bond Purchase Agreement – Governmental Tax- or Revenue-Supported Securities – Instructions and Commentary" (9/17/08).

under Rule G-23(b), it must clearly identify itself, in writing, as an underwriter and not as a financial advisor from the earliest stages of the relationship. Amendment No. 1 would also amend the original proposed rule change to provide that the required disclosure must make clear that the primary role of an underwriter is to purchase securities in an arm's-length commercial transaction between the issuer and the underwriter and that the underwriter has financial and other interests that differ from those of the issuer. Additionally, as amended, the interpretive notice would provide that the dealer must not engage in a course of conduct that is inconsistent with an arm's length relationship with the issuer in connection with such issue of municipal securities or the dealer will be deemed to be a financial advisor with respect to that issue and precluded from underwriting that issue by Rule G-23(d). The MSRB is of the view that these disclosures will be adequate to alert the issuer to the role of the dealer as an underwriter with respect to an issue, especially when coupled with the requirement that the dealer's course of conduct must not be inconsistent with its disclosures if it is to avoid being considered a financial advisor.

As stated in the amended interpretive notice, Rule G-23 is only a conflicts rule and addresses only whether the provision of certain advice will result in a ban on underwriting. The purpose of the interpretive notice is not to define what is meant by the term "underwriting" for purposes of the definition of "municipal advisor" in the Exchange Act. Under the amended interpretive notice, types of advice that are not specifically addressed in Rule G-23(b) -- the investment of bond proceeds and municipal derivatives -- would no longer be characterized as underwriting activities, in order to eliminate any perceived conflict between the interpretive notice and the Commission's proposed definition of "municipal advisor." However, the provision of advice on those subjects would not result in a ban on underwriting under Rule G-23.

A minor conforming change to Rule G-23(b) would make it parallel the language of the interpretive notice that a dealer acting as an underwriter and not as a financial advisor would not trigger the ban.

II. <u>Proposed Amendments</u>. Comments related to the proposed amendments are discussed below.

A. *Effective Date/Sunset Provision/Grandfather Provision*

NAIPFA suggested that the proposed rule change be effective immediately upon Commission approval. SIFMA suggested a grandfather provision for existing financial advisory relationships that are in place at the time of adoption of the proposed rule change. BMO and SIFMA recommended a sunset provision in order for the MSRB to justify publicly any continuation of the proposed rule change.

MSRB Response: The MSRB does not recommend changing the current proposal that the rule change be made effective for new issues for which the Time of Formal Award (as defined in MSRB Rule G-34) occurs more than six months after Commission approval. In

addition, the MSRB does not recommend a grandfather provision, as the MSRB has determined that the effective date described above provides an ample time period for issuers of municipal securities to finalize any outstanding transactions that might be affected by the proposed rule change. The MSRB does not recommend a sunset provision, as the MSRB and Commission comment periods have provided ample opportunity for public comment and considerations of those comments on the proposed rule change.

B. *Miscellaneous*

Kidwell stated, "We believe MSRB proposed Rules G-23 and G-36 are inexorably bound and evaluation of each should be taken in consideration of both rules." It suggested that the proposed interpretive guidance be eliminated.[6] NAIPFA stated that future changes to Rule G-23 should be considered only after the market has absorbed all regulatory changes and regulators are able to assess definitively any impact due only to Rule G-23. GFOA expressed concern that the proposed interpretive guidance has not received the attention that it deserves because of the short comment period that was provided.

GFOA also stated that in negotiated transactions the advice that underwriters provide related to the structure, timing and terms of the bonds should not be substituted for the advice the issuer receives from a financial advisor. "When underwriter input is presented to an issuer that is represented by a financial advisor, such input should not be seen as violating the intent of G-23. In contrast, when the issuer is not represented by a financial advisor, input provided by the underwriter becomes the issuer's sole source of financial advice, even though the underwriter does not have a fiduciary duty to the issuer. This type of situation should be prohibited by G-23."

MSRB Response: The MSRB does not recommend delaying rulemaking in this area since the rule is based on the definition of "financial advisor" in Rule G-23 and not on the definition of "municipal advisor" under the Dodd-Frank Act. Furthermore, Rule G-23 is solely a conflicts rule, so the proposed rule change as amended by Amendment No. 1 does not address whether provision of the advice addressed by Rule G-23 would make the a dealer a "municipal advisor" under the Dodd-Frank Act. In response to the statement by GFOA regarding the comment period for the proposed rule change, the MSRB notes that it filed the original proposed rule change with the Commission in accordance with the requirements of Section 19(b) of the Exchange Act, which generally provides for a 21-day comment period following publication in the Federal Register of a rule change proposed by a self-regulatory organization. The MSRB does not agree with GFOA's comment, which would require issuers to hire non-dealer financial advisors for all of their issues.

C. *Comments previously addressed by the MSRB*

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6 See also PFM.

The MSRB also received and reviewed comments that were significantly similar to comments generated by the MSRB request for comment related to Rule G-23.[7] The following comments were previously addressed by the MSRB:[8]

A number of commenters[9] stated that role switching should be permitted for competitive issues (with suggested amounts for small competitive issues ranging from either $5 million cap or $10 million cap or no cap but non-rated, non credit-enhanced, fixed rate municipal debt issuances in which the issuer utilizes an electronic bidding platform).

MSRB Response: As the MSRB said previously, the MSRB believes that the potential negative impact on fees and market accessibility for small and/or infrequent issuers would be minimal compared to the protections that will be afforded to such issuers. The MSRB is persuaded by the arguments that small and/or infrequent issuers are, in many cases, unable to appreciate the nature of the conflict they are being asked to waive by the very dealer financial advisor that will benefit from the waiver. The MSRB does not believe that exceptions should be provided for smaller offerings as suggested by several commenters. Furthermore, the MSRB does not believe that the use of electronic bidding platforms mitigates the conflict of interest posed by a dealer financial advisor's switching to an underwriter role, in part, because such platforms are not necessarily available to all issuers.

NAIPFA stated that "Proposed Rule G-23 should be modified in a way that would force the underwriter acting as an advisor to decide which role they will play for the issuer and not be able to play both roles at the same time."

MSRB Response: The MSRB notes that Rule G-23 currently does not and would not permit a dealer to serve as underwriter and financial advisor for an issuer at the same time. As the MSRB previously stated, the MSRB has determined to continue to apply Rule G-23 on an issue-by-issue basis. The proposed amendments would not prohibit a dealer financial advisor from providing financial advisory services on one issue and then serving as underwriter on another issue, even if the two issues were in the market concurrently.

Eastern Bank and SIFMA said that there have been no studies or indications of abuses in the market necessitating a change to Rule G-23.

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7 See MSRB Notice 2010-27 (August 17, 2010) Request for Comment on Rule G-23 on the Underwriting Activities of Financial Advisors.

8 See note 3, supra.

9 See BDA, Baird, Eastern Bank, First Southwest, Mr. Giles, RBC and SIFMA.

MSRB Response: The MSRB understands that there may not be actual studies or indications of abuses in the market directly related to the prohibitions that will result from the proposed rule change, however the MSRB believes the proposed amendments will protect municipal entities, as the MSRB is mandated to do by Dodd-Frank, by preventing the perceived and actual conflicts of interest that arise under the existing rule.

SIFMA suggested that the prohibition on switching to remarketing agent should be 3 months, rather than 1 year.

MSRB Response: The MSRB has previously stated that it does consider it to be appropriate to impose a cooling off period of one year during which a dealer financial advisor could not serve as remarketing agent for the same issue of municipal securities. The MSRB believes the one year term is a significant timeframe that would more adequately address any potential or actual conflicts of interest than the three month time frame.

BDA suggested a transitional period of one year after approval by the SEC in order to allow issuers, dealers, and financial advisors sufficient time to review their current engagements and business practices and to take action to conform to, and comply with, the new rules and to access the market for those transaction that are currently under consideration.

MSRB Response: The MSRB has previously stated its intent that the proposed rule change be made effective for new issues for which the Time of Formal Award (as defined in Rule G- 34(a)(ii)(C)(1)(a)) occurs more than six months after SEC approval to allow issuers of municipal securities time to finalize any outstanding transactions that might be affected by the proposed rule change.