

JOSHUA P. MEYER

August 16, 2019

Ms. Jennifer A. Galloway
Chief Communications Officer
Municipal Securities Rulemaking Board
1300 I Street NW, Suite 1000
Washington, DC 20005

Re: Request for Comment on MSRB Rule G-23 on Activities of Dealers
Acting as Financial Advisors

Dear Ms. Galloway:

This letter (the “Letter”) is written in response to the request (the “Request”) of the Municipal Securities Rulemaking Board (the “MSRB”) for comments on MSRB Rule G-23 (“Rule G-23”) on Activities of Dealers Acting as Financial Advisors.

By way of background, our firm is annually listed in the top 5 of the most active municipal finance law firms, nationwide, as bond or disclosure/underwriter’s counsel, both by dollar amount and by number of issues. Particularly applicable to this Letter, our firm is very active as bond and disclosure counsel to numerous special infrastructure districts within the state of Nebraska, the vast majority of which districts are represented by a financial advisor.

We endorse the MSRB’s request to solicit comments with respect to Rule G-23 and offer our comments based on our firm’s broad-based national municipal finance practice and the experience we have accumulated in our daily interactions with municipal entities for many decades. With respect to the MSRB’s specific questions attached the Request, we have chosen to answer one specific question and formulate a response around such. Question 1 attached to the Request asks:

- “1. What has been the experience of issuers, dealers, municipal advisors, and other market participants with respect to Rule G-23s prohibition on role switching since the 2011 amendment? Has the Rule been effective in achieving its primary purpose of addressing the conflict of interest that exists when a dealer acts as both a financial advisor and an underwriter with respect to the same issue?”**

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Rule G-23 establishes certain basic requirements applicable to a broker, dealer, or municipal securities dealer acting as a financial advisor with respect to the issuance of municipal securities. As more pointedly articulated by the Request, Rule G-23's purpose is to address the conflicts of interest that exist when a dealer acts as both a financial advisor and as an underwriter with respect to the same issue. While Rule G-23 certainly makes it clear that an underwriter or placement agent of municipal securities may not "role switch" as both underwriter/placement agent and as financial advisor with regard to the same issue, Rule G-23 remains ambiguous and overly burdensome in certain contexts. Rule G-23 remains ambiguous with respect to what is permissible as it pertains to the activities of a financial advisor in connection with the issuance of municipal securities for an issuer client—placing financial advisors in an uncomfortable and unfair position in a municipal securities transaction.

By way of example, the MSRB has stated that a financial advisor may, among other things, create a term sheet for an investor RFP or RFQ process¹, and, most ambiguously, act as a "finder" in connection with the placement of municipal securities, citing the Securities and Exchange Commission's well documented revocation of a no-action letter relating to Dominion Resources². As neither the SEC nor the MSRB has fully articulated its stance on what constitutes the act of "finding" or what the activities of a "finder" might be, it leaves financial advisors in a peculiar spot in a transaction, particularly in a private placement or direct purchase with a bank or financial institution. In MSRB Notice 2011-37 (August 3, 2011), in describing the denial of certain no-action letters with similar facts to the Dominion Resources no-action letter, the MSRB states that the denial of those no-action letters was because "all involved situations in which various parties had introduced the issuers of securities to investors and/or participated in negotiations with those investors, and received transaction based compensation." Thus, the MSRB has taken the stance that a financial advisor may act as a "finder"—but may not introduce the issuer of securities to an investor. It would seem that the act of "finding" an investor for a municipal client is synonymous with introducing the issuer of securities to an investor. Accordingly, it is understandable why it is difficult for a financial advisor to understand what is permissible under Rule G-23 as the MSRB's guidance on Rule G-23 seems to directly conflict.

While our firm certainly understands Rule G-23's aim at addressing the conflicts of interest that exist when a dealer acts as both a financial advisor and as an underwriter with respect to the same issue, Rule G-23 is unduly burdening financial advisors' fiduciary obligation³ with respect to providing services to an issuer client. In addition, as the ambiguous regulatory landscape now exists, financial advisors have to toe the line between being a "finder" and serving as a true fiduciary for an issuer client (as MSRB Rule G-42 ("Rule G-42") requires) and obtaining the most efficient, cheapest cost to capital for a client—which, in certain circumstances, is through a direct placement with a bank or financial institution. Any hesitation

¹ See Exchange Act Release No. 70462, 78 Fed. Reg. 67468 (November 12, 2013) at 67509.

² See MSRB Notice 2011-37 (August 3, 2011).

³ See MSRB Rule G-42(a)(ii).

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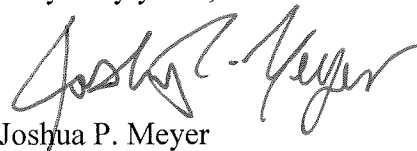
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on the part of the MSRB regarding a clearer, bright line rule allowing financial advisors to negotiate on behalf of issuer clients with direct purchasers of debt should be entirely mitigated by the current regulatory scheme, namely the existence of Rule G-42, which provides that a financial advisor “shall, in the conduct of all municipal advisory activities ... be subject to a fiduciary duty that includes a duty of loyalty and a duty of care.” Rule G-42 and the imposition of a fiduciary duty on the activities of a financial advisor is the essence of the financial advisor rules and underlies all activities of a financial advisor in connection with rendering services to clients. In addition, Rule G-42 also requires that all financial advisors, among other things, provide to a client, in a writing: (a) any potential conflicts of interest that may exist for the financial advisor, including any conflicts relating to compensation, and (b) evidence of the financial advisory relationship that will exist between the financial advisor and the client, setting forth, among other things, the form and basis of direct or indirect compensation. As Rule G-42 requires the disclosure of any conflicts of interest of a financial advisor, namely conflicts of interest relating to compensation (including transaction based compensation), the current ambiguities with regard to Rule G-23 as it relates to the permitted activities of financial advisors is unnecessary as Rule G-42 should alleviate any and all concerns relating to conflicts of interest should a financial advisor negotiate the placement of municipal debt on behalf of an issuer client. Indeed, it would seem that one of the central roles of a financial advisor would be to negotiate, on behalf of a potentially unsophisticated municipal client, with a sophisticated bank or financial institution. In other words, the current ambiguity with Rule G-23 unduly impedes financial advisors to fulfill their fiduciary obligation.

Accordingly, we respectfully submit that the MSRB (a) amend Rule G-23 to exempt certain activities of a financial advisor under Rule G-23, namely that financial advisors may negotiate on behalf of issuer clients to place municipal debt with banks or financial institutions, and (b) issue a notice detailing that such activity is permissible under Rule G-23. As noted above, because Rule G-42 imposes a fiduciary obligation on financial advisors, the current regulatory scheme already protects issuers from any potential conflicts of interest relating to the direct placement of debt—most importantly, conflicts relating to compensation of a financial advisor.

We would be pleased to discuss any of the foregoing comments in greater detail.

Very truly yours,



Joshua P. Meyer