LEWIS YOUNG
ROBERTSON & BURNINGHAM, INC.
AN INDEPENDENT MUNICIPAL FINANCIAL ADVISORY
AND CONSULTING FIRM

Via E-Mail [CommentLetters@msrb.org]
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA 22314

April 11, 2011

Re: MSRB Notice 2011-14, Request for Comment on Draft MSRB Rule G-36 and Draft Interpretative Notice

Ladies and Gentlemen:

Lewis Young Robertson & Burningham ("LYRB") is pleased to submit comments on the above-referenced Notice.

LYRB is an independent financial advisory firm which has elected, since its inception 15 years ago, to be regulated as a broker dealer and, therefore, has been and remains subject to MSRB regulation. We are now also registered as a municipal advisor with the Securities and Exchange Commission and the MSRB pursuant to Rule 15Ba2-6T of the Commission.

LYRB does not underwrite or purchase securities for our own account or for sale to others nor do we carry customer accounts of any kind. We do not participate as a co-manager or member of selling groups and do not act as a remarketing agent. For the year 2010, we were ranked by The Bond Buyer as the number two financial advisor in the State of Utah, measured by volume. LYRB has acted as financial advisor on hundreds of transactions with a volume of well over $5 billion. These transactions run the gamut from small to large, and include general obligation bonds, various types of revenue and tax backed bonds, revenue and bond anticipation notes, and taxable and tax-exempt (including Build America Bonds) bonds in both fixed rate and variable rate structures.

Proposed Rule G-36 imposes a general fiduciary duty connected with the services provided to a municipal entity by a municipal advisor, with specific attention to a duty of loyalty and a duty of care. While we have always and do presently acknowledge the fiduciary duty we owe our financial advisory clients, we are concerned with some aspects of the basic approach taken in the proposed rule and the draft interpretive notice.

As to the rule text itself, we recommend the deletion of the phrase ", which shall include a duty of loyalty and a duty of care". There is a substantial body of state and federal law on the duties of fiduciaries. While the duties of loyalty and care are important aspects of the overall duties they are by no means the only duties.

As to the draft interpretive notice, we offer the following for your consideration:

First, we recommend that the "Conflicts of Interest" material beginning "The following are examples…" and ending prior to "Informed Consent" be deleted. The matters discussed are largely subsumed in the chief paragraph and, to the extent they are not, are best moved or left out altogether. In particular, we note that the third party compensation matters discussed under "Unmanageable Conflicts" and listed as the first three items in the material we suggest be deleted are almost always problematic and should be considered unwaiveable. This might be addressed under its own separate heading, rather than

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as a part of Conflicts of Interest. Further, the reference to "other…relationships that might impair the municipal advisor's ability to act only in the best interests of its…client" is both vague and overbroad. Without further definition, the term "relationships" can be construed narrowly or expansively, and can result in entirely appropriate relationships being open to second guessing by persons in hindsight. Actual engagements are concrete, clear and measurable. Personal, past, or other "relationships" should only need to be disclosed when the advisor reasonably feels its judgment may be clouded. Otherwise, very real risks are run of not being sufficiently comprehensive in a conflict disclosure communication or, more to the point, of including in the disclosure so many cautionary items that matters of real concern are lost in the "chatter" of the overbroad disclosure. There is also a concern that this reference to "relationships" may require a standard considerably higher than that applicable to attorneys. We cannot believe this is intended or desirable.

The provisions relating to disclosure of conflicts in forms of compensation is a solution in search of a problem. While the method and amount of compensation, together with conditions, if any, should be disclosed in writing, the material in Appendix A is unnecessary and its inclusion in the rule gives it an importance it does not merit, thus detracting from the gravity the rest of the subject matter and purpose of the rule. Most municipal entities will find the statements that most forms of compensation have embedded conflicts of interest to be confusing at best.

Second, as to the duty of care, the first paragraph is sufficient. While the references to qualifications and consideration of alternatives are interesting, mention of these, while leaving unmentioned the many other aspects of the general fiduciary duty and the more specific duty of care, unbalances the implications of the general duty.

Other objections exist to the language under "Duty of Inquiry". The first sentence is a mere truism. The second should be governed by the language of the certificate, showing the scope of inquiry, if any, made.

The final sentence under "Duty of Inquiry" is misplaced entirely. The use of the phrase "due diligence" appears to impose the duty of an underwriter (who acts for investors) on a financial advisor (who acts for an issuer, and only advises in a secondary role to the issuer, as principal, as regards to its disclosure duties). The imposition of such a duty on a financial advisor is not only inconsistent with its basic role and its fiduciary duty to its client, but is unnecessarily duplicative of the responsibilities of an underwriter. This adds unnecessarily to the expense of an already complex process. A municipal advisor's duty of care must run to the issuer (and in this context may include advice such as urging retention of disclosure counsel if no reputable underwriter's counsel is involved or explanation of the issuer's disclosure duties), not to investors. The phrase "due diligence" in the context of the securities law is a term of art applicable solely to underwriters and not to issuers and their agents. Under the general fiduciary duty, the responsibility of a municipal advisor in connection with the disclosure process would include an explanation of the disclosure obligations of the issuer and/or obligated person, recommendations as to the structuring and contents of the disclosure document and the retention of experienced counsel to assist in the disclosure process.

Sincerely,

Lewis Young Robertson & Burningham, Inc.

Scott J. Robertson
Principal