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September 28, 2010

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

Re: Request for Comments on Changes to Rule G-23

Ladies and Gentlemen:

This letter is in response to the MSRB's request for comments on the proposed changes to Rule G-23 that will preclude a financial advisor from terminating its financial advisory relationship with an issuer and subsequently serving as the underwriter. I am commenting in my capacity as an Independent Financial Advisor (a municipal advisor that is not affiliated with any firm that is a broker, dealer or bank).

Rule G-23 was designed principally to minimize the prima facia conflict of interest that exists when a municipal securities dealer acts as both a financial adviser and underwriter. In its *Notice of Filing of Fair Practice Rules,* dated September 20, 1977 (the "Notice"), the MSRB identified some of these conflicts. A copy of certain portions of the Notice, including, in particular, portions describing the conflicts of interest, is enclosed with this letter. When adopted, Rule G-23 alleviated the most egregious conflicts. The proposed amendments will further reduce these conflicts; however, additional modifications are required to protect the interests of issuers and to comply with the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"). Consequently, I am submitting the following comments and requesting further amendments to Rule G-23.

Comment: Section (b) of Rule G-23 should be changed

Section (b) presently reads as follows:

> (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 a new issue or issues of municipal securities, including advice with respect to the structure, timing, terms and other similar matters concerning such issue or issues, for a fee or other compensation or in expectation of such compensation for the rendering of such services. **Notwithstanding the foregoing, a financial advisory relationship shall not be deemed to exist when, in the course of acting as an underwriter, 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 a new issue of municipal securities.

By definition, under the Act if an underwriter provides "**advice with respect to the structure, timing, terms and other similar matters concerning such financial products or issues**" the underwriter is acting as a financial advisor. The Act exempted from the definition of financial advisor a "broker, dealer, or municipal securities dealer serving as an underwriter (as defined in section 2(a)(11) of the Securities Act of 1933) (15 U.S.C. 77b(a)(11))." Furthermore, as noted by the Securities Industry and Financial Markets Association in its "Model Bond Purchase Agreement" released on September 17, 2008, (1) the purchase and sale of securities is an arm's-length commercial transaction between the issuer and the underwriter, (2) underwriters are not acting as an agent or a fiduciary of the issuer, and (3) underwriters do not assume a fiduciary responsibility in favor of the issuer with respect to the offering of the securities or the process leading thereto.

Based on the foregoing, the last sentence of Section (b) should be deleted. Alternatively, the last sentence could be rewritten to make a clear distinction between a financial advisor and an underwriter as follows: "**Notwithstanding the foregoing, a financial advisory relationship shall not be deemed to exists when, in the course of acting as an underwriter, a broker, dealer or municipal securities dealer renders information to issuers that is incidental to an underwriting of a new issue of municipal securities.**"

Comment: Companies should be precluded from serving as underwriter, for any transaction of an issuer, for a period of two years from the date the financial advisory agreement expires or is terminated.

Some of the firms that serve as financial advisors do so with the objective of establishing a relationship with the issuer that will ultimately enable the company to terminate their financial advisory relationship and serve as underwriter for the current issue or future issues. A two year ban, from the date the financial advisory agreement expires or is terminated, would provide adequate time to remove a company's incentive to serve as a financial advisor when the objective is to serve as underwriter.

In addition, a two year ban would provide adequate time to protect issuers from the conflicts of interest created by role switching.

There is a precedent for establishing a two year ban. Under MSRB's Rule G-37, when certain political contributions are made, the firm is banned from underwriting (alone or as part of an underwriting syndicate) for a period of two years. The MSRB has determined that the nexus between a political contribution and "pay-to-play practices" is removed after two years. Likewise, the nexus between financial advisory services and underwriting is removed after two years. While the MSRB could explore an unlimited number of other time periods, as noted, the precedent for a two year ban exists and two years would ensure the elimination of conflicts of interest in the case of Rule G-23.

Comment: There should be no exceptions for competitive sales

In a competitive sale, the financial advisor's responsibilities include creating competition by distributing bidding documents to potential bidders, advertising the sale and contacting bidders in order to secure the largest number of bids possible for the transaction. If a financial advisor is permitted to bid, the company may not aggressively work to secure the largest number of bids possible. Stated differently, there may be an incentive to reduce competition. Public perceptions of improprieties arise if the financial advisor happens to be the only bidder or is the winning bidder when more than one bid is received. Did the financial advisor take all actions possible to secure bids? Did the financial advisor have exclusive access to information that made it possible to submit the winning bid?

Similarly, if a company is permitted to underwrite an issue after failing to receive bids it raises questions regarding intent and improprieties.

A failed bid is extremely rare. In my state of Missouri, I am aware of only one occurrence. The transaction involved the issuance of certificates of participation for a city that did not have audited financial statements or an existing revenue stream with which to pay the certificates. Initially, the city engaged an underwriter. The firm was unsuccessful in underwriting the securities and then switched to serving as financial advisor for a competitive sale. No bids were received and, to date, the transaction has not been completed. A conclusion should not me made that there are transactions that justify role switching, but rather that there are some municipal securities which should never be publicly sold.

Comment: There should be no exceptions for small issuers

There should be no exceptions for small or infrequent issuers. First, it begs the question as to what constitutes a "small" or "infrequent" issuer. Second, there is no evidence that "small" or "infrequent" issuers have difficulty marketing their issues. Rule G-23 **does not** require the use of a financial advisor nor does it require competitive bidding. Issuers have several options with respect to the approach used to market their bonds including privately placing the issue with a local bank, working exclusively with an underwriter in a negotiated sale, engaging a financial advisor to assist with the negotiated sale, or selling the issue by competitive bidding with or without the services of a financial advisor. This flexibility of approach negates the need to provide special exemptions.

Small and infrequent issuers will be the primary beneficiaries of a revised Rule G-23. Small and infrequent issuers are less knowledgeable about the capital markets and consequently are the least likely issuers to understand the conflicts of interest that arise when a financial advisor switches to serving as an underwriter.

It should be noted that when the Securities and Exchange Commission recently adopted revisions to Rule 15c2-12 (changes effective December 1, 2010) it choose to impose additional disclosure requirements for primary offerings of municipal securities of $1,000,000 or more, thereby affecting "small issuers," and noted, in substance, that the benefits of the rule outweighed potential burdens on small issuers. Similarly, the benefits of a strict Rule G-23 outweigh any isolated marketing difficulty. Adding loopholes to Rule G-23 is likely to defeat the purpose of the rule and continue to promote conflicts of interest.

Conclusion

I support the proposed changes to Rule G-23 as presently drafted provided that the last sentence of section (b) is deleted or revised as noted herein and that a provision is added that precludes firms from acting as underwriter for two years on any transaction of an issuer after serving as a financial advisor. No exceptions should be added for "small" or "infrequent" issuers or for competitive bidding. I appreciate the opportunity to comment and would be happy to provide clarification to my comments.

Sincerely,

Joy A. Howard

Joy A. Howard
Principal

cc: Ms. Mary L. Schapiro
Ms. Martha M. Haines

Municipal Securities Rulemaking Board
1150 CONNECTICUT AVENUE, N.W. SUITE 507
WASHINGTON, D. C. 20036

FOR IMMEDIATE RELEASE

September 20, 1977

For further information, please contact:
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and General Counsel
Municipal Securities Rulemaking Board
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Washington, D. C. 20036
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MSRB FILES PROPOSED FAIR PRACTICE RULES

The Municipal Securities Rulemaking Board announced that it filed with the Securities and Exchange Commission today a series of proposed fair practice rules, originally issued by the Board in an exposure draft dated April 7, 1977. The proposed rules codify basic standards of fair and ethical business conduct for municipal securities professionals, in furtherance of Congress' intent that the Board develop a prophylactic framework of regulation for the municipal securities industry.

The proposed rules cover a variety of subjects, including standards for the execution of agency transactions, suitability requirements, administration of discretionary accounts, supervision of accounts, fair prices and commissions, activities of municipal securities professionals acting as financial advisors to municipalities, disclosures in connection with new issues of municipal securities, and advertisements of new issues of municipal securities. The Board stated that

it had received 57 letters of comment on the exposure draft from numerous bank dealers and securities firms, industry trade associations, and others, and that the proposed rules as filed incorporate many of the suggestions made by the commentators.

The proposed rules will become effective when approved by the Commission which, under the terms of the Board's filing, has an initial period of 90 days ending December 19, 1977 within which to act.

A more detailed discussion of the proposed rules, together with the text of the proposals, is included in the notice attached to this release.

Municipal Securities Rulemaking Board
1150 CONNECTICUT AVENUE, N.W. SUITE 507
WASHINGTON, D. C. 20036

September 20, 1977

Notice of Filing of Fair Practice Rules

The Municipal Securities Rulemaking Board (the "Board") today filed with the Securities and Exchange Commission (the "Commission") a series of proposed rules and rule amendments covering the following subjects:

Subject	Rule Number
"Bank Dealer"	D-8
"Customer"	D-9
"Discretionary Account"	D-10
"Associated Persons"	D-11
Misrepresentations of Quotations	G-13(d)
Conduct of Municipal Securities Business	G-17
Execution of Transactions	G-18
Suitability of Recommendations and Transactions	G-19
Gifts and Gratuities	G-20
Professional Advertising	G-21
Control Relationships	G-22
Activities of Financial Advisors	G-23
Use of Ownership Information Obtained in Fiduciary or Agency Capacity	G-24
Improper Use of Assets	G-25

to which the professional has a control relationship. However, if the discretionary account customer is advised of the control relationship and consents, the professional may effect the transaction. Appropriate written evidence would be essential to avoid compliance questions in these circumstances.

The Board notes that in some instances, state or local laws address the matter of conflicts of interest resulting from the existence of a control relationship. The proposed rule is not intended to supersede any provision of state or local law which may impose additional restrictions.

Several commentators raised questions regarding the provision in draft rule G-22 which provided that a control relationship with respect to a municipal security would be deemed to exist if an associated person of a securities professional is a member of the governing body or acts as an officer of the issuer. The Board has determined to delete this provision in view of the problems highlighted by the commentators. Accordingly, a control relationship will be deemed to exist only if, as a factual matter, a securities professional (or an organization of which it is a department or division) has a control relationship with the issuer or with a debt service obligor.

Rule G-23 Activities of Financial Advisors

Proposed rule G-23 addresses certain aspects of the conduct of a municipal securities professional acting as a financial advisor or consultant to a state or local governmental unit. As a financial advisor, the municipal securities professional acts in a fiduciary capacity as agent for the governmental unit, assisting it in determining its debt structure, determining when and under what circumstances to market its securities, and preparing or assisting in the preparation of documents to be used in connection with the sale of its securities. The existence of such an arrangement is evidenced by an agreement, written or otherwise, for the municipal securities professional to render financial advisory services to the governmental unit for a fee or other compensation or in expectation of compensation. Certain provisions of proposed rule G-23 are designed to assure that financial advisory agreements are in writing, and that the basis of compensation to the advisor is clearly disclosed to the governmental unit.

The role and interests of a securities professional acting as financial advisor to a governmental unit are significantly different from the role and interests of a securities professional acting as an underwriter or as a purchaser in a private placement. For example, as agent for the issuer, a financial advisor

would normally seek to achieve the lowest possible interest cost for the issuer, while an underwriter, acting as principal for its own account, would normally want to establish yields which make the securities attractive for resale to others. Other marketing features, important from an underwriting perspective may conflict with an independent determination of the same matters from the perspective of the issuer. If the underwriter has customers for large amounts of the securities to be issued, the underwriter may be influenced to advocate a larger issue than might otherwise be in the best interests of the issuer; conversely, an underwriter might advocate a smaller issue if its own customers' interest is not strong. Maturities, redemption provisions and remedy covenants are other facets of an issue with respect to which a municipal securities professional may be influenced to give different advice, depending on whether the securities professional is acting as an underwriter or private placement purchaser of the securities, or solely as the issuer's agent. The size of the underwriting spread may also be affected by the arm's-length character of the relationship between the issuer and its agents, on the one hand, and the underwriter, on the other.