

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

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

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

Proposed rule change to delete obsolete Question-and-Answer interpretive guidance under former Rule G-38, on consultants, and certain Question-and-Answer interpretive guidance relating to the definition of solicitation under Rule G-37, on political contributions and prohibitions on municipal securities business

**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  Last Name   
 Title   
 E-mail   
 Telephone  Fax

**Signature**  
Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date   
 By  Senior Associate General Counsel  
 (Name) (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**

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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**

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**

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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**

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.

**1. Text of Proposed Rule Change**

(a) The Municipal Securities Rulemaking Board (the “MSRB”) is hereby filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change to delete obsolete Question-and-Answer (“Q&A”) interpretive guidance under former Rule G-38, on consultants, and certain Q&A interpretive guidance relating to the definition of “solicitation” under Rule G-37, on political contributions and prohibitions on municipal securities business (the “proposed rule change”). The text of the proposed rule change is included in Exhibit 5.

(b) Not applicable.

(c) Not applicable.

**2. Procedures of the Self-Regulatory Organization**

The proposed rule change was adopted by the MSRB at its February 15-16, 2006 meeting. Questions concerning this filing may be directed to Ernesto A. Lanza, Senior Associate General Counsel, or Jill C. FINDER, Assistant 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

On August 29, 2005, new Rule G-38, on solicitation of municipal securities business, became effective, superseding former Rule G-38 on consultants.<sup>1</sup> The MSRB had previously published a number of Q&A interpretations on the former rule, none of which continue to apply to new Rule G-38 since the consultant provisions to which they relate are no longer in effect. Accordingly, the MSRB is deleting all obsolete Rule G-38 Qs&As.<sup>2</sup> In addition, the MSRB is deleting three Qs&As and partially deleting a fourth Q&A under Rule G-37 relating to the definition of solicitation of municipal securities business (the “Rule G-37 solicitation Qs&As”).<sup>3</sup>

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<sup>1</sup> SEC Release No. 34-52278 (August 17, 2005); 70 FR 49342 (August 23, 2005).

<sup>2</sup> All Q&A interpretations under former Rule G-38 relating to consultants are being withdrawn, other than the Q&A interpretation published on June 6, 2001 entitled “Bank Affiliates: Individuals as Municipal Finance Professionals or Consultants,” which also provides guidance under Rule G-37. *See* Exchange Act Release No. 44459 (June 20, 2001), 66 FR 34501 (June 28, 2001). The portions of this Q&A relating to former Rule G-38 no longer apply.

<sup>3</sup> The three deleted Rule G-37 solicitation Qs&As are published as Qs&As IV.10, IV.11 and IV.13 in *MSRB Rule Book* (January 1, 2006). In addition, the last

In December 2005, the Commission published for comment the MSRB's proposed interpretive notice on the definition of "solicitation" under Rules G-37 and G-38 (the "Solicitation Notice").<sup>4</sup> Among other things, the Solicitation Notice incorporated, by means of footnote 2 thereof and the text accompanying such footnote, guidance on the meaning of solicitation under Rule G-37 previously provided in the Rule G-37 solicitation Qs&As. The Commission received one comment letter in response to the Solicitation Notice.<sup>5</sup> The commentator supported the Solicitation Notice but suggested that the MSRB withdraw all of its prior published Q&A guidance regarding the definition of solicitation of municipal securities business in order to avoid potential conflicts between such prior Q&A guidance and the Solicitation Notice.<sup>6</sup>

The MSRB believes that it would be appropriate to consolidate its guidance on the definition of solicitation for purposes of Rules G-37 and G-38 by amending its Solicitation Notice and simultaneously deleting (1) the Rule G-37 solicitation Qs&As, and (2) all obsolete Rule G-38 Q&A guidance relating to consultants. Thus, in addition to the Q&A deletions which are the subject of this filing, the MSRB has submitted to the Commission a companion filing consisting of an amendment to the Solicitation Notice that would delete footnote 2 in the Solicitation Notice, which contains references to the Rule G-37 solicitation Qs&As, and would instead insert the substantive language of those Qs&As into the text of the Solicitation Notice.<sup>7</sup> Thus, the language of the Rule G-37 solicitation Qs&As which had previously been incorporated by reference would now be explicitly included within the Solicitation Notice. The amendment to the Solicitation Notice and the withdrawal of the Rule G-37 solicitation Qs&As and obsolete Rule G-38 Qs&As do not effect a substantive change in the MSRB's guidance on the definition of solicitation as set forth in the Solicitation Notice.

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sentence of Q&A IV.18, published in *MSRB Rule Book* (January 1, 2006), is deleted.

<sup>4</sup> SEC Release No. 34-52948 (December 13, 2005); 70 FR 75514 (December 20, 2005).

<sup>5</sup> See Letter from Leslie M. Norwood, Vice President and Assistant General Counsel, The Bond Market Association, to Jonathan G. Katz, Commission Secretary, dated January 10, 2006.

<sup>6</sup> The commentator stated that, in certain respects, the guidance on solicitation and related matters provided in the Solicitation Notice may not be wholly consistent with guidance previously provided by the MSRB and that such prior guidance should be withdrawn. The MSRB addresses this and other statements and concerns in the companion filing to this filing. See Amendment No. 2 (March 17, 2006) to File No. SR-MSRB-2005-11 (June 8, 2005).

<sup>7</sup> See Amendment No. 2 (March 17, 2006) to File No. SR-MSRB-2005-11 (June 8, 2005).

(b) Statutory Basis

The MSRB has adopted the proposed rule change 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 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 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.

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

Written comments were neither solicited nor received on the proposed rule change.

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)**

The MSRB requests that the Commission find good cause, pursuant to Section 19(b)(2) of the Act, for approving the proposed rule change prior to the thirtieth day after publication of the notice of filing in the Federal Register. The MSRB believes that the Commission has good cause for granting accelerated approval of the proposed rule change because it will avoid the potential for confusion by dealers by deleting obsolete interpretive guidance, as well as consolidating existing guidance, concerning the

definition of solicitation. The MSRB also requests that the Commission approve this proposed rule change simultaneously with SR-MSRB-2005-11.

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

Not applicable.

9. **Exhibits**

1. Federal Register Notice
5. Rule G-37 and Rule G-38 Qs&As to be deleted

**EXHIBIT 1**

**SECURITIES AND EXCHANGE COMMISSION**

(Release No. 34- ; File No. SR-MSRB-2006-01)

**SELF-REGULATORY ORGANIZATIONS**

Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Withdrawal of Obsolete Question-and-Answer Interpretive Guidance Under Former Rule G-38, on Consultants, and Certain Question-and-Answer Interpretive Guidance Relating to the Definition of “Solicitation” Under Rule G-37, on Political Contributions and Prohibitions on Municipal Securities Business

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on March 17, 2006 the Municipal Securities Rulemaking Board (“MSRB” or “Board”) filed with the Securities and Exchange Commission (“Commission” or “SEC”) the proposed rule change as 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 is filing with the Commission a proposed rule change to delete obsolete Question-and-Answer (“Q&A”) interpretive guidance under former Rule G-38, on consultants, and certain Q&A interpretive guidance relating to the definition of “solicitation” under Rule G-37, on political contributions and prohibitions on municipal

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

securities business. The text of the proposed rule change is set forth below. Deleted language is in brackets.

**Questions and Answers Concerning Political Contributions and Prohibitions on Municipal Securities Business: Rule G-37**

**December 7, 1994**

[Q: What constitutes "solicitation" of municipal securities business?

A: Solicitation activities may include, but are not limited to, responding to issuer Requests for Proposals, making presentations of public finance and/or municipal securities marketing capabilities to issuer officials, and engaging in other activities calculated to appeal to issuer officials for municipal securities business, or which effectively do so.]

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**December 7, 1994**

[Q: Has a "solicitation" occurred if a retail sales person receives a "finder's fee" for bringing municipal securities business to the dealer?

A: If a retail sales person receives a "finder's fee" for bringing municipal securities business to the dealer, then there should be a presumption that the sales person solicited municipal business from an issuer official. In such situations, the sales person becomes a municipal finance professional and any contributions made by that person to an issuer official may subject the dealer to the two-year prohibition on business with that issuer.]

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**March 22, 1995**

**Q:** Any associated person who solicits municipal securities business is deemed a municipal finance professional under Rule G-37. The Board previously noted that "solicitation" may encompass a number of activities, including, for example, making presentations of public finance and/or municipal securities marketing capabilities to issuer officials, and engaging in other activities calculated to appeal to issuer officials for municipal securities business, or which effectively do so. If an associated person of a dealer attends a presentation by dealer personnel of public finance capabilities, would this also constitute "solicitation" under Rule G-37?

**A:** Yes. If an associated person of a dealer attends such a presentation, then he or she is assumed to have solicited municipal securities business and therefore is deemed a municipal finance professional under Rule G-37. Accordingly, any contributions given to issuer officials by that person within the last two years could subject the dealer to the rule's two-year prohibition on business with such issuers.]

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**September 9, 1997, revised October 30, 2003**

**Q:** In making the determination of which associated persons of a dealer meet the definitions of municipal finance professional and non-MFP executive officer, is it correct to designate all the executives of the dealer (*e.g.*, President, Executive Vice Presidents) under the category of non-MFP executive officers?

**A:** No. In making the determination of whether someone is a municipal finance professional or non-MFP executive officer, one must review the activities of the

individual and not his or her title. Rule G-37(g)(iv) defines the term “municipal finance professional” as:

(A) any associated person primarily engaged in municipal securities representative activities, as defined in Rule G-3(a)(i), provided, however, that sales activities with natural persons shall not be considered to be municipal securities representative activities for purposes of this subparagraph (A);

(B) any associated person who solicits municipal securities business, as defined in paragraph (vii);

(C) any associated person who is both (i) a municipal securities principal or a municipal securities sales principal and (ii) a supervisor of any persons described in subparagraphs (A) or (B);

(D) any associated person who is a supervisor of any person described in subparagraph (C) up through and including, in the case of a broker, dealer or municipal securities dealer other than a bank dealer, the Chief Executive Officer or similarly situated official and, in the case of a bank dealer, the officer or officers designated by the board of directors of the bank as responsible for the day-to-day conduct of the bank’s municipal securities dealer activities, as required pursuant to Rule G-1(a); or

(E) any associated person who is a member of the broker, dealer or municipal securities dealer (or, in the case of a bank dealer, the separately identifiable department or division of the bank, as defined in Rule G-1)

executive or management committee or similarly situated officials, if any; provided, however, that, if the only associated persons meeting the definition of municipal finance professional are those described in this subparagraph (E), the broker, dealer or municipal securities dealer shall be deemed to have no municipal finance professionals.

Rule G-37(g)(v) defines the term “non-MFP executive officer” as:

an associated person in charge of a principal business unit, division or function or any other person who performs similar policy making functions for the broker, dealer or municipal securities dealer (or, in the case of a bank dealer, the separately identifiable department or division of the bank, as defined in Rule G-1), *but does not include any municipal finance professional*, as defined in paragraph (iv) of this section (g); provided, however, that, if no associated person of the broker, dealer or municipal securities dealer meets the definition of municipal finance professional, the broker, dealer or municipal securities dealer shall be deemed to have no non-MFP executive officers. {emphasis added}

Dealers should first review the activities of their associated persons to determine whether they are municipal finance professionals, and then, once that list of individuals has been established, conduct a review of the remaining associated persons to determine whether they are non-MFP executive officers. Dealers should pay close attention to those associated persons who are soliciting municipal securities business and, thus, will be considered municipal finance professionals. [The Board has previously stated that

solicitation activities may include, but are not limited to, responding to issuer Requests for Proposals, making presentations of public finance and/or municipal marketing capabilities to issuer officials, and engaging in other activities calculated to appeal to issuer officials for municipal securities business, or which effectively do so.]

\* \* \* \* \*

***[Rule G-38 Questions and Answers***

**February 28, 1996**

**Consultants**

**1.**

**Q:** Who is considered a "consultant" pursuant to rule G-38?

**A:** Rule G-38(a)(i) defines "consultant" as any person used by a dealer to obtain or retain municipal securities business<sup>1</sup> through direct or indirect communication by such person with an issuer on behalf of such dealer where the communication is undertaken by such person in exchange for, or with the understanding of receiving, payment from the dealer or any other person. The definition specifically excludes "municipal finance professionals" of the dealer, as that term is defined in rule G-37(g)(iv), because such individuals are covered by the requirements of rule G-37. The definition also excludes any person whose sole basis of compensation from the dealer is the actual provision of legal, accounting or engineering advice, services or assistance in connection with the municipal securities business that the dealer is seeking to obtain or retain.

**2.**

**Q:** What are examples of persons who would be excluded from the definition of consultant for providing legal, accounting or engineering advice, services or assistance to a dealer in connection with municipal securities business?

**A:** The exclusion would apply, for example, to a lawyer retained to conduct a legal analysis on a particular transaction contemplated by the dealer, or to review local regulations; an accountant retained to conduct a tax analysis or to scrutinize financial reports; or an engineer retained to perform a technical review or feasibility study. The exemption is intended to ensure that professionals who are engaged by the dealer solely to perform substantive work in connection with municipal securities business are not brought within the definition of consultant as long as their compensation is in consideration of only those professional services actually provided in connection with such municipal securities business.

**3.**

**Q:** Would an attorney hired by a dealer to conduct a legal analysis on a transaction being contemplated by the dealer and then subsequently paid a finder's fee by the dealer for bringing that municipal securities business to the dealer be considered a consultant?

**A:** Yes, any attorney or other professional used by the dealer as a "finder" for municipal securities business is considered a consultant pursuant to rule G-38.

**4.**

**Q:** Does the definition of consultant also encompass third parties who initiate contact with dealers to offer their services in obtaining or retaining municipal securities business through direct or indirect communication by such person with an issuer official?

**A:** Yes. The definition of consultant in rule G-38 does not distinguish between instances in which the dealer initiates contact with a third party to act as a consultant and instances in which the third party initiates contact.

**5.**

**Q:** Does the definition of consultant encompass a lobbyist hired by the dealer if the only activity the lobbyist engages in on behalf of the dealer is to lobby state legislators for legislation which grants issuers authority to issue certain types of municipal securities?

**A:** No, however, if the lobbyist is also used by the dealer to obtain or retain municipal securities business through direct or indirect communication with an issuer on the dealer's behalf where the communication is undertaken for payment from the dealer or any other person, then the lobbyist would meet the definition of consultant.

**6.**

**Q:** If an affiliated company of a bank introduces one of its customers (a municipal issuer) to the bank's dealer department for purposes of engaging in municipal securities business, and the dealer pays the affiliated company for this activity, would the affiliated company be a "consultant" under rule G-38?

**A:** Any person used by a dealer as a "finder" for municipal securities business would be considered a consultant under rule G-38. In this example, if the affiliated company is

used by the bank dealer to obtain or retain municipal securities business through direct or indirect communication by the affiliated company with the issuer on the dealer's behalf, and the affiliated company does so with the understanding of receiving payment from the dealer, then the affiliated company would be a consultant.

**7.**

**Q:** Does the definition of consultant encompass a person retained by an affiliate or parent of a dealer if any portion of that person's activity relates to efforts to obtain municipal securities business for the dealer?

**A:** Yes, because the definition of consultant includes those who receive payment from the dealer or "any other person" for use in obtaining or retaining municipal securities business through communication with an issuer on behalf of the dealer. In such instances, the dealer would need to be in compliance with the provisions of rule G-38, as discussed below.

### **Consultant Agreement**

**8.**

**Q:** Rule G-38 requires dealers to evidence their consulting arrangements in writing. What must be included in this Consultant Agreement?

**A:** The Consultant Agreement must include, at a minimum, the name, company, role and compensation arrangement of each consultant used by the dealer.

**9.**

**Q:** When must the dealer enter into the Consultant Agreement?

**A:** The Consultant Agreement must be entered into before the consultant engages in any direct or indirect communication with an issuer on the dealer's behalf.

**Disclosure to Issuers**

**10.**

**Q:** Does rule G-38 require a dealer to disclose its consulting arrangements to an issuer with which it is engaging or seeking to engage in municipal securities business?

**A:** Yes; such disclosures must be in writing.

**11.**

**Q:** What must be included in these written disclosures to issuers?

**A:** The written disclosures must include, at a minimum, the name, company, role and compensation arrangement with the consultant or consultants.

**12.**

**Q:** When are dealers required to make their written disclosures concerning consultants to issuers?

**A:** The written disclosures must be made prior to the issuer's selection of any dealer in connection with the municipal securities business being sought, regardless of whether the dealer making the disclosure ultimately is the one to obtain or retain that business.

**Disclosure to the Board**

**13.**

**Q:** Are dealers required to submit any reports concerning their consultants to the Board?

**A:** Yes. Dealers must submit to the Board, on a quarterly basis, reports of all consultants used by the dealers. These reports must be submitted on Form G-37/G-38.

**14.**

**Q:** What information concerning consultants must be included on Form G-37/G-38?

**A:** For each consultant, dealers must report, in the prescribed format (refer to Form G-37/G-38), the consultant's name, company, role and compensation arrangement, as well as the dollar amount of any payment made to the consultant during the quarterly reporting period. If any payment made during the reporting period is related to the consultant's efforts on behalf of the dealer which resulted in particular municipal securities business, whether the municipal securities business was completed during that or a prior reporting period, then the dealer must separately identify that business and the dollar amount of the payment.

**15.**

**Q:** If a dealer includes information concerning a particular consultant on a Form G-37/G-38 submission, must the dealer continue to submit information concerning this consultant on subsequent Form G-37/G-38 submissions?

**A:** As long as the dealer continues to use the consultant to obtain or retain municipal securities business (i.e., has a continuing arrangement with the consultant), the dealer must report information concerning such consultant every quarter, whether or not compensation is paid to the consultant during the reporting period.

**16.**

**Q:** What are the due dates for the submission of Form G-37/G-38?

**A:** The quarterly due dates are within 30 calendar days after the end of each calendar quarter (i.e., January 31, April 30, July 31 and October 31).

**17.**

**Q:** Will the Board accept fax transmissions of Form G-37/G-38?

**A:** No. Dealers are required to submit Forms G-37/G-38 to the Board by certified or registered mail, or some other equally prompt means that provides a record of sending.

**18.**

**Q:** Are Forms G-37/G-38 submitted by dealers available to the public for review?

**A:** Yes. These forms are available to the public for inspection and photocopying at the Board's Public Access Facility in Alexandria, Virginia, and for review by the agencies charged with enforcement of Board rules.

**19.**

**Q:** If a dealer has adopted a voluntary ban on political contributions and/or does not use consultants, is the dealer still required to submit a Form G-37/G-38?

**A:** Dealers are required to submit a Form G-37/G-38 to the Board if ANY one of the following occurred: (i) reportable political contributions or payment to political parties were made during the reporting period; (ii) the dealer engaged in municipal securities business (as defined in rule G-37(g)(vii) during the reporting period; or (iii) the dealer used consultant during the reporting period (i.e., new or continuing relationships with consultants). Dealers are not required to submit a Form G-37/G-38 for a reporting period if all three of the following conditions are met for that particular reporting period: (i) there were not reportable political contributions or payments made to political parties; (ii) the dealer did not engage in municipal securities business; and (iii) the dealer did not use consultants.

## **Recordkeeping Requirements**

**20.**

**Q:** What records concerning consultants must dealers maintain?

**A:** Rule G-8, on books and records, requires dealers to maintain: (i) a listing of the name, company, role and compensation arrangement of each consultant; (ii) a copy of each Consultant Agreement referred to in rule G-38(b); (iii) a listing of the compensation paid in connection with each such Consultant Agreement; (iv) where applicable, a listing of the municipal securities business obtained or retained through the activities of each consultant; (v) a listing of issuers and a record of disclosures made to such issuers, pursuant to rule G-38(c), concerning each consultant used by the dealer to obtain or retain municipal securities business with each such issuer; and (vi) the date of termination of any consultant arrangement.

**21.**

**Q:** How long must dealers maintain their records concerning consultants?

**A:** Rule G-9, on preservation of records, requires dealers to maintain their records concerning consultants for a six-year period.]

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### **[ENDNOTE**

<sup>1</sup> "Municipal securities business" as used in rule G-38 has the same meaning as in rule G-37(g)(vii): (i) negotiated underwriting (if the dealer is a manager or syndicate member); (ii) private placement; (iii) the provision of financial advisory

or consultant services to or on behalf of an issuer (on a negotiated bid basis); or  
(iv) the provision of remarketing agent services (on a negotiated bid basis).]

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**[Additional Questions and Answers**

**November 18, 1996**

**Role to be Performed by Consultant**

**1.**

**Q:** Is there specific information concerning the role to be performed by a consultant that a dealer must disclose on Form G-37/G-38?

**A:** The role to be performed by a consultant may be described in general terms on Form G-37/G-38; however, dealers must include the state or geographic area in which the consultant is working on behalf of the dealer.

**Compensation Arrangement, Total Dollar Amount Paid to Consultant During Reporting Period and Dollar Amount Paid to Consultant Connected with Particular Municipal Securities Business**

**2.**

**Q:** When providing the information required to be disclosed on Form G-37/G-38, how should dealers describe the consultant's compensation arrangement?

**A:** Dealers must ensure that the compensation arrangement is clearly described and that it correlates with the information being disclosed concerning the total dollar amount paid to the consultant during the reporting period and the dollar amounts paid in connection with particular municipal securities business.

- For example, if a consultant is paid a monthly retainer, the amount of the monthly retainer must be disclosed and the total dollar amount paid during the reporting period must be reported.
- If a consultant is reimbursed for expenses, the amount of the reimbursed expenses must be disclosed either separately or within the total dollar amount paid for the quarter.
- If a consultant is to be paid a success fee, dealers must disclose how the success fee will be arrived at (e.g., a certain percentage of profits). The sum total of the dollar amounts paid to the consultant in connection with particular municipal securities business should equal the total dollar amount paid to the consultant during the reporting period.
- In addition, if any discretionary bonus or similar payment is made, this amount must be included within the total amount paid for the quarter in which it is paid.

**3.**

**Q:** What information must a dealer disclose on Form G-37/G-38 for the dollar amounts paid to a consultant connected with particular municipal securities business?

**A:** If any payment made during the reporting period is related to a consultant's efforts on behalf of the dealer which resulted in particular municipal securities business, whether the municipal securities business was completed during that or a prior reporting period, then the dealer must separately identify that business and the dollar amount of the payment.

## **Disclosure to Issuers of the Compensation Arrangement with Consultants**

### **4.**

**Q:** Rule G-38 requires a dealer to disclose in writing its consulting arrangements to an issuer with which it is engaging or seeking to engage in municipal securities business and this written disclosure must include, among other things, the compensation arrangement. What is the level of disclosure required to issuers of the compensation arrangement with consultants?

**A:** The written disclosure to issuers of the compensation arrangement must explain the arrangement.

- For example, if a consultant is paid a monthly retainer, the amount of the monthly retainer must be disclosed.
- If a consultant also is reimbursed for expenses, this fact must be noted.
- If a consultant is to be paid a success fee, the dealer must disclose to the issuer how that fee will be arrived at (e.g., a certain percentage of profits).]

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## **[Bank Affiliates and Definition of Payment**

**May 20, 1998**

### **1.**

**Q:** A bank and its employees communicate with an issuer on behalf of an affiliated dealer to obtain municipal securities business for that dealer. In return, the bank and its employees receive certain "credits" from the dealer. These credits, which do not involve any direct or indirect cash payments from the dealer to the bank or its employees, are

used for internal purposes to identify the source of business referrals. Are the credits considered a "payment" under rule G-38 thereby requiring the dealer to designate the bank or its employees as consultants and comply with the requirements of rule G-38?

**A:** Rule G-38 defines a consultant as any person used by a dealer to obtain or retain municipal securities business through direct or indirect communication by such person with an issuer on behalf of the dealer where the communication is undertaken by the person in exchange for, or with the understanding of receiving, **payment** from the dealer or any other person.<sup>[1]</sup> The term payment, as used in rule G-38, means any gift, subscription, loan, advance, or deposit of money or **anything of value**. The absence of an immediate transfer of funds or anything of value to an affiliate or individual employed by the affiliate would not exclude the credits from the definition of payment if such credits eventually (e.g., at the end of the fiscal year) result in compensation to the affiliate or individual employed by the affiliate for referring municipal securities business to the dealer. In this regard, the compensation may be in the form of cash (e.g., a bonus) or non-cash. In either case, if the dealer or any other person<sup>[2]</sup> eventually gives anything of value (e.g., makes a "payment") to the affiliate or individual based, even in part, on the referral, then the affiliate or individual is a consultant for purposes of rule G-38. In this regard, each dealer (bank or securities firm) should determine whether the affiliate or individual employee(s) of the affiliate is its consultant(s), and must then ensure compliance with rule G-38, including the contractual arrangements and disclosures required by the rule. For additional guidance in this area, you may wish to review Q&A

numbers 6 and 7 in the MSRB Manual following rule G-38, as well as Q&A number 4 (dated December 7, 1994) in the MSRB Manual following rule G-37.]

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**[ENDNOTES**

- 1 Municipal finance professionals and any person whose sole basis of compensation is the actual provision of legal, accounting or engineering advice, services or assistance are excepted from the definition of consultant.
  - 2 The Securities Exchange Act of 1934 (the "Act") defines the term "person" as a "natural person, company, government, or political subdivision, agency, or instrumentality of a government." Board rule D-1 provides that unless the context otherwise specifically requires, the terms used in Board rules shall have the same meanings as set forth in the Act.]
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**[Rule G-38 Question and Answer**

**March 4, 1999**

**Agreement to Jointly Seek Underwriting Assignments**

**1.**

**Q:** Dealer Firm A and Dealer Firm B have entered into an agreement to jointly seek underwriting assignments. As part of this agreement, the two dealers have jointly submitted proposals to issuers. Dealer Firm A ultimately is selected to underwrite a negotiated sale of a primary offering of municipal securities (i.e., "municipal securities business" as defined in rule G-37). Dealer Firm B will not act as an underwriter on this

offering but will assist Dealer Firm A in structuring the transaction. Dealer Firm A will compensate Dealer Firm B for the work it provides on the transaction. Is Dealer Firm B a consultant to Dealer Firm A pursuant to rule G-38, on consultants?

**A:** Yes. Dealer Firm B is a consultant to Dealer Firm A because, pursuant to the definition of consultant in rule G-38(a)(i), Dealer Firm B is: (1) used by Dealer Firm A to obtain municipal securities business, (2) through direct or indirect communication with an issuer on behalf of Dealer Firm A, and (3) the communication is undertaken by Dealer Firm B in exchange for, or with the understanding of receiving, payment from Dealer Firm A. Moreover, Dealer Firm B is not exempt from the definition of consultant since it is not a municipal finance professional, and its sole basis of compensation is not the actual provision of legal, accounting or engineering advice, services or assistance. In addition, the Board believes that, even though Dealer Firm B is providing substantive work on the transaction, any dealer used by another dealer (other than a member of the syndicate) to assist in obtaining or retaining municipal securities business is acting as a consultant pursuant to rule G-38.]

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**[Questions and Answers Concerning Information about Consultants' Political Contributions and Payments to State and Local Political Parties**

**March 1, 2000**

**GENERAL REQUIREMENTS OF NEW AMENDMENTS**

**1.**

**Q:** What are the new amendments to rule G-38 about?

**A:** The amendments will require dealers to collect from their consultants, and to disclose to the Board on revised Form G-37/G-38, information regarding certain contributions to issuer officials and certain payments to state and local political parties made by such consultants.

**2.**

**Q:** What political contributions and political party payments are subject to the new reporting requirement?

**A:** This depends upon whether the consultant is an individual or a company. If the consultant is an individual, then the contributions and payments that are covered (to the extent reportable under the rule) are those of (1) that individual and (2) any political action committee controlled by such individual. If the consultant is a company, then the contributions and payments that are covered (to the extent reportable under the rule) are those of (1) that company, (2) any partner, director, officer or employee of such company who communicates with an issuer to obtain municipal securities business on behalf of the dealer, and (3) any political action committee controlled by such company or any of the individuals identified in the immediately preceding clause (2).

**3.**

**Q:** May the dealer enter into a Consultant Agreement with either an individual or a company?

**A:** Yes, provided that the dealer must enter into a Consultant Agreement with the actual party that is serving as the consultant. For example, if the consultant is in effect a company with several employees making actual contact with issuers on the dealer's

behalf, a Consultant Agreement entered into only with one of these employees may not, depending upon all the relevant facts and circumstances, satisfy the requirement that the dealer enter into a Consultant Agreement with the consultant.

**4.**

**Q:** Must a Consultant Agreement include any provisions regarding a consultant's reportable political contributions and reportable political party payments?

**A:** Yes. A dealer is required to include within its Consultant Agreement a provision to the effect that the consultant agrees to provide the dealer each calendar quarter with either (1) a listing of reportable political contributions to official(s) of an issuer and reportable payments to political parties of states and political subdivisions during such quarter, or (2) a report that no reportable political contributions or reportable political party payments were made during such quarter, as appropriate.

**5.**

**Q:** Which contributions to issuer officials made by consultants are reportable under the rule?

**A:** Rule G-38(a)(vi) defines the term "reportable political contribution" to mean, if the consultant has had direct or indirect communication with an issuer on behalf of the dealer to obtain or retain municipal securities business for such dealer, a political contribution to an official(s) of such issuer made by any contributor referred to in rule G-38(b)(i) (see Question and Answer number 2) during the period beginning six months prior to such communication and ending six months after such communication.

6.

**Q:** Which payments to state and local political parties made by consultants are reportable under the rule?

**A:** Rule G-38(a)(vii) defines the term “reportable political party payment” to mean, if a political party of a state or political subdivision operates within the geographic area (*e.g.*, city, county and state parties) of an issuer with which the consultant has had direct or indirect communication to obtain or retain municipal securities business on behalf of the dealer, a payment to such party made by any contributor referred to in rule G-38(b)(i) (see Question and Answer number 2) during the period beginning six months prior to such communication and ending six months after such communication.

7.

**Q:** Is there a *de minimis* exception for the reporting of political contributions and political party payments?

**A:** Yes. The *de minimis* exception for contributions to official(s) of an issuer provides that a consultant need not provide to a dealer information about contributions of the consultant (but only if the consultant is an individual) or by any partner, director, officer or employee of the consultant (if the consultant is a company) who communicates with issuers to obtain municipal securities business on behalf of the dealer made to any official of an issuer for whom such individual is entitled to vote if such individual’s contributions, in total, are not in excess of \$250 to each official of such issuer, per election.

Similarly, the *de minimis* exception for political party payments provides that a consultant need not provide to a dealer information about payments of the consultant to political parties of a state or political subdivision (but only if the consultant is an individual) or by any partner, director, officer or employee of the consultant (if the consultant is a company) who communicates with issuers to obtain municipal securities business on behalf of the dealer and who is entitled to vote in such state or political subdivision if the payments made by the individual, in total, are not in excess of \$250 per political party, per year.

Again, the *de minimis* exception applies only to contributions or payments by individuals. There is no *de minimis* exception for contributions by the consultant if it is a company or for any PAC controlled by the company or individuals covered by the rule.

**8.**

**Q:** If a consultant makes political contributions during a particular quarter but these contributions do not meet the definition of “reportable political contribution” as defined in rule G-38, is the consultant required to report any information about its political contributions to the dealer?

**A:** The consultant is required to report to the dealer that it made no reportable political contributions during the quarter.

**9.**

**Q:** With respect to a particular issuer, if a consultant is communicating with one individual but has made a contribution to a different individual, would the consultant report this contribution to the dealer? For example, if the dealer is seeking municipal

securities business from City A and its consultant communicates with the Mayor of the City, would a non-*de minimis* political contribution to the City's Comptroller (an official of the issuer) have to be reported?

**A:** Yes. A consultant must report and a dealer must disclose contributions with respect to those "issuers" from which a consultant is seeking municipal securities business on behalf of the dealer, regardless of whether contributions are going to and communications are occurring with the same or different personnel within that particular issuer.

**10.**

**Q:** What is the date that establishes the obligation for the collection of reportable political contributions and reportable political party payments?

**A:** The date of the consultant's communication with the issuer to obtain or retain municipal securities business on behalf of the dealer is the key date with respect to determining whether a contribution or payment is reportable. For the quarter in which a consultant first communicates with the issuer, the dealer is required to collect from the consultant its reportable political contributions and reportable political party payments for such quarter and, pursuant to the six-month look-back, for the six-month period preceding such first communication.

**11.**

**Q:** How do the "look-back" and "look-forward" provisions operate?

**A:** Pursuant to the look-back provision, a consultant must disclose to the dealer the reportable political contributions and reportable political party payments made by the consultant during the six months prior to the date of the consultant's communication with

the issuer. These contributions and payments become reportable in the calendar quarter in which the consultant first communicates with the issuer. Of course, any reportable political contributions and reportable political party payments made during the period that the consultant continues to communicate with the issuer are required to be disclosed. Once communication with an issuer ceases, the consultant still must disclose information with respect to reportable political contributions and reportable political party payments made during the ensuing six months pursuant to the look-forward provision.

Contributions and payments made simultaneously with or after the consultant's first communication with the issuer are reportable in the calendar quarter in which they are made.

**12.**

**Q:** When does the requirement cease for a dealer to collect contribution and payment information from its consultants?

**A:** The requirement ceases when a consultant agreement has been terminated. Of course, dealers should not attempt to avoid the requirements of rule G-38 by terminating a consultant relationship after directing or soliciting the consultant to make a political contribution to an issuer official after such termination. Rule G-37(d) prohibits a dealer from doing any act indirectly which would result in a violation of rule G-37 if done directly by the dealer. Thus, a dealer may violate rule G-37 by engaging in municipal securities business with an issuer after directing or soliciting any person to make a contribution to an official of such issuer.

**“REASONABLE EFFORTS” PROVISION**

**13.**

**Q:** What is the reasonable efforts provision contained in rule G-38?

**A:** This provision provides that a dealer will not be found to have violated rule G-38 if the dealer fails to receive from its consultants all required information about reportable political contributions and reportable political party payments and thus fails to report such information to the Board if the dealer can demonstrate that it used reasonable efforts in attempting to obtain the necessary information.

**14.**

**Q:** What must a dealer do to avail itself of the reasonable efforts provision?

**A:** A dealer must: (1) state in the Consultant Agreement that Board rules require disclosure of consultant contributions to issuer officials and payments to state and local political parties; (2) send quarterly reminders to its consultants of the deadline for their submissions to the dealer of contribution and payment information; (3) include language in the Consultant Agreement to the effect that: (a) the Consultant Agreement will be terminated if, for any calendar quarter, the consultant fails to provide the dealer with information about its reportable contributions or payments, or a report noting that the consultant made no reportable contributions or payments, and such failure continues up to the date to be determined by the dealer but no later than the date by which the dealer is required to send Form G-37/G-38 to the Board with respect to the next succeeding calendar quarter, such termination to be effective upon the date the dealer must send its Form G-37/G-38 to the Board, and (b) the dealer may not make any further payments to

the consultant, including payments owed for services performed prior to the date of termination, as of the date of such termination; and (4) enforce the Consultant Agreement provisions described above in a full and timely manner and indicate the reason for and date of the termination on its Form G-37/G-38 for the applicable quarter.

**15.**

**Q:** If a dealer does not include the termination and non-payment provisions in a Consultant Agreement or enforce any such provision that may be contained in the Consultant Agreement, would this constitute a violation of rule G-38?

**A:** No. Failure to follow the requirements of the reasonable efforts provision would not result in a violation of rule G-38; however, the dealer would be precluded from invoking the reasonable efforts provision as a defense against a possible violation for failing to disclose consultant contribution information, which the consultant may have withheld from the dealer. Of course, whether or not a dealer would be charged with a violation of rule G-38 for failure to disclose consultant contribution information would depend upon a review of the facts and circumstances of the individual case by the appropriate regulatory agency.

**DISCLOSURE ON FORM G-37/G-38**

**16.**

**Q:** What information concerning consultants' political contributions and payments to political parties are required to be reported to the Board on Form G-37/G-38?

**A:** Forms G-37/G-38 shall include the following information to the extent required to be obtained for a calendar quarter: (1) the name and title (including any city/county/state or

political subdivision) of each official of an issuer and political party receiving reportable political contributions or reportable political party payments, listed by state, and contribution or payment amounts made and the contributor category; **or** (2) if applicable, a statement that the consultant reported that no reportable political contributions or reportable political party payments were made; **or** (3) if applicable, a statement that the consultant failed to provide any report of information to the dealer concerning reportable political contributions or reportable political party payments.

**17.**

**Q:** Does a dealer have a reporting obligation if a consultant fails to provide a report for a particular quarter?

**A:** Yes. The dealer must disclose on Form G-37/G-38 if the consultant has failed to provide it with a report of its reportable political contributions and reportable political party payments.

**18.**

**Q:** In listing consultants' reportable political contributions and reportable political party payments on Form G-37/G-38, how are the contributors to be identified?

**A:** By contributor category (*i.e.*, company, individual, company controlled PAC or individual controlled PAC).

**19.**

**Q:** How should look-back contributions and payments be disclosed on Form G-37/G-38?

**A:** Dealers must disclose, in addition to the other required information, the calendar quarter and year of any reportable political contributions and reportable political party payments that were made prior to the calendar quarter for which the form is being completed. Look-back contributions and payments should be disclosed on the Form G-37/G-38 for the quarter in which the consultant has first communicated with an issuer to obtain municipal securities business on behalf of the dealer.

## **RECORDKEEPING**

**20.**

**Q:** What records concerning consultants' political contributions and payments to political parties are required to be maintained?

**A:** Rule G-8(a)(xviii) requires a dealer to maintain: (1) records of each reportable political contribution, (2) records of each reportable political party payment, (3) records indicating, if applicable, that a consultant made no reportable political contributions or no reportable political party payments, and (4) a statement, if applicable, that a consultant failed to provide any report of information to the dealer concerning reportable political contributions or reportable political party payments.

## **EFFECTIVE DATE OF REQUIREMENTS CONCERNING CONSULTANTS' POLITICAL CONTRIBUTIONS AND PAYMENTS TO STATE AND LOCAL POLITICAL PARTIES**

**21.**

**Q:** What is the effective date of the amendments to rule G-38 concerning the disclosure of consultants' reportable political contributions and reportable political party payments?

**A:** The amendments will become effective on April 1, 2000. On the Forms G-37/G-38 for the second quarter of 2000 (required to be sent to the Board by July 31, 2000) dealers are required to disclose their consultants' reportable political contributions and reportable political party payments for the second quarter of 2000 and include, if applicable, reportable political contributions and reportable political party payments made since October 1, 1999 pursuant to the six-month look-back provision.]

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**[Questions and Answers: Rule G-38**

**February 25, 2004**

**1.**

**Q:** Pursuant to Rule G-38, what information is a dealer required to disclose regarding money paid to its consultants?

**A:** Rule G-38 requires that dealers disclose information relating to money paid to consultants in three separate areas on Form G-37/G-38. These disclosures relate to the consultant's compensation arrangement, dollar amounts paid to the consultant in connection with specific municipal securities business, and the total dollar amount paid to the consultant during the reporting period.

Dealers should describe their consultants' "compensation arrangements" clearly and with as much specificity as possible. The arrangement should correlate with the information reported on the form concerning the "total dollar amount paid" to the consultant during the reporting period. It is not sufficient to disclose a compensation arrangement in vague or generalized terms, such as "a monthly retainer not related to any

specific transaction,” “a percentage of net revenues received for transactions with xyz issuer,” or “a percentage of management fees and takedown from specified transactions.” Dealers must report information on their consultants' compensation arrangements with specificity, for example, by providing the dollar amount of the monthly retainer or the numeric formulations used to calculate compensation. Dealers should also provide the dollar amount or numeric formulations used to calculate success fees, discretionary bonuses, and similar payments made or to be made to consultants. For example, it is not sufficient to report that a discretionary bonus or success fee will be “equal to a percentage of the net investment banking fees received on certain transactions.” Rather, the dealer should disclose the fee or payment as a *specific* (numeric) percentage of profits.

Dealers also are required to disclose on Form G-37/G-38 information relating to “municipal securities business obtained or retained” by the consultant. This section of the form requires the dealer to list each item of business separately and, if applicable, to indicate the dollar amount paid to the consultant in connection with each item of municipal securities business listed. Dealers are reminded to list the relevant municipal securities business obtained or retained in this section of Form G-37/G-38 even if payments were not paid to the consultant in connection with the listed municipal securities business during that quarter.

Finally, dealers are required to disclose on Form G-37/G-38 information relating to “total dollar amounts paid to the consultant during the reporting period.” The dealer must report the cumulative total of *all* payments made to its consultant during the particular quarter. Such payments include compensation paid for that quarter (including reimbursed

expenses) and the total dollar amounts paid, if any, in connection with particular municipal securities business (including discretionary bonuses, success fees or similar payments). The dealer also should report any payments made to its consultant even if such payments were *not* made in connection with a particular item of municipal securities business.

For additional guidance in this area, please review Q&A number 2 (dated November 18, 1996) in the MSRB Rule Book following Rule G-38; this Q&A can also be found on the MSRB's website at <http://www.msrb.org/msrb1/rules/notg38.htm>.

**2.**

**Q:** If a consultant obtains municipal securities business in one quarter, and the dealer pays the consultant in connection with that business during a subsequent quarter, how should the dealer disclose this information on its Form G-37/G-38?

**A:** The dealer should disclose on its Form G-37/G-38 in the “municipal securities business obtained or retained” section the municipal securities business obtained or retained by its consultant during the relevant quarter whether or not payments connected with that business were made during that quarter. If the dealer subsequently makes a payment to the consultant in connection with that particular business, the dealer should disclose that payment in the “municipal securities business obtained or retained” section for the quarter in which such payment was made and should indicate in this section that the business was previously disclosed and the quarter for which it was disclosed (*e.g.*, second quarter 2003). For additional guidance, please review Q&A number 14 (dated

February 28, 1996) in the MSRB Rule Book following Rule G-38; this Q&A can also be found on the MSRB's website at <http://www.msrb.org/msrb1/rules/notg38.htm>.

**3.**

**Q:** If a dealer has a continuing relationship with a consultant, is the dealer required to list the consultant on its Form G-37/G-38 for each quarterly reporting period even if the dealer did not pay the consultant any compensation and/or the consultant did not undertake any affirmative efforts on behalf of the dealer to obtain or retain municipal securities business during that quarter?

**A:** Yes, the dealer must continue to list the consultant and disclose the required consultant information for each quarterly reporting period during which there is a continuing relationship even if the consultant received no compensation or other payment from the dealer, and even if the consultant did not undertake any affirmative efforts on behalf of the dealer to obtain or retain municipal securities business.

**4.**

**Q:** Under the section of Form G-37/G-38 entitled "Role to be Performed by Consultant," is a dealer required to list the geographic area or areas where the consultant is working on the dealer's behalf?

**A:** Yes, the dealer must specifically list each state or geographic area where the consultant is working on behalf of the dealer. For additional guidance in this area, please review Q&A number 1 (dated November 18, 1996) in the MSRB Rule Book following Rule G-38; this Q&A can also be found on the MSRB's website at <http://www.msrb.org/msrb1/rules/notg38.htm>.]

\* \* \* \* \*

**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**

On August 29, 2005, new Rule G-38, on solicitation of municipal securities business, became effective, superseding former Rule G-38 on consultants.<sup>3</sup> The MSRB had previously published a number of Q&A interpretations on the former rule, none of which continue to apply to new Rule G-38 since the consultant provisions to which they relate are no longer in effect. Accordingly, the MSRB is deleting all obsolete Rule G-38 Qs&As.<sup>4</sup> In addition, the MSRB is deleting three Qs&As and partially deleting a fourth

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<sup>3</sup> SEC Release No. 34-52278 (August 17, 2005); 70 FR 49342 (August 23, 2005).

<sup>4</sup> All Q&A interpretations under former Rule G-38 relating to consultants are being withdrawn, other than the Q&A interpretation published on June 6, 2001 entitled “Bank Affiliates: Individuals as Municipal Finance Professionals or Consultants,” which also provides guidance under Rule G-37. *See* Exchange Act Release No. 44459 (June 20, 2001), 66 FR 34501 (June 28, 2001). The portions of this Q&A relating to former Rule G-38 no longer apply.

Q&A under Rule G-37 relating to the definition of solicitation of municipal securities business (the “Rule G-37 solicitation Qs&As”).<sup>5</sup>

In December 2005, the Commission published for comment the MSRB’s proposed interpretive notice on the definition of “solicitation” under Rules G-37 and G-38 (the “Solicitation Notice”).<sup>6</sup> Among other things, the Solicitation Notice incorporated, by means of footnote 2 thereof and the text accompanying such footnote, guidance on the meaning of solicitation under Rule G-37 previously provided in the Rule G-37 solicitation Qs&As. The Commission received one comment letter in response to the Solicitation Notice.<sup>7</sup> The commentator supported the Solicitation Notice but suggested that the MSRB withdraw all of its prior published Q&A guidance regarding the definition of solicitation of municipal securities business in order to avoid potential conflicts between such prior Q&A guidance and the Solicitation Notice.<sup>8</sup>

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<sup>5</sup> The three deleted Rule G-37 solicitation Qs&As are published as Qs&As IV.10, IV.11 and IV.13 in *MSRB Rule Book* (January 1, 2006). In addition, the last sentence of Q&A IV.18, published in *MSRB Rule Book* (January 1, 2006), is deleted.

<sup>6</sup> SEC Release No. 34-52948 (December 13, 2005); 70 FR 75514 (December 20, 2005).

<sup>7</sup> See Letter from Leslie M. Norwood, Vice President and Assistant General Counsel, The Bond Market Association, to Jonathan G. Katz, Commission Secretary, dated January 10, 2006.

<sup>8</sup> The commentator stated that, in certain respects, the guidance on solicitation and related matters provided in the Solicitation Notice may not be wholly consistent with guidance previously provided by the MSRB and that such prior guidance should be withdrawn. The MSRB addresses this and other statements and concerns in the companion filing to this filing. See Amendment No. 2 (March 17, 2006) to File No. SR-MSRB-2005-11 (June 8, 2005).

The MSRB believes that it would be appropriate to consolidate its guidance on the definition of solicitation for purposes of Rules G-37 and G-38 by amending its Solicitation Notice and simultaneously deleting (1) the Rule G-37 solicitation Qs&As, and (2) all obsolete Rule G-38 Q&A guidance relating to consultants. Thus, in addition to the Q&A deletions which are the subject of this filing, the MSRB has submitted to the Commission a companion filing consisting of an amendment to the Solicitation Notice that would delete footnote 2 in the Solicitation Notice, which contains references to the Rule G-37 solicitation Qs&As, and would instead insert the substantive language of those Qs&As into the text of the Solicitation Notice.<sup>9</sup> Thus, the language of the Rule G-37 solicitation Qs&As which had previously been incorporated by reference would now be explicitly included within the Solicitation Notice. The amendment to the Solicitation Notice and the withdrawal of the Rule G-37 solicitation Qs&As and obsolete Rule G-38 Qs&As do not effect a substantive change in the MSRB's guidance on the definition of solicitation as set forth in the Solicitation Notice.

## **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 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.

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<sup>9</sup> See Amendment No. 2 (March 17, 2006) to File No. SR-MSRB-2005-11 (June 8, 2005).

The MSRB believes that the proposed rule change is consistent with these provisions in that 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 result in any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

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

Written comments were neither solicited nor received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The MSRB requests that the Commission find good cause, pursuant to Section 19(b)(2) of the Act, for approving the proposed rule change prior to the thirtieth day after publication of the notice of filing in the Federal Register. The MSRB believes that the Commission has good cause for granting accelerated approval of the proposed rule change because it will avoid the potential for confusion by dealers by deleting obsolete interpretive guidance, as well as consolidating existing guidance, concerning the definition of solicitation. The MSRB also requests that the Commission approve this proposed rule change simultaneously with SR-MSRB-2005-11.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments 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](mailto:rule-comments@sec.gov). Please include File Number SR-MSRB-2006-01 on the subject line.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-MSRB-2006-01. 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 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, 100 F Street, N.E.,

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-2006-01 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.<sup>10</sup>

Nancy M. Morris  
Secretary

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<sup>10</sup> 17 CFR 200.30-3(a)(12).

## **EXHIBIT 5**

### **Questions and Answers Concerning Political Contributions and Prohibitions on Municipal Securities Business: Rule G-37<sup>1</sup>**

**December 7, 1994**

**[Q:** What constitutes "solicitation" of municipal securities business?

**A:** Solicitation activities may include, but are not limited to, responding to issuer Requests for Proposals, making presentations of public finance and/or municipal securities marketing capabilities to issuer officials, and engaging in other activities calculated to appeal to issuer officials for municipal securities business, or which effectively do so.]

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**December 7, 1994**

**[Q:** Has a "solicitation" occurred if a retail sales person receives a "finder's fee" for bringing municipal securities business to the dealer?

**A:** If a retail sales person receives a "finder's fee" for bringing municipal securities business to the dealer, then there should be a presumption that the sales person solicited municipal business from an issuer official. In such situations, the sales person becomes a municipal finance professional and any contributions made by that person to an issuer official may subject the dealer to the two-year prohibition on business with that issuer.]

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**March 22, 1995**

**[Q:** Any associated person who solicits municipal securities business is deemed a municipal finance professional under Rule G-37. The Board previously noted that "solicitation" may encompass a number of activities, including, for example, making presentations of public finance and/or municipal securities marketing capabilities to issuer officials, and engaging in other activities calculated to appeal to issuer officials for municipal securities business, or which effectively do so. If an associated person of a dealer attends a presentation by dealer personnel of public finance capabilities, would this also constitute "solicitation" under Rule G-37?

**A:** Yes. If an associated person of a dealer attends such a presentation, then he or she is assumed to have solicited municipal securities business and therefore is deemed a municipal finance

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<sup>1</sup> Brackets indicate deleted language.

professional under Rule G-37. Accordingly, any contributions given to issuer officials by that person within the last two years could subject the dealer to the rule's two-year prohibition on business with such issuers.]

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**September 9, 1997, revised October 30, 2003**

**Q:** In making the determination of which associated persons of a dealer meet the definitions of municipal finance professional and non-MFP executive officer, is it correct to designate all the executives of the dealer (*e.g.*, President, Executive Vice Presidents) under the category of non-MFP executive officers?

**A:** No. In making the determination of whether someone is a municipal finance professional or non-MFP executive officer, one must review the activities of the individual and not his or her title. Rule G-37(g)(iv) defines the term “municipal finance professional” as:

(A) any associated person primarily engaged in municipal securities representative activities, as defined in Rule G-3(a)(i), provided, however, that sales activities with natural persons shall not be considered to be municipal securities representative activities for purposes of this subparagraph (A);

(B) any associated person who solicits municipal securities business, as defined in paragraph (vii);

(C) any associated person who is both (i) a municipal securities principal or a municipal securities sales principal and (ii) a supervisor of any persons described in subparagraphs (A) or (B);

(D) any associated person who is a supervisor of any person described in subparagraph (C) up through and including, in the case of a broker, dealer or municipal securities dealer other than a bank dealer, the Chief Executive Officer or similarly situated official and, in the case of a bank dealer, the officer or officers designated by the board of directors of the bank as responsible for the day-to-day conduct of the bank’s municipal securities dealer activities, as required pursuant to Rule G-1(a); or

(E) any associated person who is a member of the broker, dealer or municipal securities dealer (or, in the case of a bank dealer, the separately identifiable department or division of the bank, as defined in Rule G-1) executive or management committee or similarly situated officials, if any; provided, however, that, if the only associated persons meeting the definition of municipal finance professional are those described in this subparagraph (E), the broker, dealer or

municipal securities dealer shall be deemed to have no municipal finance professionals.

Rule G-37(g)(v) defines the term “non-MFP executive officer” as:

an associated person in charge of a principal business unit, division or function or any other person who performs similar policy making functions for the broker, dealer or municipal securities dealer (or, in the case of a bank dealer, the separately identifiable department or division of the bank, as defined in Rule G-1), *but does not include any municipal finance professional*, as defined in paragraph (iv) of this section (g); provided, however, that, if no associated person of the broker, dealer or municipal securities dealer meets the definition of municipal finance professional, the broker, dealer or municipal securities dealer shall be deemed to have no non-MFP executive officers. {emphasis added}

Dealers should first review the activities of their associated persons to determine whether they are municipal finance professionals, and then, once that list of individuals has been established, conduct a review of the remaining associated persons to determine whether they are non-MFP executive officers. Dealers should pay close attention to those associated persons who are soliciting municipal securities business and, thus, will be considered municipal finance professionals. [The Board has previously stated that solicitation activities may include, but are not limited to, responding to issuer Requests for Proposals, making presentations of public finance and/or municipal marketing capabilities to issuer officials, and engaging in other activities calculated to appeal to issuer officials for municipal securities business, or which effectively do so.]

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**[Rule G-38 Questions and Answers**

**February 28, 1996**

**Consultants**

**1.**

**Q:** Who is considered a "consultant" pursuant to rule G-38?

**A:** Rule G-38(a)(i) defines "consultant" as any person used by a dealer to obtain or retain municipal securities business<sup>1</sup> through direct or indirect communication by such person with an issuer on behalf of such dealer where the communication is undertaken by such person in exchange for, or with the understanding of receiving, payment from the dealer or any other person. The definition specifically excludes "municipal finance professionals" of the dealer, as

that term is defined in rule G-37(g)(iv), because such individuals are covered by the requirements of rule G-37. The definition also excludes any person whose sole basis of compensation from the dealer is the actual provision of legal, accounting or engineering advice, services or assistance in connection with the municipal securities business that the dealer is seeking to obtain or retain.

**2.**

**Q:** What are examples of persons who would be excluded from the definition of consultant for providing legal, accounting or engineering advice, services or assistance to a dealer in connection with municipal securities business?

**A:** The exclusion would apply, for example, to a lawyer retained to conduct a legal analysis on a particular transaction contemplated by the dealer, or to review local regulations; an accountant retained to conduct a tax analysis or to scrutinize financial reports; or an engineer retained to perform a technical review or feasibility study. The exemption is intended to ensure that professionals who are engaged by the dealer solely to perform substantive work in connection with municipal securities business are not brought within the definition of consultant as long as their compensation is in consideration of only those professional services actually provided in connection with such municipal securities business.

**3.**

**Q:** Would an attorney hired by a dealer to conduct a legal analysis on a transaction being contemplated by the dealer and then subsequently paid a finder's fee by the dealer for bringing that municipal securities business to the dealer be considered a consultant?

**A:** Yes, any attorney or other professional used by the dealer as a "finder" for municipal securities business is considered a consultant pursuant to rule G-38.

**4.**

**Q:** Does the definition of consultant also encompass third parties who initiate contact with dealers to offer their services in obtaining or retaining municipal securities business through direct or indirect communication by such person with an issuer official?

**A:** Yes. The definition of consultant in rule G-38 does not distinguish between instances in which the dealer initiates contact with a third party to act as a consultant and instances in which the third party initiates contact.

5.

**Q:** Does the definition of consultant encompass a lobbyist hired by the dealer if the only activity the lobbyist engages in on behalf of the dealer is to lobby state legislators for legislation which grants issuers authority to issue certain types of municipal securities?

**A:** No, however, if the lobbyist is also used by the dealer to obtain or retain municipal securities business through direct or indirect communication with an issuer on the dealer's behalf where the communication is undertaken for payment from the dealer or any other person, then the lobbyist would meet the definition of consultant.

6.

**Q:** If an affiliated company of a bank introduces one of its customers (a municipal issuer) to the bank's dealer department for purposes of engaging in municipal securities business, and the dealer pays the affiliated company for this activity, would the affiliated company be a "consultant" under rule G-38?

**A:** Any person used by a dealer as a "finder" for municipal securities business would be considered a consultant under rule G-38. In this example, if the affiliated company is used by the bank dealer to obtain or retain municipal securities business through direct or indirect communication by the affiliated company with the issuer on the dealer's behalf, and the affiliated company does so with the understanding of receiving payment from the dealer, then the affiliated company would be a consultant.

7.

**Q:** Does the definition of consultant encompass a person retained by an affiliate or parent of a dealer if any portion of that person's activity relates to efforts to obtain municipal securities business for the dealer?

**A:** Yes, because the definition of consultant includes those who receive payment from the dealer or "any other person" for use in obtaining or retaining municipal securities business through communication with an issuer on behalf of the dealer. In such instances, the dealer would need to be in compliance with the provisions of rule G-38, as discussed below.

### **Consultant Agreement**

8.

**Q:** Rule G-38 requires dealers to evidence their consulting arrangements in writing. What must be included in this Consultant Agreement?

**A:** The Consultant Agreement must include, at a minimum, the name, company, role and compensation arrangement of each consultant used by the dealer.

**9.**

**Q:** When must the dealer enter into the Consultant Agreement?

**A:** The Consultant Agreement must be entered into before the consultant engages in any direct or indirect communication with an issuer on the dealer's behalf.

### **Disclosure to Issuers**

**10.**

**Q:** Does rule G-38 require a dealer to disclose its consulting arrangements to an issuer with which it is engaging or seeking to engage in municipal securities business?

**A:** Yes; such disclosures must be in writing.

**11.**

**Q:** What must be included in these written disclosures to issuers?

**A:** The written disclosures must include, at a minimum, the name, company, role and compensation arrangement with the consultant or consultants.

**12.**

**Q:** When are dealers required to make their written disclosures concerning consultants to issuers?

**A:** The written disclosures must be made prior to the issuer's selection of any dealer in connection with the municipal securities business being sought, regardless of whether the dealer making the disclosure ultimately is the one to obtain or retain that business.

### **Disclosure to the Board**

**13.**

**Q:** Are dealers required to submit any reports concerning their consultants to the Board?

**A:** Yes. Dealers must submit to the Board, on a quarterly basis, reports of all consultants used by the dealers. These reports must be submitted on Form G-37/G-38.

**14.**

**Q:** What information concerning consultants must be included on Form G-37/G-38?

**A:** For each consultant, dealers must report, in the prescribed format (refer to Form G-37/G-38), the consultant's name, company, role and compensation arrangement, as well as the dollar amount of any payment made to the consultant during the quarterly reporting period. If any payment made during the reporting period is related to the consultant's efforts on behalf of the dealer which resulted in particular municipal securities business, whether the municipal securities business was completed during that or a prior reporting period, then the dealer must separately identify that business and the dollar amount of the payment.

**15.**

**Q:** If a dealer includes information concerning a particular consultant on a Form G-37/G-38 submission, must the dealer continue to submit information concerning this consultant on subsequent Form G-37/G-38 submissions?

**A:** As long as the dealer continues to use the consultant to obtain or retain municipal securities business (i.e., has a continuing arrangement with the consultant), the dealer must report information concerning such consultant every quarter, whether or not compensation is paid to the consultant during the reporting period.

**16.**

**Q:** What are the due dates for the submission of Form G- 37/G-38?

**A:** The quarterly due dates are within 30 calendar days after the end of each calendar quarter (i.e., January 31, April 30, July 31 and October 31).

**17.**

**Q:** Will the Board accept fax transmissions of Form G-37/G-38?

**A:** No. Dealers are required to submit Forms G-37/G-38 to the Board by certified or registered mail, or some other equally prompt means that provides a record of sending.

**18.**

**Q:** Are Forms G-37/G-38 submitted by dealers available to the public for review?

**A:** Yes. These forms are available to the public for inspection and photocopying at the Board's Public Access Facility in Alexandria, Virginia, and for review by the agencies charged with enforcement of Board rules.

**19.**

**Q:** If a dealer has adopted a voluntary ban on political contributions and/or does not use consultants, is the dealer still required to submit a Form G-37/G-38?

**A:** Dealers are required to submit a Form G-37/G-38 to the Board if ANY one of the following occurred: (i) reportable political contributions or payment to political parties were made during the reporting period; (ii) the dealer engaged in municipal securities business (as defined in rule G-37(g)(vii) during the reporting period; or (iii) the dealer used consultant during the reporting period (i.e., new or continuing relationships with consultants). Dealers are not required to submit a Form G-37/G-38 for a reporting period if all three of the following conditions are met for that particular reporting period: (i) there were not reportable political contributions or payments made to political parties; (ii) the dealer did not engage in municipal securities business; and (iii) the dealer did not use consultants.

### **Recordkeeping Requirements**

**20.**

**Q:** What records concerning consultants must dealers maintain?

**A:** Rule G-8, on books and records, requires dealers to maintain: (i) a listing of the name, company, role and compensation arrangement of each consultant; (ii) a copy of each Consultant Agreement referred to in rule G-38(b); (iii) a listing of the compensation paid in connection with each such Consultant Agreement; (iv) where applicable, a listing of the municipal securities business obtained or retained through the activities of each consultant; (v) a listing of issuers and a record of disclosures made to such issuers, pursuant to rule G-38(c), concerning each consultant used by the dealer to obtain or retain municipal securities business with each such issuer; and (vi) the date of termination of any consultant arrangement.

**21.**

**Q:** How long must dealers maintain their records concerning consultants?

**A:** Rule G-9, on preservation of records, requires dealers to maintain their records concerning consultants for a six-year period.]

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**[ENDNOTE**

- <sup>1</sup> "Municipal securities business" as used in rule G-38 has the same meaning as in rule G-37(g)(vii): (i) negotiated underwriting (if the dealer is a manager or syndicate member); (ii) private placement; (iii) the provision of financial advisory or consultant services to or on behalf of an issuer (on a negotiated bid basis); or (iv) the provision of remarketing agent services (on a negotiated bid basis).]
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**[Additional Questions and Answers**

**November 18, 1996**

**Role to be Performed by Consultant**

**1.**

**Q:** Is there specific information concerning the role to be performed by a consultant that a dealer must disclose on Form G-37/G-38?

**A:** The role to be performed by a consultant may be described in general terms on Form G-37/G-38; however, dealers must include the state or geographic area in which the consultant is working on behalf of the dealer.

**Compensation Arrangement, Total Dollar Amount Paid to Consultant During Reporting Period and Dollar Amount Paid to Consultant Connected with Particular Municipal Securities Business**

**2.**

**Q:** When providing the information required to be disclosed on Form G-37/G-38, how should dealers describe the consultant's compensation arrangement?

**A:** Dealers must ensure that the compensation arrangement is clearly described and that it correlates with the information being disclosed concerning the total dollar amount paid to the consultant during the reporting period and the dollar amounts paid in connection with particular municipal securities business.

- For example, if a consultant is paid a monthly retainer, the amount of the monthly retainer must be disclosed and the total dollar amount paid during the reporting period must be reported.

- If a consultant is reimbursed for expenses, the amount of the reimbursed expenses must be disclosed either separately or within the total dollar amount paid for the quarter.
- If a consultant is to be paid a success fee, dealers must disclose how the success fee will be arrived at (e.g., a certain percentage of profits). The sum total of the dollar amounts paid to the consultant in connection with particular municipal securities business should equal the total dollar amount paid to the consultant during the reporting period.
- In addition, if any discretionary bonus or similar payment is made, this amount must be included within the total amount paid for the quarter in which it is paid.

**3.**

**Q:** What information must a dealer disclose on Form G-37/G-38 for the dollar amounts paid to a consultant connected with particular municipal securities business?

**A:** If any payment made during the reporting period is related to a consultant's efforts on behalf of the dealer which resulted in particular municipal securities business, whether the municipal securities business was completed during that or a prior reporting period, then the dealer must separately identify that business and the dollar amount of the payment.

**Disclosure to Issuers of the Compensation Arrangement with Consultants**

**4.**

**Q:** Rule G-38 requires a dealer to disclose in writing its consulting arrangements to an issuer with which it is engaging or seeking to engage in municipal securities business and this written disclosure must include, among other things, the compensation arrangement. What is the level of disclosure required to issuers of the compensation arrangement with consultants?

**A:** The written disclosure to issuers of the compensation arrangement must explain the arrangement.

- For example, if a consultant is paid a monthly retainer, the amount of the monthly retainer must be disclosed.
  - If a consultant also is reimbursed for expenses, this fact must be noted.
  - If a consultant is to be paid a success fee, the dealer must disclose to the issuer how that fee will be arrived at (e.g., a certain percentage of profits).]
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## [Bank Affiliates and Definition of Payment

May 20, 1998

1.

**Q:** A bank and its employees communicate with an issuer on behalf of an affiliated dealer to obtain municipal securities business for that dealer. In return, the bank and its employees receive certain "credits" from the dealer. These credits, which do not involve any direct or indirect cash payments from the dealer to the bank or its employees, are used for internal purposes to identify the source of business referrals. Are the credits considered a "payment" under rule G-38 thereby requiring the dealer to designate the bank or its employees as consultants and comply with the requirements of rule G-38?

**A:** Rule G-38 defines a consultant as any person used by a dealer to obtain or retain municipal securities business through direct or indirect communication by such person with an issuer on behalf of the dealer where the communication is undertaken by the person in exchange for, or with the understanding of receiving, **payment** from the dealer or any other person.<sup>[1]</sup> The term payment, as used in rule G-38, means any gift, subscription, loan, advance, or deposit of money or **anything of value**. The absence of an immediate transfer of funds or anything of value to an affiliate or individual employed by the affiliate would not exclude the credits from the definition of payment if such credits eventually (e.g., at the end of the fiscal year) result in compensation to the affiliate or individual employed by the affiliate for referring municipal securities business to the dealer. In this regard, the compensation may be in the form of cash (e.g., a bonus) or non-cash. In either case, if the dealer or any other person<sup>[2]</sup> eventually gives anything of value (e.g., makes a "payment") to the affiliate or individual based, even in part, on the referral, then the affiliate or individual is a consultant for purposes of rule G-38. In this regard, each dealer (bank or securities firm) should determine whether the affiliate or individual employee(s) of the affiliate is its consultant(s), and must then ensure compliance with rule G-38, including the contractual arrangements and disclosures required by the rule. For additional guidance in this area, you may wish to review Q&A numbers 6 and 7 in the MSRB Manual following rule G-38, as well as Q&A number 4 (dated December 7, 1994) in the MSRB Manual following rule G-37.]

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## [ENDNOTES

- 1 Municipal finance professionals and any person whose sole basis of compensation is the actual provision of legal, accounting or engineering advice, services or assistance are excepted from the definition of consultant.
- 2 The Securities Exchange Act of 1934 (the "Act") defines the term "person" as a "natural person, company, government, or political subdivision, agency, or instrumentality of a government." Board rule D-1 provides that unless the context otherwise specifically

requires, the terms used in Board rules shall have the same meanings as set forth in the Act.]

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**[Rule G-38 Question and Answer**

**March 4, 1999**

**Agreement to Jointly Seek Underwriting Assignments**

**1.**

**Q:** Dealer Firm A and Dealer Firm B have entered into an agreement to jointly seek underwriting assignments. As part of this agreement, the two dealers have jointly submitted proposals to issuers. Dealer Firm A ultimately is selected to underwrite a negotiated sale of a primary offering of municipal securities (i.e., "municipal securities business" as defined in rule G-37). Dealer Firm B will not act as an underwriter on this offering but will assist Dealer Firm A in structuring the transaction. Dealer Firm A will compensate Dealer Firm B for the work it provides on the transaction. Is Dealer Firm B a consultant to Dealer Firm A pursuant to rule G-38, on consultants?

**A:** Yes. Dealer Firm B is a consultant to Dealer Firm A because, pursuant to the definition of consultant in rule G-38(a)(i), Dealer Firm B is: (1) used by Dealer Firm A to obtain municipal securities business, (2) through direct or indirect communication with an issuer on behalf of Dealer Firm A, and (3) the communication is undertaken by Dealer Firm B in exchange for, or with the understanding of receiving, payment from Dealer Firm A. Moreover, Dealer Firm B is not exempt from the definition of consultant since it is not a municipal finance professional, and its sole basis of compensation is not the actual provision of legal, accounting or engineering advice, services or assistance. In addition, the Board believes that, even though Dealer Firm B is providing substantive work on the transaction, any dealer used by another dealer (other than a member of the syndicate) to assist in obtaining or retaining municipal securities business is acting as a consultant pursuant to rule G-38.]

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**[Questions and Answers Concerning Information about Consultants' Political Contributions and Payments to State and Local Political Parties**

**March 1, 2000**

**GENERAL REQUIREMENTS OF NEW AMENDMENTS**

**1.**

**Q:** What are the new amendments to rule G-38 about?

**A:** The amendments will require dealers to collect from their consultants, and to disclose to the Board on revised Form G-37/G-38, information regarding certain contributions to issuer officials and certain payments to state and local political parties made by such consultants.

**2.**

**Q:** What political contributions and political party payments are subject to the new reporting requirement?

**A:** This depends upon whether the consultant is an individual or a company. If the consultant is an individual, then the contributions and payments that are covered (to the extent reportable under the rule) are those of (1) that individual and (2) any political action committee controlled by such individual. If the consultant is a company, then the contributions and payments that are covered (to the extent reportable under the rule) are those of (1) that company, (2) any partner, director, officer or employee of such company who communicates with an issuer to obtain municipal securities business on behalf of the dealer, and (3) any political action committee controlled by such company or any of the individuals identified in the immediately preceding clause (2).

**3.**

**Q:** May the dealer enter into a Consultant Agreement with either an individual or a company?

**A:** Yes, provided that the dealer must enter into a Consultant Agreement with the actual party that is serving as the consultant. For example, if the consultant is in effect a company with several employees making actual contact with issuers on the dealer's behalf, a Consultant Agreement entered into only with one of these employees may not, depending upon all the relevant facts and circumstances, satisfy the requirement that the dealer enter into a Consultant Agreement with the consultant.

4.

**Q:** Must a Consultant Agreement include any provisions regarding a consultant's reportable political contributions and reportable political party payments?

**A:** Yes. A dealer is required to include within its Consultant Agreement a provision to the effect that the consultant agrees to provide the dealer each calendar quarter with either (1) a listing of reportable political contributions to official(s) of an issuer and reportable payments to political parties of states and political subdivisions during such quarter, or (2) a report that no reportable political contributions or reportable political party payments were made during such quarter, as appropriate.

5.

**Q:** Which contributions to issuer officials made by consultants are reportable under the rule?

**A:** Rule G-38(a)(vi) defines the term "reportable political contribution" to mean, if the consultant has had direct or indirect communication with an issuer on behalf of the dealer to obtain or retain municipal securities business for such dealer, a political contribution to an official(s) of such issuer made by any contributor referred to in rule G-38(b)(i) (see Question and Answer number 2) during the period beginning six months prior to such communication and ending six months after such communication.

6.

**Q:** Which payments to state and local political parties made by consultants are reportable under the rule?

**A:** Rule G-38(a)(vii) defines the term "reportable political party payment" to mean, if a political party of a state or political subdivision operates within the geographic area (*e.g.*, city, county and state parties) of an issuer with which the consultant has had direct or indirect communication to obtain or retain municipal securities business on behalf of the dealer, a payment to such party made by any contributor referred to in rule G-38(b)(i) (see Question and Answer number 2) during the period beginning six months prior to such communication and ending six months after such communication.

7.

**Q:** Is there a *de minimis* exception for the reporting of political contributions and political party payments?

**A:** Yes. The *de minimis* exception for contributions to official(s) of an issuer provides that a consultant need not provide to a dealer information about contributions of the consultant (but

only if the consultant is an individual) or by any partner, director, officer or employee of the consultant (if the consultant is a company) who communicates with issuers to obtain municipal securities business on behalf of the dealer made to any official of an issuer for whom such individual is entitled to vote if such individual's contributions, in total, are not in excess of \$250 to each official of such issuer, per election.

Similarly, the *de minimis* exception for political party payments provides that a consultant need not provide to a dealer information about payments of the consultant to political parties of a state or political subdivision (but only if the consultant is an individual) or by any partner, director, officer or employee of the consultant (if the consultant is a company) who communicates with issuers to obtain municipal securities business on behalf of the dealer and who is entitled to vote in such state or political subdivision if the payments made by the individual, in total, are not in excess of \$250 per political party, per year.

Again, the *de minimis* exception applies only to contributions or payments by individuals. There is no *de minimis* exception for contributions by the consultant if it is a company or for any PAC controlled by the company or individuals covered by the rule.

**8.**

**Q:** If a consultant makes political contributions during a particular quarter but these contributions do not meet the definition of "reportable political contribution" as defined in rule G-38, is the consultant required to report any information about its political contributions to the dealer?

**A:** The consultant is required to report to the dealer that it made no reportable political contributions during the quarter.

**9.**

**Q:** With respect to a particular issuer, if a consultant is communicating with one individual but has made a contribution to a different individual, would the consultant report this contribution to the dealer? For example, if the dealer is seeking municipal securities business from City A and its consultant communicates with the Mayor of the City, would a non-*de minimis* political contribution to the City's Comptroller (an official of the issuer) have to be reported?

**A:** Yes. A consultant must report and a dealer must disclose contributions with respect to those "issuers" from which a consultant is seeking municipal securities business on behalf of the dealer, regardless of whether contributions are going to and communications are occurring with the same or different personnel within that particular issuer.

**10.**

**Q:** What is the date that establishes the obligation for the collection of reportable political contributions and reportable political party payments?

**A:** The date of the consultant's communication with the issuer to obtain or retain municipal securities business on behalf of the dealer is the key date with respect to determining whether a contribution or payment is reportable. For the quarter in which a consultant first communicates with the issuer, the dealer is required to collect from the consultant its reportable political contributions and reportable political party payments for such quarter and, pursuant to the six-month look-back, for the six-month period preceding such first communication.

**11.**

**Q:** How do the "look-back" and "look-forward" provisions operate?

**A:** Pursuant to the look-back provision, a consultant must disclose to the dealer the reportable political contributions and reportable political party payments made by the consultant during the six months prior to the date of the consultant's communication with the issuer. These contributions and payments become reportable in the calendar quarter in which the consultant first communicates with the issuer. Of course, any reportable political contributions and reportable political party payments made during the period that the consultant continues to communicate with the issuer are required to be disclosed. Once communication with an issuer ceases, the consultant still must disclose information with respect to reportable political contributions and reportable political party payments made during the ensuing six months pursuant to the look-forward provision. Contributions and payments made simultaneously with or after the consultant's first communication with the issuer are reportable in the calendar quarter in which they are made.

**12.**

**Q:** When does the requirement cease for a dealer to collect contribution and payment information from its consultants?

**A:** The requirement ceases when a consultant agreement has been terminated. Of course, dealers should not attempt to avoid the requirements of rule G-38 by terminating a consultant relationship after directing or soliciting the consultant to make a political contribution to an issuer official after such termination. Rule G-37(d) prohibits a dealer from doing any act indirectly which would result in a violation of rule G-37 if done directly by the dealer. Thus, a dealer may violate rule G-37 by engaging in municipal securities business with an issuer after directing or soliciting any person to make a contribution to an official of such issuer.

## **“REASONABLE EFFORTS” PROVISION**

**13.**

**Q:** What is the reasonable efforts provision contained in rule G-38?

**A:** This provision provides that a dealer will not be found to have violated rule G-38 if the dealer fails to receive from its consultants all required information about reportable political contributions and reportable political party payments and thus fails to report such information to the Board if the dealer can demonstrate that it used reasonable efforts in attempting to obtain the necessary information.

**14.**

**Q:** What must a dealer do to avail itself of the reasonable efforts provision?

**A:** A dealer must: (1) state in the Consultant Agreement that Board rules require disclosure of consultant contributions to issuer officials and payments to state and local political parties; (2) send quarterly reminders to its consultants of the deadline for their submissions to the dealer of contribution and payment information; (3) include language in the Consultant Agreement to the effect that: (a) the Consultant Agreement will be terminated if, for any calendar quarter, the consultant fails to provide the dealer with information about its reportable contributions or payments, or a report noting that the consultant made no reportable contributions or payments, and such failure continues up to the date to be determined by the dealer but no later than the date by which the dealer is required to send Form G-37/G-38 to the Board with respect to the next succeeding calendar quarter, such termination to be effective upon the date the dealer must send its Form G-37/G-38 to the Board, and (b) the dealer may not make any further payments to the consultant, including payments owed for services performed prior to the date of termination, as of the date of such termination; and (4) enforce the Consultant Agreement provisions described above in a full and timely manner and indicate the reason for and date of the termination on its Form G-37/G-38 for the applicable quarter.

**15.**

**Q:** If a dealer does not include the termination and non-payment provisions in a Consultant Agreement or enforce any such provision that may be contained in the Consultant Agreement, would this constitute a violation of rule G-38?

**A:** No. Failure to follow the requirements of the reasonable efforts provision would not result in a violation of rule G-38; however, the dealer would be precluded from invoking the reasonable efforts provision as a defense against a possible violation for failing to disclose consultant contribution information, which the consultant may have withheld from the dealer. Of course, whether or not a dealer would be charged with a violation of rule G-38 for failure to disclose

consultant contribution information would depend upon a review of the facts and circumstances of the individual case by the appropriate regulatory agency.

#### **DISCLOSURE ON FORM G-37/G-38**

#### **16.**

**Q:** What information concerning consultants' political contributions and payments to political parties are required to be reported to the Board on Form G-37/G-38?

**A:** Forms G-37/G-38 shall include the following information to the extent required to be obtained for a calendar quarter: (1) the name and title (including any city/county/state or political subdivision) of each official of an issuer and political party receiving reportable political contributions or reportable political party payments, listed by state, and contribution or payment amounts made and the contributor category; **or** (2) if applicable, a statement that the consultant reported that no reportable political contributions or reportable political party payments were made; **or** (3) if applicable, a statement that the consultant failed to provide any report of information to the dealer concerning reportable political contributions or reportable political party payments.

#### **17.**

**Q:** Does a dealer have a reporting obligation if a consultant fails to provide a report for a particular quarter?

**A:** Yes. The dealer must disclose on Form G-37/G-38 if the consultant has failed to provide it with a report of its reportable political contributions and reportable political party payments.

#### **18.**

**Q:** In listing consultants' reportable political contributions and reportable political party payments on Form G-37/G-38, how are the contributors to be identified?

**A:** By contributor category (*i.e.*, company, individual, company controlled PAC or individual controlled PAC).

#### **19.**

**Q:** How should look-back contributions and payments be disclosed on Form G-37/G-38?

**A:** Dealers must disclose, in addition to the other required information, the calendar quarter and year of any reportable political contributions and reportable political party payments that were made prior to the calendar quarter for which the form is being completed. Look-back

contributions and payments should be disclosed on the Form G-37/G-38 for the quarter in which the consultant has first communicated with an issuer to obtain municipal securities business on behalf of the dealer.

## **RECORDKEEPING**

### **20.**

**Q:** What records concerning consultants' political contributions and payments to political parties are required to be maintained?

**A:** Rule G-8(a)(xviii) requires a dealer to maintain: (1) records of each reportable political contribution, (2) records of each reportable political party payment, (3) records indicating, if applicable, that a consultant made no reportable political contributions or no reportable political party payments, and (4) a statement, if applicable, that a consultant failed to provide any report of information to the dealer concerning reportable political contributions or reportable political party payments.

## **EFFECTIVE DATE OF REQUIREMENTS CONCERNING CONSULTANTS' POLITICAL CONTRIBUTIONS AND PAYMENTS TO STATE AND LOCAL POLITICAL PARTIES**

### **21.**

**Q:** What is the effective date of the amendments to rule G-38 concerning the disclosure of consultants' reportable political contributions and reportable political party payments?

**A:** The amendments will become effective on April 1, 2000. On the Forms G-37/G-38 for the second quarter of 2000 (required to be sent to the Board by July 31, 2000) dealers are required to disclose their consultants' reportable political contributions and reportable political party payments for the second quarter of 2000 and include, if applicable, reportable political contributions and reportable political party payments made since October 1, 1999 pursuant to the six-month look-back provision.]

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## [Questions and Answers: Rule G-38

February 25, 2004

1.

**Q:** Pursuant to Rule G-38, what information is a dealer required to disclose regarding money paid to its consultants?

**A:** Rule G-38 requires that dealers disclose information relating to money paid to consultants in three separate areas on Form G-37/G-38. These disclosures relate to the consultant's compensation arrangement, dollar amounts paid to the consultant in connection with specific municipal securities business, and the total dollar amount paid to the consultant during the reporting period.

Dealers should describe their consultants' "compensation arrangements" clearly and with as much specificity as possible. The arrangement should correlate with the information reported on the form concerning the "total dollar amount paid" to the consultant during the reporting period. It is not sufficient to disclose a compensation arrangement in vague or generalized terms, such as "a monthly retainer not related to any specific transaction," "a percentage of net revenues received for transactions with xyz issuer," or "a percentage of management fees and takedown from specified transactions." Dealers must report information on their consultants' compensation arrangements with specificity, for example, by providing the dollar amount of the monthly retainer or the numeric formulations used to calculate compensation. Dealers should also provide the dollar amount or numeric formulations used to calculate success fees, discretionary bonuses, and similar payments made or to be made to consultants. For example, it is not sufficient to report that a discretionary bonus or success fee will be "equal to a percentage of the net investment banking fees received on certain transactions." Rather, the dealer should disclose the fee or payment as a *specific* (numeric) percentage of profits.

Dealers also are required to disclose on Form G-37/G-38 information relating to "municipal securities business obtained or retained" by the consultant. This section of the form requires the dealer to list each item of business separately and, if applicable, to indicate the dollar amount paid to the consultant in connection with each item of municipal securities business listed. Dealers are reminded to list the relevant municipal securities business obtained or retained in this section of Form G-37/G-38 even if payments were not paid to the consultant in connection with the listed municipal securities business during that quarter.

Finally, dealers are required to disclose on Form G-37/G-38 information relating to "total dollar amounts paid to the consultant during the reporting period." The dealer must report the cumulative total of *all* payments made to its consultant during the particular quarter. Such payments include compensation paid for that quarter (including reimbursed expenses) and the total dollar amounts paid, if any, in connection with particular municipal securities business

(including discretionary bonuses, success fees or similar payments). The dealer also should report any payments made to its consultant even if such payments were *not* made in connection with a particular item of municipal securities business.

For additional guidance in this area, please review Q&A number 2 (dated November 18, 1996) in the MSRB Rule Book following Rule G-38; this Q&A can also be found on the MSRB's website at <http://www.msrb.org/msrb1/rules/notg38.htm>.

**2.**

**Q:** If a consultant obtains municipal securities business in one quarter, and the dealer pays the consultant in connection with that business during a subsequent quarter, how should the dealer disclose this information on its Form G-37/G-38?

**A:** The dealer should disclose on its Form G-37/G-38 in the “municipal securities business obtained or retained” section the municipal securities business obtained or retained by its consultant during the relevant quarter whether or not payments connected with that business were made during that quarter. If the dealer subsequently makes a payment to the consultant in connection with that particular business, the dealer should disclose that payment in the “municipal securities business obtained or retained” section for the quarter in which such payment was made and should indicate in this section that the business was previously disclosed and the quarter for which it was disclosed (*e.g.*, second quarter 2003). For additional guidance, please review Q&A number 14 (dated February 28, 1996) in the MSRB Rule Book following Rule G-38; this Q&A can also be found on the MSRB's website at <http://www.msrb.org/msrb1/rules/notg38.htm>.

**3.**

**Q:** If a dealer has a continuing relationship with a consultant, is the dealer required to list the consultant on its Form G-37/G-38 for each quarterly reporting period even if the dealer did not pay the consultant any compensation and/or the consultant did not undertake any affirmative efforts on behalf of the dealer to obtain or retain municipal securities business during that quarter?

**A:** Yes, the dealer must continue to list the consultant and disclose the required consultant information for each quarterly reporting period during which there is a continuing relationship even if the consultant received no compensation or other payment from the dealer, and even if the consultant did not undertake any affirmative efforts on behalf of the dealer to obtain or retain municipal securities business.

**4.**

**Q:** Under the section of Form G-37/G-38 entitled “Role to be Performed by Consultant,” is a dealer required to list the geographic area or areas where the consultant is working on the dealer's behalf?

**A:** Yes, the dealer must specifically list each state or geographic area where the consultant is working on behalf of the dealer. For additional guidance in this area, please review Q&A number 1 (dated November 18, 1996) in the MSRB Rule Book following Rule G-38; this Q&A can also be found on the MSRB's website at <http://www.msrb.org/msrb1/rules/notg38.htm>.]