OMB APPROVAL	
OMB Number:	3235-0045
Expires:	June 30, 2007
Estimated average burden hours per response	38

Page 1 of 176

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

File No. SR - 2005 - 11
Amendment No.

Proposed Rule Change by Municipal Securities Rulemaking Board

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

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

Pilot ☐

Extension of Time Period for Commission Action ☐

Date Expires

Rule

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

Exhibit 2 Sent As Paper Document ☑

Exhibit 3 Sent As Paper Document ☐

Description

Provide a brief description of the proposed rule change (limit 250 characters).

Proposed rule change consisting of an interpretive notice relating to the definition of solicitation for purposes of MSRB Rule G-37, on political contributions and prohibitions on municipal securities business, and Rule G-38, on solicitation of 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: Ernesto Last Name: Lanza
Title: Senior Associate General Counsel
E-mail: elanza@msrb.org
Telephone: (703) 797-6600 Fax: (703) 797-6700

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: 06/08/2005

By: Ernesto A. Lanza
(Name)

Senior Associate General Counsel
(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.

Ernesto A. Lanza, elanza@msrb.org

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

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

Form 19b-4 Information

Add Remove View

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

Add Remove View

Exhibit Sent As Paper Document

☑

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit 3 - Form, Report, or Questionnaire

Add Remove View

Exhibit Sent As Paper Document

☐

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit 4 - Marked Copies

Add Remove View

The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

Add Remove View

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

Add Remove View

If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of Proposed Rule Change

(a) The Municipal Securities Rulemaking Board (the "MSRB") is hereby filing with the Securities and Exchange Commission (the "Commission") a proposed rule change (the "proposed rule change") consisting of an interpretive notice relating to the definition of solicitation for purposes of Rules G-37 and G-38. The MSRB proposes that the proposed rule change be made effective on the same date as the effective date of File No. SR-MSRB-2005-04 ("revised Rule G-38"). The proposed rule change is as follows:

INTERPRETIVE NOTICE ON THE DEFINITION OF SOLICITATION UNDER RULES G-37 AND G-38

Revised Rule G-38, on solicitation of municipal securities business, recently adopted by the Municipal Securities Rulemaking Board ("MSRB") defines "solicitation" as any direct or indirect communication with an issuer for the purpose of obtaining or retaining municipal securities business. This definition is important for purposes of determining whether payments made by a broker, dealer or municipal securities dealer ("dealer") to persons who are not affiliated persons of the dealer would be prohibited under revised Rule G-38.[1] In addition, the definition is central to determining whether communications by dealer personnel would result in such personnel being considered municipal finance professionals ("MFPs") of the dealer for purposes of Rule G-37. This notice provides interpretive guidance relating to the status of certain types of communications as solicitations for purposes of Rules G-37 and G-38.

Intent

The concept of solicitation under Rules G-37 and G-38 includes the element of intent in that the communication must have a purpose of obtaining municipal securities business. The determination of whether a particular communication is a solicitation is dependent upon the specific facts and circumstances relating to such communication. The examples described below are illustrative and are not the only instances in which a solicitation may be deemed to have or have not occurred.

Limited Communications with Issuer Representative

If an issuer representative asks an affiliated person of a dealer whether the dealer has municipal securities capabilities, such affiliated person generally would not be viewed as having solicited municipal securities business if he or she provides a limited affirmative response, together with either providing the issuer representative with contact information for an MFP of the dealer or informing the issuer representative that dealer personnel who handle municipal

---

[1] The term "affiliated person" is defined in revised Rule G-38(b)(ii).

securities business will contact him or her. Similarly, if an issuer representative is discussing governmental cash flow management issues with an affiliated person of a dealer who concludes, in his or her professional judgment, that an appropriate means of addressing the issuer's needs may be through an issue of municipal securities, the affiliated person generally would not be viewed as having solicited business if he or she provides a limited communication to the issuer representative that such alternative may be appropriate, together with either providing the issuer representative with contact information for an MFP or informing the issuer representative that dealer personnel who handle municipal securities business will contact him or her.

In the examples above, if the affiliated person receives compensation such as a finder's or referral fee for such business or if the affiliated person engages in other activities that could be deemed a solicitation with respect to such business (for example, attending presentations of the dealer's municipal finance capabilities or responding to a request for proposals), the affiliated person generally would be viewed as having solicited the municipal securities business.[2]

Promotional Communication

The MSRB understands that an affiliated person of a dealer may provide information to potential clients and others regarding the general capabilities of the dealer through either oral or written communications. Any such communication that is not made with the purpose of obtaining or retaining municipal securities business would not be considered a solicitation. Thus, depending upon the specific facts and circumstances, a communication that merely lists the significant business lines of a dealer without further descriptive information and which does not give the dealer's municipal securities practice a place of prominence within such listing generally would not be considered a solicitation unless the facts and circumstances indicate that it was aimed at obtaining or retaining municipal securities business. To the extent that a communication, such as a dealer brochure or other promotional materials, contains more than a mere listing of business lines, such as brief descriptions of each business line (including its municipal securities capabilities), determining whether such communication is a solicitation depends upon whether the facts and circumstances indicate that it was undertaken for the purpose of obtaining or retaining municipal securities business. The nature of the information provided and the manner in which it is presented are relevant factors to consider. Although no single factor is necessarily controlling in determining intent, the following considerations, among others, may often be relevant: (i) whether the municipal securities practice is the only business line included in the communication that would reasonably be of interest to an issuer representative; (ii) whether the portions of the communication describing the dealer's municipal securities capabilities are designed to garner more attention than other portions describing different business lines; (iii) whether the communication contains quantitative or qualitative information on the nature or extent of the dealer's municipal securities capabilities that is

---

[2] *See* Rule G-37 Questions and Answers IV.10-13, *reprinted in* MSRB Rule Book.

promotional in nature (*e.g.*, quantitative or qualitative rankings, claims of expertise, identification of specific transactions, language associated with "puffery," etc.); and (iv) whether the dealer is currently seeking to obtain or retain municipal securities business from the issuer.

Work-Related Communications

Communications that are incidental to undertaking tasks to complete municipal securities business for which the dealer has already been engaged generally would not be solicitations. For example, if a dealer has engaged an independent contractor as a cash flow consultant to provide expert services on a negotiated underwriting for which the dealer has already been selected and the contractor communicates with the issuer on cash flow matters relevant to the financing, such communication would not be a solicitation under revised Rule G-38. Similarly, if a dealer has already been selected to serve as the underwriter for an airport financing and a non-MFP affiliated person of the dealer who normally works on airline corporate matters is used to provide his or her expertise to complete the financing, communications in this regard by the affiliated person with the issuer would not be a solicitation under revised Rule G-38. In addition, the fact that the work product of persons such as those described above may be used by MFPs of the dealer in their solicitation activities would not make the producer of the work product a solicitor unless such person personally presents his or her work to the issuer in connection with soliciting the municipal securities business.

Communications with Conduit Borrowers

The MSRB understands that dealers often work closely with private entities on their capital and other financing needs. In many cases, this work may evolve into a conduit borrowing through a conduit issuer. Although the ultimate obligor on such a financing is the private entity, if the dealer acts as underwriter for a financing undertaken through a conduit issuer on other than a competitive bid basis, it is engaging in municipal securities business for purposes of Rule G-37. The selection of the underwriter for such a financing frequently is made by the conduit borrower. While in many cases conduit issuers have either formal procedures or an informal historical practice of accepting the dealer selected by the conduit borrower, some conduit issuers may set minimum standards that dealers must meet to qualify to underwrite a conduit issue, and other conduit issuers may have a slate of dealers selected by the conduit issuer from which the conduit borrower chooses the underwriter for its issue. Still other conduit issuers may defer to the conduit borrower's selection of lead underwriter but may require the underwriting syndicate to include additional dealers selected by the issuer or selected by the conduit borrower from a slate of issuer-approved underwriters, often with the purpose of ensuring participation by local dealers or historically disadvantaged dealers. A smaller number of conduit issuers retain more significant control over which dealers act as underwriters, either by making the selection for the conduit borrower or by considering the conduit borrower's selection to be merely a suggestion which in some cases the conduit issuer does not follow. However, in virtually all cases, the conduit issuer will maintain ultimate power to control which dealer underwrites a conduit issue

since the conduit issuer has discretion to withhold its agreement to issue the securities through any particular dealer.

From a literal perspective, any communication by a dealer with a conduit borrower that is intended to cause the borrower to select the dealer to serve as underwriter for a conduit issue could be considered a solicitation of municipal securities business. This is because the conduit borrower eventually communicates its selection of the dealer to act as underwriter to the conduit issuer for approval. This series of communications would, by its terms, constitute an indirect communication by the dealer through the conduit borrower to the conduit issuer with the intent of obtaining municipal securities business.

However, the MSRB believes that a dealer's communication with a conduit borrower generally should not be deemed an indirect solicitation of the issuer unless a reasonable nexus can be established between the making of contributions to officials of the conduit issuer within the meaning of Rule G-37 and the selection of the underwriter for such conduit financing. A determination of whether such a reasonable and material nexus could exist depends on the specific facts and circumstances.

Further, if an affiliated person of a dealer who is providing investment banking services and corporate financing advice to a private company concludes, in his or her professional judgment, that an appropriate financing alternative may be a conduit financing, a limited communication to the company by the affiliated person that such financing alternative may be appropriate, together with the provision to the company of contact information for an MFP of the dealer, generally would not be presumed to be a solicitation. Alternatively, the affiliated person could inform the company that dealer personnel who handle municipal securities business will contact it. In addition, if a dealer has already been selected by the conduit borrower to serve as the underwriter for a conduit financing and a non-MFP affiliated person of the dealer communicates with the conduit borrower in furtherance of the financing, such communications by the affiliated person would not be a solicitation under revised Rule G-38.

Communications by Joint Venturers and Other Professionals

So long as non-affiliated persons providing legal, accounting, engineering or other professional services in connection with specific municipal securities business are not being paid directly or indirectly for their solicitation activities (*i.e.*, they are paid solely for their provision of legal, accounting, engineering or other professional services with respect to the business), they would not become subject to revised draft Rule G-38. Similarly, in the case of joint ventures created by a dealer with other professionals seeking to engage in municipal securities business, so long as the members of the joint venture are making good faith efforts to be engaged to undertake bona fide roles in the business, the MSRB would view any communications by a member of the joint venture with the issuer as being made on its own behalf and not on behalf of the dealer. However, if payments are being made by or on behalf of the dealer to such other professionals separate from the payments they may receive for actual professional services

rendered in connection with an issue, their communications with the issuer could be considered solicitations on behalf of the dealer.

* * * * * * * * *

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was adopted by the MSRB at its May 11-12, 2005 meeting. Questions concerning this filing may be directed to Ernesto A. Lanza, Senior Associate 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**

The MSRB has recently filed with the Commission revised Rule G-38, which will prohibit dealers from making direct or indirect payments to any person who is not an affiliated person[3] of the dealer for a solicitation of municipal securities business[4] on behalf of the dealer. The proposed rule change provides interpretive guidance on the definition of "solicitation" as used in revised Rule G-38 and in Rule G-37, on political contributions and prohibitions of municipal securities business. This definition is important for purposes of determining whether dealer payments to non-affiliated persons of the dealer would be prohibited under revised Rule G-38. In addition, the definition is central to determining whether communications by dealer personnel would result in such personnel being considered municipal finance professionals of the dealer for purposes of Rule G-37. The proposed rule change makes clear that intent is a necessary element in determining whether a communication is a solicitation and provides

---

[3] Revised Rule G-38(b)(ii) generally defines an affiliated person of a dealer as an employee or other personnel of the dealer or of an affiliated company of the dealer.

[4] Municipal securities business is defined in Rule G-37 as the purchase of a primary offering from the issuer on other than a competitive bid basis (*e.g.*, negotiated underwriting), the offer or sale of a primary offering on behalf of an issuer (*e.g.*, private placement or offering of municipal fund securities), and the provision of financial advisory, consultant or remarketing agent services to an issuer for a primary offering in which the dealer was chosen on other than a competitive bid basis.

guidance on communications with issuer representatives, promotional communications, work-related communications, communications with conduit borrowers, and communications by joint venturers and other professionals.

(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 that 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

The MSRB published notices for comment on draft amendments to Rule G-38 on April 5, 2004 (the "April 2004 Notice")[5] and September 29, 2004 (the "September 2004 Notice").[6] The April 2004 Notice sought comments on draft amendments limiting payments by a dealer for the solicitation of municipal securities business on its behalf solely to its associated persons, and

---

5 *See* MSRB Notice 2004-11 (April 5, 2004).

6 *See* MSRB Notice 2004-32 (September 29, 2004), as modified by MSRB Notice 2004-33 (October 12, 2004).

also provided certain guidance on the definition of solicitation. The MSRB received comments from 28 commentators, eight of which provided comments on the definition of solicitation.[7] The September 2004 Notice sought comments on revised draft amendments to Rule G-38 prohibiting a dealer from making payments for the solicitation of municipal securities business on its behalf to any person who is not an associated person of the dealer. The September 2004 Notice also provided more detailed guidance on the definition of solicitation. The MSRB received comments from 19 commentators, five of which provided comments on the definition of solicitation.[8] The comments received on the April and September 2004 Notices relating to the definition of solicitation are discussed below.[9]

Communications with Conduit Borrowers

In the April 2004 Notice, the MSRB asked whether a communication with a conduit borrower to hire a dealer as an underwriter for a private activity bond issue where the issuer ultimately must approve the underwriter for the issue should be considered an indirect communication with the issuer. In the September 2004 Notice, the MSRB stated that, from a literal perspective, any communication by a dealer with a conduit borrower intended to cause the

---

7 Letters commenting on the definition of solicitation consisted of letters from Jerry L. Chapman ("Mr. Chapman"), to Ernesto A. Lanza, Senior Associate General Counsel, MSRB, dated April 22, 2004; Maud Daudon, Managing Director, Investment Banking, and John Rose, President & CEO, Seattle-Northwest Securities Corporation ("Seattle-Northwest") to Christopher A. Taylor, MSRB Executive Director, dated May 19, 2004; Gordon Reis III, Managing Principal, Seasongood & Mayer, LLC ("Seasongood") to Mr. Taylor, dated May 20, 2004; Bruce Moland, Vice President & Assistant General Counsel, Wells Fargo & Company ("Wells Fargo"), to Mr. Lanza dated June 2, 2004; Sarah A. Miller, General Counsel, ABA Securities Association ("ABASA"), to Mr. Lanza dated June 4, 2004; Lynette Kelly Hotchkiss, Senior Vice President and Associate General Counsel, Bond Market Association ("BMA"), to Mr. Lanza dated June 4, 2004; Robyn A. Huffman, Vice President and Associate General Counsel, Goldman Sachs & Co. ("Goldman"), to Mr. Lanza dated June 4, 2004; and James S. Keller, Chief Regulatory Counsel, PNC Capital Markets, Inc. ("PNC"), to Mr. Lanza dated June 4, 2004.

8 Letters commenting on the definition of solicitation consisted of letters from Ms. Daudon and Mr. Rose, Seattle-Northwest, to Mr. Lanza dated December 13, 2004; Mr. Moland, Wells Fargo, to Mr. Lanza dated December 15, 2004; Ms. Hotchkiss, BMA, to Mr. Lanza dated December 15, 2004; Ms. Huffman, Goldman, to Mr. Lanza dated December 15, 2004; and Ms. Miller, ABASA, to Mr. Lanza dated December 17, 2004.

9 The remaining comments received on the April and September 2004 Notices were discussed in SR-MSRB-2005-04. *See* Exchange Act Release No. 34-51561.

borrower to select the dealer to serve as underwriter for a conduit issue could be considered a solicitation of municipal securities business. This is because the conduit borrower eventually communicates its selection of the dealer to the conduit issuer for approval, with the result that this series of communications becomes an indirect communication by the dealer through the conduit borrower to the conduit issuer with the intent of obtaining municipal securities business. However, if the dealer can establish that no reasonable nexus could exist between the making of contributions to officials of the conduit issuer and the selection of the underwriter for such conduit financing, then a communication with the borrower would be deemed not to be a solicitation for purposes of revised Rule G-38. For example, if a conduit issuer historically defers to its conduit borrowers' selections of underwriters without influencing the selection, communications with the conduit borrower to obtain the underwriting assignment would not be treated as a solicitation, even if that communication is relayed by the conduit borrower to the conduit issuer.

Comments Received. Several commentators stated that communications with conduit borrowers should not be considered solicitations, or that the circumstances under which they are so considered should be narrowly drawn. ABASA, BMA, PNC and Wells Fargo stated that communications with conduit borrowers generally should not be considered solicitations, whereas Mr. Chapman stated that communications should be treated as solicitations. The ABA noted that, in conduit financings, typically a complete package (including the underwriter) is presented to the selected conduit issuer, with the issuer either accepting or rejecting the package. BMA stated that in a conduit deal, if an employee is only communicating with a private obligor and not with the issuer, then there is no possibility that a contribution made by that employee to an official of such issuer would influence the underwriter selection process. ABASA and Wells Fargo asked, in the alternative, that the MSRB provide more specific guidance on what would cause a communication to be a solicitation.

ABASA and BMA characterized the MSRB's guidance in the September 2004 Notice as creating a presumption that a communication with a conduit borrower is a solicitation which can be rebutted only under narrowly drawn circumstances. They also observed that many communications with conduit borrowers occur before the identity of the issuer has been determined. As a result, they suggested that a dealer often cannot know if a communication with a conduit borrower might later be considered a solicitation since the dealer does not know if the issuer ultimately used will meet the requirements for rebutting the presumption that a communication with the borrower is a solicitation.

MSRB Response. The MSRB believes that ABASA and BMA incorrectly implied that the only way for a dealer to rebut the presumption that a communication with a conduit borrower is a solicitation is by establishing that a conduit issuer historically defers to its conduit borrowers' selections of underwriters. The September 2004 Notice provided that a communication would not be considered a solicitation if there is no reasonable nexus between the making of contributions to officials of a conduit issuer and the selection of the underwriter

for a conduit financing. The method mentioned by ABASA and BMA was simply one example of how a dealer could establish that there was no such reasonable nexus.

Nonetheless, the MSRB agrees that a dealer's communication with a conduit borrower generally should not be deemed an indirect solicitation of the issuer unless a reasonable and material nexus can be established between the making of contributions to officials of the conduit issuer within the meaning of Rule G-37 and the selection of the underwriter for such conduit financing. A determination of whether such a reasonable and material nexus could exist depends on the specific facts and circumstances. The proposed rule change reflects this position.

Inform and Refer

In the April 2004 Notice, the MSRB noted that, where an issuer representative asks an associated person of a dealer whether the dealer has municipal securities capabilities, a limited affirmative response by the associated person, together with the provision to the issuer representative of contact information for dealer personnel who handle municipal securities business, generally would not be presumed to be a solicitation by such associated person. In the September 2004 Notice, the MSRB provided further elaboration and additional examples, noting in particular that the associated person could have an MFP of the dealer contact the issuer representative directly in response to such an inquiry. In both notices, the MSRB stated that, if the associated person receives compensation such as a finder's or referral fee for such business, the associated person generally would be viewed as having solicited the business.

Comments Received. In response to the April 2004 Notice, ABASA stated that, in a bank holding company, bankers should be free to inform issuers that affiliated dealers have municipal securities capabilities and provide contact information without such communication being deemed a solicitation. PNC stated that the draft amendment would "negatively impact the ability of affiliated companies to conduct banking business and make referrals. It would require dealers to disassemble the structures and controls that have been created to address requirements of the rule."

ABASA appreciated the clarification of the "inform and refer" concept provided in the September 2004 Notice. However, ABASA continued to object that the MSRB viewed the receipt of a finder's fee or referral fee as causing a communication to be considered a solicitation. ABASA stated that this would significantly add to the regulatory burden of bank dealers and, at a minimum, the MSRB should exempt any referral fees permitted under the Gramm-Leach-Bliley Act. PNC stated that dealer personnel should be permitted to approach issuer representatives to inform them of the dealer's municipal securities capabilities without such communication being considered a solicitation, but Mr. Chapman disagreed.

MSRB Response. The MSRB believes that the guidance provided in the September 2004 Notice on this topic is appropriate and has not made any further changes.

Technical Experts

Comments Received. BMA, Goldman and Seattle-Northwest requested that the MSRB explicitly exempt communications by attorneys, accountants, engineers and legislative lobbyists with issuers from the definition of solicitation. They noted that such technical experts were exempted from former Rule G-38 relating to consultants[10] and argued that such exclusion should be continued in revised Rule G-38. BMA argued that "the MSRB's broad interpretation of the meaning of solicitation means that broker-dealers would be prohibited from hiring outside persons to perform necessary services given that they would have to, as a practical matter, attend … meetings with issuers and will ultimately make the broker-dealer more appealing to the issuer by doing a good job." PNC stated that including conversations through or with secondary participants of an issue would not serve to enhance the goal of the rule. Seasongood stated that all contact by or through third parties should be considered a solicitation.

MSRB Response. The proposed rule change makes clear that, so long as non-affiliated persons providing legal, accounting, engineering or other professional services are not being paid directly or indirectly for their solicitation activities, they would not become subject to revised draft Rule G-38. In addition, the proposed rule change clarifies that, in the case of joint ventures created by a dealer with other professionals seeking to engage in municipal securities business, so long as the members of the joint venture are making good faith efforts to be engaged to undertake bona fide roles in the business, the MSRB would view any communications by a member of the joint venture with the issuer as being made on its own behalf and not on behalf of the dealer. The MSRB believes that this language adequately addresses the concerns raised by the commentators.

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.

---

[10] Attorneys, accountants and engineers were excluded from the definition of consultant under former Rule G-38 only so long as their sole basis of compensation from the dealer was the actual provision of legal, accounting or engineering services on the municipal securities business that the dealer is seeking. As BMA noted, the rule did not exempt legislative lobbying; rather, the MSRB had noted in a Question and Answer guidance that the activity of lobbying legislators for legislation granting an issuer authority to issue certain types of municipal securities would not, by itself, result in the lobbyist being considered a consultant. *See* Rule G-38 Question & Answer #5, dated February 28, 1996, published in *MSRB Rule Book*.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

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

Not applicable.

9. Exhibits

1. Federal Register Notice.

2. MSRB Notice 2004-11 (April 5, 2004), MSRB Notice 2004-32 (September 29, 2004) and MSRB Notice 2004-33 (October 12, 2004) and relevant comment letters.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION

(RELEASE NO. 34- ; File No. SR-MSRB-2005-11)

SELF-REGULATORY ORGANIZATIONS

Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Definition of Solicitation Under MSRB Rules G-37 and G-38

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1) (the "Act"), notice is hereby given that on June 8, 2005, the Municipal Securities Rulemaking Board (the "MSRB") filed with the Securities and Exchange Commission (the "SEC" or "Commission") 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 has filed with the SEC a proposed rule change consisting of an interpretive notice relating to the definition of solicitation for purposes of Rules G-37 and G-38. The MSRB proposes that the proposed rule change be made effective on the same date as the effective date of File No. SR-MSRB-2005-04 ("revised Rule G-38"). The proposed rule change is as follows:

INTERPRETIVE NOTICE ON THE DEFINITION OF SOLICITATION UNDER RULES G-37 AND G-38

Revised Rule G-38, on solicitation of municipal securities business, recently adopted by the Municipal Securities Rulemaking Board ("MSRB") defines "solicitation" as any direct or indirect communication with an issuer for the purpose of obtaining or retaining municipal securities business. This definition is important for purposes of determining whether payments made by a broker, dealer or municipal securities dealer ("dealer") to persons who are not affiliated persons of the dealer would be prohibited under revised Rule G-38.[1] In addition, the definition is central to determining whether communications by dealer personnel would result in such personnel being considered municipal finance professionals ("MFPs") of the dealer for purposes of Rule G-37. This notice provides interpretive guidance relating to the status of certain types of communications as solicitations for purposes of Rules G-37 and G-38.

Intent

The concept of solicitation under Rules G-37 and G-38 includes the element of intent in that the communication must have a purpose of obtaining municipal securities business. The determination of whether a particular communication is a solicitation is dependent upon the specific facts and circumstances relating to such communication. The examples described below are illustrative and are not the only instances in which a solicitation may be deemed to have or have not occurred.

Limited Communications with Issuer Representative

If an issuer representative asks an affiliated person of a dealer whether the dealer has municipal securities capabilities, such affiliated person generally would not be viewed as having solicited municipal securities business if he or she provides a limited affirmative response, together with either providing the issuer representative with contact information for an MFP of the dealer or informing the issuer representative that dealer personnel who handle municipal securities business will contact him or her. Similarly, if an issuer representative is discussing governmental cash flow management issues with an affiliated person of a dealer who concludes, in his or her professional judgment, that an appropriate means of addressing the issuer's needs may be through an issue of municipal securities, the affiliated person generally would not be viewed as having solicited business if he or she provides a limited communication to the issuer representative that such alternative may be appropriate, together with either providing the issuer representative with contact information for an MFP or informing the issuer representative that dealer personnel who handle municipal securities business will contact him or her.

In the examples above, if the affiliated person receives compensation such as a finder's or referral fee for such business or if the affiliated person engages in other activities that could be deemed a solicitation with respect to such business (for example, attending presentations of the dealer's municipal finance capabilities or responding to a

---

(. . . continued)

[1] The term "affiliated person" is defined in revised Rule G-38(b)(ii).

request for proposals), the affiliated person generally would be viewed as having solicited the municipal securities business.[2]

Promotional Communication

The MSRB understands that an affiliated person of a dealer may provide information to potential clients and others regarding the general capabilities of the dealer through either oral or written communications. Any such communication that is not made with the purpose of obtaining or retaining municipal securities business would not be considered a solicitation. Thus, depending upon the specific facts and circumstances, a communication that merely lists the significant business lines of a dealer without further descriptive information and which does not give the dealer's municipal securities practice a place of prominence within such listing generally would not be considered a solicitation unless the facts and circumstances indicate that it was aimed at obtaining or retaining municipal securities business. To the extent that a communication, such as a dealer brochure or other promotional materials, contains more than a mere listing of business lines, such as brief descriptions of each business line (including its municipal securities capabilities), determining whether such communication is a solicitation depends upon whether the facts and circumstances indicate that it was undertaken for the purpose of obtaining or retaining municipal securities business. The nature of the information provided and the manner in which it is presented are relevant factors to

---

[2] *See* Rule G-37 Questions and Answers IV.10-13, *reprinted in* MSRB Rule Book.

consider. Although no single factor is necessarily controlling in determining intent, the following considerations, among others, may often be relevant: (i) whether the municipal securities practice is the only business line included in the communication that would reasonably be of interest to an issuer representative; (ii) whether the portions of the communication describing the dealer's municipal securities capabilities are designed to garner more attention than other portions describing different business lines; (iii) whether the communication contains quantitative or qualitative information on the nature or extent of the dealer's municipal securities capabilities that is promotional in nature (*e.g.*, quantitative or qualitative rankings, claims of expertise, identification of specific transactions, language associated with "puffery," etc.); and (iv) whether the dealer is currently seeking to obtain or retain municipal securities business from the issuer.

Work-Related Communications

Communications that are incidental to undertaking tasks to complete municipal securities business for which the dealer has already been engaged generally would not be solicitations. For example, if a dealer has engaged an independent contractor as a cash flow consultant to provide expert services on a negotiated underwriting for which the dealer has already been selected and the contractor communicates with the issuer on cash flow matters relevant to the financing, such communication would not be a solicitation under revised Rule G-38. Similarly, if a dealer has already been selected to serve as the underwriter for an airport financing and a non-MFP affiliated person of the dealer who normally works on airline corporate matters is used to provide his or her expertise to

complete the financing, communications in this regard by the affiliated person with the issuer would not be a solicitation under revised Rule G-38. In addition, the fact that the work product of persons such as those described above may be used by MFPs of the dealer in their solicitation activities would not make the producer of the work product a solicitor unless such person personally presents his or her work to the issuer in connection with soliciting the municipal securities business.

Communications with Conduit Borrowers

The MSRB understands that dealers often work closely with private entities on their capital and other financing needs. In many cases, this work may evolve into a conduit borrowing through a conduit issuer. Although the ultimate obligor on such a financing is the private entity, if the dealer acts as underwriter for a financing undertaken through a conduit issuer on other than a competitive bid basis, it is engaging in municipal securities business for purposes of Rule G-37. The selection of the underwriter for such a financing frequently is made by the conduit borrower. While in many cases conduit issuers have either formal procedures or an informal historical practice of accepting the dealer selected by the conduit borrower, some conduit issuers may set minimum standards that dealers must meet to qualify to underwrite a conduit issue, and other conduit issuers may have a slate of dealers selected by the conduit issuer from which the conduit borrower chooses the underwriter for its issue. Still other conduit issuers may defer to the conduit borrower's selection of lead underwriter but may require the underwriting syndicate to include additional dealers selected by the issuer or selected by

the conduit borrower from a slate of issuer-approved underwriters, often with the purpose of ensuring participation by local dealers or historically disadvantaged dealers. A smaller number of conduit issuers retain more significant control over which dealers act as underwriters, either by making the selection for the conduit borrower or by considering the conduit borrower's selection to be merely a suggestion which in some cases the conduit issuer does not follow. However, in virtually all cases, the conduit issuer will maintain ultimate power to control which dealer underwrites a conduit issue since the conduit issuer has discretion to withhold its agreement to issue the securities through any particular dealer.

From a literal perspective, any communication by a dealer with a conduit borrower that is intended to cause the borrower to select the dealer to serve as underwriter for a conduit issue could be considered a solicitation of municipal securities business. This is because the conduit borrower eventually communicates its selection of the dealer to act as underwriter to the conduit issuer for approval. This series of communications would, by its terms, constitute an indirect communication by the dealer through the conduit borrower to the conduit issuer with the intent of obtaining municipal securities business.

However, the MSRB believes that a dealer's communication with a conduit borrower generally should not be deemed an indirect solicitation of the issuer unless a reasonable nexus can be established between the making of contributions to officials of the conduit issuer within the meaning of Rule G-37 and the selection of the underwriter

for such conduit financing. A determination of whether such a reasonable and material nexus could exist depends on the specific facts and circumstances.

Further, if an affiliated person of a dealer who is providing investment banking services and corporate financing advice to a private company concludes, in his or her professional judgment, that an appropriate financing alternative may be a conduit financing, a limited communication to the company by the affiliated person that such financing alternative may be appropriate, together with the provision to the company of contact information for an MFP of the dealer, generally would not be presumed to be a solicitation. Alternatively, the affiliated person could inform the company that dealer personnel who handle municipal securities business will contact it. In addition, if a dealer has already been selected by the conduit borrower to serve as the underwriter for a conduit financing and a non-MFP affiliated person of the dealer communicates with the conduit borrower in furtherance of the financing, such communications by the affiliated person would not be a solicitation under revised Rule G-38.

Communications by Joint Venturers and Other Professionals

So long as non-affiliated persons providing legal, accounting, engineering or other professional services in connection with specific municipal securities business are not being paid directly or indirectly for their solicitation activities (*i.e.*, they are paid solely for their provision of legal, accounting, engineering or other professional services with respect to the business), they would not become subject to revised draft Rule G-38. Similarly, in the case of joint ventures created by a dealer with other professionals seeking to engage in municipal securities business, so long as the members of the joint venture are making good faith efforts to be engaged to undertake bona fide roles in the business, the MSRB would view any communications by a member of the joint venture with the issuer as being made on its own behalf and not on behalf of the dealer. However, if payments are being made by or on behalf of the dealer to such other professionals separate from the payments they may receive for actual professional services rendered in connection with an issue, their communications with the issuer could be considered solicitations on behalf of the dealer.

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

The MSRB has recently filed with the Commission revised Rule G-38, which will prohibit dealers from making direct or indirect payments to any person who is not an affiliated person[3] of the dealer for a solicitation of municipal securities business[4] on behalf of the dealer. The proposed rule change provides interpretive guidance on the definition of "solicitation" as used in revised Rule G-38 and in Rule G-37, on political contributions and prohibitions of municipal securities business. This definition is important for purposes of determining whether dealer payments to non-affiliated persons of the dealer would be prohibited under revised Rule G-38. In addition, the definition is central to determining whether communications by dealer personnel would result in such personnel being considered municipal finance professionals of the dealer for purposes of

---

3 Revised Rule G-38(b)(ii) generally defines an affiliated person of a dealer as an employee or other personnel of the dealer or of an affiliated company of the dealer.

4 Municipal securities business is defined in Rule G-37 as the purchase of a primary offering from the issuer on other than a competitive bid basis (*e.g.*, negotiated underwriting), the offer or sale of a primary offering on behalf of an issuer (*e.g.*, private placement or offering of municipal fund securities), and the provision of financial advisory, consultant or remarketing agent services to an issuer for a primary offering in which the dealer was chosen on other than a competitive bid basis.

Rule G-37. The proposed rule change makes clear that intent is a necessary element in determining whether a communication is a solicitation and provides guidance on communications with issuer representatives, promotional communications, work-related communications, communications with conduit borrowers, and communications by joint venturers and other professionals.

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 the MSRB's 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.

B. Self-Regulatory Organization's Statement on Burden on Competition

The MSRB does not believe that 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.

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

The MSRB published notices for comment on draft amendments to Rule G-38 on April 5, 2004 (the "April 2004 Notice")[5] and September 29, 2004 (the "September 2004 Notice").[6] The April 2004 Notice sought comments on draft amendments limiting payments by a dealer for the solicitation of municipal securities business on its behalf solely to its associated persons, and also provided certain guidance on the definition of solicitation. The MSRB received comments from 28 commentators, eight of which provided comments on the definition of solicitation.[7] The September 2004 Notice sought comments on revised draft amendments to Rule G-38 prohibiting a dealer from making

---

5 *See* MSRB Notice 2004-11 (April 5, 2004).

6 *See* MSRB Notice 2004-32 (September 29, 2004), as modified by MSRB Notice 2004-33 (October 12, 2004).

7 Letters commenting on the definition of solicitation consisted of letters from Jerry L. Chapman ("Mr. Chapman"), to Ernesto A. Lanza, Senior Associate General Counsel, MSRB, dated April 22, 2004; Maud Daudon, Managing Director, Investment Banking, and John Rose, President & CEO, Seattle-Northwest Securities Corporation ("Seattle-Northwest") to Christopher A. Taylor, MSRB Executive Director, dated May 19, 2004; Gordon Reis III, Managing Principal, Seasongood & Mayer, LLC ("Seasongood") to Mr. Taylor, dated May 20, 2004; Bruce Moland, Vice President & Assistant General Counsel, Wells Fargo & Company ("Wells Fargo"), to Mr. Lanza dated June 2, 2004; Sarah A. Miller, General Counsel, ABA Securities Association ("ABASA"), to Mr. Lanza dated June 4, 2004; Lynette Kelly Hotchkiss, Senior Vice President and Associate General Counsel, Bond Market Association ("BMA"), to Mr. Lanza dated June 4, 2004; Robyn A. Huffman, Vice President and Associate General Counsel, Goldman Sachs & Co. ("Goldman"), to Mr. Lanza dated June 4, 2004; and James S. Keller, Chief Regulatory Counsel, PNC Capital Markets, Inc. ("PNC"), to Mr. Lanza dated June 4, 2004.

payments for the solicitation of municipal securities business on its behalf to any person who is not an associated person of the dealer. The September 2004 Notice also provided more detailed guidance on the definition of solicitation. The MSRB received comments from 19 commentators, five of which provided comments on the definition of solicitation.[8] The comments received on the April and September 2004 Notices relating to the definition of solicitation are discussed below.[9]

Communications with Conduit Borrowers

In the April 2004 Notice, the MSRB asked whether a communication with a conduit borrower to hire a dealer as an underwriter for a private activity bond issue where the issuer ultimately must approve the underwriter for the issue should be considered an indirect communication with the issuer. In the September 2004 Notice, the MSRB stated that, from a literal perspective, any communication by a dealer with a conduit borrower intended to cause the borrower to select the dealer to serve as underwriter for a conduit issue could be considered a solicitation of municipal securities business. This is because the conduit borrower eventually communicates its selection of the dealer to the conduit

---

8 Letters commenting on the definition of solicitation consisted of letters from Ms. Daudon and Mr. Rose, Seattle-Northwest, to Mr. Lanza dated December 13, 2004; Mr. Moland, Wells Fargo, to Mr. Lanza dated December 15, 2004; Ms. Hotchkiss, BMA, to Mr. Lanza dated December 15, 2004; Ms. Huffman, Goldman, to Mr. Lanza dated December 15, 2004; and Ms. Miller, ABASA, to Mr. Lanza dated December 17, 2004.

9 The remaining comments received on the April and September 2004 Notices were discussed in SR-MSRB-2005-04. *See* Exchange Act Release No. 34-51561.

issuer for approval, with the result that this series of communications becomes an indirect communication by the dealer through the conduit borrower to the conduit issuer with the intent of obtaining municipal securities business. However, if the dealer can establish that no reasonable nexus could exist between the making of contributions to officials of the conduit issuer and the selection of the underwriter for such conduit financing, then a communication with the borrower would be deemed not to be a solicitation for purposes of revised Rule G-38. For example, if a conduit issuer historically defers to its conduit borrowers' selections of underwriters without influencing the selection, communications with the conduit borrower to obtain the underwriting assignment would not be treated as a solicitation, even if that communication is relayed by the conduit borrower to the conduit issuer.

Comments Received. Several commentators stated that communications with conduit borrowers should not be considered solicitations, or that the circumstances under which they are so considered should be narrowly drawn. ABASA, BMA, PNC and Wells Fargo stated that communications with conduit borrowers generally should not be considered solicitations, whereas Mr. Chapman stated that communications should be treated as solicitations. The ABA noted that, in conduit financings, typically a complete package (including the underwriter) is presented to the selected conduit issuer, with the issuer either accepting or rejecting the package. BMA stated that in a conduit deal, if an employee is only communicating with a private obligor and not with the issuer, then there is no possibility that a contribution made by that employee to an official of such

issuer would influence the underwriter selection process. ABASA and Wells Fargo asked, in the alternative, that the MSRB provide more specific guidance on what would cause a communication to be a solicitation.

ABASA and BMA characterized the MSRB's guidance in the September 2004 Notice as creating a presumption that a communication with a conduit borrower is a solicitation which can be rebutted only under narrowly drawn circumstances. They also observed that many communications with conduit borrowers occur before the identity of the issuer has been determined. As a result, they suggested that a dealer often cannot know if a communication with a conduit borrower might later be considered a solicitation since the dealer does not know if the issuer ultimately used will meet the requirements for rebutting the presumption that a communication with the borrower is a solicitation.

MSRB Response. The MSRB believes that ABASA and BMA incorrectly implied that the only way for a dealer to rebut the presumption that a communication with a conduit borrower is a solicitation is by establishing that a conduit issuer historically defers to its conduit borrowers' selections of underwriters. The September 2004 Notice provided that a communication would not be considered a solicitation if there is no reasonable nexus between the making of contributions to officials of a conduit issuer and the selection of the underwriter for a conduit financing. The method mentioned by ABASA and BMA was simply one example of how a dealer could establish that there was no such reasonable nexus.

Nonetheless, the MSRB agrees that a dealer's communication with a conduit borrower generally should not be deemed an indirect solicitation of the issuer unless a reasonable and material nexus can be established between the making of contributions to officials of the conduit issuer within the meaning of Rule G-37 and the selection of the underwriter for such conduit financing. A determination of whether such a reasonable and material nexus could exist depends on the specific facts and circumstances. The proposed rule change reflects this position.

Inform and Refer

In the April 2004 Notice, the MSRB noted that, where an issuer representative asks an associated person of a dealer whether the dealer has municipal securities capabilities, a limited affirmative response by the associated person, together with the provision to the issuer representative of contact information for dealer personnel who handle municipal securities business, generally would not be presumed to be a solicitation by such associated person. In the September 2004 Notice, the MSRB provided further elaboration and additional examples, noting in particular that the associated person could have an MFP of the dealer contact the issuer representative directly in response to such an inquiry. In both notices, the MSRB stated that, if the associated person receives compensation such as a finder's or referral fee for such business, the associated person generally would be viewed as having solicited the business.

Comments Received. In response to the April 2004 Notice, ABASA stated that, in a bank holding company, bankers should be free to inform issuers that affiliated dealers have municipal securities capabilities and provide contact information without such communication being deemed a solicitation. PNC stated that the draft amendment would "negatively impact the ability of affiliated companies to conduct banking business and make referrals. It would require dealers to disassemble the structures and controls that have been created to address requirements of the rule."

ABASA appreciated the clarification of the "inform and refer" concept provided in the September 2004 Notice. However, ABASA continued to object that the MSRB viewed the receipt of a finder's fee or referral fee as causing a communication to be considered a solicitation. ABASA stated that this would significantly add to the regulatory burden of bank dealers and, at a minimum, the MSRB should exempt any referral fees permitted under the Gramm-Leach-Bliley Act. PNC stated that dealer personnel should be permitted to approach issuer representatives to inform them of the dealer's municipal securities capabilities without such communication being considered a solicitation, but Mr. Chapman disagreed.

MSRB Response. The MSRB believes that the guidance provided in the September 2004 Notice on this topic is appropriate and has not made any further changes.

Technical Experts

Comments Received. BMA, Goldman and Seattle-Northwest requested that the MSRB explicitly exempt communications by attorneys, accountants, engineers and

legislative lobbyists with issuers from the definition of solicitation. They noted that such technical experts were exempted from former Rule G-38 relating to consultants[10] and argued that such exclusion should be continued in revised Rule G-38. BMA argued that "the MSRB's broad interpretation of the meaning of solicitation means that broker-dealers would be prohibited from hiring outside persons to perform necessary services given that they would have to, as a practical matter, attend … meetings with issuers and will ultimately make the broker-dealer more appealing to the issuer by doing a good job." PNC stated that including conversations through or with secondary participants of an issue would not serve to enhance the goal of the rule. Seasongood stated that all contact by or through third parties should be considered a solicitation.

MSRB Response. The proposed rule change makes clear that, so long as non-affiliated persons providing legal, accounting, engineering or other professional services are not being paid directly or indirectly for their solicitation activities, they would not become subject to revised draft Rule G-38. In addition, the proposed rule change clarifies that, in the case of joint ventures created by a dealer with other professionals

---

[10] Attorneys, accountants and engineers were excluded from the definition of consultant under former Rule G-38 only so long as their sole basis of compensation from the dealer was the actual provision of legal, accounting or engineering services on the municipal securities business that the dealer is seeking. As BMA noted, the rule did not exempt legislative lobbying; rather, the MSRB had noted in a Question and Answer guidance that the activity of lobbying legislators for legislation granting an issuer authority to issue certain types of municipal securities would not, by itself, result in the lobbyist being considered a

(continued . . .)

seeking to engage in municipal securities business, so long as the members of the joint venture are making good faith efforts to be engaged to undertake bona fide roles in the business, the MSRB would view any communications by a member of the joint venture with the issuer as being made on its own behalf and not on behalf of the dealer. The MSRB believes that this language adequately addresses the concerns raised by the commentators.

III. DATE OF EFFECTIVENESS OF THE PROPOSED RULE CHANGE AND TIMING FOR COMMISSION ACTION

The MSRB proposes that the proposed rule change be made effective on the same date as the effective date of revised Rule G-38. Within 35 days of the publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the SEC will:

(A) by order approve the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. SOLICITATION OF COMMENTS

Interested persons are invited to submit written data, views, and arguments

---

(. . . continued)

consultant. *See* Rule G-38 Question & Answer #5, dated February 28, 1996, published in *MSRB Rule Book*.

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. Please include File Number SR-MSRB-2005-11 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-MSRB-2005-11. 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, 450 Fifth Street, NW, 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-2005-11 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.[11]

Jonathan G. Katz
Secretary

---

[11] 17 CFR 200.30-3(a)(12).

EXHIBIT 2

MSRB Notice 2004-11
(April 5, 2004)

Request for Comments on Draft Amendment to Rule G-38 Relating to Solicitation of Municipal Securities Business

Rule G-38, on consultants, was adopted by the Municipal Securities Rulemaking Board (the "MSRB") to address actual and perceived abuses associated with the awarding of municipal securities business to brokers, dealers and municipal securities dealers ("dealers").[1] The rule was intended to deter and detect attempts by dealers to avoid the limitations placed on certain dealer activities by Rule G-37, on political contributions and prohibitions on municipal securities business, and Rule G-20, on gifts and gratuities.[2] The rule also sought to provide information to issuers about the relationship between dealers and persons they have engaged to seek municipal securities business on their behalf. The MSRB felt that these disclosures would help to limit undisclosed relationships that could pose potential conflicts-of-interest or result in potentially improper conduct by consultants attempting to obtain business for dealers.

Rule G-38 defines a consultant as any person used by a dealer to obtain or retain municipal securities business through direct or indirect communications by such person with an issuer on behalf of the dealer that is undertaken in exchange for (or with the understanding of receiving) payment from the dealer or any other person.[3] The rule requires disclosure on Form G-37/G-38 of the consultant's name, business address, role to be performed, compensation

---

1 Municipal securities business includes the purchase of a primary offering of municipal securities by a dealer from the issuer on other than a competitive bid basis (such as a negotiated underwriting), the offer or sale of a primary offering of municipal securities by a dealer on behalf of any issuer (such as a private placement or an offering of municipal fund securities), and the provision of financial advisory, consultant or remarketing agent services by a dealer to an issuer for a primary offering of municipal securities in which the dealer was chosen on other than a competitive bid basis.

2 Rule G-37 prohibits dealers from engaging in municipal securities business with issuers for two years after certain contributions to issuer officials are made by dealers, their municipal finance professionals (as defined in Rule G-37(g)(iv)) or political action committees controlled by the dealers or their municipal finance professionals. The rule also requires disclosure on Form G-37/G-38 of political contributions to issuer officials and payments to state and local political parties made by dealers, municipal finance professionals, other dealer executive officers, and political action committees controlled by the dealers or their municipal finance professionals. Rule G-20 places limitations on gifts made to individuals in relation to the municipal securities activities of the individuals' employers.

3 A dealer's municipal finance professionals and lawyers, accountants and engineers whose sole basis of compensation from the dealer is the actual provision of legal, accounting or engineering services are excluded from the definition of consultant.

arrangement and total dollar amount paid. The dealer also must disclose this information to the issuer either prior to the selection of any dealer for the particular municipal securities business sought or by no later than the consultant's first communication with the issuer. In addition, Rule G-38 requires dealers to disclose on Form G-37/G-38 contributions made by their consultants to officials of issuers with which the consultants have communicated and consultant payments to state and local political parties operating within the jurisdiction of such issuers, other than certain *de minimis* contributions and payments. These forms are made publicly available on the MSRB's website.

The MSRB believes that its consultant disclosure requirements have been extremely effective in bringing to light many aspects of dealer practices with respect to the use of consultants to solicit municipal securities business. Nonetheless, the MSRB believes that some consultant practices challenge the integrity of the municipal securities market. The MSRB has noted in recent years significant increases in the number of consultants being used, the amount these consultants are being paid and the level of reported political giving by consultants. The MSRB is concerned that some of these political contributions may be indirect violations of Rule G-37.[4] The MSRB also is concerned that increases in levels of compensation paid to consultants for successfully obtaining municipal securities business may be motivating consultants to use more aggressive tactics in their contacts with issuers. These activities suggest that disclosure may not be sufficient to ensure that those who market the dealer's services to issuers act fairly. The MSRB believes that, in order to preserve the integrity of the municipal securities market, the basic standards of fair practice and professionalism embodied in MSRB rules should be made applicable to the process by which municipal securities business is solicited.

Thus, the MSRB is publishing for comment a draft amendment to Rule G-38 that would repeal existing Rule G-38 relating to consultants and replace it with a requirement that paid solicitations of municipal securities business on behalf of a dealer be undertaken only by persons associated with the dealer. The MSRB also is publishing related draft amendments to Rule G-37, Rule G-8 (on books and records) and Rule G-9 (on preservation of records). The MSRB seeks comments on all facets of this proposal.

Summary of Draft Rule Changes

The principal provisions of the draft amendments are summarized below. The full text of the draft amendments, as well as draft revised Forms G-37 and G-37x, appear at the end of this notice.

Draft Amendments to Rule G-38. Existing Rule G-38 relating to consultants would be deleted in its entirety. In its place, new Rule G-38, on solicitation of municipal securities business, would be adopted. New Rule G-38 would prohibit dealers from making any direct or indirect payment to any person, other than an associated person of the dealer, for any solicitation

---

[4] *See* Rule G-37 Interpretation – Notice Concerning Indirect Rule Violations: Rules G-37 and G-38, August 6, 2003, *reprinted in* MSRB Rule Book. It is also unclear whether dealers are uniformly making the required disclosures to issuers and on Form G-37/G-38 for all persons who by their actions should be considered consultants under Rule G-38.

of municipal securities business on behalf of the dealer. Solicitation would be defined as a direct or indirect communication with an issuer for the purpose of obtaining or retaining municipal securities business.

The requirement that solicitations for municipal securities business only be done by associated persons would have certain ramifications, as discussed in more detail below. First, if a dealer seeks to provide compensation to any person in exchange for solicitation of municipal securities business, such person must become an associated person and, consequently, would become a municipal finance professional under Rule G-37.[5] In addition, the MSRB is proposing a clarification relating to the applicability of other MSRB rules to such associated persons, as described below.

Draft Amendments to Rule G-37 and Forms G-37/G-38 and G-37x. Rule G-37 would be amended to refer to the new definition of solicitation in new Rule G-38 and to delete references to consultant information to be provided under Rule G-38. Form G-37/G-38 would be renamed as Form G-37, and Section IV and the consultant attachment to the form would be removed.[6] In addition, Form G-37x would be amended to delete references to the reporting of consultant information.

Draft Amendments to Rules G-8 and G-9. Rules G-8 and G-9 would be amended to delete recordkeeping requirements in connection with the consultant provisions of existing Rule G-38.

Request for Comments

The MSRB seeks comments on all facets of this rulemaking proposal. In particular, the MSRB is interested in receiving the views of industry participants in the following areas.

Role of Consultants in the Municipal Securities Market. Individuals and companies that are not affiliated with dealers have been used by dealers for years to obtain municipal securities business. As noted above, the MSRB has determined to seek comment on this proposed rulemaking out of its concern that the use of independent consultants who are not subject to fair practice standards and rigorous supervision may potentially threaten the integrity of the municipal securities market.

---

5 Of course, if a person who is already an associated person of the dealer solicits municipal securities business, such person would be considered a municipal finance professional under Rule G-37 regardless of whether he or she receives compensation. *See* Rule G-38 Question and Answer, Bank Affiliates: Individuals as Municipal Finance Professionals or Consultants, June 6, 2001.

6 Form G-37/G-38 also would be amended to reflect the previous renaming of "executive officers" as "non-MFP executive officers" under Rule G-37 and to rename the municipal securities business category designation of "private placement" to "agency offering" to more accurately reflect the nature of this category.

- Is the solicitation of municipal securities business from issuers on behalf of dealers a legitimate role for individuals or entities that are independent from such dealers and that operate outside the broker-dealer regulatory scheme?

- Are there benefits derived from such an independent role that outweigh the concerns regarding the potentially negative impact of consultants on the integrity of the municipal securities market?

- Are there ways that the current rule could be amended that would preserve the integrity of the municipal securities market more effectively than the draft amendment?

Effect of Becoming an Associated Person. The rulemaking proposal would prohibit dealers from compensating any person who is not an associated person of the dealer for obtaining municipal securities business for the dealer. For purposes of MSRB rules, an associated person of a broker or dealer is defined under Section 3(a)(18) of the Securities Exchange Act of 1934 as any partner, officer, director or branch manager of the broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with the broker or dealer, or any employee of the broker or dealer.[7]

Draft new Rule G-38 would necessitate that persons who are compensated for soliciting municipal securities business on behalf of a dealer become associated persons of the dealer.[8] Given the definition of municipal finance professional under Rule G-37, all solicitors who previously were considered consultants under existing Rule G-38 who become associated with a dealer in order to continue soliciting municipal securities business would be considered municipal finance professionals.[9] Thus, solicitors' non-*de minimis* contributions to issuer

---

[7] In the case of a municipal securities dealer that is a bank, an associated person is defined under Section 3(a)(32) of the Securities Exchange Act of 1934 as any person directly engaged in the management, direction, supervision, or performance of any of the municipal securities dealer's activities with respect to municipal securities, and any person directly or indirectly controlling such activities or controlled by the municipal securities dealer in connection with such activities. MSRB Rule D-11 provides that persons whose functions are solely clerical or ministerial are not treated as associated person of brokers, dealers or municipal securities dealers.

[8] As a general matter, such person could become associated with a dealer by becoming employed by the dealer or by entering into an arrangement with the dealer whereby the dealer is given control over such person's municipal securities activities. This "control" would include the application of MSRB rules to the municipal securities activities of such person and the subjection of such activities to supervision by the dealer, as described below.

[9] Rule G-37(g)(iv) defines municipal finance professional to include, among other persons, any associated person who solicits municipal securities business. The draft amendment

officials could subject the dealer to the ban on municipal securities business, and such contributions and non-*de minimis* payments to state or local political parties would be subject to the reporting requirements of Rule G-37. As is the case currently under Rule G-37, payment in exchange for a solicitation is not a precondition for an associated person to be considered a municipal finance professional. Rather, the draft amendments condition the ability of a dealer to provide compensation for such solicitation on the solicitor being associated with the dealer.

In conjunction with draft new Rule G-38, the MSRB would seek to clarify the applicability of other MSRB rules to solicitors who become associated persons of dealers. The MSRB has previously noted that its basic fair practice rules would ordinarily not apply to persons who are associated with dealers solely by reason of a control relationship.[10] If the MSRB adopts this proposed rulemaking, the MSRB also would clarify that, although these "controlled" associated persons would not be subject to the fair practice rules in connection with their day-to-day activities that are not related to the municipal securities activities of the dealer, MSRB rules would apply to their municipal securities activities undertaken for the benefit of the dealer. Therefore, consistent with this view, if this rulemaking proposal is adopted, the MSRB expects that any solicitors who become associated with a dealer would conform their municipal securities activities to all applicable MSRB rules.[11] For example, in soliciting municipal securities business, the solicitor would be subject to the MSRB's basic fair practice rule, Rule G-17, and its rule on gifts and gratuities, Rule G-20, in connection with such solicitation. The solicitor's municipal securities activities also would be subject to supervision by the appropriate principal under Rule G-27. Further, should the solicitor's activities rise to the level of those listed in Rule G-3(a)(i) as municipal securities representative activities, the solicitor would be required to become appropriately qualified under that rule.[12]

---

to Rule G-37(g)(iv) would explicitly tie this provision to the definition of solicitation under new Rule G-38(b)(i).

10 *See* Rule D-11 Interpretation – Excerpt from Notice of Approval of Fair Practice Rules, October 25, 1978, *reprinted in* MSRB Rule Book.

11 The MSRB is aware that a number of dealers have re-classified many employees of their affiliated banks who are associated persons of the dealers from consultants to municipal finance professionals under Rule G-37 as a result of the Securities and Exchange Commission's administrative proceedings relating to Fifth Third Securities, Inc. *See* Exchange Act Release No. 46087 (June 18, 2002), In the Matter of Fifth Third Securities, Inc. If this rulemaking is adopted, such dealers and any other dealers with associated persons who solicit municipal securities business would need to review their compliance and supervisory procedures to ensure that the municipal securities activities undertaken by these associated persons are taken into account with respect to all applicable MSRB rules.

12 Rule G-3(a)(i) describes municipal securities representative activities as (A) underwriting, trading or sales of municipal securities, (B) financial advisory or consultant services for issuers in connection with the issuance of municipal securities, (C) research or investment advice with respect to municipal securities, but only as it relates to the activities listed in (A) or (B) above, and (D) any other activities which involve

- Is requiring that a person be an associated person sufficient to address concerns regarding supervision and adherence to standards of fair practice, or should the rule require that a solicitor be an actual employee of the dealer?

- What would be the legal and business impact of requiring a solicitor to be an employee of the dealer, rather than an associated person of that dealer?

- Would requiring that a solicitor be an associated person of a dealer effectively limit such solicitor to working for only one dealer (or only for affiliated dealers)? If so, is this appropriate?

- Would the limitations imposed by draft new Rule G-38 have different impacts on different categories of dealers (*e.g.*, broker-dealer vs. bank dealer, large vs. small firm, national vs. regional firm, etc.)?

- Would the limitations imposed by draft new Rule G-38 have different impacts on different categories of persons seeking to solicit municipal securities business for dealers (*e.g.*, individuals vs. companies)? Could a company that formerly served as a consultant continue to solicit municipal securities business for dealers under the requirements of draft new Rule G-38?

- Are there circumstances where MSRB rules (other than Rule G-37) should not apply to non-employee associated persons' municipal securities activities?

- Do consultants under existing Rule G-38 engage in any types of activities that would be considered municipal securities representative activities under Rule G-3(a)(i) if undertaken by an associated person of a dealer? Should Rule G-3(a)(i) be amended to make the act of soliciting municipal securities business (without more) an activity that requires qualification as a municipal securities representative?

- Where a solicitor is an employee of a dealer's affiliate that is subject to another regulatory regime (*e.g.*, a bank affiliate), what is the nature of the supervision applicable to such person under such regime with respect to the person's municipal securities activities?

- Would the draft amendments have an impact on who will continue to solicit municipal securities business on behalf of dealers? If so, would this have a beneficial or detrimental impact on the municipal securities market?

- Would the draft amendments have an impact on the behavior of solicitors toward issuers? If so, would this be beneficial or detrimental to the market?

---

communication, directly or indirectly, with public investors in municipal securities, but only as they relate to the activities listed in (A) or (B) above.

Definition of Solicitation. Draft new Rule G-38 would define a solicitation as any direct or indirect communication with an issuer for the purpose of obtaining or retaining municipal securities business. This is consistent with the types of communications covered by the consultant definition in existing Rule G-38. Thus, just as a consultant who currently communicates indirectly with an issuer through a third party (*e.g.*, through issuer agents such as financial advisors, bond counsel, etc, or through conduit borrowers in connection with private activity bond issues) to obtain municipal securities business for a dealer can be subject to current Rule G-38, depending upon the specific facts and circumstances, so too could an indirect communication with an issuer through a third party be considered a solicitation under draft new Rule G-38. The MSRB notes that the definition of municipal finance professional in existing Rule G-37(g)(iv) is not dependent upon the person to whom a solicitation to obtain business is made. As this definition would be amended, either direct or indirect communications with an issuer to obtain business would trigger the application of Rule G-37. The MSRB would not view this as a change in how Rule G-37 operates but instead as a change made to provide for a consistent definition of solicitation for purposes of Rules G-37 and G-38.

The MSRB notes that the existing concept of solicitation under Rules G-37 and G-38 includes the notion of intent in that the communication has a purpose of obtaining municipal securities business. This notion is continued in draft new Rule G-38's formulation that a solicitation involves a communication "for the purpose of" obtaining business for the dealer. The determination of whether a particular communication is a solicitation is dependent upon the specific facts and circumstances relating to such communication. Thus, if an issuer representative asks an associated person of a dealer whether the dealer has municipal securities capabilities, a limited affirmative response by the associated person, together with the provision to the issuer representative of contact information for dealer personnel who handle municipal securities business, generally would not be presumed to be a solicitation by such associated person. However, this presumption may be lost depending upon the specific facts and circumstances, for example, if there are indications that the associated person has caused the circumstances to develop that were likely to result in such question being asked. Similarly, if an associated person of a dealer who is providing investment banking services and corporate financing advice to a private company concludes, in his or her professional judgment, that an appropriate financing alternative may be a conduit borrowing through a private activity bond issue, a limited communication to the company by the associated person that such financing alternative may be appropriate, together with the provision to the company of contact information for dealer personnel who handle municipal securities business, generally would not be presumed to be a solicitation by such associated person. However, this presumption may be lost depending upon the specific facts and circumstances, for example, if there are indications that the associated person is providing investment banking and corporate financing services as a pretense for suggesting a municipal securities issue to be handled by the dealer. Further, in either example, if the associated person receives any compensation in the nature of a finder's fee or referral fee with respect to such business or if the associated person engages in any other activities that could be deemed a solicitation with respect to such business (for example, attending presentations of the dealer's municipal finance capabilities or responding to a request

for proposals), then the associated person will be presumed to have solicited municipal securities business.[13]

Another aspect of the intent element of the term solicitation relates to communications that are incidental to undertaking tasks in connection with successfully completing municipal securities business for which the dealer has already been engaged. These types of communications generally are not considered solicitations under current Rule G-37 and would continue not to be considered solicitations under draft new Rule G-38. For example, if a dealer has engaged a non-associated person as a cash flow consultant to provide expert services on a negotiated underwriting for which the dealer has already been selected and the consultant communicates with the issuer with respect to cash flow matters relevant to the financing, then such communication generally would not be considered a solicitation under draft new Rule G-38. Similarly, if a dealer has already been selected to serve as the underwriter for an airport financing and a non-municipal finance professional employee of the dealer who normally works on airline corporate matters is used to provide his or her expertise in connection with completing the financing, any communications in this regard by the employee with the issuer generally would not be considered a solicitation under draft new Rule G-38. However, in either case, the dealer must ensure that such person does not solicit the issuer, directly or indirectly, for any other municipal securities business on behalf of the dealer in order for that person to remain outside of the scope of Rule G-37.

The MSRB seeks comment on the draft definition of solicitation.

- Should parties other than the issuer (such as financial advisors, bond counsel, conduit borrowers or other governmental borrowers) be explicitly listed in the definition as persons to whom communications are directed?

- Should a communication with a conduit borrower to hire a dealer as an underwriter for a private activity bond issue where the issuer ultimately must approve the underwriter for the issue be considered an indirect communication with the issuer?

- Are the examples provided above to illustrate the concept of intent in connection with solicitations helpful in explaining the scope of the definition? Should other circumstances be considered?

- If an associated person of a dealer approaches an issuer representative to inform the issuer that the dealer has municipal securities capabilities and provides to the issuer representative contact information for dealer personnel who handle municipal securities business, should such a communication be considered a solicitation by such associated person?

- Does draft Rule G-38 draw an appropriate line between those communications that would or would not constitute solicitations? Would the rule effectively prohibit any types of contacts that are important for the marketplace, or does it fail to reach certain

---

13 *See* Rule G-37 Questions and Answers IV.10-13, *reprinted in* MSRB Rule Book.

types of communications that can call into question the integrity of the municipal securities market?

Exemptions from Definition of Solicitation. Unlike existing Rule G-38, the draft new rule does not provide exemptions for certain non-associated persons. For example, existing Rule G-38 does not treat a lawyer, accountant or engineer as a consultant if its sole basis for compensation from the dealer is the actual provision of legal, accounting or engineering services in connection with the municipal securities business. Existing Rule G-38 also has been interpreted to exclude other dealers who are members of an underwriting syndicate from the definition of consultant for purposes of that particular municipal securities business. Draft new Rule G-38 does not include such exemptions in part because, unlike in the case of existing Rule G-38 where payment can come from either the dealer or any other person, the only payments that would be covered under the new rule are those made directly or indirectly by the dealer.

- Would it be appropriate for draft new Rule G-38 to include the same types of exemptions provided in existing Rule G-38? If so, should such exemptions be conditioned on the existence of a formal arrangement with the dealer that has been disclosed to the issuer? Are there additional conditions that should be imposed in connection with such an exemption?

- Are there other parties or roles that call for such an exemption?

Prohibited Payments for Solicitations by Non-Associated Persons. Draft new Rule G-38 would prohibit a dealer from providing or agreeing to provide, directly or indirectly, payment to non-associated persons for soliciting municipal securities business. The term payment is defined in Rule G-37 as any gift, subscription, loan, advance, or deposit of money or anything of value. Payment is not limited to cash compensation and can consist of anything of value, including reciprocal agreements to engage another party in exchange for obtaining municipal securities business. For example, if a person obtains specific municipal securities business for a dealer in exchange for being hired by the dealer to provide services in connection with a different engagement of municipal securities business, such *quid pro quo* arrangement would constitute payment for purposes of draft new Rule G-38. Further, there is no requirement under draft new Rule G-38 that there exist a formalized agreement to provide payment that induces the communication on behalf of the dealer. Thus, a communication by any person could be considered a solicitation even if it is undertaken without the dealer's prior knowledge or arrangement. In such an instance, the dealer would be prohibited under draft new Rule G-38 from paying a "finder's fee" to such person for such communication if the person is not associated with the dealer.

- Should the rule limit its reach solely to those persons who have an agreement or understanding with a dealer to solicit municipal securities business in exchange for payment?

- Should the rule limit only cash compensation, or only certain types of non-cash compensation?

- Should payment by the issuer from bond proceeds to persons who have solicited municipal securities business for a dealer be considered an indirect payment by the dealer?

- Is it appropriate for the rule to limit *quid pro quo* arrangements where the dealer engages a non-associated person for a different engagement of municipal securities business?

- Instead of prohibiting payment to solicitors who are not associated with the dealer, should the rule prohibit the dealer from engaging in any municipal securities business where such business has been solicited by a non-associated person of the dealer?

Disclosure. Existing Rule G-38 requires that the dealer provide specific information to issuers and on Form G-37/G-38 about a consultant's role, compensation arrangement and amounts paid to it. In addition, dealers currently are required to disclose non-*de minimis* political contributions made to officials of issuers with which the consultant has communicated on behalf of the dealer during the period beginning six months prior to such communication and ending six months after the communication, as well as payments to state and local political parties operating within the jurisdiction of such issuers during such period. These contributions could subject the dealer to the ban on municipal securities business under Rule G-37 only if they were indirect contributions of the dealer pursuant to section (d) of Rule G-37. If, pursuant to draft new Rule G-38, the dealer were to make such consultant an associated person who undertakes the same solicitation duties (thereby becoming a municipal finance professional for purposes of Rule G-37), none of the information regarding role and compensation would be subject to disclosure. However, all non-*de minimis* contributions made by the new municipal finance professional to any official of an issuer would be subject to disclosure on revised Form G-37 and could subject the dealer to a two-year ban on municipal securities business with such issuer.[14]

- Would the process of soliciting business for dealers become less transparent to issuers, the marketplace and the public if dealers were to take solicitors on as associated persons subject to the requirements of Rule G-37 as opposed to remaining subject to the consultant requirements of existing Rule G-38?

- Would the benefits of subjecting such solicitors to the fair practice standards and supervisory requirements of MSRB rules (including the potential ban on municipal securities business as a result of their non-*de minimis* contributions) outweigh this potential loss of public information?

---

[14] Any contribution to an official of an issuer from which such municipal finance professional has solicited business made during the six month period prior to becoming a municipal finance professional, and all contributions made during the one year period after ceasing solicitation activities, also would be covered by Rule G-37. However, the disclosure of contributions and payments on revised Form G-37 would require only that the contributor category be disclosed, not the name and address of the contributor.

- Should more information about an associated person's arrangements with dealers be made public through revised Form G-37 or be required to be provided to issuers? For example, should the MSRB maintain disclosure requirements regarding compensation arrangements and payments made to solicitors who are associated persons but not employees of a dealer?

Recordkeeping. In connection with draft new Rule G-38, the MSRB also is proposing to delete references to Rule G-38 from the recordkeeping requirements of Rules G-8 and G-9.

- Should the MSRB establish any recordkeeping requirements in connection with draft new Rule G-38?

*** * * * ***

Comments from all interested parties are welcome. Comments should be submitted no later than June 4, 2004 and may be directed to Ernesto A. Lanza, Senior Associate General Counsel. Written comments will be available for public inspection.

April 5, 2004

*** * * * ***

Text of Draft Amendments

[Rule G-38, on Consultants, repealed in its entirety and replaced by Rule G-38, on Solicitation of Municipal Securities Business, as follows:]

Rule G-38. Solicitation of Municipal Securities Business

(a) No broker, dealer or municipal securities dealer may provide or agree to provide, directly or indirectly, payment to any person, other than an associated person of such broker, dealer or municipal securities dealer, for a solicitation on behalf of such broker, dealer or municipal securities dealer.

(b)(i) The term "solicitation" means a direct or indirect communication with an issuer for the purpose of obtaining or retaining municipal securities business.

(ii) The terms "issuer," "municipal securities business" and "payment" shall have the meanings set forth in Rule G-37(g).

*** * * * ***

Rule G-37. Political Contributions and Prohibitions on Municipal Securities Business

(a) No change.

(b)(i) No change.

(ii) For an individual designated as a municipal finance professional solely pursuant to subparagraph (B) of paragraph (g)(iv) of this rule, the provisions of paragraph (b)(i) shall apply to contributions made by such individual to officials of an issuer prior to becoming a municipal finance professional only if such individual solicits **(within the meaning of Rule G-38(b)(i))** municipal securities business from such issuer.

(iii) No change.

(c)-(d) No change.

(e)(i) Except as otherwise provided in paragraph (e)(ii), each broker, dealer or municipal securities dealer shall, by the last day of the month following the end of each calendar quarter (these dates correspond to January 31, April 30, July 31 and October 31) send to the Board Form G-37~~/G-38~~ setting forth, in the prescribed format, the following information:

(A)-(B) No change.

(C) any information required to be included on Form G-37~~/G-38~~ for such calendar quarter pursuant to paragraph (e)(iii);

~~**(D) any information required to be disclosed pursuant to section (e) of rule G-38;**~~

(D) ~~**(E)**~~ such other identifying information required by Form G-37~~/G-38~~; and

(F) No change.

The Board shall make public a copy of each Form G-37~~/G-38~~ received from any broker, dealer or municipal securities dealer.

(ii)~~**(A)**~~ No broker, dealer or municipal securities dealer shall be required to send Form G-37~~/G-38~~ to the Board for any calendar quarter in which either:

(A) ~~**(1)**~~ such broker, dealer or municipal securities dealer has no information that is required to be reported pursuant to clauses (A) through **(C)** ~~**(D)**~~ of paragraph (e)(i) for such calendar quarter; or

(B) ~~**(2) subject to clause (B) of this paragraph (e)(ii),**~~ such broker, dealer or municipal securities dealer has not engaged in municipal securities business, but only if such broker, dealer or municipal securities dealer:

(1) ~~**(a)**~~ had not engaged in municipal securities business during the seven consecutive calendar quarters immediately preceding such calendar quarter; and

(2) ~~**(b)**~~ has sent to the Board completed Form G-37x setting forth, in the prescribed format, (i) a certification to the effect that such broker, dealer or municipal securities dealer did not engage in municipal securities business during the eight consecutive calendar quarters immediately preceding the date of such certification, (ii) certain acknowledgments as are set forth in said Form G-37x regarding the obligations of such broker, dealer or municipal securities dealer in connection with Forms G-37~~**/G-38**~~ and G-37x under this paragraph (e)(ii) and rule G-8(a)(xvi), and (iii) such other identifying information required by Form G-37x; provided that, if a broker, dealer or municipal securities dealer has engaged in municipal securities business subsequent to the submission of Form G-37x to the Board, such broker, dealer or municipal securities dealer shall be required to submit a new Form G-37x to the Board in order to again qualify for an exemption under this **clause (B).** ~~**subclause (A)(2).**~~ The Board shall make public a copy of each Form G-37x received from any broker, dealer or municipal securities dealer.

~~**(B) If for any calendar quarter a broker, dealer or municipal securities dealer has met the requirements of clause (A)(2) of this paragraph (e)(ii) but has information that is required to be reported pursuant to clause (D) of paragraph (e)(i), then such broker, dealer or municipal securities dealer shall be required to send Form G-37/G-38 to the Board for such quarter setting forth only such information as is required to be reported pursuant to clauses (D) and (E) of paragraph (e)(i).**~~

(iii) If a broker, dealer or municipal securities dealer engages in municipal securities business during any calendar quarter after not having reported on Form G-37~~**/G-38**~~ the information described in clause (A) of paragraph (e)(i) for one or more contributions or payments made during the two-year period preceding such calendar quarter solely as a result of clause **(B)** ~~**(A)(2)**~~ of paragraph (e)(ii), such broker, dealer or municipal securities dealer shall include on Form G-37~~**/G-38**~~ for such calendar quarter all such information (including year and calendar quarter of such contributions or payments) not so reported during such two-year period.

(iv) A broker, dealer or municipal securities dealer that submits Form G-37~~**/G-38**~~ or Form G-37x to the Board shall either:

(A) No change.

(B) submit an electronic version of such form to the Board in such format and manner specified in the current *Instructions for Forms G-37~~/G-38~~* and ~~***Form***~~ *G-37x*.

(f) No change.

(g) Definitions.

(i)-(iii) No change.

(iv) The term "municipal finance professional" means:

(A) No change.

(B) any associated person who solicits **(within the meaning of Rule G-38(b)(i))** municipal securities business~~, as defined in paragraph (vii)~~;

(C)-(E) No change.

Each person designated by the broker, dealer or municipal securities dealer as a municipal finance professional pursuant to Rule G-8(a)(xvi) is deemed to be a municipal finance professional. Each person designated a municipal finance professional shall retain this designation for one year after the last activity or position which gave rise to the designation.

(v)-(viii) No change.

(h)-(j) No change.

*** * * * ***

Rule G-8. Books and Records to be Made by Brokers, Dealers and Municipal Securities Dealers

(a) Description of Books and Records Required to be Made. Except as otherwise specifically indicated in this rule, every broker, dealer and municipal securities dealer shall make and keep current the following books and records, to the extent applicable to the business of such broker, dealer or municipal securities dealer:

(i)-(xv) No change.

(xvi) *Records Concerning Political Contributions and Prohibitions on Municipal Securities Business Pursuant to Rule G-37.* Records reflecting:

(A)-(G) No change.

(H) Brokers, dealers and municipal securities dealers shall maintain copies of the Forms G-37~~/G-38~~ and G-37x sent to the Board along with the certified or registered mail receipt or other record of sending such forms to the Board.

(I)-(J) No change.

(K) No broker, dealer or municipal securities dealer shall be subject to the requirements of this paragraph (a)(xvi) during any

period that such broker, dealer or municipal securities dealer has qualified for and invoked the exemption set forth in **subparagraph (B)** ~~**clause (A)(2)**~~ of paragraph (e)(ii) of rule G-37; provided, however, that such broker, dealer or municipal securities dealer shall remain obligated to comply with clause (H) of this paragraph (a)(xvi) during such period of exemption. At such time as a broker, dealer or municipal securities dealer that has been exempted by this clause (K) from the requirements of this paragraph (a)(xvi) engages in any municipal securities business, all requirements of this paragraph (a)(xvi) covering the periods of time set forth herein (beginning with the then current calendar year and the two preceding calendar years) shall become applicable to such broker, dealer or municipal securities dealer.

(xvii) No change.

(xviii) **[RESERVED]** ~~***Records Concerning Consultants Pursuant to Rule G-38.***~~ ~~**Each broker, dealer and municipal securities dealer shall maintain:**~~

~~**(A) a listing of the name of the consultant pursuant to the Consultant Agreement, business address, role (including the state or geographic area in which the consultant is working on behalf of the broker, dealer or municipal securities dealer) and compensation arrangement of each consultant;**~~

~~**(B) a copy of each Consultant Agreement referred to in rule G-38(b);**~~

~~**(C) a listing of the compensation paid in connection with each such Consultant Agreement;**~~

~~**(D) where applicable, a listing of the municipal securities business obtained or retained through the activities of each consultant;**~~

~~**(E) a listing of issuers and a record of disclosures made to such issuers, pursuant to rule G-38(d), concerning each consultant used by the broker, dealer or municipal securities dealer to obtain or retain municipal securities business with each such issuer;**~~

~~**(F) records of each reportable political contribution (as defined in rule G-38(a)(vi)), which records shall include:**~~

~~**(1) the names, city/county and state of residence of contributors;**~~

~~**(2) the names and titles (including any city/county/state or other political subdivision) of the recipients of such contributions; and**~~

~~**(3) the amounts and dates of such contributions;**~~

~~**(G) records of each reportable political party payment (as defined in rule G-38(a)(vii)), which records shall include:**~~

~~**(1) the names, city/county and state of residence of contributors;**~~

~~**(2) the names and titles (including any city/county/state or other political subdivision) of the recipients of such contributions; and**~~

~~**(3) the amounts and dates of such payments;**~~

~~**(H) records indicating, if applicable, that a consultant made no reportable political contributions (as defined in rule G-38(a)(vi)) or no reportable political party payments (as defined in rule G-38(a)(vii));**~~

~~**(I) 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; and**~~

~~**(J) the date of termination of any consultant arrangement.**~~

(xix)-(xxii) No change.

(b)-(g) No change.

*** * * * ***

Rule G-9. Preservation of Records

(a) *Records to be Preserved for Six Years.* Every broker, dealer and municipal securities dealer shall preserve the following records for a period of not less than six years:

(i)-(vii) No change.

(viii) the records to be maintained pursuant to rule G-8(a)(xvi); provided, however, that copies of Forms G-37x shall be preserved for the period during which such Forms G-37x are effective and for at least six years following the end of such effectiveness; **and**

(ix) the records regarding information on gifts and gratuities and employment agreements required to be maintained pursuant to rule G-8(a)(xvii)**.**~~**; and**~~

~~**(x) the records required to be maintained pursuant to rule G-8(a)(xviii).**~~

(b)-(g) No change.

FORM G-37x MSRB

Name of dealer: _____

The undersigned, on behalf of the dealer identified above, does hereby certify that such dealer did not engage in "municipal securities business" (as defined in **Rule** ~~**rule**~~ G-37) during the eight full consecutive calendar quarters ending immediately on or prior to the date of this Form G-37x.

The undersigned, on behalf of such dealer, does hereby acknowledge that, notwithstanding the submission of this Form G-37x to the MSRB, such dealer will be required to:

(1) submit Form G-37~~/G-38~~ for each calendar quarter unless it has met all of the requirements for an exemption set forth in **Rule** ~~**rule**~~ G-37(e)(ii) for such calendar quarter;

~~**(2) submit Form G-37/G-38 for each calendar quarter in which it has information relating to consultants that is required to be reported pursuant to rule G-37(e)(ii)(B), regardless of whether the dealer has qualified for the exemption set forth in rule G-37(e)(ii)(A)(2);**~~

(2) ~~**(3)**~~ undertake the recordkeeping obligations set forth in **Rule** ~~**rule**~~ G-8(a)(xvi) at such time as it no longer qualifies for the exemption set forth in **Rule** ~~**rule**~~ G-8(a)(xvi)(K);

(3) ~~**(4)**~~ undertake the disclosure obligations set forth in **Rule** ~~**rule**~~ G-37(e), including in particular the disclosure obligations under paragraph (e)(iii) thereof, at such time as it no longer qualifies for the exemption set forth in **Rule** ~~**rule**~~ G-37(e)(ii)**(B)** ~~**(A)(2)**~~; and

(4) ~~**(5)**~~ submit a new Form G-37x in order to again meet the requirements for the exemption set forth in **Rule** ~~**rule**~~ G-37(e)(ii)**(B)** ~~**(A)(2)**~~ in the event that the dealer has engaged in municipal securities business subsequent to the date of this Form G-37x and thereafter wishes to qualify for said exemption.

Signature: _____ **Date:** _____
(must be officer of dealer)

Name: _____ **Phone:** _____

Address: _____

Submit to: **Municipal Securities Rulemaking Board**
1900 Duke Street, Suite 600
Alexandria, Virginia 22314

FORM G-37/~~G-38~~ MSRB

Name of dealer: _____

Report period: _____

I. CONTRIBUTIONS made to issuer officials (list by state)

State	Complete name, title (including any city/county/state or other political subdivision) of issuer official	Contributions by each contributor category (*i.e.*, dealer, dealer controlled PAC, municipal finance professional controlled PAC, municipal finance professionals and **non-MFP** executive officers). For each contribution, list contribution amount and contributor category (For example, $500 contribution by **non-MFP** executive officer) If any contribution is the subject of an automatic exemption pursuant to Rule G-37(j), list amount of contribution and date of such automatic exemption.

II. PAYMENTS made to political parties of states or political subdivisions (list by state)

State	Complete name (including any city/county/state or other political subdivision) of political party	Payments by each contributor category (*i.e.*, dealer, dealer controlled PAC, municipal finance professional controlled PAC, municipal finance professionals and **non-MFP** executive officers). For each payment, list payment amount and contributor category (For example, $500 payment by **non-MFP** executive officer)

III. ISSUERS with which dealer has engaged in municipal securities business (list by state)

State	Complete name of issuer and city/county	Type of municipal securities business (negotiated underwriting, **agency offering,** ~~**private placement,**~~ financial advisor, or remarketing agent)

Signature: _____ **Date:** _____
(must be officer of dealer)

Name: _____

Address: _____

_____

Phone: _____

Submit two completed forms quarterly by due date (specified by the MSRB) to:

Municipal Securities Rulemaking Board
1900 Duke Street
Suite 600
Alexandria, VA 22324

IV. CONSULTANTS
(specific information for each consultant must be attached)

NAME OF CONSULTANT (PURSUANT TO CONSULTANT AGREEMENT):

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Signature: _____ **Date:** _____
(must be officer of dealer)

Name: _____

Address: _____

_____

Phone: _____

Submit two completed forms quarterly by due date (specified by the MSRB) to:

Municipal Securities Rulemaking Board
1900 Duke Street
Suite 600
Alexandria, VA 22324

ATTACHMENT TO FORM G-37/G-38
(submit a separate attachment sheet for each consultant listed under IV)

Name of Consultant (pursuant to Consultant Agreement): _____

_____

Consultant's Business Address: _____

Role to be Performed by Consultant (including the state or geographic area in which the consultant is working on behalf of the broker, dealer or municipal securities dealer): _____

_____

Compensation Arrangement: _____

Municipal Securities Business Obtained or Retained by Consultant (list each such business separately and, if applicable, indicate dollar amounts paid to consultant connected with particular municipal securities business):

_____

_____

Total Dollar Amount Paid to Consultant during Reporting Period: _____

Contributions Made to Issuer Officials by Consultant and Any Partner, Director, Officer or Employee of the Consultant Who Communicates with An Issuer Official to Obtain Municipal Securities Business for the Broker, Dealer or Municipal Securities Dealer or Any PAC Controlled by Any of These Entities or Persons:

State	Complete name and title (including any city/county/state or other political subdivision) of issuer official	For each contribution, list contribution amount and contributor category (i.e., company, individual, company controlled PAC or individual controlled PAC)

Payments Made to Political Parties of States and Political Subdivisions by Consultant and Any Partner, Director, Officer or Employee of the Consultant Who Communicates with An Issuer Official to Obtain Municipal Securities Business for the Broker, Dealer or Municipal Securities Dealer or Any PAC Controlled by Any of These Entities or Persons:

State	Complete name (including any city/county/state or other political subdivision) of political party	For each payment, list payment amount and contributor category (i.e., company, individual, company controlled PAC or individual controlled PAC)

MSRB Notice 2004-32
(September 29, 2004)

Request for Comments on Revised Draft Amendments to Rule G-38 Relating to Solicitation of Municipal Securities Business

INTRODUCTION

The Municipal Securities Rulemaking Board ("MSRB") has noted that some practices of consultants who solicit municipal securities business[1] on behalf of brokers, dealers and municipal securities dealers ("dealers") could potentially present challenges to maintaining the integrity of the municipal securities market. The MSRB believes that, as a proactive measure, it may be appropriate to apply the basic standards of fair practice and professionalism embodied in MSRB rules to those who solicit municipal securities business on behalf of dealers. Such actions would raise the ethical standards under which municipal securities business is solicited by independent solicitors to the standards already applicable to dealer personnel.

The MSRB published a notice on April 5, 2004 (the "April Notice") requesting comments on draft amendments replacing the existing language of Rule G-38 relating to consultants with a provision limiting paid solicitations of municipal securities business on behalf of a dealer solely to persons associated with the dealer.[2] The MSRB received comments from 28 commentators. After reviewing these comments, the MSRB has determined to republish the draft amendments, with certain modifications, for further comment from industry participants.

EXECUTIVE SUMMARY OF REVISED DRAFT AMENDMENTS

The revised draft amendments to Rule G-38 would:

- prohibit a dealer from making payments for solicitation of municipal securities business to any person who is not an associated person of the dealer.

- require a dealer to enter into an agreement with any solicitor who is not a partner, director, officer or employee of the dealer (an "independent solicitor") in which, among other things, the solicitor explicitly agrees to be treated as an associated person of the dealer with respect to its solicitation activities on the dealer's behalf.

---

1 Pursuant to Rule G-37(g)(vii), municipal securities business includes the purchase of a primary offering of municipal securities by a dealer from the issuer on other than a competitive bid basis (such as a negotiated underwriting), the offer or sale of a primary offering of municipal securities by a dealer on behalf of an issuer (such as a private placement or an offering of municipal fund securities), and the provision of financial advisory, consultant or remarketing agent services by a dealer to an issuer for a primary offering of municipal securities in which the dealer was chosen on other than a competitive bid basis.

2 The MSRB also sought comment on certain related amendments to Rule G-37, Rule G-8 and Rule G-9 (on preservation of records).

- any paid solicitor would be subject to MSRB rules with respect to its solicitation activities on behalf of the dealer, including:
  - Rule G-17 (on fair dealing);
  - Rule G-20 (on gifts and gratuities);
  - Rule G-27 (on supervision); and
  - Rule G-37 (on political contributions and prohibitions on municipal securities business), under which the solicitor would be a municipal finance professional ("MFP") of the dealer.

- require a dealer to disclose, both on Form G-37/G-38 and to any issuer solicited by an independent solicitor, among other things, information about:
  - the solicitor's identity, role and compensation arrangement; and
  - whether the dealer has other arrangements with the solicitor calling for payments by the dealer to the solicitor.

- define solicitation as a direct or indirect communication with an issuer for the purpose of obtaining or retaining municipal securities business.

In addition, amendments would be made to Rules G-37 and G-8 (on books and records), as well as to Forms G-37/G-38 and G-37x, consistent with the provisions described above. The revised draft amendments are described more fully below.

This notice also makes clear that the definition of solicitation included in the revised draft amendments is consistent with how such term is currently used in existing Rules G-37 and G-38. The MSRB notes that the concept of solicitation under existing Rules G-37 and G-38 includes the element of intent in that a communication must have a purpose of obtaining municipal securities business in order to be considered a solicitation. This notice illustrates how the element of intent may be applied to various types of communications, including certain limited communications with issuer representatives, promotional communications, work-related communications and communications with conduit borrowers.

BACKGROUND

Current Rule G-38 was adopted by the MSRB to address actual and perceived abuses associated with the awarding of municipal securities business to dealers. The rule was intended to limit undisclosed relationships that could pose potential conflicts-of-interest or result in potentially improper conduct by consultants attempting to obtain business for dealers. As initially adopted, the rule required that the relationship between a dealer and its consultant be embodied in a formal agreement setting forth, among other things, the role of the consultant and compensation arrangement.[3] In addition, the rule required that the dealer disclose information about its consulting arrangements to any issuer from which a consultant would solicit municipal securities business on its behalf so that the issuer would be aware of the existence and nature of

---

[3] *See* "Consultants: Rule G-38," January 17, 1996, *MSRB Reports*, Vol. 16, No. 1 (Jan. 1996).

the relationship when making its decision to award business. Furthermore, to help deter and detect attempts by dealers to avoid the limitations placed on certain activities by Rule G-37 and Rule G-20 (on gifts and gratuities),[4] Rule G-38 also required disclosure to the MSRB on Form G-37/G-38 of the terms of the consulting arrangements and the business obtained by consultants. These Forms G-37/G-38 are made available to the public through the MSRB web site at www.msrb.org.

The MSRB subsequently amended Rule G-38 to provide further safeguards against undisclosed conflicts-of-interests and potential circumvention of Rule G-37.[5] As amended and currently in effect, Rule G-38 requires dealers to obtain from their consultants, and to disclose on Form G-37/G-38, information on contributions made by their consultants to officials of issuers with which the consultants have communicated and payments made by consultants to state and local political parties operating within the jurisdiction of such issuers.

The MSRB believes that its consultant disclosure requirements have been extremely effective in bringing to light many aspects of dealer practices relating to the use of consultants to solicit municipal securities business. However, as noted in the April Notice, several factors have caused the MSRB to consider whether some consultant practices may present challenges to the municipal securities market if left unchecked. As a proactive measure to forestall the potential growth of questionable practices that could imperil the high level of integrity of the municipal securities market, the MSRB published the original draft amendments to Rule G-38 to raise the ethical standards of the municipal securities industry. The amendments would apply the basic standards of fair practice and professionalism embodied in MSRB rules to the process by which municipal securities business is solicited.

The MSRB appreciates the comments it received from industry participants on the April Notice and, where appropriate, has made certain revisions to the draft amendments to reflect these comments. However, the majority of the comments received by the MSRB related to the political activities of consultants and the potential application, either in whole or in part, of Rule G-37 to contributions made by consultants, with only limited commentary on the other facets of the proposal. Although the possibility of circumvention of Rule G-37 was one important factor in the MSRB's decision to seek comment on the proposal, the MSRB also believes that the basic standards of fair practice and professionalism embodied in MSRB rules, which apply to all other

---

[4] Rule G-37 prohibits dealers from engaging in municipal securities business with issuers for two years after certain contributions to issuer officials are made by dealers, their MFPs or political action committees ("PACs") controlled by the dealers or their MFPs. The rule also requires disclosure on Form G-37/G-38 of political contributions to issuer officials and payments to state and local political parties made by dealers, MFPs, other dealer executive officers, and PACs controlled by the dealers or their MFPs. Rule G-20 places limitations on gifts made to individuals in relation to the municipal securities activities of the individuals' employers.

[5] *See* "Requirements for Dealers to Obtain from Their Consultants Information on Political Contributions and Payments to Political Parties and for Dealers to Report Such Information to the Board," December 9, 1999, *MSRB Reports*, Vol. 20, No. 1 (March 2000).

municipal securities activities undertaken on behalf of dealers, should be made applicable to the process by which municipal securities business is solicited. Furthermore, the MSRB is concerned whether increases in levels of compensation paid to consultants for successfully obtaining municipal securities business could motivate consultants to use more aggressive tactics in their contacts with issuers. Both of these concerns served as critical bases for the MSRB's rulemaking proposal to ensure that the activities of persons who solicit municipal securities business on behalf of dealers are appropriately supervised and subject to the industry's ethical standards of fair practice and professionalism.

Thus, the MSRB is publishing for further industry comment a revised version of the draft amendments to Rule G-38. The revision would include the requirement that paid solicitations of municipal securities business on behalf of a dealer be undertaken only by persons associated with the dealer, as in the original draft amendments. However, with respect to the solicitation activities of certain categories of persons, the revised version of draft Rule G-38 would differ from the original draft amendments by retaining many of the requirements relating to contractual arrangements and disclosure of various items of information (with certain modifications) that exist under current Rule G-38 with respect to consultants. The MSRB also is publishing related revised draft amendments to Rule G-37, Rule G-8 and Forms G-37/G-38 and G-37x.[6]

The MSRB seeks comments on all facets of the revised draft amendments. The principal provisions of the revised draft amendments are summarized below.[7] This is followed by a discussion of the principal comments received on the original draft amendments. To the extent that the MSRB received substantive comments on the April Notice, the MSRB considered the merits of the comments and made certain revisions to the proposal, as noted below.

SUMMARY OF REVISED DRAFT AMENDMENTS

Summary of Revised Draft Amendments to Rule G-38

Existing Rule G-38 on consultants would be deleted in its entirety. In its place, new draft Rule G-38, on solicitation of municipal securities business, is proposed for comment. Revised draft Rule G-38 would establish further requirements for paid solicitors of a dealer, other than partners, directors, officers or employees of the dealer ("independent solicitors"), that were not included in the original draft Rule G-38 but are similar in many respects to the consultant requirements under existing Rule G-38.

Prohibited Payments. As originally proposed in the April Notice, new Rule G-38 would prohibit dealers from making any direct or indirect payment to any person, other than an

---

6 The revised draft amendments do not amend Rule G-9 (on preservation of records), as did the original draft amendments. As a result of changes made to the draft amendments to Rule G-38, the record retention requirement of Rule G-9 with respect to records created under Rule G-38 would be retained.

7 The full text of the revised draft amendments, as well as revised draft Forms G-37/G-38 and G-37x, appear at the end of this notice.

associated person of the dealer, for any solicitation of municipal securities business on behalf of the dealer. This prohibition is retained in the revised draft amendments.

Definition of Solicitation. The original draft amendments defined solicitation as a direct or indirect communication with an issuer for the purpose of obtaining or retaining municipal securities business. In addition, the April Notice included a discussion regarding how this definition should be applied and sought comment from the industry in this regard. The revised draft amendments do not modify the original language of this definition. However, the MSRB provides a more extensive discussion below on how this definition should be applied.

New Requirements with Respect to Independent Solicitors. The revised draft amendments establish certain requirements for independent solicitors that were not included in the original draft amendments. In most respects, these requirements are modeled after similar requirements under existing Rule G-38 that apply to consultants. These requirements would not apply to the solicitation activities of partners, directors, officers or employees of the dealer.

Solicitation Agreement – The dealer would be required to enter into a written agreement with an independent solicitor (a "solicitation agreement") before the independent solicitor engages in communication with an issuer. A solicitation agreement must include the following:

- name, business address, role (including state or geographic area in which the independent solicitor is working for the dealer) and compensation arrangement. This is the same information required under current Rule G-38 for consultants.

- if the independent solicitor is not an individual (*i.e.*, it is a corporation, partnership or other entity), a requirement that the independent solicitor provide to the dealer a list of any partner, director, officer or employee of the independent solicitor who directly or indirectly communicates with an issuer to obtain municipal securities business on behalf of the dealer ("solicitor personnel"). These are the same types of personnel for which an entity acting as a consultant must provide contribution information under current Rule G-38.

- a requirement that the independent solicitor provide to the dealer a list of all contributions to issuer officials and payments to state or local political parties made by the independent solicitor, any solicitor personnel and any political action committee ("PAC") controlled by the independent solicitor or solicitor personnel.[8] Although somewhat similar to the types of contribution and payment information required to be provided by a consultant under current Rule G-38, the range of

[8] Contributions to issuer officials and payments to state or local political parties by an independent solicitor who is an individual or by solicitor personnel would be subject to the same *de minimis* exclusions available to MFPs under Rule G-37, in which case such contributions and payments need not be reported.

contributions and payments required to be disclosed would be broader than under current Rule G-38.[9]

- an agreement that the independent solicitor (if the solicitor is an individual) or any of its solicitor personnel (if the solicitor is an entity) is an associated person of the dealer with respect to solicitation activities undertaken on behalf of the dealer, that such solicitation activities on behalf of the dealer shall be subject to the direction and supervision of the dealer, and that such person shall undertake solicitation activities for the dealer in conformity with MSRB rules. This requirement does not appear in current Rule G-38 and is intended both to ensure that independent solicitors and their solicitor personnel conform their solicitation activities to standards of fair practice and professionalism and to eliminate any ambiguity as to whether the independent solicitor would be considered an associated person for purposes of the rule.

Disclosure to Issuers – The dealer would be required to make disclosures to issuers on the use of independent solicitors in a manner similar to the disclosures required under current Rule G-38 relating to consultants.[10] The disclosures to the issuer would consist of the following:

- the name, business address, role (including state or geographic area in which the independent solicitor is working for the dealer) and compensation arrangement. This is the same information required under current Rule G-38 for consultants.

- if the independent solicitor is an entity, a list of all solicitor personnel. This requirement does not appear in current Rule G-38 and is intended to provide issuers with information that would help them understand the nature of the relationships that may exist with respect to individuals who communicate with them about municipal securities business.

- a statement as to whether the dealer has any existing arrangement (other than a solicitation agreement required under revised draft Rule G-38) with the

---

9 Under current Rule G-38, reportable contributions and payments are limited to those made to officials of issuers with which a consultant has communicated and those made to political parties operating within the geographic area of issuers with which the consultant has communicated. However, since independent solicitors would also be MFPs under Rule G-37 by virtue of their status as associated persons of the dealer, the contributions and payments covered by revised draft Rule G-38 would include (with certain limitations under the "look back" provision of Rule G-37(b)(ii)) those made to any issuer official or to any state or local political party regardless of whether the independent solicitor has communicated with the issuer, and the time frame for which contributions and payments are covered also would change.

10 The disclosure must be made either (i) prior to the selection of the dealer for the particular municipal securities business being sought or (ii) at or prior to the independent solicitor's first communication with the issuer for any municipal securities business.

independent solicitor or any of its solicitor personnel under which any direct or indirect payments from the dealer are or may be payable to the independent solicitor or its solicitor personnel with respect to any activities of the independent solicitor relating to the issuer.[11] This requirement does not appear in current Rule G-38 and is intended to provide issuers with information that would help them understand the nature of the business and financial relationships that may exist between a dealer and the independent solicitors they use to solicit business and to identify any potential conflicts of interest.

Disclosure to MSRB on Form G-37/G-38 – The dealer would be required to make disclosures on revised draft Form G-37/G-38 regarding the use of independent solicitors in a manner similar to the disclosures required under current Form G-37/G-38 with respect to consultants. The disclosures on Form G-37/G-38 would consist of the following:

- the name, business address, role (including the state or geographic area in which the independent solicitor is working on behalf of the dealer), compensation arrangement, any municipal securities business obtained or retained by the independent solicitor (with each such business listed separately) and dollar amounts paid to the independent solicitor connected with particular municipal securities business, if applicable. These are the same requirements applicable under current Form G-37/G-38 with respect to consultants.

- if the independent solicitor is an entity, a list of all solicitor personnel. This information is currently not required on Form G-37/G-38 and is intended to provide the marketplace and enforcement agencies with information helpful in understanding the nature of the relationships that may exist with respect to individuals who solicit municipal securities business.

- a check-box disclosure of whether the dealer has any existing arrangement (other than a solicitation agreement required under revised draft Rule G-38) with the independent solicitor or any of its solicitor personnel under which any direct or indirect payments from the dealer are or may be payable to the independent solicitor or its solicitor personnel with respect to any activities of the independent solicitor relating to issuers of municipal securities.[12] This requirement does not

---

11 Some examples of existing arrangements that would be subject to this requirement include agreements under which the independent solicitor seeks, on behalf of the dealer, derivatives, public funds management or other types of business with the issuer. This provision only requires disclosure of whether such other arrangement exists and would not require the dealer to disclose any of the terms of such relationship.

12 Unlike in the case of the disclosure required to be made to an individual issuer as to whether there exists such an arrangement for that specific issuer, the dealer would be required to provide an affirmative response on Form G-37/G-38 if any such arrangement exists for any issuer of municipal securities. *See* revised draft Form G-37/G-38 appearing at the end of this notice. This provision only requires disclosure of whether such other

appear in current Rule G-38 and is intended to provide the marketplace and enforcement agencies with information helpful in identifying potential conflicts of interest and understanding the nature of the business and financial relationships that may exist between dealers and their independent solicitors. The existence of other arrangements relating to issuers of municipal securities in certain circumstances also may indicate potential indirect payments to independent solicitors for solicitations of municipal securities business.

Form G-37/G-38 would be revised to include such items of information. Since contributions to issuer officials and payments to state or local political parties made by independent solicitors, their solicitor personnel and PACs they control would be treated as contributions and payments made by MFPs, such disclosures would be made on Form G-37/G-38 in the same manner as contributions and payments made by any other MFP. Therefore, revised draft Form G-37/G-38 would not include a separate section for reporting these contributions and payments, as currently is the case with consultant contributions and payments in existing Form G-37/G-38.

Summary of Revised Draft Amendments to Rule G-37 and Forms G-37/G-38 and G-37x

The original draft amendments to Rule G-37 published in the April Notice inserted references to the definition of solicitation in new Rule G-38, deleted references to the information required to be provided under existing Rule G-38 and changed references from Form G-37/G-38 to Form G-37. The revised draft amendments to Rule G-37 make several changes from the original draft amendments. The revised draft amendments would:

- reinsert existing references to information required to be provided under revised draft Rule G-38 (as described above) and to Form G-37/G-38.

- create a new definition of solicitor MFP, consisting of independent solicitors, any solicitor personnel of an independent solicitor that is an entity, and any partner, director, officer or employee of the dealer who solicits municipal securities business.

- clarify that the *de minimis* exemption from the rule's disclosure requirement and ban on municipal securities business with respect to contributions and payments made by an MFP applies only where the MFP is an individual.[13]

- retain the existing name of Form G-37/G-38, and Section IV and the attachment to the form would be retained with certain modifications to reflect the types of information to be disclosed for independent solicitors (as described above).[14]

---

arrangement exists and would not require the dealer to disclose any of the terms of such relationship.

[13] This clarification reflects the fact that, under the revised draft amendments, some solicitor MFPs may be entities that are not entitled to vote.

[14] Form G-37/G-38 also would be amended to reflect the previous renaming of "executive officers" as "non-MFP executive officers" under Rule G-37 and to rename the municipal

- retain the changes to Form G-37x contained in the original draft amendments without further modification.

Summary of Revised Draft Amendments to Rules G-8

As published in the April Notice, Rules G-8 and G-9 would have been amended to delete recordkeeping requirements in connection with the consultant provisions of existing Rule G-38. Under the current proposal, no amendments would be made to Rule G-9. The language relating to consultants in Rule G-8 that were to be deleted pursuant to the original draft amendments would largely be retained but modified to make them applicable solely with respect to independent solicitors. However, the portions relating to records of political contributions and payments to state or local political parties would remain deleted.[15] The revised draft amendments to Rule G-8 adds recordkeeping requirements relating to the list of solicitor personnel of independent solicitors and of any arrangement (other than a solicitation agreement required under revised draft Rule G-38) with an independent solicitor or any of its solicitor personnel under which direct or indirect payments are or may be payable to the independent solicitor or its solicitor personnel for activities of the independent solicitor relating to municipal securities.

DISCUSSION OF COMMENTS ON THE ORIGINAL DRAFT AMENDMENTS

Constitutionality of Proposal

Comments Received. One commentator states that the draft amendments would violate the First Amendment of the U.S. Constitution by requiring consultants to become MFPs. This commentator argues that the U.S. Supreme Court has equated political contributions with protected speech, and any restriction on speech must be narrowly tailored to advance a compelling governmental interest. The commentator asserts that, assuming for the sake of argument that pay-to-play problems exist relating to consultants, the draft amendments' restrictions "far exceed what would be necessary to address that problem."

MSRB Response. In upholding the constitutionality of Rule G-37 in *Blount vs. SEC,*[16] the Supreme Court recognized that, at its core, the rule was intended to sever the connection between the making of political contributions and the awarding of municipal securities business. The rule as then written (and as found constitutional) applied to various categories of associated persons in addition to associated persons who solicit municipal securities business. For example,

---

securities business category designation of "private placement" to "agency offering" to more accurately reflect the nature of this category.

15 Since contributions to issuer officials and payments to state or local political parties made by independent solicitors, their solicitor personnel and PACs they control would be treated as contributions and payments made by MFPs, records of such contributions would already be covered under the recordkeeping provision relating to Rule G-37.

16 *Blount v. SEC,* 61 F. 3d 938 (D.C. Cir. 1995), *cert. denied,* 116 S. Ct. 1351 (1996).

the rule covers associated persons who underwrite or trade municipal securities or who supervise such activities. Persons who undertake these types of activities on behalf of dealers have always been associated persons. Given that the act of soliciting municipal securities business more closely touches on the core purpose of Rule G-37 than do some of the other municipal securities activities that are undertaken by associated persons already treated as MFPs, the MSRB firmly believes that the argument that it is unconstitutional to require a person who solicits municipal securities business on behalf of a dealer to be an associated person of that dealer, and thereby also an MFP subject to Rule G-37, has no merit.

Reach of Rulemaking Proposal

Comments Received. Many commentators express a belief that the MSRB's primary concern in proposing the draft amendments related to political contributions, or suggest alternatives to the MSRB's proposal that solely address political contribution issues. For example, many commentators propose that, in lieu of the draft amendments, the MSRB adopt a version of Rule G-37 that would apply to consultants. These proposals are discussed below.

MSRB Response. As noted above, the MSRB is not concerned solely with the issue of political giving by consultants but instead seeks to have the full range of MSRB fair practice and professionalism standards apply to the process of soliciting municipal securities business.

Other Unregulated Municipal Securities Industry Participants

Comments Received. Many commentators are concerned that, although the problems associated with pay-to-play in the municipal securities industry are not limited to dealers, only dealers are subject to regulation in this area. They urge the MSRB to coordinate efforts with the Securities and Exchange Commission ("SEC"), NASD and others to apply pay-to-play limits to financial advisors, derivatives advisors, bond lawyers and other market participants.

MSRB Response. The MSRB recognizes that other participants in the municipal securities industry face the same types of challenges as does the dealer community. However, the MSRB's rulemaking authority is limited under the Securities Exchange Act of 1934 (the "Exchange Act") to the activities of dealers. The MSRB strongly encourages other industry participants to take affirmative steps to ensure the integrity of their portion of the marketplace and toward severing the connection between political contributions and the awarding of contracts relating to the municipal securities, derivative products and other financial activities of issuers.

Effective Date

Comments Received. Several commentators express concern about existing contractual obligations if the draft amendments were to be adopted and urge the MSRB to make the effective date apply prospectively so as not to disrupt or dismantle existing contracts.

MSRB Response. Should the MSRB adopt the revised draft amendments, the MSRB would seek to have their effectiveness delayed for a period of time to permit dealers to accommodate, or make the appropriate changes to, their existing contractual arrangements.

Role of Consultants in the Municipal Securities Market

Comments Received. Many commentators believe that consultants are beneficial and allow dealers, especially smaller regional dealers, to maximize their limited resources and compete with larger national dealers. Some of these commentators express concern that the draft amendments would negatively impact such dealers. One commentator states that the use of consultants increases competition and provides issuers with greater choice, thereby resulting in "better service at lower rates." In addition, this commentator argues that consultants that have a local presence "have unique knowledge regarding the local issuer's needs and requirements," thereby improving the effectiveness of the dealer at servicing the issuer. Other commentators note that "the municipal marketplace is uniquely fragmented, covering myriad issuers in diverse locations." They argue that consultants are necessary to providing quality service to such a diverse market. Some commentators who believe that consultants are beneficial focus on their role in providing specific expertise or services in connection with the completion of a financing, rather than their role as solicitors of municipal securities business.

Other commentators believe that there is a significant problem with the use of consultants that is appropriately addressed by requiring that solicitation activity be undertaken only by associated persons of dealers. One commentator agrees "that eliminating the use of consultants who are not associated persons will advance the … standards of fair practice and professionalism embodied in the Board's rules and in the rules and regulations that govern all activities of brokers, dealers and municipal securities dealers and their associated persons." This commentator views the draft amendments as "a sensible regulatory response to the increasing and evolving use of third parties to solicit municipal securities business." Another commentator states that "removing the opportunity for improper conduct by consultants would result overall in an improved environment for issuance of municipal securities." A third commentator believes that the draft amendments have "the benefit of removing the ability of a dealer to indirectly evade the 'pay to play' prohibitions … through the use of consultants."

One commentator questions whether there has been a significant increase in contributions by consultants, stating that the number of consultants making reportable political contributions has "only increased by slightly over 2% (from 11.3% to 13.8%) during the last four-year period, between 2000 and 2003." This commentator further states that, "regardless of the level of the contributions being made, there is no indication whatsoever that Consultant contributions are being used to influence decisions regarding municipal securities business." It states that coupling Rule G-37(d), on indirect violations, with the existing disclosure requirements of Rule G-38 provides an effective means for addressing the MSRB's concerns.

With regard to compensation, one commentator argues that the increase in payments to consultants "does not in any way indicate or imply that Consultants are engaging in pay-to-play or that there is added pressure on Consultants to engage in aggressive or abusive practices. Rather, the recent increase in compensation appears to be attributable to the significant increase in the volume and size of municipal securities deals." On the other hand, some commentators state that they would support the prohibition of contingent compensation arrangements or "success" fees paid to consultants. One commentator notes that such arrangements "have long

been one of the primary traditional indicators under the securities laws as to whether a person is required to register as a broker or dealer" and therefore any person who solicits municipal securities business and has a contingent compensation arrangement should be properly registered. Another commentator states that, while success fees can often be appropriate, "this type of fee arrangement does introduce greater incentives to pursue municipal securities business more aggressively and may, especially where these fees are very large, undermine public confidence in the integrity of the municipal securities markets." A third commentator states that success fees "inherently apply…undue pressure on Consultants and create, at the very least, a perception of impropriety." However, another commentator opposes the imposition of restrictions on the type and amount of compensation paid to consultants.

MSRB Response. The MSRB observes that current Rule G-38 applies only to persons who solicit municipal securities business. Independent contractors that provide specific expertise or services in connection with the completion of a financing and that do not solicit municipal securities business are not considered to be consultants under current Rule G-38, nor would their activities be affected under the draft amendments. The MSRB has noted that some industry participants appear to have difficulty in distinguishing between solicitors and consultants that provide technical expertise and, for this reason, the MSRB did not use the term "consultant" in draft Rule G-38 to avoid further confusion on this point.

Contrary to the apparent understanding of some commentators, the draft amendments do not prohibit the use of independent solicitors but instead require that they act in accordance with MSRB rules and that they be subject to dealer supervision with respect to such actions. Thus, dealers would be free to continue using independent solicitors who are willing to operate by the rules of fair practice and professionalism under the supervision of the dealers – conditions under which the dealers themselves must operate.

It is important to note that overall levels of giving have in fact increased, even though this may primarily reflect a significant increase in the amount of reportable contributions being made by those specific consultants that do make contributions rather than a sizeable increase in the number of consultants making such contributions. The MSRB believes that many of the same ethical considerations that resulted in the MSRB's initial adoption of Rule G-37 with respect to the political giving of dealers apply with respect to contributions made by consultants to officials of issuers from whom they are attempting to obtain municipal securities business for their dealer clients. Thus, treating the political giving of solicitors as MFP contributions and payments subject to the full set of Rule G-37 requirements is appropriate given the direct connection that independent solicitors have to the awarding of municipal securities business to dealers.

Further, although it may very well be that consultant compensation is rising because larger issue sizes are resulting in percentage-based success fees that produce proportionately larger pay-outs, the MSRB's concern in this area does not arise so much from the cause of the higher compensation but rather from the potential effect on solicitors' behavior prompted by such increase. The MSRB believes that this concern is better addressed through subjecting such behavior to MSRB standards of fair dealing and professionalism, rather than by regulating the amount or type of compensation paid to solicitors. In addition, as described above, the revised draft amendments would require that compensation and related information for independent

solicitors be disclosed to issuers being solicited and on Form G-37/G-38 in a manner similar to the current disclosure requirements for consultants.

Effect of Becoming an Associated Person

In the April Notice, the MSRB observed that prohibiting dealers from making payments for solicitations to any person other than an associated person would necessitate that all paid solicitors be associated persons and, consequently, also MFPs under Rule G-37.[17] In addition, the MSRB clarified that other MSRB rules would apply to the municipal securities activities undertaken on behalf of the dealer by any such associated person.

The MSRB provided guidance in the April Notice with regard to the nature of the relationship entailed by becoming an associated person of a dealer. The MSRB stated that, as a general matter, a person could become associated with a dealer by becoming employed by the dealer or by entering into an arrangement with the dealer whereby the dealer is given control over such person's municipal securities activities. This "control" would include the application of MSRB rules to the municipal securities activities of such person and the subjection of such activities to supervision by the dealer. The MSRB also clarified that, if the proposed rulemaking were adopted, these "controlled" associated persons would not be subject to the fair practice rules in connection with their day-to-day activities that are not related to the municipal securities activities of the dealer, but only with respect to their municipal securities activities undertaken for the dealer. Therefore, any solicitors who become associated with a dealer would need to conform their municipal securities activities to all applicable MSRB rules. For example, in soliciting municipal securities business, the solicitor would be subject to Rules G-17 and G-20. The solicitor's municipal securities activities also would be subject to supervision by the appropriate principal under Rule G-27. In the April Notice, the MSRB also sought comments on whether solicitors' activities are such that they should be required to become appropriately qualified under Rule G-3(a)(i) as municipal securities representatives.

Comments Received. Many commentators state that supervision of solicitors as associated persons of the dealer would be extremely burdensome or impossible, particularly where they are located at a distance from the dealer. Some commentators state that the added cost of compliance could adversely affect smaller or minority firms. Others state that, in the case

---

[17] An associated person of a broker or dealer is defined under Section 3(a)(18) of the Exchange Act as any partner, officer, director or branch manager of the broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with the broker or dealer, or any employee of the broker or dealer. In the case of a municipal securities dealer that is a bank, an associated person is defined under Section 3(a)(32) of the Exchange Act as any person directly engaged in the management, direction, supervision, or performance of any of the municipal securities dealer's activities with respect to municipal securities, and any person directly or indirectly controlling such activities or controlled by the municipal securities dealer in connection with such activities. MSRB Rule D-11 provides that persons whose functions are solely clerical or ministerial are not treated as associated persons of brokers, dealers or municipal securities dealers.

where a bank employee makes a referral to an affiliated dealer, the employee would be required to function within two supervisory structures, leading to "duplicative oversight for little benefit." In addition, some commentators note that it may be difficult to distinguish which activities undertaken by a solicitor that serves many clients would need to be supervised by a particular dealer. Some commentators sought clarification as to the nature of the relationship that would be necessary to ensure that a solicitor is considered an associated person for purposes of the rule, and whether a firm rather than an individual could be a solicitor under the proposal. Another commentator observes that the requirement to make solicitors be associated persons of the dealer can have repercussions with respect to the rules of other securities regulators as well. Some commentators state that persons whose only municipal securities activities consist of solicitation of municipal securities business should not be required to qualify as municipal securities representatives.

Many commentators suggest that the applicability of MSRB rules to solicitors be limited to Rule G-37 itself, or that the MSRB draft new provisions having varying degrees of similarity to those of Rule G-37. For example, one commentator recommends that the MSRB: (1) require dealers to prohibit their consultants from making contributions to issuer officials; (2) prohibit dealers from hiring a consultant to solicit an issuer if the consultant has made a contribution to an official of that issuer; (3) require dealers to terminate their consultant agreement and cease paying the consultant upon learning of a prohibited contribution; and (4) require dealers to obtain periodic certifications from their consultants.

Another commentator recommends that the MSRB: (i) apply the contribution limits of Rule G-37 to consultants; (ii) prohibit contingent fee arrangements; (iii) seek more aggressive enforcement of Rule G-37(d), on indirect violations; and (iv) clarify what it considers abusive practices and provide "best practices" guidelines regarding the use of consultants. Other commentators propose different variations similar to the two preceding examples. While some commentators believe that a contribution made by a consultant to an official of an issuer should result in a ban on business for the dealer, others disagree and instead believe that the dealer should only be required to terminate the consultant relationship.

MSRB Response. The MSRB notes that many dealers currently supervise associated persons who are located in widely dispersed offices, sometimes consisting of one-person offices throughout the country in geographically isolated locations. In some cases, these supervised persons are not employees of the dealer, such as "independent" brokers who are nonetheless associated persons of the dealer subject to the control of and supervision of the dealer with respect to brokerage functions undertaken on the dealer's behalf. In addition, some dealers contract out the functions of municipal securities principals to independent contractors who nonetheless also are under the control of the dealer with respect to such functions. These contractors often enter into contemporaneous arrangements with multiple dealers. Furthermore, NASD member firms sometimes are obligated under NASD Rule 3030 (on outside business activities of an associated person) to supervise certain activities of their associated persons (*e.g.*, certain investment advisory arrangements) when conducted as an employee of a different firm. It is not uncommon currently for individuals to be subject to more than one set of regulatory requirements (*e.g.*, brokers who are also investment advisors), each relating to different aspects

of their activities.[18] The same principles involved in permitting these arrangements also would apply with respect to the supervision of solicitors under the draft amendments. Thus, the MSRB believes that a dealer would be able to undertake the duties of supervision even when a solicitor is not an employee of the dealer and may in fact be an employee of another firm that serves multiple dealers. Further, the revised draft amendments make clear that, where an independent solicitor is an entity, MSRB rules would be applied to those personnel of the solicitor who undertake the communications on behalf of the dealer.

The MSRB has proposed in the revised draft amendments to Rule G-38 that an independent solicitor's contract with the dealer explicitly provide for the dealer's control of and supervision over the independent solicitor's solicitation activities undertaken on behalf of the dealer with respect to municipal securities business, which would thereby satisfy the requirement that the independent solicitor be an associated person for purposes of MSRB rules. The MSRB believes that this provision would eliminate any ambiguity regarding whether an independent solicitor has indeed become an associated person for purposes of Rule G-38. In addition, the language of the revised draft amendments specifically establishes that the independent solicitor's activities which must be subject to dealer supervision are those solicitation activities undertaken on behalf of the dealer with respect to municipal securities business. The MSRB is of the view that an independent solicitor that limits its activities on behalf of a dealer to such solicitation activities would not be required to qualify as a municipal securities representative.

The MSRB disagrees that only Rule G-37, and not the other rules of the MSRB, should apply to the activities of solicitors. As noted above, one of the principal purposes of this proposal was to make the process of soliciting municipal securities business subject to the standards of fair practice and professionalism that apply to the other municipal securities activities of dealers. Imposition solely of Rule G-37 would fall short of this objective.

The MSRB understands that dealers and their consultants will have to weigh various considerations in determining whether to continue in their arrangements with respect to the solicitation of municipal securities business and concedes that some consultants may choose not to continue soliciting business on behalf of dealers. The MSRB believes that the benefits gained from holding solicitors to standards of fair dealing and professionalism far outweigh the cost of the possible decrease in the size of the pool of available solicitors resulting from the departure from that business of consultants who are unwilling or unable to abide by these standards.

The MSRB received comments both in favor of and in opposition to the draft amendments from large national firms and small or regional firms. Taken as a whole, the

---

[18] The MSRB observes that, pursuant to Section 15B(b)(2)(H) of the Exchange Act, Congress directed the MSRB to define the term "separately identifiable department or division" ("SID") of a bank in a manner that would permit a SID to engage in municipal securities activities within the bank itself and also to engage in activities unrelated to municipal securities. This Congressional formulation clearly envisioned that many personnel within SIDs who are engaged in municipal securities activities would be subject to dual regulatory structures. *See* MSRB Rule G-1.

comments did not provide persuasive evidence that the draft amendments would have a disparate effect on different types of dealers.

Definition of Solicitation

Solicitation is defined in draft new Rule G-38 as any direct or indirect communication with an issuer for the purpose of obtaining or retaining municipal securities business. In the April Notice, the MSRB stated that this is consistent with the types of communications covered by the consultant definition in existing Rule G-38. Thus, just as a consultant who currently communicates indirectly with an issuer through a third party (*e.g.*, through issuer agents such as financial advisors, bond counsel, etc, or through conduit borrowers in connection with private activity bond issues) to obtain municipal securities business for a dealer can be subject to current Rule G-38, depending upon the specific facts and circumstances, so too could an indirect communication with an issuer through a third party be considered a solicitation under draft new Rule G-38. The MSRB noted in the April Notice that the definition of MFP in existing Rule G-37(g)(iv) is not dependent upon the person to whom a solicitation to obtain business is made. As the definition of solicitation would be amended, either direct or indirect communications with an issuer to obtain business would trigger the application of Rule G-37. The MSRB stated that it would not view this as a change in how Rule G-37 operates.

The April Notice made clear that intent is an important element in determining whether a communication should be considered a solicitation under Rules G-37 and G-38, both as currently in effect and as they would be modified by the draft amendment, and provided examples of instances where a communication would not be a solicitation. The April Notice further stated that communications incidental to undertaking tasks to complete municipal securities business for which the dealer has already been engaged are not solicitations. The MSRB sought comment particularly on whether a communication with a conduit borrower to hire a dealer as an underwriter for a private activity bond issue where the issuer ultimately must approve the underwriter for the issue should be considered an indirect communication with the issuer.

Comments Received. Most commentators seem to accept the draft rule language of the definition of solicitation – a direct or indirect communication with an issuer for the purpose of obtaining or retaining municipal securities business – as appropriate, although one commentator states that the term should be limited to "activity aimed at an issuer" out of concern that any communication with a third party regarding a municipal securities issue could potentially become a solicitation of an issuer if the third party passes such communication on to the issuer.

Many commentators are concerned with two general scenarios where they believe that certain types of communications should not be considered solicitations. These involve communications with conduit borrowers and limited communications with issuers.

Many commentators express concern over whether communications with a conduit borrower would be considered an indirect solicitation of the conduit issuer, stating that where the conduit borrower selects the underwriter, a contribution to an issuer official could not influence the selection process. One commentator argues that, in some cases, the "conduit borrower would not have any influence over the issuer or even the selection of the issuer" and therefore should

"not be considered [an] agent[] of the issuer." Another commentator asks that the MSRB clarify that, in connection with a conduit issuance in which the issuer is brought into the discussions only after the feasibility of tax-exempt financing is determined and the election of an underwriter has been made, there is no indirect communication with the issuer that is intended to obtain municipal securities business for the dealer. One commentator states that, in the alternative, if the MSRB interprets Rule G-37 to cover mere communications with private obligors, it should "carve out an exemption that reflects how conduit deals really work."

With respect to limited direct communications with issuer officials, some commentators believe that bank employees and other associated persons of a dealer should be free to inform issuers that the affiliated dealer has municipal securities capabilities and provide to issuers contact information for MFPs of the dealer without the communication becoming a solicitation.

MSRB Response. The MSRB believes it would be appropriate to provide a more detailed discussion on certain issues raised by the commentators. Thus, the MSRB restates in full its discussion on solicitation set forth in the April Notice, with various modifications:

Intent – The MSRB notes that the existing concept of solicitation under current Rules G-37 and G-38 includes the element of intent in that the communication has a purpose of obtaining municipal securities business. This same intent element would be continued in draft new Rule G-38's formulation that a solicitation involves a communication "for the purpose of" obtaining business for the dealer. The determination of whether a particular communication is a solicitation is dependent upon the specific facts and circumstances relating to such communication.

Limited Communications with Issuer Representative – If an issuer representative asks an associated person of a dealer whether the dealer has municipal securities capabilities, the associated person generally would not be viewed as having solicited municipal securities business if he or she provides a limited affirmative response, together with either providing the issuer representative with contact information for an MFP of the dealer or informing the issuer representative that the associated person will have dealer personnel who handle municipal securities business contact him or her. Similarly, if an issuer representative is discussing governmental cash flow management issues with an associated person of a dealer who concludes, in his or her professional judgment, that an appropriate means of addressing the issuer's needs may be through an issue of municipal securities, the associated person generally would not be viewed as having solicited business if he or she provides a limited communication to the issuer representative that such alternative may be appropriate, together with either providing the issuer representative with contact information for an MFP or informing the issuer representative that the associated person will have dealer personnel who handle municipal securities business contact him or her.

In the examples above, if the associated person receives compensation such as a finder's or referral fee for such business or if the associated person engages in other activities that could be deemed a solicitation with respect to such business (for example, attending presentations of the dealer's municipal finance capabilities or responding to a request for proposals), the

associated person generally would be viewed as having solicited the business.[19] The examples above are intended for illustrative purposes and are not the only instances in which a solicitation may be deemed to have or have not occurred.

Promotional Communications – The MSRB understands that an associated person of a dealer may provide information to potential clients and others regarding the general capabilities of the dealer through either oral or written communications. Any such communication that is not made with the purpose of obtaining or retaining municipal securities business would not be considered a solicitation. Thus, depending upon the specific facts and circumstances, a communication that merely lists the significant business lines of a dealer without further descriptive information and which does not give the dealer's municipal securities practice a place of prominence within such listing generally would not be considered a solicitation unless the facts and circumstances indicate that it was aimed at obtaining or retaining municipal securities business. To the extent that a communication, such as a dealer brochure or other promotional materials, contains more than a mere listing of business lines, such as brief descriptions of each business line (including its municipal securities capabilities), determining whether such communication is a solicitation depends upon whether the facts and circumstances indicate that it was undertaken for the purpose of obtaining or retaining municipal securities business. The nature of the information provided and the manner in which it is presented are relevant factors to consider. Although no single factor is necessarily controlling in determining intent, the following considerations, among others, may often be relevant: (i) whether the municipal securities practice is the only business line included in the communication that would reasonably be of interest to an issuer representative; (ii) whether the portions of the communication describing the dealer's municipal securities capabilities are designed to garner more attention than other portions describing different business lines; (iii) whether the communication contains quantitative or qualitative information on the nature or extent of the dealer's municipal securities capabilities that is promotional in nature (*e.g.*, quantitative or qualitative rankings, claims of expertise, identification of specific transactions, language associated with "puffery," etc.); and (iv) whether the dealer is currently seeking to obtain or retain municipal securities business.

Work-Related Communications – Another aspect of the intent element relates to communications that are incidental to undertaking tasks to complete municipal securities business for which the dealer has already been engaged. These types of communications generally are not solicitations under current Rule G-37 and would continue not to be solicitations under draft new Rule G-38. For example, if a dealer has engaged an independent contractor as a cash flow consultant to provide expert services on a negotiated underwriting for which the dealer has already been selected and the contractor communicates with the issuer on cash flow matters relevant to the financing, such communication would not be a solicitation under draft new Rule G-38. Similarly, if a dealer has already been selected to serve as the underwriter for an airport financing and a non-MFP employee of the dealer who normally works on airline corporate matters is used to provide his or her expertise to complete the financing, communications in this regard by the employee with the issuer would not be a solicitation under draft new Rule G-38. The fact that the work product of such person may be used by MFPs of the dealer in their solicitation activities would not make the producer of the work product a solicitor unless such

---

[19] *See* Rule G-37 Questions and Answers IV.10-13, *reprinted in* MSRB Rule Book.

person personally presents his or her work to the issuer in connection with soliciting the municipal securities business.

Communications with Conduit Borrowers – The MSRB understands that dealers often work closely with private entities on their capital and other financing needs. In many cases, this work may evolve into a conduit borrowing through a conduit issuer. Although the ultimate obligor on such a financing is the private entity, if the dealer acts as underwriter for a financing undertaken through a conduit issuer on other than a competitive bid basis, it is engaging in municipal securities business for purposes of Rule G-37. The selection of the underwriter for such a financing frequently is made by the conduit borrower. However, contrary to some commentators' assertions that contributions to conduit issuers could not affect the award of municipal securities business, conduit financings originate under a myriad of circumstances and the conduit issuer typically has the power to affect which dealer acts as underwriter. While in many cases conduit issuers have either formal procedures or an informal historical practice of accepting the dealer selected by the conduit borrower, some conduit issuers may set minimum standards that dealers must meet to qualify to underwrite a conduit issue, and other conduit issuers may have a slate of dealers selected by the conduit issuer from which the conduit borrower chooses the underwriter for its issue. Still other conduit issuers may defer to the conduit borrower's selection of lead underwriter but may require the underwriting syndicate to include additional dealers selected by the issuer or selected by the conduit borrower from a slate of issuer-approved underwriters, often with the purpose of ensuring participation by local dealers or historically disadvantaged dealers. A smaller number of conduit issuers retain more significant control over which dealers act as underwriters, either by making the selection for the conduit borrower or by considering the conduit borrower's selection to be merely a suggestion which in some cases the conduit issuer does not follow. However, in virtually all cases, the conduit issuer will maintain ultimate power to control which dealer underwrites a conduit issue since the conduit issuer has discretion to withhold its agreement to issue the securities through any particular dealer.

From a literal perspective, any communication by a dealer with a conduit borrower that is intended to cause the borrower to select the dealer to serve as underwriter for a conduit issue could be considered a solicitation of municipal securities business. This is because the conduit borrower eventually communicates its selection of the dealer to act as underwriter to the conduit issuer for approval. This series of communications would, by its terms, constitute an indirect communication by the dealer through the conduit borrower to the conduit issuer with the intent of obtaining municipal securities business.

However, the MSRB believes that, under certain circumstances, a dealer may establish that a communication with a conduit borrower intended to cause the borrower to select the dealer to serve as underwriter should not be deemed an indirect solicitation of the issuer. Thus, if the dealer can establish that no reasonable nexus could exist between the making of contributions to officials of the conduit issuer within the meaning of Rule G-37 and the selection of the underwriter for such conduit financing, then a communication with the borrower would not be deemed a solicitation. A determination of whether such a reasonable nexus could exist depends on the specific facts and circumstances. For example, if a conduit issuer historically defers to its conduit borrowers' selections of underwriters and, for a particular issue, the issuer in fact has not

influenced the borrower's selection of the underwriter, communications with the conduit borrower to obtain that underwriting assignment would not be considered a solicitation.

Further, regardless of whether the conduit issuer actively exercises control over the dealer selected to underwrite municipal securities business, if an associated person of a dealer who is providing investment banking services and corporate financing advice to a private company concludes, in his or her professional judgment, that an appropriate financing alternative may be a conduit financing, a limited communication to the company by the associated person that such financing alternative may be appropriate, together with the provision to the company of contact information for an MFP of the dealer, generally would not be presumed to be a solicitation. Alternatively, the associated person could inform the company that the associated person will have dealer personnel who handle municipal securities business contact it, and could provide the company's contact information to an MFP of the dealer.

Exemptions from Definition of Solicitation

Existing Rule G-38 provides exemptions from the definition of consultant for certain non-associated persons, such as lawyers, accountants and engineers if their sole basis for compensation from the dealer is the actual provision of legal, accounting or engineering services. Existing Rule G-38 also has been interpreted to exclude other dealers who are members of an underwriting syndicate from the definition of consultant for purposes of such underwriting. The draft new rule does not provide such exemptions with respect to persons whose communications could be deemed solicitations.

Comments Received. Some commentators ask that the MSRB create exemptions from the definition of solicitation for those communications by persons who provide legal, accounting, engineering and legislative lobbying services.

MSRB Response. The current exemptions under Rule G-38 for persons providing legal, accounting or engineering services are not blanket exemptions. Rather, these exemptions effectively shield such persons from being considered consultants if they are not receiving separate payment for their solicitation activities. This treatment would continue under revised draft Rule G-38. So long as such persons are not being paid directly or indirectly for their solicitation activities (*i.e.*, they are paid solely for their provision of legal, accounting or engineering services with respect to the issue), they would not become subject to revised draft Rule G-38. Similarly, in the case of joint ventures created by a dealer with other professionals seeking to engage in municipal securities business, so long as the members of the joint venture are making a good faith effort to be engaged to undertake a bona fide role in the business, the MSRB would view any communications by a member of the joint venture with the issuer as being made on its own behalf and not on behalf of the dealer. However, if payments are being made by or on behalf of the dealer to such other professionals separate from the payments they may receive for actual professional services rendered in connection with an issue, their communications with the issuer could be considered solicitations on behalf of the dealer.

Prohibited Payments for Solicitations by Non-Associated Persons

Draft new Rule G-38 would prohibit a dealer from providing or agreeing to provide, directly or indirectly, payment to non-associated persons for soliciting municipal securities business. The term payment is defined as any gift, subscription, loan, advance, or deposit of money or anything of value. Payment is not limited to cash compensation and can consist of anything of value, including reciprocal agreements to engage another party in exchange for obtaining municipal securities business. For example, if a person solicits specific municipal securities business for a dealer in exchange for being hired by the dealer to provide services for a different engagement of municipal securities business, such *quid pro quo* arrangement would constitute payment for purposes of draft new Rule G-38. Further, there is no requirement under draft new Rule G-38 that there exist an agreement that induces the communication on behalf of the dealer. Thus, a communication by any person could be considered a solicitation even if it is undertaken without the dealer's prior knowledge or arrangement. In such an instance, the dealer would be prohibited under draft new Rule G-38 from paying a "finder's fee" to such person for such communication if the person is not associated with the dealer.

Comments Received. The MSRB did not receive significant commentary with respect to the nature of payments covered by the draft amendments, other than the suggestion from several commentators that the MSRB prohibit contingent or success fees.

MSRB Response. As noted above, the MSRB has declined to prohibit contingent or success fees. No change has been made with respect to the nature of payments in the revised draft amendments.

Disclosure

Existing Rule G-38 requires that the dealer provide specific information to issuers and on Form G-37/G-38 about a consultant's role, compensation arrangement and amounts paid to it. In addition, dealers currently are required to disclose certain non-*de minimis* political contributions to issuer officials and payments to state and local political parties made by consultants. Under the original draft amendments, these disclosures would no longer be required, except that certain political contributions and payments by solicitors who become MFPs under the draft rule would be subject to disclosure. The MSRB sought comment on whether it should maintain disclosure requirements for compensation arrangements and payments made to solicitors who are associated persons but not employees of a dealer.

Comments Received. Many commentators state that the disclosure provisions of Rule G-38 work well in their current form, although these comments were made primarily as an argument against adopting the draft amendments.[20]

MSRB Response. The MSRB did not receive significant commentary on whether some or all of the existing disclosures for consultants should be retained for solicitors. In considering

---

[20] Several commentators also recommend that the MSRB amend Rule G-37 to require disclosure of contributions to issuer officials by dealer affiliated banks, bank PACs and bank holding company PACs.

further the original draft amendments, however, the MSRB has concluded that disclosure of information regarding the arrangements between dealers and their independent solicitors would be appropriate to permit continued scrutiny of such arrangements and activities as a safeguard for the industry. As a result, the MSRB is proposing in the revised draft amendments to retain the Form G-37/G-38 disclosure requirements with respect to such independent solicitors as described above.

*** * * * ***

The MSRB seeks comment on all aspects of the proposal, including in particular:

- whether and/or how dealers can effectively apply the associated person concept to independent solicitors (*i.e.*, which solicitor activities would be subject to MSRB rules and how would the dealer supervise the solicitor)

- whether solicitors' compensation arrangements should be disclosed

- what types of arrangements involving payments from dealers to independent solicitors should trigger "yes/no disclosure" (*e.g.*, all arrangements relating to issuers even if they have nothing to do with municipal securities, or only arrangements relating to municipal securities)

Comments from all interested parties are welcome. **Comments should be submitted no later than December 15, 2004 and may be directed to Ernesto A. Lanza, Senior Associate General Counsel.** Written comments will be available for public inspection.

September 29, 2004

*** * * * ***

Text of Revised Draft Amendments[21]

Rule G-38. Solicitation of Municipal Securities Business ~~Consultants~~

[The existing language of Rule G-38 would be deleted in its entirety and replaced by the following rule language:]

(a) *Prohibited Payments*. No broker, dealer or municipal securities dealer may provide or agree to provide, directly or indirectly, payment to any person, other than an associated person of such broker, dealer or municipal securities dealer, for a solicitation on behalf of such broker, dealer or municipal securities dealer.

(b) *Independent Solicitors as Associated Persons*. An independent solicitor that has entered into a Solicitation Agreement in compliance with the requirements of section (c) of this rule with a

---

[21] Underlining indicates additions; strikethrough indicates deletions.

broker, dealer or municipal securities dealer with respect to the independent solicitor's municipal securities activities undertaken for, on behalf of, or in furtherance of the interests of such broker, dealer or municipal securities dealer shall be considered an associated person of the broker, dealer or municipal securities dealer.

(c) *Solicitation Agreements With Independent Solicitors*.

(i) Each broker, dealer or municipal securities dealer that uses an independent solicitor to solicit municipal securities business on its behalf shall evidence the arrangement by a writing setting forth, at a minimum, the name, business address, role (including the state or geographic area in which the independent solicitor is working on behalf of the broker, dealer or municipal securities dealer) and compensation arrangement of each such independent solicitor ("Solicitation Agreement"). The Solicitation Agreement shall require the independent solicitor to provide to the broker, dealer or municipal securities dealer, in writing, in sufficient time for the broker, dealer or municipal securities dealer to meet its reporting obligations under section (e) of this rule, with:

(A) if the independent solicitor is not an individual, a list of solicitor personnel of the independent solicitor;

(B) a list, by category, of any contributions to officials of issuers and payments to political parties of states and political subdivisions during each calendar quarter made by:

(1) the independent solicitor; *provided, however,* that contributions to an official of an issuer made by an independent solicitor who is an individual and who is entitled to vote for such official shall not be required to be provided if the contributions made by such independent solicitor, in total, are not in excess of $250 to such official, per election, and payments made by an independent solicitor who is an individual to a political party of a state or a political subdivision in which such independent solicitor is entitled to vote shall not be required to be provided if the payments made by such independent solicitor to such political party, in total, do not exceed $250 per year;

(2) if the independent solicitor is not an individual, any solicitor personnel of the independent solicitor; *provided, however,* that contributions to an official of an issuer made by any solicitor personnel who is entitled to vote for such official shall not be required to be provided if the contributions made by such solicitor personnel, in total, are not in excess of $250 to such official, per election, and payments made by any solicitor personnel to a political party of a state or a political subdivision in which such solicitor personnel is entitled to vote shall not be required to be provided if the payments made by such solicitor personnel to such political party, in total, do not exceed $250 per year; and

(3) any political action committee controlled by the independent solicitor or any solicitor personnel of the independent solicitor.

(ii) The Solicitation Agreement shall set forth the agreement of the broker, dealer or municipal securities dealer and the independent solicitor that:

(A) either:

(1) if the independent solicitor is an individual, that the independent solicitor shall be an associated person of the broker, dealer or municipal securities dealer for purposes of Board rules with respect to the independent solicitor's solicitation activities undertaken for, on behalf of, or in furtherance of the interests of such broker, dealer or municipal securities dealer with respect to municipal securities business; or

(2) if the independent solicitor is not an individual, that all solicitor personnel of the independent solicitor shall be associated persons of the broker, dealer or municipal securities dealer for purposes of Board rules with respect to the independent solicitor's solicitation activities undertaken by such solicitor personnel for, on behalf of, or in furtherance of the interests of such broker, dealer or municipal securities dealer with respect to municipal securities business; and

(B) all solicitation activities undertaken by the independent solicitor or any solicitor personnel of the independent solicitor for, on behalf of, or in furtherance of the interests of the broker, dealer or municipal securities dealer with respect to municipal securities business shall be subject to the direction and supervision of the broker, dealer or municipal securities dealer and that the independent solicitor or solicitor personnel shall undertake such solicitation activities in conformity with Board rules.

(iii) The Solicitation Agreement must be entered into before the independent solicitor engages in any direct or indirect communication with an issuer on behalf of the broker, dealer or municipal securities dealer.

(d) *Disclosure to Issuers*. Each broker, dealer or municipal securities dealer shall submit in writing to each issuer with which the broker, dealer or municipal securities dealer is engaging or is seeking to engage in municipal securities business information on independent solicitors used, directly or indirectly, by the broker, dealer or municipal securities dealer to attempt to obtain or retain municipal securities business with such issuer, which information shall include the name of the independent solicitor, business address, role (including the state or geographic area in which the independent solicitor is working on behalf of the broker, dealer or municipal securities dealer), compensation arrangement, a list of all solicitor personnel of the independent solicitor if the independent solicitor is not an individual, and an indication as to whether the broker, dealer or municipal securities dealer has had at any time during the past year any arrangement (other than a Solicitation Agreement under section (c) of this rule) with the independent solicitor or any of its solicitor personnel under which any direct or indirect payment from the broker, dealer or municipal securities dealer is or will be made to the independent solicitor or its solicitor personnel with respect to any activities of the independent solicitor relating to such issuer. Such information shall be submitted to the issuer either:

(i) prior to the selection of any broker, dealer or municipal securities dealer in connection with the particular municipal securities business being sought; or

(ii) at or prior to the independent solicitor's first direct or indirect communication with the issuer for any municipal securities business. Each broker, dealer or municipal securities dealer shall promptly advise the issuer, in writing, of any change in the information disclosed pursuant to this subsection (d)(ii) on each solicitation arrangement relating to such issuer. In addition, each broker, dealer or municipal securities dealer disclosing information pursuant to this subsection (d)(ii) shall update such information by notifying each issuer in writing within one year of the previous disclosure made to such issuer concerning each independent solicitor's name, company, role, compensation arrangement, and the list of all solicitor personnel of the independent solicitor if the independent solicitor is not an individual, even where the information has not changed; provided, however, that this annual requirement shall not apply where the broker, dealer or municipal securities dealer has ceased to use the independent solicitor, directly or indirectly, to attempt to obtain or retain municipal securities business with the particular issuer.

(e) *Disclosure to Board*. Each broker, dealer and municipal securities dealer shall send to the Board, and the Board shall make public, reports of all independent solicitors used by the broker, dealer or municipal securities dealer during each calendar quarter. Such reports must be sent to the Board on Form G-37/G-38 by the last day of the month following the end of each calendar quarter (these dates correspond to January 31, April 30, July 31, and October 31) in the manner provided under Rule G-37. Such reports shall include, for each independent solicitor, in the prescribed format:

(i) the independent solicitor's name pursuant to the Solicitation Agreement;

(ii) business address;

(iii) role (including the state(s) or geographic area(s) in which the independent solicitor is working on behalf of the broker, dealer or municipal securities dealer);

(iv) if the independent solicitor is not an individual, a list of all solicitor personnel of the independent solicitor;

(v) specific compensation arrangement;

(vi) total dollar amount of payments made to the independent solicitor during the report period;

(vii) any municipal securities business obtained or retained by the independent solicitor with each such business listed separately;

(viii) dollar amounts paid to the independent solicitor connected with particular municipal securities business if applicable; and

(ix) an indication as to whether the broker, dealer or municipal securities dealer has had at any time during the past year any arrangement (other than a Solicitation Agreement under section (c) of this rule) with the independent solicitor or any of its solicitor personnel under which any direct or indirect payment from the broker, dealer or municipal securities dealer is or will be made to the independent solicitor or its solicitor personnel with respect to any solicitation activities of the independent solicitor relating to issuers of municipal securities.

Contributions to officials of issuers and payments to political parties of a state or a political subdivision shall be disclosed as contributions and payments by a solicitor MFP as provided under Rule G-37(e)(i)(A) and (B).

(f) *Definitions*. For purposes of this rule, the following terms shall have the following meanings:

(i) The term "solicitation" means a direct or indirect communication by any person with an issuer for the purpose of obtaining or retaining municipal securities business, and the term "to solicit" means to communicate, directly or indirectly, with an issuer for the purpose of obtaining or retaining municipal securities business.

(ii) The term "independent solicitor" of a broker, dealer or municipal securities dealer means any person, other than an individual who is a partner, director, officer or employee of the broker, dealer or municipal securities dealer, to which the broker, dealer or municipal securities dealer provides or agrees to provide, directly or indirectly, payment for a solicitation on behalf of the broker, dealer or municipal securities dealer.

(iii) The term "Solicitation Agreement" shall have the meaning set forth in section (c)(i) of this rule.

(iv) The term "solicitor personnel" of an independent solicitor that is not an individual means any individual who is a partner, director, officer or employee of the independent solicitor who has directly or indirectly communicated during the past year with an issuer to obtain municipal securities business on behalf of the broker, dealer or municipal securities dealer.

(v) The terms "contribution," "issuer," "municipal securities business," "payment" and "solicitor MFP" shall have the meanings set forth in Rule G-37(g).

*** * * * ***

Rule G-37. Political Contributions and Prohibitions on Municipal Securities Business

(a) *Purpose*. No change.

(b) ***Ban on Municipal Securities Business.***

(i) No broker, dealer or municipal securities dealer shall engage in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by:

(A) the broker, dealer or municipal securities dealer;

(B) any municipal finance professional associated with such broker, dealer or municipal securities dealer; or

(C) any political action committee controlled by the broker, dealer or municipal securities dealer or by any municipal finance professional;

provided, however, that this section shall not prohibit the broker, dealer or municipal securities dealer from engaging in municipal securities business with an issuer if the only contributions made by the persons and entities noted above to officials of such issuer within the previous two years were made by municipal finance professionals **who are individuals** to officials of such issuer for whom the municipal finance professionals were entitled to vote and which contributions, in total, were not in excess of $250 by any municipal finance professional to each official of such issuer, per election.

(ii) For **any person** ~~an individual~~ designated as a municipal finance professional solely **by reason of being a solicitor MFP,** ~~pursuant to subparagraph (B) of paragraph (g)(iv) of this rule,~~ the provisions of paragraph (b)(i) shall apply to contributions made by such **solicitor MFP** ~~individual~~ to officials of an issuer prior to becoming a municipal finance professional only if such **solicitor MFP** ~~individual~~ solicits municipal securities business from such issuer.

(iii) No change.

(c) ***Prohibition on Soliciting and Coordinating Contributions.*** No change.

(d) ***Circumvention of Rule.*** No change.

(e) ***Required Disclosure to Board.***

(i) Except as otherwise provided in paragraph (e)(ii), each broker, dealer or municipal securities dealer shall, by the last day of the month following the end of each calendar quarter (these dates correspond to January 31, April 30, July 31 and October 31) send to the Board Form G-37/G-38 setting forth, in the prescribed format, the following information:

(A) for contributions to officials of issuers (other than a contribution made by a municipal finance professional **who is an individual** or a non-MFP executive officer to an official of an issuer for whom such person is entitled to vote if all contributions by such person to such official of an issuer, in total, do not exceed $250 per election) and payments to political parties of states and political subdivisions (other than a payment made by a municipal finance professional **who is an individual** or a non-MFP executive officer to a political party of a state or a political subdivision in which such person is entitled to vote if all payments by such person to such political party, in total, do not exceed $250 per year) made by the persons and entities described in subclause (2) of this clause (A):

(1)-(2) No change.

(B)-(F) No change.

The Board shall make public a copy of each Form G-37/G-38 received from any broker, dealer or municipal securities dealer.

(ii)**~~(A)~~** No broker, dealer or municipal securities dealer shall be required to send Form G-37/G-38 to the Board for any calendar quarter in which either:

(A) **~~(1)~~** No change.

(B) **~~(2)~~** **~~subject to clause (B) of this paragraph (e)(ii),~~** such broker, dealer or municipal securities dealer has not engaged in municipal securities business, but only if such broker, dealer or municipal securities dealer:

(1) **~~(a)~~** No change.

(2) **~~(b)~~** No change.

~~(B) If for any calendar quarter a broker, dealer or municipal securities dealer has met the requirements of clause (A)(2) of this paragraph (e)(ii) but has information that is required to be reported pursuant to clause (D) of paragraph (e)(i), then such broker, dealer or municipal securities dealer shall be required to send Form G-37/G-38 to the Board for such quarter setting forth only such information as is required to be reported pursuant to clauses (D) and (E) of paragraph (e)(i).~~

(iii)-(iv) No change.

(f) ***Voluntary Disclosure to Board.*** No change.

(g) *Definitions*.

(i)-(iii) No change.

(iv) The term "municipal finance professional" means:

(A) No change.

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

(C)-(E) No change.

Each person designated by the broker, dealer or municipal securities dealer as a municipal finance professional pursuant to Rule G-8(a)(xvi) is deemed to be a municipal finance professional. Each person designated a municipal finance professional shall retain this designation for one year after the last activity or position which gave rise to the designation.

(v)-(viii) No change.

(ix) The term "solicitor MFP" of a broker, dealer or municipal securities dealer means:

(A) any independent solicitor of the broker, dealer or municipal securities dealer;

(B) if an independent solicitor of the broker, dealer or municipal securities dealer is not an individual, any solicitor personnel of the independent solicitor;

(C) any individual who is a partner, director, officer or employee of the broker, dealer or municipal securities dealer and who solicits municipal securities business.

(x) The terms "solicitation" or "to solicit," "independent solicitor" and "solicitor personnel" shall have the meanings set forth in Rule G-38(f).

(h) ***Operative Date.*** No change.

(i) ***Application for Exemption.*** No change.

(j) *Automatic Exemption**s**.* No change.

*** * * * ***

Rule G-8. Books and Records to be Made by Brokers, Dealers and Municipal Securities Dealers

(a) Description of Books and Records Required to be Made. Except as otherwise specifically indicated in this rule, every broker, dealer and municipal securities dealer shall make and keep current the following books and records, to the extent applicable to the business of such broker, dealer or municipal securities dealer:

(i)-(xv) No change.

(xvi) *Records Concerning Political Contributions and Prohibitions on Municipal Securities Business Pursuant to Rule G-37.* Records reflecting:

(A)-(J) No change.

(K) No broker, dealer or municipal securities dealer shall be subject to the requirements of this paragraph (a)(xvi) during any period that such broker, dealer or municipal securities dealer has qualified for and invoked the exemption set forth in **subparagraph (B)** ~~**clause (A)(2)**~~ of paragraph (e)(ii) of rule G-37; provided, however, that such broker, dealer or municipal securities dealer shall remain obligated to comply with clause (H) of this paragraph (a)(xvi) during such period of exemption. At such time as a broker, dealer or municipal securities dealer that has been exempted by this clause (K) from the requirements of this paragraph (a)(xvi) engages in any municipal securities business, all requirements of this paragraph (a)(xvi) covering the periods of time set forth herein (beginning with the then current calendar year and the two preceding calendar years) shall become applicable to such broker, dealer or municipal securities dealer.

(xvii) No change.

(xviii) *Records Concerning* ***Solicitation of Municipal Securities Business by Independent Solicitors*** ~~***Consultants***~~ *Pursuant to Rule G-38.* Each broker, dealer and municipal securities dealer shall maintain:

(A) a listing of the name of the **independent solicitor** ~~**consultant**~~ pursuant to the **Solicitation** ~~**Consultant**~~ Agreement, business address, role (including the state or geographic area in which the **independent solicitor** ~~**consultant**~~ is working on behalf of the broker, dealer or municipal securities dealer) and compensation arrangement of each **independent solicitor;** ~~**consultant;**~~

(B) a copy of each **Solicitation** ~~**Consultant**~~ Agreement referred to in **Rule G-38(c);** ~~**rule G-38(b);**~~

(C) a listing of the compensation paid in connection with each such **Solicitation** ~~**Consultant**~~ Agreement;

(D) where applicable, a listing of the municipal securities business obtained or retained through the activities of each **independent solicitor;** ~~**consultant;**~~

(E) a listing of issuers and a record of disclosures made to such issuers, pursuant to **Rule** ~~**rule**~~ G-38(d), concerning each **independent solicitor** ~~**consultant**~~ used by the broker, dealer or municipal securities dealer to obtain or retain municipal securities business with each such issuer;

(F) **if an independent solicitor is not an individual, a listing of solicitor personnel (as defined in Rule G-38(f)(iv) of the independent solicitor;** ~~**records of each reportable political contribution (as defined in rule G-38(a)(vi)), which records shall include:**~~

~~(1) the names, city/county and state of residence of contributors;~~

~~(2) the names and titles (including any city/county/state or other political subdivision) of the recipients of such contributions; and~~

~~(3) the amounts and dates of such contributions;~~

(G) **copies of all arrangements (other than a Solicitation Agreement) with independent solicitors or any of their solicitor personnel under which any direct or indirect payment is or will be made to the independent solicitor or its solicitor personnel with respect to any activities of the independent solicitor relating to municipal securities.** ~~records of each reportable political party payment (as defined in rule G-38(a)(vii)), which records shall include:~~

~~(1) the names, city/county and state of residence of contributors;~~

~~(2) the names and titles (including any city/county/state or other political subdivision) of the recipients of such contributions; and~~

~~(3) the amounts and dates of such payments;~~

~~(H) records indicating, if applicable, that a consultant made no reportable political contributions (as defined in rule G-38(a)(vi)) or no reportable political party payments (as defined in rule G-38(a)(vii));~~

~~(I) 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; and~~

(H) ~~(J)~~ the date of termination of any **Solicitation Agreement.** ~~consultant arrangement.~~

(xix)-(xxii) No change.

(b)-(g) No change.

FORM G-37X MSRB

Name of dealer: _____

The undersigned, on behalf of the dealer identified above, does hereby certify that such dealer did not engage in "municipal securities business" (as defined in **Rule** ~~**rule**~~ G-37) during the eight full consecutive calendar quarters ending immediately on or prior to the date of this Form G-37x.

The undersigned, on behalf of such dealer, does hereby acknowledge that, notwithstanding the submission of this Form G-37x to the MSRB, such dealer will be required to:

(1) submit Form G-37/G-38 for each calendar quarter unless it has met all of the requirements for an exemption set forth in **Rule** ~~**rule**~~ G-37(e)(ii) for such calendar quarter;

~~**(2) submit Form G-37/G-38 for each calendar quarter in which it has information relating to consultants that is required to be reported pursuant to rule G-37(e)(ii)(B), regardless of whether the dealer has qualified for the exemption set forth in rule G-37(e)(ii)(A)(2);**~~

(2) ~~**(3)**~~ undertake the recordkeeping obligations set forth in **Rule** ~~**rule**~~ G-8(a)(xvi) at such time as it no longer qualifies for the exemption set forth in **Rule** ~~**rule**~~ G-8(a)(xvi)(K);

(3) ~~**(4)**~~ undertake the disclosure obligations set forth in **Rule** ~~**rule**~~ G-37(e), including in particular the disclosure obligations under paragraph (e)(iii) thereof, at such time as it no longer qualifies for the exemption set forth in **Rule** ~~**rule**~~ G-37(e)(ii)**(B)** ~~**(A)(2)**~~; and

(4) ~~**(5)**~~ submit a new Form G-37x in order to again meet the requirements for the exemption set forth in **Rule** ~~**rule**~~ G-37(e)(ii)**(B)** ~~**(A)(2)**~~ in the event that the dealer has engaged in municipal securities business subsequent to the date of this Form G-37x and thereafter wishes to qualify for said exemption.

Signature: _____ **Date:** _____
(must be officer of dealer)

Name: _____ **Phone:** _____

Address: _____

Submit to: **Municipal Securities Rulemaking Board**
1900 Duke Street, Suite 600
Alexandria, Virginia 22314

FORM G-37/G-38 MSRB

Name of dealer: _____

Report period: _____

I. CONTRIBUTIONS made to issuer officials (list by state)

State	Complete name, title (including any city/county/state or other political subdivision) of issuer official	Contributions by each contributor category (*i.e.*, dealer, dealer controlled PAC, municipal finance professional controlled PAC, municipal finance professionals and **non-MFP** executive officers). For each contribution, list contribution amount and contributor category (For example, $500 contribution by **non-MFP** executive officer) If any contribution is the subject of an automatic exemption pursuant to Rule G-37(j), list amount of contribution and date of such automatic exemption.

II. PAYMENTS made to political parties of states or political subdivisions (list by state)

State	Complete name (including any city/county/state or other political subdivision) of political party	Payments by each contributor category (*i.e.*, dealer, dealer controlled PAC, municipal finance professional controlled PAC, municipal finance professionals and **non-MFP** executive officers). For each payment, list payment amount and contributor category (For example, $500 payment by **non-MFP** executive officer)

III. ISSUERS with which dealer has engaged in municipal securities business (list by state)

State	Complete name of issuer and city/county	Type of municipal securities business (negotiated underwriting, **agency offering,** ~~**private placement,**~~ financial advisor, or remarketing agent)

IV. INDEPENDENT SOLICITORS ~~CONSULTANTS~~
(specific information for each **independent solicitor** ~~**consultant**~~ must be attached)

NAME OF INDEPENDENT SOLICITOR ~~CONSULTANT~~ (PURSUANT TO SOLICITATION ~~CONSULTANT~~ AGREEMENT):

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Signature: _____ **Date:** _____
(must be officer of dealer)

Name: _____

Address: _____

_____

Phone: _____

Submit two completed forms quarterly by due date (specified by the MSRB) to:

Municipal Securities Rulemaking Board
1900 Duke Street
Suite 600
Alexandria, VA 22324

ATTACHMENT TO FORM G-37/G-38

(submit a separate attachment sheet for each **independent solicitor** ~~**consultant**~~ listed under IV)

Name of **Independent Solicitor** ~~**Consultant**~~ (pursuant to **Solicitation** ~~**Consultant**~~ Agreement): _____

_____

Independent Solicitor's ~~**Consultant's**~~ Business Address: _____

Role to be Performed by **Independent Solicitor** ~~**Consultant**~~ (including the state or geographic area in which the **independent solicitor** ~~**consultant**~~ is working on behalf of the broker, dealer or municipal securities dealer): _____

_____

Compensation Arrangement: _____

Municipal Securities Business Obtained or Retained by **Independent Solicitor** ~~**Consultant**~~ (list each such business separately and, if applicable, indicate dollar amounts paid to **independent solicitor** ~~**consultant**~~ connected with particular municipal securities business):

_____

_____

Total Dollar Amount Paid to **Independent Solicitor** ~~**Consultant**~~ during Reporting Period: _____

Solicitor Personnel of the Independent Solicitor (if independent solicitor is not an individual): _____

_____

Does the dealer have any arrangement (other than a Solicitation Agreement) with the Independent Solicitor or any of its solicitor personnel during the past year under which any direct or indirect payment from the dealer is or will be made to the Independent Solicitor or its solicitor personnel with respect to any activities of the Independent Solicitor relating to issuers of municipal securities?

Yes ☐ **No** ☐

~~**Contributions Made to Issuer Officials by Consultant and Any Partner, Director, Officer or Employee of the Consultant Who Communicates with An Issuer Official to Obtain Municipal Securities Business for the Broker, Dealer or Municipal Securities Dealer or Any PAC Controlled by Any of These Entities or Persons:**~~

~~**State**~~	~~**Complete name and title (including any city/county/state or other political subdivision) of issuer official**~~	~~**For each contribution, list contribution amount and contributor category (i.e., company, individual, company controlled PAC or individual controlled PAC)**~~

~~**Payments Made to Political Parties of States and Political Subdivisions by Consultant and Any Partner, Director, Officer or Employee of the Consultant Who Communicates with An Issuer Official to Obtain Municipal Securities Business for the Broker, Dealer or Municipal Securities Dealer or Any PAC Controlled by Any of These Entities or Persons:**~~

~~**State**~~	~~**Complete name (including any city/county/state or other political subdivision) of political party**~~	~~**For each payment, list payment amount and contributor category (i.e., company, individual, company controlled PAC or individual controlled PAC)**~~

MSRB Notice 2004-33
(October 12, 2004)

Correction to MSRB Notice 2004-32 Requesting Comments on Revised Draft Amendments to Rule G-38 Relating to Solicitation of Municipal Securities Business

On September 29, 2004, the Municipal Securities Rulemaking Board ("MSRB") published a notice requesting comments on revised draft amendments to Rule G-38 relating to solicitation of municipal securities business (the "September Notice").[1] In connection with the draft amendments to Rule G-38, certain related amendments to Rule G-37, on political contributions and prohibitions on municipal securities business, were also proposed. This notice corrects an omission in the draft amendments to Rule G-37 appearing in the September Notice.

It has come to the MSRB's attention that the definition of "solicitor MFP" contained in section (g)(ix) of the draft amendments to Rule G-37 omitted language necessary to fully describe those persons intended to be included within such definition. The term "solicitor MFP" was introduced in the draft amendments to Rule G-37 to assist in more clearly setting forth the fact that, under the draft amendments to Rules G-37 and G-38, independent solicitors of a dealer, as well as solicitor personnel of any independent solicitors that are entities, would be considered municipal finance professionals of the dealer. However, the language used in the September Notice inadvertently omitted to include as solicitor MFPs those individuals who are already associated persons of a dealer (but who are not partners, directors, officers or employees of the dealer) who also solicit municipal securities business for the dealer but do not receive payment specifically for such solicitation.[2] Such individuals currently are considered municipal finance professionals for purposes of existing Rule G-37 and the September Notice did not intend to omit such individuals from the definition of solicitor MFP.

The language of that provision is modified to read as follows:[3]

---

1 *See* MSRB Notice 2004-32, *available at* www.msrb.org/msrb1/archive/2004/RevRuleG-38Solicitation.htm. All terms used herein are as defined in the September Notice.

2 For example, Rule G-37 currently considers the president of a bank or other company affiliated with a dealer who solicits municipal securities business on behalf of the dealer to be a municipal finance professional of the dealer, regardless of whether such individual receives payment for such solicitation.

3 Underlining indicates additions to the language contained in the September Notice; strikethrough indicates deletions from the language contained in September Notice. In addition, the description of this provision in the second bullet appearing in the text of the September Notice under the heading "SUMMARY OF REVISED DRAFT AMENDMENTS – Summary of Revised Draft Amendments to Rule G-37 and Forms G-37/G-38 and G-37x" is modified to read as follows:

- create a new definition of solicitor MFP, consisting of independent solicitors, any solicitor personnel of an independent solicitor that is an entity, and any partner, director, officer**,** ~~**or**~~ employee **or other associated person** of the dealer who solicits municipal securities business.

* * * * *

Rule G-37. Political Contributions and Prohibitions on Municipal Securities Business

(a)-(f) No additional changes.

(g) *Definitions*.

(i)-(viii) No additional changes.

(ix) The term "solicitor MFP" of a broker, dealer or municipal securities dealer means:

(A)-(B) No additional changes.

(C) any individual who is a partner, director, officer**, or** ~~or~~ employee **or other associated person (not otherwise described in clause (A) or (B) of this paragraph)** of the broker, dealer or municipal securities dealer and who solicits municipal securities business.

(x) No additional changes.

(h)-(j) No additional changes.

* * * * *

In order to avoid further confusion, the MSRB is modifying the September Notice to read as provided above. The September Notice remains unchanged in all other respects. The September Notice, as modified, is available at www.msrb.org/msrb1/archive/2004/RevRuleG-38Solicitation.htm. Comments on the modified September Notice should be submitted no later than December 15, 2004.

October 12, 2004

Alphabetical List of Comment Letters on MSRB Notice 2004-11 (April 5, 2004) (the "April 2004 Notice") and MSRB Notice 2004-32 (September 29, 2004), as modified by MSRB Notice 2004-33 (October 12, 2004) (the "September 2004 Notice")

1. ABA Securities Association: Letter to Ernesto A. Lanza, MSRB, from Sarah A. Miller, General Counsel (June 4, 2004) relating to April 2004 Notice
2. ABA Securities Association: Letter to Ernesto A. Lanza, MSRB, from Sarah A. Miller, General Counsel (December 17, 2004) relating to September 2004 Notice
3. Bond Market Association: Letter to Ernesto A. Lanza, MSRB, from Lynette Kelly Hotchkiss, Senior Vice President and Associate General Counsel (June 4, 2004) relating to April 2004 Notice
4. Bond Market Association: Letter to Ernesto A. Lanza, MSRB, from Lynette Kelly Hotchkiss, Senior Vice President and Associate General Counsel (December 15, 2004) relating to September 2004 Notice
5. Chapman, Jerry L.: Letter to Ernest A. Lanza, MSRB (April 22, 2004) relating to April 2004 Notice
6. Goldman, Sachs & Co.: Letter to Ernesto A. Lanza, MSRB, from Robyn A. Huffman, Vice President and Associate General Counsel (June 4, 2004) relating to April 2004 Notice
7. Goldman, Sachs & Co.: Letter to Ernesto A. Lanza, MSRB, from Robyn A. Huffman, Managing Director and Associate General Counsel (December 15, 2004) relating to September 2004 Notice
8. PNC Capital Markets, Inc.: Letter to Ernesto A. Lanza, MSRB, from James S. Keller, Chief Regulatory Counsel (June 4, 2004) relating to April 2004 Notice
9. Seasongood & Mayer, LLC: Letter to Christopher Taylor, MSRB, from Gordon Reis III, Managing Principal (May 20, 2004) relating to April 2004 Notice
10. Seattle-Northwest Securities Corporation: Letter to Christopher Taylor, MSRB, from Maud Daudon, Managing Director, Investment Banking, and John Rose, President & CEO (May 19, 2004) relating to April 2004 Notice
11. Seattle-Northwest Securities Corporation: Letter to Ernesto A. Lanza, MSRB, from Maud Daudon, Managing Director, Investment Banking, and John Rose, President & CEO (December 13, 2004) relating to September 2004 Notice
12. Wells Fargo & Company: Letter to Ernesto A. Lanza, MSRB, from Bruce Moland, Vice President & Assistant General Counsel (June 2, 2004) relating to April 2004 Notice
13. Wells Fargo & Company: Letter to Ernesto A. Lanza, MSRB, from Bruce Moland, Vice President & Assistant General Counsel (December 15, 2004) relating to September 2004 Notice

SECURITIES ASSOCIATION

An affiliate of the
AMERICAN BANKERS ASSOCIATION

1120 Connecticut Avenue, NW
Washington, DC 20036

202-663-5277
Fax: 202-828-4546
www.aba.com

Sarah A. Miller
General Counsel
smiller@aba.com

June 4, 2004

Ernesto A. Lanza
Senior Associate General Counsel
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA 22314

Re: Draft Amendment to MSRB Rule G-38

Dear Mr. Lanza:

The ABA Securities Association ("ABASA")[1] is responding to the request of the Municipal Securities Rulemaking Board ("MSRB") for comments on its draft amendment to Rule G-38. The proposed amendment would repeal existing Rule G-38 relating to consultants and replace it with a requirement that paid solicitations of municipal securities business on behalf of a dealer be undertaken only by associated persons of that dealer.

The MSRB has taken this action because the significant increases in both the amount of compensation being paid to and the amount of political contributions given by these consultants have raised concerns that (1) disclosure may not be sufficient to ensure fair dealing by consultants and (2) that these activities may involve indirect violations of MSRB Rule G-37. An associated person that solicits municipal securities business on behalf of a dealer would become a municipal finance professional and thereby be subject to the MSRB's rules on political contributions and fair practices with respect to municipal securities activities undertaken for the benefit of the dealer.[2]

---

[1] ABASA is a separately chartered trade association and nonprofit affiliate of the American Bankers Association ("ABA") whose mission is to represent the interests of banks underwriting and dealing in securities, proprietary mutual funds and derivatives before Congress, federal and state governments, and the courts. The views in this letter are also endorsed by the ABA. ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership -- which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks -- makes ABA the largest banking trade association in the country.

[2] As is currently the case, payment is not a precondition to the applicability of MSRB Rule G-37. Rather, under the proposal, a dealer could not compensate any party other than an associated person for solicitations to issuer officials.

Repeal of Rule G-38 Consultants

Under the proposed amendment, Rule G-38 would be replaced in its entirety by a requirement that dealers provide compensation for soliciting municipal securities business *only* to associated persons of the broker-dealer. The proposal would define an "associated person" as "any partner, officer, director or branch manager of the broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with the broker or dealer or any employee of the broker or dealer. . ."[3]

Since the Securities and Exchange Commission's settlement agreement with Fifth Third Securities, bank-affiliated dealers have treated employees of their affiliated banks as associated persons because they are under common control with the dealer (at least theoretically, if not in fact). As a result, bank employees that solicit municipal securities business on behalf of their affiliated dealer are already subject to Rule G-37, whether or not there is any compensation for the solicitation. Accordingly, ABASA supports an amendment that would treat all solicitors in the same manner.

Definition of "Solicitation"

Under the proposal, "solicitation" occurs when there is both (1) a direct or indirect communication with an issuer, and (2) that communication is for the purpose of obtaining municipal securities business for a dealer. The proposal notes that a direct or indirect communication with an issuer through a third party could also be considered a solicitation under draft new Rule G-38.[4] Specifically, the proposal asks whether a communication with a conduit borrower to hire a dealer as an underwriter for a private activity bond issue where the issuer ultimately must approve the underwriter for the issue be considered an indirect communication with the issuer.

ABASA is concerned that under the proposal, all communications with conduit borrowers may be seen as indirect "solicitations" of issuers. Therefore, ABASA seeks clarification that in the context of a conduit issuance in which the issuer is brought into the discussions only after the feasibility of tax-exempt financing is determined and the election of an underwriter has already been made, there is no indirect communication with the issuer that is intended to obtain municipal securities business for a dealer.

---

[3] Section 3(a)(18) of the Securities Exchange Act of 1934 (12 U.S.C. § 78c(a)(18)).

[4] The MSRB further notes that the definition of municipal finance professional in existing Rule G-37(g)(iv) is not dependent upon the person to whom a solicitation to obtain business is made.

The following scenario is typical of the genesis and issuance of an industrial development bond or an industrial revenue bond in the commercial banking industry. In this scenario, it is not the conduit issuer who determines who will be its underwriter. Rather, the conduit borrower/banker/affiliated MFP bring to the conduit issuer a project (complete with underwriter) that may be financed by tax-exempt bonds. The same scenario would apply if the bonds were taxable, but nonetheless were issued through a conduit borrower.

Scenario

A borrower seeks financing for a potential expansion project that will involve the acquisition of hard assets (property, plant, fixtures and equipment) to be treated as capital expenditures.

First, the borrower talks to its relationship manager at its bank ("banker") to find out the most economical way to finance the project. After some discussion, the bank and the borrower decide that financing using tax-exempt bond proceeds may be the method of choice. At this point, neither party knows whether the project will qualify for tax-exempt financing or what entity will be chosen to be the issuer.

Second, the banker contacts an MFP at the bank's affiliated broker-dealer who is an expert in tax-exempt finance. The MFP will review the project to determine if it qualifies for tax-exempt financing. Eligible borrowers and projects could include without limitation:

- Non-profit organizations – 501(c)(3);
- "Small manufacturing" as defined in the Internal Revenue Code ("IRC");
- Qualified multi-family housing; and
- Solid waste (handling/processing solid waste or effluents).

Third, all three parties (borrower, banker, MFP) discuss the project and financing to assess, among other things:

- The project's qualification under the IRC;
- The project's timing and financing schedule;
- Whether the project may be financed with a tax-exempt bond; and
- The borrower's ability to qualify for any credit enhancement that would be required to secure the bond.

At the end of this process, the parties determine whether or not tax-exempt financing is feasible. *At this point, no contact has been made with any issuer. Indeed, the issuer has not yet been selected.*

Five, *if* the project qualifies, the MFP, who knows the capabilities of various issuers in the area, will review them to determine which is best suited for the project. For example, the amount of the issuance may exceed the permissible amounts for certain issuers; or, the project may not be within the scope of some issuers' authority.

Six, after the MFP selects an appropriate issuer, the borrower applies to the conduit issuer for preliminary approval or "inducement." Most conduit issuers will review the project to determine whether it meets public policy guidelines.

* * * * * *

It is clear from the above scenario that the conduit issuer has no discretion regarding the selection of the underwriter. These communications between the conduit borrower, the banker and the MFP cannot constitute indirect communications with an issuer because the issuer is not identified until the project (complete with underwriter) is already formed. In this respect, it is more analogous to the situation cited in the proposal where the underwriter or its personnel contact the issuer about an underwriting for which it has already been chosen.

ABASA believes that without clarification, the proposed definition of "solicitation" could call into question the above types of contacts between the conduit borrower, its banker and MFP that are intended to determine the type of financing best suited to the borrower's needs. These types of contacts are both typical of and important for this marketplace. Accordingly, ABASA urges the MSRB to craft an amendment to ensure that these time-honored ways of doing business are not construed as being solicitations that could ultimately trigger the ban on underwriting under MSRB Rule G-37.

For the same reasons, ABASA believes that parties other than the issuer (such as financial advisors, bond counsel, conduit borrowers or other governmental borrowers) should *not* be explicitly listed in the definition of "solicitation" as persons to whom communications are directed.

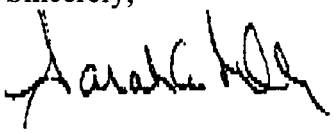
In a bank holding company, a banker may likely be an associated person of its affiliated broker-dealer, and such bankers have many occasions to discuss non-securities services performed for issuer representatives. ABASA believes such bankers should be free to inform issuers that affiliated broker-dealers have municipal securities capabilities and provide the relevant contact information without it being considered "solicitation."

Similarly, ABASA believes that in the scenario above, if the borrower was the issuer itself, the banker and that issuer should be able to discuss the pros and cons of different financing mechanisms without it being considered solicitation. However, once tax-exempt financing becomes the focus, the banker should be permitted to bring its MFP into the discussion and bow out without becoming a solicitor.

The banking industry's concern focuses largely on the ability of bankers to discuss financing options with clients without triggering MSRB Rule G-37; and, therefore, those bankers would likely have no other municipal securities responsibilities. Accordingly, ABASA strongly believes that the act of soliciting municipal securities business (without more) should *not* require qualification as a municipal securities representative.

ABASA representatives would be pleased to discuss any of these issues further. If you have any questions, please do not hesitate to contact Cris Naser at 202-663-5332 or cnaser@aba.com.

Sincerely,



Sarah Miller

SECURITIES ASSOCIATION™

Sarah A. Miller
General Counsel

December 17, 2004

Mr. Ernesto A. Lanza
Senior Associate General Counsel
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA 22314

Re: Revised Draft Amendments to Rule G-38
Solicitation of Municipal Securities Business

Dear Mr. Lanza:

The ABA Securities Association ("ABASA")[1] is responding to the request of the Municipal Securities Rulemaking Board ("MSRB") for comments on revised draft amendments to MSRB Rule G-38—requirements for independent solicitors.

The revised draft amendments represent a further step by the MSRB in response to its concerns that the significant increases in both the amount of compensation being paid to and the amount of political contributions given by these consultants could potentially present challenges to maintaining the integrity of the municipal securities market. Specifically the MSRB believes that (1) the current disclosure scheme may not be sufficient to ensure fair dealing by consultants and (2) that these activities may involve indirect violations of MSRB Rule G-37.

Previously on April 5, 2004, the MSRB published a notice requesting comments on draft amendments replacing the existing language of Rule G-38 relating to consultants with a provision limiting paid solicitations of municipal securities business on behalf of a dealer solely to persons associated with the dealer. An associated person that solicits municipal securities business on behalf of a dealer would become a municipal finance professional and thereby be subject to the MSRB's rules on political contributions and fair practices with respect to municipal securities activities undertaken for the benefit of the dealer.

The revised draft amendments to Rule G-38 would, among other things:

[1] ABASA is a separately chartered trade association and nonprofit affiliate of the American Bankers Association ("ABA") whose mission is to represent the interests of banks underwriting and dealing in securities, proprietary mutual funds and derivatives before Congress, federal and state governments, and the courts. The views in this letter are also endorsed by the ABA. ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership -- which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks -- makes ABA the largest banking trade association in the country.

- Define solicitation as a direct or indirect communication with an issuer for the purpose of obtaining or retaining municipal securities business;

- Prohibit a dealer from making payments for solicitation of municipal securities business to any person who is not an associated person of the dealer;

- Require any paid solicitor to be subject to the MSRB's rules on fair dealing, gifts and gratuities, supervision and political contributions with respect to his or her solicitation activities on behalf of the dealer;

- Require a dealer to enter into a written solicitation agreement with an independent solicitor including, among other things:

    - Name, business address, role (including state or geographic area in which the independent solicitor is working for the dealer) and compensation arrangement; and

    - A requirement that the independent solicitor provide to the dealer a list of all contributions to issuer officials and payments to state or local political parties made by the independent solicitor, any solicitor personnel and any political action committee ("PAC") controlled by the independent solicitor or solicitor personnel.

Although ABASA supports the goals of the proposal, as discussed more fully below, the proposal would significantly add to the regulatory burden and disrupt established compensation and incentive programs for banks and bank holding companies affiliated with municipal securities dealers—all without any measurable progress toward the MSRB's goals. Moreover, the MSRB's determination that communications with conduit borrowers constitutes solicitation reflects a misunderstanding of the marketplace.

Discussion

1. "Independent Solicitor as Individual or Entity

The revised proposal incorporates the definition of "solicitation" of the original draft amendments—any direct or indirect communication with an issuer for the purpose of obtaining or retaining municipal securities business—and, for the first time, addresses "independent solicitors" as individuals or entities. The proposal appears to require that if employees of a bank solicit municipal securities business on behalf of their affiliated dealer, the bank itself would be required to enter into a solicitation agreement with the dealer. Such a reading would have significant negative implications for banking organizations.

We understand from conversations with MSRB staff that this language in the proposal was intended to clarify that dealers have the *option* of entering into agreements with either individuals or companies. Accordingly, ABASA requests clarification in any final proposal that a dealer may contract for solicitation activities with individuals employed by a bank without implicating the bank itself as an independent solicitor.

2. "Inform and Refer" Concept

The revised proposal provides further guidance on the activities that constitute "solicitation" for purposes of Rules G-37 and G-38. Under the proposal, an employee of an affiliate of a dealer could engage in limited communications with issuers affirming the dealer's public finance

capabilities and arranging the dealer to contact the issuer without that activity rising to the level of "solicitation." This concept would formalize the guidance that banking organizations have given to their employees since the Securities and Exchange Commission's ("Commission") agreement with Fifth Third Securities in 2002.

In that case, the Commission determined that individuals under common control with municipal securities dealers are associated persons of the dealer with the result that bank personnel engaged in soliciting on behalf of affiliated dealers could no longer qualify as consultants under Rule G-38. Therefore, bank employees that made political contributions to issuer officials had to avoid "soliciting" those officials so they did not trigger the two-year ban on business under Rule G-37.

ABASA appreciates the clarification of the "inform and refer" concept. As the MSRB is well aware, bank organizations engage in a wide array of financial activities that involve contacts with issuers of municipal securities. These include deposits of public funds, cash management, payroll processing, accounts receivable processing and lending, to name but a few. Thus, bankers often find themselves in circumstances with issuer officials in which public finance issues are raised. Walking a fine line to avoid soliciting has been of particular concern in smaller banking organizations because the top officers of a bank are integrally involved in the affairs of their community, both business and political.

If the guidance were limited to excluding from solicitation such "inform and refer" activities, ABASA would not object. However, the proposal goes on to state that "[I]f an associated person receives compensation such as a finder's fee or referral fee for [referring business to the dealer] . . . the associated person generally would be viewed as having solicited the business." Under MSRB interpretations, "compensation" or "payment" is defined as anything of value and thus would include referral fees or credits in a company's bonus plan. This extension of the "inform and refer" concept would significantly disrupt long-established bank incentive programs and, importantly, would not alleviate the MSRB's concerns about large payments to consultants.

Because of their fragmented structure, banking organizations rely on cross-selling by all of their employees to grow the organizations' business and maintain the profitability of the banks and their affiliates. Indeed, the Gramm-Leach-Bliley Act ("GLBA") was enacted in 1999 to promote integrated financial services—one-stop shopping—in a single organization through functional regulation of bank affiliates. To incent such cross-selling, banking organizations have established elaborate and varied referral and bonus programs.

For referrals of securities business, bank employees may receive payments, which may be in the form of cash or credits, for referring business to affiliates. Because dealers may not make payments to unregistered individuals, such payments generally flow to the bank from the dealer. The bank, in turn, credits the individual employee, typically in the form of a cash referral fee or as a component of a bonus plan.[2] In the case of a bonus plan, there is very little nexus between a yearly bonus and any given securities referral. Bonus plans typically involve numerous components that may cover the range of businesses in which the bank participates. Moreover, the determination of any particular bonus is very subjective because management retains discretion as to how to allocate the funds from the organization's bonus pool.

[2] Because each organization's incentive plan is unique, no one simple formula exists. A plan may encompass a branch, a department, a line-of-business, a region or entire entity. Further, it is not uncommon to find a variety of performance objectives one of which could be expressed in terms of asset gathering, i.e., new business brought into the unit or referred to other units or affiliates, at a single institution.

If the MSRB retains this element of the proposal—payment for "inform and refer" situations results in solicitation—banking organizations would be required to designate as independent solicitors *hundreds* of employees involved to any degree in public finance to avoid violating Rule G-38 as proposed. The types of employees that would be covered by this provision include relationship managers, personal trustees, corporate trustees, custodians and more. Estimates at individual banks run from 100 employees to 350 employees. This would be an enormous reporting and recordkeeping burden on banking organizations because of the wide range of cross-selling opportunities throughout the organization as a whole that are tied to incentive plans. Most importantly, however, over-designating such bank personnel as independent solicitors would do *nothing* to alleviate the MSRB's concerns because these referral fees or credits are quite small in comparison to the consultant fees cited by the Board in the both the original and revised amendments.

These same securities-related referral fees are currently the subject of a Commission rulemaking under Title II of GLBA. If the MSRB believes that it must retain the provision in the revised proposal that receiving referral fees for "inform and refer" situations constitutes solicitation, ABASA strongly urges the MSRB to exempt from that provision any referral fees permitted under GLBA. In this way, banking organizations would not be burdened with the costs involved in over-designating bank employees, and the MSRB (and issuers) would not be inundated with essentially meaningless disclosures.

3. Communications with Conduit Borrowers

In its earlier proposal, the MSRB sought comment on whether a communication with a conduit borrower to hire a dealer as an underwriter for a private activity bond issue should be considered an indirect communication with the issuer. In the revised amendments, the MSRB has rejected the notion that the issuer may *not* actually determine the underwriter, and has offered the industry an unworkable compromise. ABASA strongly disagrees both with this position and with the compromise.

First, ABASA believes the agency has misconstrued the process of putting together a tax-exempt project. In its response to the MSRB's earlier proposal, ABASA presented a typical scenario (incorporated herein by reference) in which the conduit borrower, the banker and the banker's affiliated municipal finance professional ("MFP") after determining that a project involving tax-exempt bonds is feasible, presents the complete package (including the underwriter) to the selected conduit issuer.[3] The issuer either accepts or rejects the complete package. Generally, the issuer's principal role is to determine whether the project meets the public purpose of the issuer. Typically, the issuer expresses no opinion on the transaction participants.

Yet, in the revised draft amendments, the MSRB states that "[I]n virtually all cases, the conduit issuer will maintain ultimate power to control which dealer underwrites a conduit issue since the conduit issuer has discretion to withhold its agreement to issue the securities through any particular dealer." ABASA believes that in the scenario described, if the underwriter were to be rejected, at best, the entire project would likely have to be renegotiated; at worst, the project would not go forward.

---

[3] It is only once the feasibility of using tax-exempt bonds has been determined that the MFP, who knows the capabilities of various issuers in the area, will review them to determine which is best suited for the project. (For example, the amount of the issuance may exceed the permissible amounts for certain issuers, or the project may not be within the scope of some issuers' authority.)

Second, the MSRB states that "some conduit issuers may set minimum standards that dealers must meet to qualify to underwrite a conduit issue, and other conduit issuers may have a slate of dealers selected by the conduit issuer from which the conduit borrower chooses the underwriter for its issue." ABASA believes that when an issuer establishes standards or compiles a slate of underwriters, it is merely selecting a subset of the universe of underwriters. We strongly believe that such subsets are not in any way the equivalent of an issuer influencing the conduit borrower to choose a particular underwriter because of political contributions made on behalf of the underwriter.

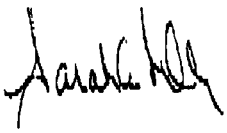
Finally, the MSRB has asserted that a communication with a conduit borrower would not be deemed to be solicitation if: (1) the conduit issuer historically defers to the obligor's selection of underwriters; and (2) the conduit issuer has not, in fact, influenced the conduit borrower's selection of the underwriter. This is a compromise in name only because a dealer would never be able to make such showings. Should the Board determine to go forward on this point, it should give clear guidance on how many deals does it take and what factors must be present to demonstrate that an issuer "historically" defers to the conduit borrower. What proof would demonstrate that there could be no reasonable "nexus" between political contributions and a selection?

Conclusion

In conclusion, while ABASA supports the goal of maintaining the integrity of the municipal securities market, the proposal fails to achieve that goal. It would impose a significant regulatory burden on banks affiliated with municipal securities dealers and disrupt long-established incentive and bonus programs without addressing the MSRB's concerns about the potential distortion of the market as a result of high fees being paid to consultants. Moreover, the MSRB's determination that discussions with conduit borrowers constitute "solicitation" does not reflect current market practices and the compromise offered by the agency is unworkable.

ABASA would be happy to discuss these issues with MSRB staff. In the meantime, if you have any questions, please contact Cris Naser at 202-663-5332.

Sincerely,



Sarah A. Miller

360 Madison Avenue
New York, NY 10017-7111
Telephone 646.637.9200
Fax 646.637.9126
www.bondmarkets.com

1399 New York Avenue, NW
Washington, DC 20005-4711
Telephone 202.434.8400
Fax 202.434.8456

St. Michael's House
1 George Yard
London EC3V 9DH
Telephone 44.20.77 43 93 00
Fax 44.20.77 43 93 01

June 4, 2004

Ernesto A. Lanza, Esq.
Senior Associate General Counsel
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, Virginia 22314

RE: Comments to Proposed Rule G-38 Amendments

Dear Mr. Lanza:

The Bond Market Association[1] ("Association") appreciates this opportunity to respond to the notice ("Notice") issued by the Municipal Securities Rulemaking Board ("MSRB") on April 5, 2004, in which the MSRB proposes draft amendments to Rule G-38.[2] In particular, the Association agrees with the MSRB that Rule G-38's disclosure requirements have been extremely effective in identifying broker-dealer practices regarding the use of Consultants, as defined under that Rule. However, the Association strongly disagrees with the MSRB's assertion that the disclosures made pursuant to these requirements raise concerns of Consultants circumventing Rule G-37's prohibition on political contributions or otherwise engaging in aggressive or abusive practices. This letter describes the valuable role of Consultants in the municipal securities industry and why there is no reason for concern regarding their practices. Moreover, the Association proposes an alternative Rule amendment that would eliminate even the appearance of pay-to-play by prohibiting Consultant contributions that are currently reportable under Rule G-38.

The Association understands that the MSRB's purpose in issuing the Notice is primarily to seek comments and information, and not to arrive at any conclusion or judgment, regarding the practices of Consultants in the municipal securities industry. However, the public may mistakenly view the concerns expressed by the MSRB in the Notice as such conclusions or judgments, especially given that the Notice was issued as a proposed regulatory amendment rather than a mere request for comments

---

[1] The Association represents securities firms and banks that underwrite, distribute and trade fixed income securities and other credit market instruments in the U.S. and globally. Additional information about the Association and its members and activities is located at www.bondmarkets.com.

[2] MSRB Notice 2004-11.

THE BOND MARKET ASSOCIATION

and received significant negative press attention pre-judging the role of Consultants. Thus, the Association submits these comments in an effort to avoid those possible inferences and to provide recommendations to ensure the integrity of the municipal securities industry, while accurately reflecting Consultant practices in the industry.[3] Indeed, the Association's long history and extensive activity in developing best practices, market guidelines and trading standards for the municipal and other fixed income markets, illustrates our commitment to maintaining and enhancing the highest levels of professionalism and integrity in our markets.

Consultants serve a legitimate and important role in the industry by permitting broker-dealers that do not have the resources to maintain an office or an adequate presence in a particular jurisdiction to compete for municipal securities business in that jurisdiction. This permits issuers to have more choices and increases competition, which in turn lead to the issuer and the investing public receiving better service at lower rates. Given their local presence, Consultants also have unique knowledge regarding the local issuer's needs and requirements, thus permitting the broker-dealer to more effectively provide services to that issuer. In many cases, Consultants are hired to perform necessary services, such as providing technical/educational support or strategic advice to the broker-dealer. A broker-dealer may even outsource certain functions related to a municipal securities deal to a Consultant (e.g., recordkeeping function).[4] Thus, rather than harming the integrity of the market, Consultants help preserve the interests of the investing and taxpaying public.

There is no evidence to warrant the MSRB's concerns that Consultants are being used indirectly to make prohibited political contributions under Rule G-37 or that Consultants may be using more aggressive tactics in contacting issuers. The MSRB bases these concerns on its general statements that there has been an increase in reported Consultant contributions and in the compensation paid to Consultants.

These grounds for concern, however, do not indicate or imply any improper behavior by Consultants. For example, the MSRB states that there has been a "significant increase" in the political contributions made by Consultants. However, the incidence of broker-dealers hiring Consultants who make political contributions has increased only minimally. Indeed, the percentage of Consultants who made reportable political contributions to issuer officials only increased by slightly over 2% (from 11.3% to

---

[3] Please note that although not addressed in Question & Answer ("Q&A") form, many of the questions posed by the MSRB in the Notice are addressed in these comments.

[4] The MSRB recognized this outsourcing possibility in Rule G-38 Q&A (March 4, 1999).

THE BOND MARKET ASSOCIATION

13.8%) during the last four-year period, between 2000 and 2003.[5] In other words, in 2003, over 86% of the Consultants in the industry did not make any reportable contribution to an issuer official. This strongly supports the conclusion that Consultants are being used for the legitimate services and advice they provide (e.g., by having a local presence and knowledge of local issuers) rather than for their political contributions. More importantly, regardless of the level of the contributions being made, there is no indication whatsoever that Consultant contributions are being used to influence decisions regarding municipal securities business.

The MSRB is also concerned because there has been an increase in the compensation paid to Consultants. This increase, however, does not in any way indicate or imply that Consultants are engaging in pay-to-play or that there is added pressure on Consultants to engage in aggressive or abusive practices. Rather, the recent increase in compensation appears to be attributable to the significant increase in the volume and size of municipal securities deals. As described in footnote 5, the total amount of new issuance of municipal securities went up 87% -- from $241.8 billion in 2000 to $452.4 billion in 2003.[6] Moreover, the average size of a municipal securities offering went up 55% -- from $15.9 million in 2000 to $24.6 million in 2003.[7] Compensation paid to broker-dealer employees in the municipal securities industry has also increased due to this increase in the volume and size of the issuances. Please note that even if there were no explanation for the increased compensation, there is no evidence of a correlation between increased compensation and aggressive or abusive practices. In fact, there may actually be an increased incentive on the part of the Consultant not to jeopardize such a lucrative practice by engaging in improper activity.

---

[5] Between 2000 and 2003, the total number of Consultants increased from 582 to 954. The number of Consultants who made reportable contributions to issuer officials increased from 66 (11.3%) to 132 (13.8%). Please note that the increase in the total number of Consultants is likely due to the increase in municipal securities issuances. In 2003, a total of $452.4 billion in municipal securities was issued compared to $241.8 billion in 2000, an increase of 87%. See Thomson Financial Securities Data. The number of municipal securities transactions also increased from 15,216 in 2000 to 18,390 in 2003.

[6] See id. In contrast, the total amount of municipal securities issuances decreased by 10% between 1997 (when a total of $267.1 billion was issued) and 2000 (when a total of $241.8 billion was issued). See id.

[7] See id. In contrast, the average size of municipal securities deals decreased by 1% between 1997 (when the average size was $16.1 million) and 2000 (when the average size was $15.9 million). See id.

THE BOND MARKET ASSOCIATION

In light of the legitimate and important role of Consultants, the Association addresses below the specific amendments proposed by the MSRB.

I. Non-Associated Persons Should Continue to Be Permitted to Act as Consultants

The draft amendment prohibits a broker-dealer from paying any person for soliciting municipal securities business, unless that person qualifies as an "associated person," as defined under the Securities Exchange Act of 1934 ("'34 Act"). As discussed above, there is no indication that the alleged abuses, which this amendment is supposed to address, actually exist. The following describes other problems with this amendment and then proposes an alternative restriction on Consultants, which would eliminate even the appearance of pay-to-play. Please note, however, that if the MSRB does ultimately require all solicitors to be associated persons under the '34 Act, either the MSRB or the Securities and Exchange Commission ("SEC") must provide clear guidance as to what is required for an independent contractor to qualify as an associated person and the level of supervision to be provided by the broker-dealer. Current MSRB and SEC guidance is lacking on this subject.

Without such guidance, broker-dealers would be subject to arbitrary and capricious enforcement when it comes to using independent contractors to solicit municipal securities business. With such risk, broker-dealers would be forced to discontinue the use of independent contractors for the purpose of soliciting municipal securities business.

A. Rule G-38 Works in Its Current Form

Rule G-38 works well in its current form in that it requires full disclosure, not only to the MSRB but also to the issuers and the general public, regarding the Consultant's compensation, role, and political contributions. Such extensive disclosure (which would be lost under the draft amendment) minimizes, if not eliminates, the possibility of abusive practices. Indeed, there already is a regulatory mechanism in place that prohibits Consultants from engaging in pay-to-play. Rule G-37 prohibits broker-dealers from indirectly making prohibited contributions using their Consultants and imposes a two-year ban on municipal business on the broker-dealer if a violation occurs. Pay-to-play practices of Consultants, if any, should be eliminated by enforcing this prohibition based on the totality of the circumstances in a given case, rather than indiscriminately eliminating the use of Consultants altogether. The transparency created under current Rule G-38 disclosure requirements should facilitate such enforcement.

THE BOND MARKET ASSOCIATION

B. The Associated Person Concept is Impractical and Unworkable

As discussed above, broker-dealers that do not have the resources to maintain an office or an adequate presence in a particular jurisdiction use Consultants as an affordable way to compete for municipal securities business in that jurisdiction.[8] By requiring Consultants to become associated persons, geographical restraints may make it impossible for a broker-dealer to supervise a Consultant as an associated person unless the broker-dealer maintains such adequate presence in that jurisdiction. The proposed amendment would also make it unfeasible for broker-dealers with limited resources to retain Consultants who provide certain necessary services, such as technical/educational support (i.e., experts who can educate the issuer and the broker-dealer in a particular area). This includes the ability of broker-dealers to outsource certain functions related to a municipal securities deal. Moreover, given that only individuals may be considered to be associated persons, the proposed amendment would eliminate a broker-dealer's ability to use consulting firms.

Additional burdens are imposed on associated persons under MSRB Rules and the '34 Act, including, but not limited to, the requirement that associated persons become subject to the broker-dealer's insider trading policy; that they be trained and possibly registered by passing a qualifying exam; and that they refrain from meeting with members of the public for at least ninety (90) days following such qualification.[9] There are further restrictions on associated persons under National Association of Securities Dealers and New York Stock Exchange rules that may be applicable. These burdens are further compounded by the fact that there is no clear guidance as to what is required to make an independent contractor an associated person.

Thus, the cost of treating Consultants as associated persons would unfairly drive many of these capable broker-dealers (including many women and minority-owned firms) out of the municipal securities business industry, especially given that the margins of profit in the industry are relatively low. Moreover, even if a broker-dealer is large enough not to be driven out of the business, it would still be required

---

[8] It is interesting to note that J.P. Morgan Chase, which submitted a comment letter supporting the MSRB's proposed amendment, confirmed this by stating in a newspaper article that J.P. Morgan Chase no longer needs to hire independent Consultants, given its pending merger with Bank One will enable it to have an increased local presence around the country. *J.P. Morgan Backs Ban on Consultants*, The Bond Buyer (April 30, 2004).

[9] Sections 15(f) and 15(b)(7) of the '34 Act; MSRB Rule G-3.

THE BOND MARKET ASSOCIATION

to incur these significant additional costs for apparently no reason, given that there is no evidence of Consultants engaging in abusive practices.

C. The MSRB's Draft Amendment Is Unconstitutional

Requiring Consultants to essentially become Municipal Finance Professionals ("MFPs") under Rule G-37 would violate the First Amendment of the Constitution. In particular, the Supreme Court has equated political contributions with speech that is protected under the First Amendment.[10] Thus, to restrict political contributions, a rule must be narrowly tailored to advance a compelling governmental interest. For example, the D.C. Circuit Court in Blount v. SEC upheld Rule G-37 because the Rule was narrowly tailored to address the government's compelling interest of eliminating pay-to-play in the municipal securities industry.[11] To satisfy the "narrowly tailored" test, the government must demonstrate (1) that "the ills it claims the rule addresses in fact exist and the rule will materially reduce them," and (2) that the Rule is necessary where there is no "less restrictive alternatives to the rule [that] would accomplish the government's goals equally or almost equally effectively."[12]

If Consultants are required to become MFPs, thus expanding Rule G-37's ban on political contributions to those Consultants, Rule G-37 would no longer satisfy this narrowly tailored test. There is no evidence that Consultants are being used by broker-dealers to engage in pay-to-play. Even if the problem of Consultants engaging in pay-to-play were to exist, the draft amendment's restrictions far exceed what would be necessary to address that problem. As described above, by coupling the indirect violation provision of Rule G-37 with the extensive disclosure requirements of Rule G-38, the government is already in the position to effectively deal with Consultant pay-to-play practices that may exist in the industry, if any. In fact, in defending Rule G-37 before the Blount Court, the Securities Exchange Commission ("SEC") explained:

> that the "loopholes" that remain [in Rule G-37] are due to its "sensitivity" to First Amendment concerns; [the SEC] believes that closing the supposed loopholes would broaden the regulation's scope beyond that "necessary" to accomplish its interests.[13]

---

[10] See Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612 (1976).

[11] 61 F.3d 938 (D.C. Cir. 1995).

[12] Id. at 944.

[13] Id. at 946-947.

THE BOND MARKET ASSOCIATION

When the Blount case was being decided, one of these supposed "loopholes" was that Consultants were not subject to Rule G-37. Thus, even the SEC has confirmed that expanding Rule G-37 as proposed in the draft amendment would result in an excessive infringement of the First Amendment right to free speech.

D. Alternative Restrictions for Consultants

While there is no need to amend Rule G-38, to the extent the MSRB feels more is needed to avoid even the appearance of pay-to-play, the Association recommends taking a more tailored approach by imposing the following restrictions on Consultants, rather than eliminating Consultants altogether.

Under this approach, broker-dealers would still be permitted to retain non-associated persons as Consultants. However, Consultants would be prohibited from making political contributions that are currently reportable under Rule G-38. In particular, broker-dealers would be required to include in their Consultant agreements a provision that at the very least prohibits the Consultant from making a contribution to an official of an issuer during the six (6) month period preceding, or six (6) month period following, the Consultant's solicitation of municipal securities business from that issuer.[14] Moreover, broker-dealers would be prohibited from hiring a Consultant to solicit an issuer, if that Consultant has contributed to an official of that issuer during the preceding six (6) month period. If the MSRB decides to adopt this alternative proposal, Consultants who have already been retained by a broker-dealer at the time the alternative proposal takes effect should not be subject to this six (6) month look-back prohibition. This is necessary to allow for a fair and smooth transition for those Consultants who may have made a perfectly appropriate contribution under current Rule G-38.

To enforce the above contractual provision, broker-dealers could be required to automatically terminate their Consultant agreements and cease paying Consultants upon learning of a prohibited contribution. Broker-dealers may also be required to obtain periodic (e.g., quarterly) certifications from their Consultants confirming that the Consultants have not made a prohibited contribution or listing all of the political contributions made by the Consultants during that quarter.

This approach is much more reasonable than the MSRB's proposal of eliminating Consultants in that the restrictions are proportional to the paucity, or complete lack, of evidence regarding Consultants and pay-to-play. Moreover, the restriction is tailored to political contributions and pay-to-play and does not arbitrarily eliminate

---

[14] As is the case under current Rule G-37 and Rule G-38, there would be an exemption for individuals who contribute no more than $250 per election to a candidate for whom he or she is entitled to vote.

THE BOND MARKET ASSOCIATION

an important segment of the municipal securities industry. Indeed, by requiring broker-dealers to report the above Consultant contributions under the current Rule G-38, the MSRB made a determination that those contributions are the only ones that can raise the issue of pay-to-play. Under our proposed alternative, these contributions will simply be prohibited, thereby removing any doubt or question regarding pay-to-play. The tailoring of the restriction in this manner also increases the likelihood of the rule amendment surviving scrutiny under the Constitution. Please note that even this more tailored approach will cause certain qualified Consultants to simply get out of the industry given that it would prohibit them from making contributions in connection with their other lines of business, such as their legislative lobbying services on behalf of other industries.

II. The MSRB Should Modify its Definition of Solicitation

The MSRB proposes to define the act of "soliciting" municipal securities business (for purposes of triggering MFP status under Rule G-37 as well as the proposed Rule G-38 amendment prohibiting non-associated persons from soliciting such business) as any direct or indirect communication with an issuer for the purpose of obtaining or retaining municipal securities business. However, there are certain implications of this proposal that concern the Association.

A. Solicitor MFPs under Rule G-37 Should Not Include Those Who Merely Communicate with Third Parties

In the process of describing the above proposal, the MSRB states that whether an employee becomes a solicitor MFP under current Rule G-37 is not dependent upon the person who is solicited. Thus, the MSRB apparently believes that an employee becomes a solicitor MFP under Rule G-37 merely by soliciting municipal securities business from a private obligor in a conduit deal, regardless of whether that obligor is being used to ultimately solicit the issuer. This position, however, is contrary to the purpose underlying Rule G-37 as well as the formal interpretations previously issued by the MSRB.

Although the current plain language of Rule G-37 is unclear on this issue, it does not require that the term "solicitation" be read to include mere discussions with private obligors. To the contrary, each interpretation that the MSRB issued as to what constitutes a "solicitation" under Rule G-37 specifically states that the solicitation activity in question must be aimed at the issuer. For example, the MSRB interpreted the term solicitation to include any "activities calculated to appeal to issuer officials for municipal securities business, or which effectively do so."[15] The MSRB also gave as examples of solicitation the making of presentations to "issuer officials"

[15] MSRB, Q&A #2 (December 7, 1994) (emphasis added).

regarding municipal securities business, or merely attending a meeting where such presentation occurs.[16]

Limiting the term "solicitation" to such issuer-targeted activity is consistent with the purposes of Rule G-37. In particular, the goal of Rule G-37 is to eliminate "pay-to-play," whereby broker-dealers use political contributions to influence the underwriter selection process. Thus, to treat an individual as an MFP, there should at least be some possibility of his or her contribution influencing this process. However, in a conduit deal, if an employee is only communicating with a private obligor and not the issuer, there is no possibility that a contribution made by that employee to an official of that issuer would influence the underwriter selection process. The issuer would not even know that the employee is involved given that the employee is only dealing with the private obligor. Moreover, contributions made to an issuer official have no potential of influencing any decision made by the private obligor given that the employees and officers of the private obligor do not have an interest in the outcome of elections. In most cases, when an employee approaches a private obligor regarding a conduit deal, they do not even know which issuer will be used for the bonds.

The linkage between the contribution and the underwriter selection process is also required under the Constitution. In particular, to satisfy the "narrowly tailored" test, a regulation must be closely drawn (i.e., pay-to-play) and may not restrict activity beyond that which is necessary to address the concern in question.[17] Triggering Rule G-37's prohibition on contributions due to an employee's relationship with a private obligor, where there is no linkage between a contribution and the selection process, would go well beyond that which is necessary to prevent pay-to-play. Indeed, the Court upheld Rule G-37 on the basis that the Rule:

> constrains relations only between the two potential parties to a quid pro quo: the underwriters and their municipal finance employees on the one hand, and officials who might influence the award of negotiated municipal bond underwriting contracts on the other.[18]

Moreover, if the MSRB were to conclude that communications with private obligors result in a "solicitation," the results would be troubling. In particular, unless the MSRB limits the term "solicitation" to activity aimed at an issuer, an employee would be in jeopardy of qualifying as an MFP any time he or she communicates with

---

[16] Id.; MSRB, Q&A #1 (March 22, 1995).

[17] See Blount, 61 F.3d at 947.

[18] Id. (emphasis added).

THE BOND MARKET ASSOCIATION

any private entity or person, such as a lawyer or a project team member (e.g., an investment advisor firm) regarding a municipal issuance. Such result would, by any measure, be outside of the intent of Rule G-37.

The MSRB recognized this when it drafted Rule G-38 by making clear that to qualify as a Consultant, one must communicate directly or indirectly with an issuer. This sheds light on what is meant by "solicitation" under Rule G-37 given that the purposes of Rules G-37 and G-38 are the same – to eliminate the corrupt influence of political contributions on the underwriter selection process. Indeed, Rule G-38 was drafted to address possible indirect violations of Rule G-37 where broker-dealers use Consultants to make otherwise prohibited contributions to issuer officials.[19] Thus, in applying the term "solicitation" in the Rule G-37 context, there is no reason to take an approach that is different from that set forth in Rule G-38.

Based on the above, we request that the MSRB adopt the proposed definition of "solicitation" for purposes of Rule G-37. By doing so, the MSRB would make clear that an employee becomes an MFP only by directly communicating with an issuer or indirectly communicating with an issuer through a third party, such as a private obligor. The MSRB may also issue an interpretation making this clarification without formally amending Rule G-37. We also agree with the MSRB that even if one is communicating with an issuer, it should be done with the intent of obtaining municipal securities business for it to qualify as a solicitation.

Alternatively, if the MSRB continues to interpret Rule G-37 to cover mere communications with private obligors, it should carve out an exemption that reflects how conduit deals really work. In particular, the MSRB claims that Rule G-37 currently exempts from the definition of "solicitation" a situation where an employee (as part of his investment banking services) merely advises a private obligor on appropriate financing alternatives, including conduit issuances, and provides to the obligor contact information of the municipal finance employee who can assist in the underwriting. This exemption should be expanded to also permit the employee to internally refer the matter to the municipal finance employee. Thus, the employee would be permitted not only to give the obligor the municipal finance employee's contact information but also to talk to the municipal finance employee and ask him or her to call the obligor. This more accurately reflects how investment banking advisors actually operate as they provide the panoply of financing options to their client.

---

[19] See MSRB Reports, Vol. 14, No. 3 (Jun. 1994); Notice of Filing of Proposed Rule Change by the MSRB Relating to Consultants, File No. SR-MSRB-95-15 (Nov. 28, 1995).

THE BOND MARKET ASSOCIATION

B. Those Providing Professional Services to a Broker-Dealer Should Be Expressly Exempted

In an effort to consolidate the definition of solicitation for purposes of Rule G-37 and Rule G-38, the MSRB eliminates the language of current Rule G-38 that expressly exempts from the definition of Consultant professionals who merely provide legal, accounting, engineering, and legislative lobbying services ("Professionals").[20] At the same time, the MSRB states that the existence of an "intent" to obtain municipal securities business is important in determining whether a solicitation has occurred. Based on this reasoning, Professionals appear to still be exempt from the definition of solicitation in that their purpose is not to obtain municipal securities business but solely to provide Professional services to the broker-dealer. Moreover, the policy consideration has not changed that these outside Professionals provide a valuable service to broker-dealers.

However, by eliminating Rule G-38's language regarding Professionals, the MSRB creates doubt as to whether Professionals are exempt. Thus, we request that the MSRB confirm either in the Rule's definition of solicitation or through an interpretation that Professionals would not be deemed to be soliciting municipal securities business under Rule G-38.

We look forward to discussing these issues further with the MSRB staff, and appreciate your attention to our comments. Please contact the undersigned at (646)637-9218 or via e-mail at Lhotchkiss@bondmarkets.com with any questions that you might have.

Sincerely,

Lynnette Kelly Hotchkiss

Lynnette Kelly Hotchkiss
Senior Vice President and
Associate General Counsel

---

[20] The exemption for legislative lobbyist is not found in the language of Rule G-38 but in MSRB Q&A #5 (February 28, 1996).

cc: ***Securities and Exchange Commission***
The Honorable William H. Donaldson, Chairman
The Honorable Cynthia A. Glassman, Commissioner
The Honorable Harvey J. Goldschmid, Commissioner
The Honorable Paul S. Atkins, Commissioner
The Honorable Roel C. Campos, Commissioner
Giovanni P. Prezioso, General Counsel, Office of the General Counsel
Annette L. Nazareth, Director, Division of Market Regulation
Martha Mahan Haines, Director, Office of Municipal Securities

NASD Regulation, Inc.
Malcolm P. Northam, Director, Fixed Income Securities Regulation
Marc Menchel, General Counsel
Sharon K. Zackula, Assistant General Counsel

Municipal Securities Rulemaking Board
Christopher A. Taylor, Executive Director
Diane G. Klinke, General Counsel

The Bond Market Association
Executive Committee, Municipal Securities Division
Legal Advisory Committee, Municipal Securities Division
Policy Committee, Municipal Securities Division
Sales and Marketing Committee, Municipal Securities Division
Operations Committee, Municipal Securities Division
Syndicate and Trading Committee, Municipal Securities Division
Consultants Task Force, Municipal Securities Division
Regional Advisory Committee

360 Madison Avenue
New York, NY 10017-7111
Telephone 646.637.9200
Fax 646.637.9126
www.bondmarkets.com

1399 New York Avenue, NW
Washington, DC 20005-4711
Telephone 202.434.8400
Fax 202.434.8456

St. Michael's House
1 George Yard
London EC3V 9DH
Telephone 44.20.77 43 93 00
Fax 44.20.77 43 93 01

December 15, 2004

Ernesto A. Lanza, Esq.
Senior Associate General Counsel
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, Virginia 22314

RE: Comments to Second Draft of Proposed Rule G-38 Amendments

Dear Mr. Lanza:

The Bond Market Association[1] ("Association") appreciates this opportunity to respond to the notice ("Notice") issued by the Municipal Securities Rulemaking Board ("MSRB") on September 29, 2004, in which the MSRB issued its second draft of the proposed amendments to Rule G-38[2]. The MSRB in this latest draft (1) retained the requirement from the initial draft that any person who is paid to solicit municipal securities business must be an "associated person" of the broker-dealer, as defined under the Securities Exchange Act of 1934 (the "'34 Act"), and (2) proposed additional requirements that a broker-dealer have a written agreement with, and make disclosures to the issuer and the MSRB (similar to those currently required under Rule G-38) regarding such paid solicitors if they are not officers or employees of the broker-dealer. The Association offers the following comments in the hopes of

---

1 The Association represents securities firms and banks that underwrite, distribute and trade fixed-income securities and other credit market instruments in the U.S. and globally. Additional information about the Association and its members and activities is located at www.bondmarkets.com.

2 MSRB Notice 2004-32.

THE BOND MARKET ASSOCIATION

working with the MSRB to achieve our mutual goal of ensuring the highest standards of ethical conduct in the municipal securities industry.

Our goal is to give the MSRB insight as to how the amendments would impact the industry[3] and to provide a workable alternative to the proposed amendments. We share the same goals as the Board and hope to enter into a discussion with the MSRB about ways to raise the standards of fair practice and professionalism relating to Consultants and doing away with the perception of wrong-doing. Indeed, the Association shares your goals to ensure the highest standard of ethical conduct in the municipal securities industry and to vigorously enforce MSRB rules and standards. We recognize that Rule G-38 allows for complete transparency on the use of consultants to obtain municipal securities business, and believe that an incremental approach best serves the industry and accomplishes the goals of the MSRB. We believe that we are recommending solutions that are a practical and reasonable means for achieving those mutual goals.

As was the case with our comments to the MSRB's first draft of the amendments, these comments reflect the full weight of the Association's member firms (including a wide array of firm types, such as firms of different sizes, firms based in different geographic regions and minority-owned firms), which came to a consensus on these complex issues and are the result of a great deal of work on the part of the Association and its members. While each and every member of the Association did not participate in the drafting of these comment letters, we went back to the members to garner consensus in preparing these comments. Attached is a list of our members[4] so that the Board can see the depth and variety of firms represented by the Association's letters.

We found then, as we do now, that the concept of associated persons proposed by the Board is unworkable, and we apologize if our initial letter did not set forth alternative requirements which sufficiently addressed the MSRB's concerns. We appreciate the opportunity to expand upon our comments on the initial draft of these amendments and hope that this letter provides a satisfactory alternative to the associated persons concept for consultants.

We reiterate our past comments by stating that we do not believe that the proposed amendments are warranted. It remains the case that the MSRB has not shown any indication that those who are treated as Consultants under current Rule G-

---

[3] Please see Attachment A for our concerns and possible impacts of the proposed amendments on the industry.

[4] Please see Attachment B for a list of the Association's members.

38 ("Consultants")[5] are engaging in abusive practices. On the contrary, Consultants help firms to reach out to more issuers than they would otherwise be able, thus helping the issuer community and the tax-paying public by increasing competition amongst the broker-dealers. In proposing these amendments, the MSRB relies only on speculative risks that have not been shown to exist. Thus, it is not apparent to the Association that there is any justification for the proposed amendments.[6]

At the same time, the proposed amendments impose vague and overly burdensome requirements. In particular, by requiring Independent Solicitors to be associated persons, the amendment would trigger the application of a wide range of requirements not only under the MSRB Rules but also under the '34 Act and other laws that are practically impossible to apply to Independent Solicitors. Given that the requirements applicable to associated persons were created with employees (or others who are traditionally controlled by the broker-dealer) in mind, there is no regulatory guidance that a broker-dealer can use to comply with these vague and varying requirements in the context of an Independent Solicitor.

Moreover, the requirements go above and beyond the MSRB's stated purpose -- to subject Independent Solicitors to fair practice and professionalism standards -- and impose an unreasonable cost on the industry. If the proposed amendments are finalized, they will ultimately harm the industry by making it practically impossible for a broker-dealer to use Independent Solicitors, who provide value to the municipal securities industry, the issuer community and tax-paying public. Thus, by adopting the amendments, the MSRB will largely eliminate Independent Solicitors from the industry -- a step, which we understand, the MSRB considered and rejected.

The MSRB is viewing Independent Solicitors as being similar to brokers and investment bankers and thus is willing to make Independent Solicitors associated persons. However, their functions are very different in that brokers and investment bankers are actually involved in implementing and structuring deals

---

[5] We note that the proposed amendments use the term "Independent Solicitor" rather than "Consultant" when referring to non-associated persons who solicit municipal securities business on behalf of a broker-dealer. For purposes of these comments, those terms should be viewed as being interchangeable although we attempt to use the term "Consultant" when referring to the current Rule and "Independent Solicitor" when referring to the proposed amendments to the Rule.

[6] Indeed, Rule G-38's current disclosure requirements work in that they bring to light the details of a broker-dealer's relationship with a Consultant that are necessary to determine if there are improper understandings between them.

THE BOND MARKET ASSOCIATION

while Consultants primarily help solicit municipal securities business but do not participate in deal structuring. Consultants do not provide investment banking services, strategy or advice regarding the structuring of a deal. As a result, although there is a reason to require that brokers and investment bankers be associated persons, that reasoning does not extend to the limited services provided by Consultants.

By requiring all solicitors to be associated persons, the MSRB has to inherently get involved in interpreting the term "associated person" under the '34 Act -- a function that is outside of the MSRB's jurisdiction.

The problems related to the MSRB's proposed amendment and its associated person requirement are described in greater detail in Attachment A to this letter. To avoid the consequence of Consultants being largely eliminated from the industry, while at the same subjecting Consultants to standards of fairness and professionalism, we propose the following alternative to the associated person requirement.

Alternative Restrictions for Consultants

To the extent the MSRB feels more is needed to address potential abusive practices by Consultants, the MSRB should subject Consultants to standards of fair practice and professionalism by requiring that these standards be embodied in a broker-dealer's agreement with a Consultant. In fact, these and other concerns articulated by the MSRB can be addressed within these agreements, as described in greater detail below, and would not implicate other provisions of the securities laws that have far reaching effect as would be the case in implementing an associated person requirement.

A. Provisions Regarding Consultant's Conduct

1. Fair Play and Professionalism

In the Consultant agreements, Consultant should be required to agree to abide by standards of fair practice and professionalism when representing the broker-dealer. This codifies in the agreement the standards by which we believe Consultants, for the most part, already perform their services. Additionally, other provisions could be added to address concerns articulated by the MSRB. The following are some of the specific provisions that may be required to be included in the agreement to achieve this purpose:

THE BOND MARKET ASSOCIATION

- **Rule G-17 Standard:** Requirement that Consultant deal fairly with all persons and not engage in any deceptive, dishonest, or unfair practice.
  - Requirement that Consultant not misrepresent any fact, expressly or implicitly, when providing services under the agreement. This includes Consultant not withholding any materially relevant fact when dealing with an issuer.
  - Requirement that Consultant not use any improper method (i.e., any method other than accurately promoting the capabilities of the broker-dealer) when soliciting municipal securities business.
  - Prohibition on Consultant arranging with any third parties to share in any consulting fees without prior written consent of the broker-dealer.
- **Rule G-3 Licensing Issues:**
  - Contract will specify that Consultant's role is strictly limited to soliciting municipal securities business and providing advice and consultation to the broker-dealer as to municipal securities business opportunities in a particular jurisdiction.
- **Ethics and Conflict of Interest:**
  - Requirement that Consultant fully comply with all applicable State and local ethics laws and conflict of interest laws, including but not limited to those applicable to current and former federal, state or local public officials.
- **Rule G-20 and Other Gift Rules:**
  - Requirement that Consultant fully comply with all applicable State and local gift and entertainment laws as well as the standards in MSRB Rule G-20.
  - Prohibition on any reimbursements of Consultant for gifts, entertainment or other thing of value provided to anyone without prior written consent of the broker-dealer.
- **Lobbying Disclosure Laws:**
  - Requirement that Consultant fully comply with applicable State and local lobbying laws.

THE BOND MARKET ASSOCIATION

- Consultant shall certify as to its compliance with applicable laws, rules and regulations.

- **Insider Trading Laws:** Consultant will not buy or sell any securities while in possession of material, non-public information related to that security.

- **Rules G-37/G-38:** See "Political Contributions" below.

2. Political Contributions

To address concerns of pay-to-play, Consultants should not be treated as Municipal Finance Professionals ("MFPs"), but should still be prohibited from making political contributions that are currently reportable under Rule G-38. In particular, broker-dealers could be required to include in their Consultant agreements a provision that at the very least prohibits the Consultant from making a contribution to an official of an issuer during the six (6) month period preceding, or six (6) month period following, the Consultant's solicitation of municipal securities business from that issuer.[7] Broker-dealers could also be prohibited from hiring a Consultant to solicit an issuer, if that Consultant has contributed to an official of that issuer during the preceding six (6) month period.

3. Retroactivity

Regardless of the proposal that may be adopted by the MSRB, broker-dealers should be given an adequate and reasonable opportunity to transition into the new rule without triggering any penalty or violation as a result of activity engaged in by pre-existing Consultants prior to the effective date of the rule. This is necessary to allow for a fair and smooth transition for those Consultants who may have engaged in perfectly appropriate activity under current Rule G-38.

B. Enforcing the Above Provisions

The following remedial measures may be imposed to ensure that the Consultant complies with the above provisions:

---

[7] As is the case under current Rule G-37 and Rule G-38, there would be an exemption for individuals who contribute no more than $250 per election to a candidate for whom he or she is entitled to vote.

THE BOND MARKET ASSOCIATION

- Require broker-dealers to automatically terminate their Consultant agreements and cease paying Consultants upon learning of a prohibited contribution or a violation of the standards of fair practices and professionalism contained in their agreements. This leaves the broker-dealer with an obligation to terminate the Consultant if there is a violation.

- Require broker-dealers to obtain periodic (e.g., quarterly) certifications from their Consultants confirming that they are complying with these provisions and listing all of the political contributions made during that period. This puts the burden on the broker-dealer to seek out information from the Consultant.

- Require broker-dealers to promptly report to the MSRB the discovery of any violation by a Consultant of any of the above provisions. Thus, the required public disclosure of violations would serve as an incentive for Consultants and broker-dealers to abide by the above standards to avoid negative publicity and reputational risk.

- Prohibit other broker-dealers from hiring a Consultant who has violated any of the above provisions for two years. This prevents Consultants from repeatedly violating the above standards.

By imposing the above standards on Consultants, coupled with the current requirements under Rule G-38 that various compensation and other information about Consultants be disclosed, the MSRB will eliminate even the appearance of impropriety on the part of Consultants.

We have always appreciated our strong working relationship with the MSRB Board and staff. We believe that self regulation works best when the regulators and the industry work together to achieve practical solutions to issues facing the municipal markets. And we applaud the Board's vigilance in upholding the highest standards of integrity and professionalism in our markets. We appreciate your willingness to engage the industry in a fulsome discussion on this issue and offer our continued assistance to work with the Board on developing and implementing workable solutions.

We are convinced that our proposal addresses the concerns articulated by the MSRB, yet offers a practicable and workable solution. We urge the Board to consider our incremental approach. If it proves unworkable, the Board can always reintroduce the associated person concept, or ban the use of consultants outright. We look forward to discussing these issues further with the MSRB staff, and appreciate

THE BOND MARKET ASSOCIATION

your attention to our comments. Please contact the undersigned at (646)637-9218 or via e-mail at Lhotchkiss@bondmarkets.com with any questions that you might have.

Sincerely,

Lynnette Kelly Hotchkiss

Lynnette Kelly Hotchkiss
Senior Vice President and
Associate General Counsel

Attachment

cc: ***Securities and Exchange Commission***
The Honorable William H. Donaldson, Chairman
The Honorable Cynthia A. Glassman, Commissioner
The Honorable Harvey J. Goldschmid, Commissioner
The Honorable Paul S. Atkins, Commissioner
The Honorable Roel C. Campos, Commissioner
Giovanni P. Prezioso, General Counsel, Office of the General Counsel
Annette L. Nazareth, Director, Division of Market Regulation
Martha Mahan Haines, Director, Office of Municipal Securities

NASD Regulation, Inc.
Malcolm P. Northam, Director, Fixed Income Securities Regulation
Marc Menchel, General Counsel
Sharon K. Zackula, Assistant General Counsel

Municipal Securities Rulemaking Board
Christopher A. Taylor, Executive Director
Diane G. Klinke, General Counsel

The Bond Market Association
Executive Committee, Municipal Securities Division
Legal Advisory Committee, Municipal Securities Division
Policy Committee, Municipal Securities Division
Sales and Marketing Committee, Municipal Securities Division
Operations Committee, Municipal Securities Division
Syndicate and Trading Committee, Municipal Securities Division
Consultants Task Force, Municipal Securities Division
Regional Advisory Committee

THE BOND MARKET ASSOCIATION

Outline Describing the Problems Associated with the MSRB's Proposed Amendments

I. If the MSRB Decides to Adopt the Proposed Amendments, It Should Modify its Definition of Solicitation and Eliminate the Agreement and Disclosure Requirements

A. The Definition of Solicitation Should Be Modified

The proposed amendment adopts verbatim the definition of "solicitation" currently found in Rule G-38 for both revised Rules G-37 and Rule G-38. In particular, solicitation is defined as any direct or indirect communication with an issuer for the purpose of obtaining or retaining municipal securities business. The MSRB has repeatedly advised the industry since the creation of Rule G-38 that this definition does not cover communications with obligors in a conduit deal, but only direct or indirect communications with issuers. Indeed, in the initial draft of these proposed amendments, the MSRB again confirmed that, under current Rule G-38, it is not enough for a person to simply communicate with a third party, such as an obligor in a conduit deal, but rather, the person must communicate with the issuer through that third party (essentially using the third party as his or her mouthpiece).[1] The MSRB contrasted this with the definition of solicitation under current Rule G-37, which is "not dependent upon the person to whom a solicitation to obtain business is made."[2]

However, the MSRB in its latest draft reverses this longstanding and reasonable precedent without setting forth the basis for, or even acknowledging that it is, doing so. In particular, the MSRB states that a communication with an obligor in a conduit deal would be treated as a solicitation, as currently defined under Rule G-38, unless the broker-dealer is able to demonstrate that (1) the conduit issuer historically defers to the obligor's selection of underwriters, and (2) the conduit issuer has not in fact influenced the obligor's selection of the underwriter for the issuance in question. It is practically impossible to make these showings in that there is no clear or reasonably derivable standard for determining whether these factors are met. For example, how does one decide the historical practices of an issuer? Is it sufficient to get a statement from the issuer as to the history of deferring to the obligor's underwriter selection? If so, how far do you go back and what level of deference is required? More importantly, in some cases, when a Consultant communicates with an obligor, an issuer has not yet even been identified. Thus,

---

1 MSRB Notice 2004-11 (April 5, 2004).

2 Id.

THE BOND MARKET ASSOCIATION

there is no way for a broker-dealer to even broach the question of the issuer's history.

Given these insurmountable problems with the MSRB's proposed interpretation of what constitutes solicitation and the arguments specified in greater detail in our initial comments,[3] the MSRB should not change its longstanding precedent of not treating communications with third parties, including obligors in a conduit deal, as a solicitation, as currently defined under Rule G-38.

B. Eliminate the Agreement and Disclosure Requirements

If the MSRB adopts the proposed amendment to make all Independent Solicitors associated persons and MFPs, it should not impose the requirements that a broker-dealer have an agreement with an Independent Solicitor and make disclosures to the issuer and the MSRB, similar to current Rule G-38. As described above, treating an Independent Solicitor as an associated person carries with it numerous supervisory, procedural and strict liability requirements under MSRB rules, which will be difficult enough to apply, if possible at all. It is unnecessary to also require agreements and disclosures.

Moreover, making a distinction between employees of the broker-dealer and non-employees, for purposes of whether these agreement and disclosure requirements apply, is arbitrary given that the proposed amendments will treat them all as associated persons. This distinction also leads to an unreasonable result when it comes to employees of a broker-dealer's affiliate. In its settlement agreement with Fifth Third Securities, Inc.,[4] the SEC determined that employees of an affiliated company should be treated as an associated person of the broker-dealer. Thus, under current rules, an employee of an affiliated company who solicits municipal securities business is treated as an MFP and subject to Rule G-37. However, under the proposed amendments, a broker-dealer will also have to enter into an agreement with such affiliated employee, and disclose various information about that employee to the issuer and the MSRB, if he or she is being compensated for such solicitation activity.

---

[3] In the Association's initial comments, we argued that communicating with obligors should not be deemed to be solicitation under Rule G-37. There was no reason to argue this in the context of Rule G-38 given that the MSRB agreed in the initial draft that merely communicating with an obligor would not be a solicitation under Rule G-38.

[4] In the Matter of Fifth Third Securities, Inc., Exchange Act Rel. Nos. 46087 and 46088 (June 18, 2002).

THE BOND MARKET ASSOCIATION

This problem is compounded by the MSRB's broad interpretation as to what constitutes compensation. For example, one Q&A involved a bank employee who referred municipal securities business to its affiliated broker-dealer, and received a favorable mention in his or her performance evaluation for such referral.[5] The MSRB concluded that this favorable mention would qualify as compensation given that it is something of value. With such a broad approach to compensation, a broker-dealer would have to, as a practical matter, enter into an Independent Solicitor agreement and make disclosures to the issuer and the MSRB for any employee of an affiliate who solicits municipal securities business.

II. The Proposed Amendments Should Not Be Adopted

In this latest draft, the MSRB claims that it is not just concerned about political contributions, but wants to subject those who are currently treated as Consultants under Rule G-38, to the fair practice and professionalism standards that come with being an associated person. Again, the Association supports the MSRB's efforts to address any real abuses in the market and we share your goals of enhancing the integrity of our markets. Abuses of MSRB rules, negative publicity and inaccurate public perceptions hurt all market participants. We believe, however, that there is no evidence or even indicia of abusive practices by Consultants that would warrant these amendments. In fact, the MSRB has agreed that "[w]e are not saying people are doing anything wrong, but we are seeing increasing use of consultants, increasing compensation for consultants and increasing political contributions by consultants. We thought it was a good time to try to get ahead of the practice."[6] In light of the drastic changes in the structure and practices of the industry that will be required, and the tremendous burden that will be imposed on the industry, by the proposed amendments, this lack of justification is even more important. The MSRB would be practically eliminating an entire segment of the industry because of some speculative risk that Consultants may engage in abusive practices.

A. There Is No Justification for the Amendments

The primary justification that the MSRB sets forth for the proposed amendments is that compensation paid to Consultants has been rising and thus increases the motivation on the part of a Consultant to use abusive practices in soliciting municipal securities business. This is at best a speculative risk, if at all. In our last comments, we demonstrated that Consultant compensation levels have been

---

5 Q&A 1 (May 20, 1998).

6 *New York Times*, December 7, 2004.

rising as a natural function of the general increase in the number and size of municipal securities deals and does not indicate a heightened risk of abusive practices. We disagree with the MSRB's response that the cause of the increase in compensation is irrelevant. The reason for the increase does matter -- it is either an indication of abusive practices or it is not.

Relying on the theoretical construct that higher compensation could increase a Consultant's motivation to engage in abusive practices is not the way to narrowly tailor a rule that will surely have a significant impact on the business and livelihood of so many members of the industry. This is particularly true given that higher compensation may actually increase the incentive on the part of the Consultant not to jeopardize its business by engaging in improper activity.

The MSRB also restates from the initial draft its belief that there has been an increase in political giving by Consultants, although the MSRB now acknowledges it may be limited only to the amounts given by the small minority of Consultants (slightly over 10%) who make contributions in the first place. However, it still remains the fact that almost 90% of the Consultants do not make any contributions in the jurisdictions where they have been retained. We believe the Association proposed a more than reasonable alternative in its comments to the MSRB's first draft of the amendments to address even the appearance of impropriety regarding Consultant contributions.

B. The Proposed Amendments Impose Requirements that Are Impossible to Apply to Independent Solicitors

Consultants currently serve a legitimate and valuable role in the municipal securities industry. Consultants provide a cost effective way for broker-dealers to maintain a broader presence and have access to unique local knowledge and expertise. In turn, this increases competition for the marketing of ideas and promoting transactions to get them done, resulting in the issuer and the tax-paying public receiving better service at lower rates. The MSRB appears to recognize the value of Consultants and attempts to address the industry's concerns by stating that the proposed amendments do not prohibit the use of such Consultants but merely subject them to standards of fair play and professionalism. However, the proposed amendments would, as a practical matter, make it largely impossible for broker-dealers to use Consultants (otherwise referred to in the proposed amendments as Independent Solicitors).

Indeed, by requiring Independent Solicitors to be associated persons under the '34 Act, the MSRB would be imposing a standard fraught with uncertainty and vagueness. The MSRB is doing more than merely subjecting Independent

THE BOND MARKET ASSOCIATION

Solicitors to standards of fair play and fairness as it claims. The MSRB is also triggering all of the supervisory, procedural and strict liability requirements that come with being an associated person, not only under the MSRB rules but also under the '34 Act and a host of other laws. Given that these various requirements were created with employees and other traditionally controlled persons in mind, there is no way for broker-dealers to know how to apply those requirements to Independent Solicitors. By imposing associated person requirements on Independent Solicitors, the MSRB is essentially trying to fit a "square peg into a round hole" and as a result, broker-dealers are left having to guess in a vacuum as to how to comply with such a non-quantifiable legal risk, and it will thus be impossible for broker-dealers to use Independent Solicitors.

The MSRB asks for comments as to how to supervise Independent Solicitors as associated persons. This question demonstrates the very problem we are describing, in that there is no way to answer the question in a practical manner. In fact, we would suggest ways to adequately supervise Independent Solicitors as associated persons if there were a feasible way to do so, or a comparable paradigm from which we could infer such standards. However, there is none. Neither the SEC nor the MSRB has even broached the issue as to what constitutes proper supervision of an Independent Solicitor under the associated person requirement.

This is also the case regarding the requirements that apply to associated persons under the '34 Act and other laws. For example, apart from the MSRB rules, the '34 Act independently requires a broker-dealer to supervise associated persons with a view toward preventing violations of the federal securities laws and rules.[7] Thus, even if one could determine what proper supervision is under MSRB rules, the question will also have to be answered under the '34 Act. The '34 Act also requires a broker-dealer to establish, maintain and enforce written policies and procedures to prevent insider trading by associated persons.[8] It is unclear as to what type of policies and procedures would be sufficient to satisfy this requirement as they relate to Independent Solicitors. At the state level, by requiring Independent Solicitors to be associated persons, they may have to be treated as employees under the various state tax and labor laws. These are just a few of the various requirements and related uncertainties with which broker-dealers will have to contend because of the associated person requirement under the amendment.[9]

---

7 '34 Act, § 15(b)(4)(E).

8 '34 Act, § 15(f).

9 For example, there are further restrictions on associated persons under the '34 Act, National Association of Securities Dealers rules, and New York Stock Exchange rules that would appear to be applicable.

THE BOND MARKET ASSOCIATION

Moreover, even if the broker-dealers had a way of knowing how to comply with these associated person requirements, the cost of complying will be prohibitive. For example, as we described in our initial comments, geographical restraints may make it impossible for a broker-dealer to supervise an Independent Solicitor as an associated person unless the broker-dealer maintains such adequate presence in that jurisdiction. The MSRB responds by stating that this is no different than a broker-dealer supervising brokers in various locations. However, there is a significant difference. A broker is someone whom a broker-dealer has decided to license because he or she is significantly involved in the municipal securities practice (e.g., in implementing and structuring deals) and because the broker-dealer has the necessary supervisory infrastructure in place. An Independent Solicitor, on the other hand, provides incidental services in that he or she merely solicits municipal securities business and for whom the broker-dealer may not have, and may not be worth the cost of having, such supervisory infrastructure. In fact, the MSRB acknowledges this in its latest draft by stating that Independent Solicitors would not have to be licensed as would brokers. Thus, the MSRB has not adequately addressed this important issue of the prohibitive cost associated with the proposed amendments.

C. The Proposed Amendments Are Outside of the MSRB's Jurisdiction

By requiring solicitors to be associated persons and making it a violation of MSRB rules if they are not, the MSRB is inherently getting involved in interpreting the meaning of "associated person," a term defined under the '34 Act and only subject to interpretation by the SEC. In fact, the MSRB expressly makes such interpretation in the latest draft of the amendments by stating:

> an independent solicitor's contract with the dealer explicitly provid[ing] for the dealer's control of and supervision over the independent solicitor's solicitation activities undertaken on behalf of the dealer . . . would thereby satisfy the requirement that the independent solicitor be an associated person.

Thus, the proposed amendments by their very nature require the MSRB to act outside of its jurisdiction regarding the term associated person. Please note that this is very different from current Rules G-37 and G-38 where the term associated person is used merely to distinguish between an individual who is an MFP or a Consultant. This is merely a matter of categorization left to the broker-dealer to decide, whereas under the proposed amendments, one's associated person status is the sole question

THE BOND MARKET ASSOCIATION

that the regulators will have to answer to determine whether there is a violation of the rule.

We note that the MSRB attempted to implicitly interpret the term "associated person" before. In particular, on two separate occasions, the MSRB opined that employees of affiliates who solicit municipal securities business should be treated as Consultants, thereby implicitly opining that they are not associated persons.[10] The SEC subsequently made it clear in a settlement agreement with Fifth Third Securities, Inc. that employees of an affiliate are associated persons and should be treated as MFPs and not Consultants.[11] By creating the associated person requirement in the proposed amendments, the MSRB would once again have to, out of necessity, start interpreting this term.

There is also an irreconcilable conflict within the proposed amendments. In particular, the proposed amendments require that any person who is paid to solicit municipal securities business be an associated person.[12] However, the amendments go on to permit firms to be paid to solicit municipal securities business.[13] Given that associated persons have to be individuals, these two provisions cannot co-exist. As we noted in our last comments, by adopting the associated person requirement, the rule would have to eliminate a broker-dealer's ability to use Independent Solicitor firms. The MSRB cannot have it both ways -- it has to either adopt the associated person standard and embrace all of the requirements that come with it (no matter how unreasonable or indefinable) or use a different standard.

D. Broker-Dealers Will Not Be Able to Outsource Work

In its initial comments, the Association pointed out that the proposed rule would prohibit broker-dealers from hiring outside persons to perform necessary services, such as providing technical/educational support or strategic advice to the broker-dealer or to outsource certain functions (e.g., recordkeeping function or legal, engineering, or lobbying services). This type of outsourcing is very common in the municipal securities industry. The MSRB responds by simply stating that to the extent that non-associated persons are providing such specific expertise or services in connection with a municipal securities deal, there is nothing to worry about given they are not soliciting municipal securities business. This, however, fails to take into

---

[10] Q&A 6 (February 28, 1996), Q&A 1 (May 20, 1998).

[11] See supra footnote 4.

[12] Proposed Rule G-38(a).

[13] Proposed Rule G-38(f).

account the extensive history of MSRB Questions & Answers ("Qs&As"), in which the MSRB has broadly interpreted the meaning of solicitation. For example, the MSRB has gone as far as to say that merely being present at a meeting where municipal securities capabilities is discussed or merely engaging in activity that would make the broker-dealer more appealing to the issuer would qualify as a solicitation.[14] With such broad interpretations, broker-dealers would be prohibited from hiring outside persons to perform these necessary services given that they would have to, as a practical matter, attend such meetings with issuers and will ultimately make the broker-dealer more appealing to the issuer by doing a good job.

E. The MSRB's Draft Amendment Is Unconstitutional

In our initial comments, we discussed the Constitutional problem of treating Independent Solicitors as MFPs and thus restricting their ability to exercise their First Amendment right to free speech by making contributions. The MSRB responds by stating that Rule G-37 was Constitutionally upheld by the Supreme Court in Blount v. SEC and that:

> the act of soliciting municipal securities business more closely touches on the core purpose of Rule G-37 than do some of the other municipal securities activities that are undertaken by associated persons already treated as MFPs.

Please note, however, that the Supreme Court never opined on Rule G-37 in that it denied *certiorari* in the above case. More importantly, the MSRB's response misses the point. The proposed amendments significantly expand the prohibition on contributions found in the Rule that was upheld by the lower court in Blount. In particular, while Rule G-37 limits the prohibition to those who are already controlled by the broker-dealer (and thus already associated persons), the amendments expand the prohibition to those who have no reason to be associated persons, except for the artificial requirement imposed under the amendments. This expansion is significant given that an associated person is heavily involved in representing and performing services to promote the financial interests of the broker-dealer that controls him or her whereas a non-associated person is not. In fact, given that Independent Solicitors usually represent many clients (and in various capacities, such as legal or lobbying), soliciting municipal securities business for a broker-dealer may be only a small fraction of that Solicitor's activities. Thus, the amendments impose the same draconian First Amendment speech restrictions on those who have a large interest in representing and promoting the financial well-being of the broker-dealer as those who have only an incidental interest. It is worth

---

[14] Rule G-37, Q&A IV.13.

THE BOND MARKET ASSOCIATION

noting that the MSRB describes Independent Solicitor activity as "touch[ing] on the core purpose of Rule G-37" for purposes of defending the amendment's constitutionality, but as being "limited" when explaining why such activity does not warrant licensing. Again, the MSRB cannot have it both ways.

By supporting the amendments, the MSRB is essentially taking the position that it can cast as wide of a net as it wants as long as the underlying reason can somehow be tied to the purpose of Rule G-37 (demonstrable or not). Relying on such a theoretical basis, however, flouts longstanding principles of Constitutional law. As we discussed in our initial draft, the MSRB must demonstrate (1) that "the ills it claims the rule addresses in fact exist and the rule will materially reduce them," and (2) that the Rule is necessary where there are no "less restrictive alternatives to the rule [that] would accomplish the government's goals equally or almost equally effectively."[15]

The MSRB has to demonstrate that these real and important Constitutional requirements are being satisfied. However, the MSRB refuses to even address these requirements, deciding rather to dismiss them in a single legally unfounded sentence. This is because the Constitutional requirements cannot be met here. There is no evidence that Consultants are engaging in abusive practices or that making them associated persons is necessary to deal with such phantom abuses. In fact, the SEC recognized this by explaining:

> that the "loopholes" that remain [in Rule G-37] are due to its "sensitivity" to First Amendment concerns; [the SEC] believes that closing the supposed loopholes would broaden the regulation's scope beyond that "necessary" to accomplish its interests.[16]

Given that even the SEC agrees that an expansion of Rule G-37 is unconstitutional, the MSRB cannot simply ignore this pressing Constitutional issue.

---

[15] Blount v. SEC, 61 F.3d 938, 944 (D.C. Cir. 1995).

[16] Id. at 946-947.

Attachment B

THE BOND MARKET ASSOCIATION

The Bond Market Association Members

ABN AMRO, Inc.
Advest, Inc.
A.G. Edwards & Sons, Inc.
Ameritas Investment Corp.
Amherst Securities Group, L.P.
Aon Capital Markets
Banc of America Securities LLC
Banc One Capital Markets, Inc.
Banco Popular de Puerto Rico
The Bank of New York
Barclays Capital Inc.
George K. Baum & Company
BB & T Capital Markets
M.R. Beal & Company
Bear, Stearns & Co. Inc.
Blaylock & Partners, L.P.
BNP Paribas Securities Corporation
BondDesk Group, LLC
Cabrera Capital Markets, Inc.
Cantor Fitzgerald
Chapdelaine Corporate Securities
Charles Schwab & Co., Inc.
CIBC World Markets
Citadel Trading Group L.L.C.
Citigroup
G.X. Clarke & Co.
Commerzbank Capital Markets Corporation
Countrywide Securities Corporation
Credit Suisse First Boston
Crews & Associates, Inc.
Cronin & Co., Inc.
CRT Capital Group LLC
Daiwa Securities Company, Ltd.
Davenport & Company LLC
Deutsche Bank Securities Inc.

THE BOND MARKET ASSOCIATION

Dresdner Kleinwort Wasserstein Securities LLC
Edward Jones
Estrada Hinojosa & Company, Inc.
Ferris, Baker Watts, Incorporated
Fidelity Capital Markets
Fifth Third Securities, Inc.
Fimat USA, Inc.
First Albany Capital Inc.
First Southwest Company
First Trust Portfolios LP
FMSbonds, Inc.
FTN Financial
Garban-Intercapital plc
GFI Securities LLC
The GMS Group, LLC
Goldman, Sachs & Co.
Griffin, Kubik, Stephens & Thompson, Inc.
J.B. Hanauer & Co.
Hartfield, Titus & Donnelly, LLC
Hilliard Farber & Co., Inc.
J.J.B. Hilliard, W.L. Lyons, Inc.
H&R Block Financial Advisors, Inc.
HSBC Securities (USA) Inc.
Incapital
ING Corp.
Janney Montgomery Scott Inc.
J.P. Morgan Securities Inc.
Keefe, Bruyette & Woods, Inc.
Lazard Freres & Co. LLC
Lebenthal
Legg Mason Wood Walker, Inc.
Lehman Brothers Inc.
Man Securities Inc.
MarketAxess
Marsh & McLennan Securities Corp.
Maxcor Financial Inc.
McDonald Investments, Inc.
Merrill Lynch & Co., Inc.
Mesirow Financial, Inc.
Miller Johnson Steichen Kinnard, Inc.
Miller Tabak Roberts Securities LLC
Mizuho Securities USA Inc.

THE BOND MARKET ASSOCIATION

M.L. Stern & Co. , Inc.
Morgan Keegan & Company, Inc.
Morgan Stanley
Munich American Capital Markets, Inc.
NatCity Investments, Inc.
National Financial Services Corporation
Newman & Associates
Nomura Securities International, Inc.
PNC Capital Markets
Prebon Yamane (USA) Inc.
Rabobank International
Raymond James and Associates, Inc.
RBC Dain Rauscher Inc.
RBS Greenwich Capital
REFCO Securities, LLC
Roosevelt & Cross, Incorporated
Sandler O'Neill & Partners, L.P.
Seattle-Northwest Securities Corporation
SG Cowen & Co., LLC
Siebert Brandford Shank & Co., LLC
South Street Securities
Southwest Securities
Sovereign Securities Corporation
Standard & Poor's
State Street Corporation
Stephens Inc.
Stifel, Nicolaus & Company, Incorporated
Stone & Youngberg LLC
Swiss Re Capital Markets Corporation
TD Securities (USA) Inc.
Terwin Capital, LLC
TheMuniCenter
Thomson TradeWeb
Tradition Asiel Securities Inc.
Tullett Liberty Inc.
UBS Investment Bank
UMB, N.A.
Union Planters Bank
United Capital Markets
U.S. Bancorp
Vining Sparks
Wachovia Corporation

WaMu Capital Corp.
Wells Fargo Brokerage Services LLC
WestLB AGZions First National Bank

Morgan Keegan

Morgan Keegan & Company, Inc.
Morgan Keegan Tower
50 Front Street
Memphis, TN. 38103
(901) 529-5416 Fax (901) 579-4429
Watts (800) 366-7426
jerry.chapman@morgankeegan.com

Members New York Stock Exchange, Inc.

Jerry L. Chapman
Managing Director
Municipal Product Manager

April 22, 2004

Ernest A. Lanza, Esquire
Senior Associate General Counsel
MSRB
1900 Duke Street, Suite 600
Alexandria, VA. 22314

Re: Comments on Draft Amendment G-38

Dear Mr. Lanza:

First let me state that the comments expressed in this letter are my personal views as a municipal bond market participant and investor for 30 years. I am sure Morgan Keegan & Co., Inc. will also respond and as municipal product manager I will have participation in that response.

I know the MSRB desires many comments from market participants however you could make the process more user friendly. Your RFC was 15 pages and ask 29 questions. I would love to respond to each but we are all busy. I think the MSRB could send an interactive e-mail request for comment allowing participants to click and answer each question with a simple yes or no or type in a response to each question.

Before I comment on the draft, let me comment on G-37and G-38. G-37 and G-38's current and future problem is that they only address "Dealers". I believe the industry must address "other" participants, namely financial advisors and bond lawyers. We can continue to regulate part of the industry or we can ask the SEC/NASD/ and other regulatory bodies to join in an industry wide push to finally eliminate "pay for play".

You say "None the less, the MSRB believes that some consultant practices challenge the integrity of the municipal securities market". I believe you are correct. I believe we have enough regulations and need more strict enforcement. G-37 carries its own punishment and the MSRB should work with industry publications exposing violators. I know I read with interest and regret when the Bond Buyer ran a series of articles on use of consultants.

I commend the MSRB for the simplicity of the solution. Seldom, do we get "clear English" brevity! I am in favor of only having employees or associated persons solicit municipal bond business and those persons being subject to current regulations as to political contributions.

Since I have come this far let me answer your specific questions starting on page 2: no; no; no; yes; I don't see a difference; yes; not sure, but don't care as rules are for all; no; too broad a question; no; same as now; yes-beneficial; yes-detrimental; yes; yes; pass; yes; current rules (G-38) are fine; additional study needed; not sure; yes or you will have firms working for finders fees; both; yes; yes; unenforceable I think; no; yes; yes; no!. Sorry for the mess.

Sincerely,

Jerry L. Chapman

Goldman, Sachs & Co. | One New York Plaza | New York, New York 10004
Tel: 212-902-9957 | Fax: 212-428-1134 | e-mail: robyn.huffman@gs.com

Robyn Huffman
Vice President
Associate General Counsel

Goldman Sachs

June 4, 2004

Mr. Ernesto A. Lanza
Senior Associate General Counsel
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, Virginia 22314

Re: MSRB Notice 2004-11, Draft Amendment to MSRB Rule G-38 Relating to Solicitation of Municipal Securities Business (April 5, 2004) ("Notice")

Dear Mr. Lanza:

Goldman, Sachs & Co. ("Goldman Sachs") appreciates this opportunity to comment on the above-referenced proposal by the Municipal Securities Rulemaking Board (the "MSRB") to impose more stringent regulatory requirements on the use of individuals or entities ("consultants") engaged by brokers, dealers and municipal securities dealers ("dealers") to obtain municipal securities business.

Goldman Sachs fully supports the MSRB's objective of establishing a regulatory regime for the use of consultants that further enhances the integrity and fairness of the municipal securities markets, and we believe that certain elements of the MSRB's proposal will contribute substantially to achieving this objective. At the same time, however, we believe that it is important to strike an appropriate balance between addressing these regulatory concerns and allowing issuers, dealers and investors to continue to benefit from the important and *bona fide* services that consultants can provide. In particular, we are concerned that the MSRB's proposal that consultants become "associated persons" would impose unwarranted, and perhaps unanticipated, restrictions on the use of consultants and compliance issues for dealers who would be required to supervise the activities of this newly-created category of associated persons.

In our view, a somewhat modified version of the MSRB's proposal would provide adequate restrictions on the use of consultants without unduly limiting their legitimate role in the municipal securities markets. In particular, Goldman Sachs recommends the following, each of which is discussed in greater detail below:

- MSRB Rules G-37 and G-38 should be revised to restrict the use of consultants to solicit municipal securities business if such consultants have made political contributions that are currently reportable under Rule G-38.

- Consultants should be prohibited from receiving any "performance" or "success-based" compensation.

- Dealers should continue to be required to provide the disclosures currently mandated under Rule G-38 (both as to compensation and political contributions), but should *not* be required to treat each consultant as an associated person.

- In all events the MSRB should explicitly retain the safe harbor provision that exempts certain professionals who provide legal, accounting or engineering advice or services from the requirements of MSRB Rules G-37 and G-38.

Before addressing these points in greater detail, we strongly urge the MSRB, as it continues to review the use of municipal consultants, to also consider whether other activities or practices in the municipal securities markets are fully consistent with the high standards that MSRB Rules G-37 and G-38 seek to promote.

In our view, the current disclosure and regulatory framework established under these and other MSRB rules is generally very effective. But at a time when securities regulators and industry participants are actively reviewing business ethics and conflicts of interest across a range of securities products, it would seem appropriate for both the MSRB and dealers to take a closer look at any activities that could affect the integrity and fairness of the municipal securities markets. For example, the MSRB should review: the use of non-dealer affiliates (e.g., bank holding companies) that can become conduits for political contributions; the role of certain other parties whose contributions are not regulated (such as financial advisers, GIC providers and other bond market participants); and other contributions that may influence issuer officials (such as contributions to political parties, contributions to support ballot initiatives or spousal giving). In considering these activities in light of the current regulatory framework, the MSRB also should ensure that all dealers are subject to equally rigorous standards of conduct, regardless of whether they are banks or members of the National Association of Securities Dealers, Inc. (the "NASD").

I. Consultants Should Be Subject to Restrictions on Political Contributions

We support amending MSRB Rules G-37 and/or G-38 to impose restrictions on political contributions by a dealer's consultants that are similar to the restrictions imposed on the dealer's "municipal finance professionals." These restrictions could be implemented through the written agreement between the dealer and the consultant currently mandated under Rule G-38 and should prohibit the consultant from making any political contributions that are currently

reportable under Rule G-38.[1] In addition, the consultant should be required to furnish the dealer, on a quarterly basis, a certification confirming that no prohibited contributions were made during the relevant period. If a prohibited contribution is made during the quarter, it would be disclosed by the dealer on its quarterly Form G-37/G-38 filing, in the same manner as contributions by the dealer or its municipal finance professionals.[2]

If the MSRB adopts this approach, further consideration should be given to the consequences of a prohibited contribution by the consultant. In particular, we believe that to the extent practicable the applicable penalties should fall on the consultant who breached his or her contractual obligations to the dealer, as a means of properly incentivizing the consultant to comply with the restrictions of Rules G-37 and G-38 in the future. These penalties could include immediate termination of the contract, disgorgement of compensation previously paid under the contract and/or a ban on any dealer retaining that consultant for municipal securities matters for some period of time. In any event, in our view a two-year ban on a dealer engaging in municipal securities business with issuers to whom the dealer's consultant has made a prohibited contribution seems unduly excessive – particularly where the dealer acted in good faith, required the consultant to agree in writing not to make political contributions to the issuer and monitored compliance with this prohibition on a quarterly basis.

Restricting the ability of dealers to use consultants who make political contributions to an issuer official would help eliminate any incentives to use consultants to evade the requirements of Rule G-37. In addition, such restrictions would foster greater competition, transparency and efficiency in the municipal securities markets. Specifically, this approach would help ensure that municipal securities business is awarded by issuers on the basis of competitive market factors and not on the basis of the political or financial influence of consultants. Accordingly, this amendment would promote the core policy objectives of Rule G-37[3] and contribute to the more efficient allocation of municipal securities business that the MSRB sought to achieve through Rule G-38.[4]

---

1 In the case of consultants that are entities, the contributions by the entity and any of its principals should trigger the applicable penalty.

2 The restrictions on the consultant's political contributions should apply only to contributions made to officials of the issuer for which the consultant is soliciting municipal securities business on behalf of the dealer and not to contributions made by the consultant to officials of other issuers, even if the dealer otherwise conducts municipal securities business with such other issuers.

3 MSRB Rule G-37 was enacted to "ensure that the high standards and integrity of the municipal securities industry are maintained, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade [and] to perfect a free and open market and to protect investors and the public interest." MSRB Rule G-37(a).

4 In proposing Rule G-38, the MSRB noted that it would promote just and equitable principles of trade and would improve competition "by ensuring that dealers compete for, and are awarded, [municipal securities] business on the basis of merit, not on political or financial influence." SEC Release No. 34-36522 (Nov. 28, 1995), 60 Fed. Reg. 62275, 62278 (Dec. 5, 1995).

II. Consultants Should Not be Paid "Success" or "Performance" Fees

Goldman Sachs also believes that consulting arrangements in which the consultant's compensation is directly tied to the consultant's success in soliciting municipal securities business or the size of a particular municipal securities transaction may create the appearance of impropriety in certain cases. Although we believe that success-based fees may be appropriate in many instances, this type of fee arrangement does introduce greater incentives to pursue municipal securities business more aggressively and may, especially where these fees are very large, undermine public confidence in the integrity of the municipal securities markets. The Securities and Exchange Commission (the "SEC") has noted the potential need for heightened regulation or oversight of persons who have a "salesman's stake" in the success of a securities transaction.[5] Similarly, with certain limited exceptions, the NASD has generally prohibited the payment of "finder's fees" to persons who are not registered representatives of an NASD member firm.[6]

We believe that going forward, the MSRB's approach to success-based compensation for consultants should be consistent with the SEC and NASD guidance noted above. In particular, we would urge the MSRB to prohibit consultant payment arrangements where the level of compensation is dependent on the ability of the consultant to obtain municipal securities business or on the dollar amount of municipal securities actually issued. Dealers and consultants could still use a variety of other methods of compensation, including flat fees, fixed monthly retainers or payment on an hourly basis. A prophylactic ban on success-based compensation would also further enhance the integrity and transparency of the municipal securities markets by eliminating any perception that consultants may be motivated by their compensation arrangements to engage in illegal or inappropriate activities.[7]

III. Consultants Should Not be Required to Become Associated Persons

Although as noted above Goldman Sachs is fully supportive of the MSRB's efforts to regulate the use of consultants by dealers more closely, we are concerned that going so far as to require consultants to become associated persons[8] of dealers is unnecessary and will

---

5 See, e.g., SEC Release No. 34-44291 (May 11, 2001), 66 Fed. Reg. 27760, 27765 (May 18, 2001); SEC's Guide for the Registration and Regulation of Broker Dealers, *available at* http://www.sec.gov/divisions/marketreg/bdguide.htm; Dominion Resources, Inc. SEC No-Action Letter (Mar. 7, 2000); MuniAuction, Inc. SEC No-Action Letter (Mar. 13, 2000).

6 See NASD Rule 1060(b) and NASD Notice to Members 95-37 (exemption for the payment of transaction-related compensation to non-U.S. finders).

7 Of course, it would not be necessary to prohibit success-based compensation paid by a dealer to another dealer that is subject to MSRB sales practice rules.

8 An associated person of a dealer is defined under Section 3(a)(18) of the Securities Exchange Act of 1934 (the "Exchange Act") as (i) any employee of the dealer; (ii) any partner, officer, director or branch manager of the dealer (or any person occupying a similar status or performing similar functions); or (iii) any person directly or indirectly controlling, controlled by, or under common control with the dealer.

impose undue burdens on dealers. The practical effect of this proposal, in our view, will be to substantially reduce the use of consultants and thereby limit the ability of issuers and dealers to benefit from the important, legitimate services that consultants can provide.

A. Potential Benefits that Consultants Provide.

Consultants can offer a number of important benefits to dealers and issuers. For example, consultants can provide dealers with a local presence in geographic areas where they do not otherwise maintain an office (e.g., because devoting resources to such jurisdictions may not be financially feasible). Indeed, in some jurisdictions issuers may themselves require a local presence, whether a local office of the dealer or a business arrangement with a local financial institution. In addition, consultants can provide specialized expertise that the dealer does not otherwise have and that may be relevant for a particular municipal securities offering. By enhancing the ability of dealers to compete for municipal securities business, consultants can also help municipal issuers to achieve greater interest in and competition for their business, thereby increasing the issuers' ability to obtain the best possible pricing for their offerings.[9]

B. Interpretation and Implementation Issues Raised by the MSRB's Proposal.

In describing the implications of requiring consultants to become associated persons, the MSRB stated in the Notice that:

> although these "controlled" associated persons would not be subject to the fair practice rules in connection with their day-to-day activities that are not related to the municipal securities activities of the dealer, MSRB rules would apply to their municipal securities activities undertaken for the benefit of the dealer. Therefore, consistent with this view, if this rulemaking proposal is adopted, the MSRB expects that any solicitors who become associated with a dealer would conform their municipal securities activities to all applicable MSRB rules.[10]

In our view, this proposal would, as a practical matter, introduce a range of difficult interpretation and implementation issues. For example:

1. Issues Associated with the Regulation of Some, But Not All, Consultant Activities. A regime that subjects consultants to MSRB rules in connection with some, but not all, of their activities raises a number of difficult implementation issues. Will it always be clear whether the consultant's activities are "undertaken for the benefit of the dealer"?[11] More

---

9 The MSRB has acknowledged the benefits of using consultants to enhance dealers' lobbying expertise in a particular locality and to reduce the number of permanent employees. See MSRB Notice to Members, Comments Requested on Consultants (Mar. 22, 1995).

10 Notice at 3.

11 For example, the MSRB notes that a consultant would be subject to MSRB Rule G-20, restricting gifts and gratuities. How will it be determined whether a particular gift was made in connection with the

(continued ...)

generally, if a consultant's interactions with issuer officials are not related to a specific municipal securities offering, but ultimately allow the consultant to more effectively advise the dealer in connection with a future offering, are those interactions subject to MSRB rules? These and related questions become even more perplexing in the context of a consultant that is a corporation or partnership, rather than a natural person.

2. *Issues Regarding the Dealer's Supervisory Responsibilities.* In addition, the scope of the dealer's obligation to supervise consultants is unclear. Exchange Act Section 15(b)(4)(E) and MSRB Rule G-27 require dealers to supervise the conduct of their associated persons, and Exchange Act Section 20 may make a dealer jointly and severally liable for an associated person's violation of the Exchange Act or any rules thereunder.[12] If a consultant has "day-to-day activities" unrelated to its solicitation of municipal securities business, how will the dealer be able to monitor, on a real-time basis, when the consultant is acting for the dealer (and thereby subject to supervisory oversight) and when it is not? How can a dealer adequately discharge its supervisory obligations, and avoid "control person" liability, in respect of activities of a consultant that is not working out of the same offices as, and may not have day-to-day contact with, the dealer and its principals?[13]

3. *Issues Regarding What Rules Will Apply, and How.* There is also uncertainty regarding the scope of the regulatory requirements that would apply to a consultant that is an associated person. The Notice suggests that the consultant would be subject to "all applicable MSRB rules" but does not provide a complete list of those rules. It is unclear how some MSRB rules – e.g., those governing anti-money laundering compliance or advertisements – would apply to part but not all of the consultant's business activities. It is also unclear how the MSRB rules would apply in the context of a consultant that is a corporation or partnership rather than a natural person. Moreover, making a consultant an associated person in the manner contemplated by the MSRB may raise questions as to whether other regulatory restrictions thereby become applicable to the activities of the consultant. For example, would a consultant that is an associated person be subject to restrictions on trading securities appearing on the dealer's restricted trading list?

(continued ...)
consultant's activities on behalf of a dealer, as opposed to being made in connection with the consultant's other business activities?

12 The Notice does not address the potential "control person" liability that a dealer may have for actions of consultants who are associated persons. Although as noted above the MSRB states that "controlled" associated persons would not be subject to MSRB rules in connection with activities not conducted on behalf of the dealer, we believe further consideration needs to be given to whether the dealer would nevertheless have risk of "control person" liability for such activities.

13 The scope of the dealer's supervisory obligations and control person liability is even more unclear in the context of associated persons that are not natural persons. In addition, if the consultant works for more than one dealer, will it be clear which dealer has responsibility for the consultant's actions at any given time?

C. Practical Implications of Making Consultants Associated Persons.

Although we understand the MSRB may seek to clarify certain of these issues if it adopts the proposed amendments, we fear that as a practical matter the amendments will require dealers to treat consultants like employees in most material respects and to incorporate them fully within the firm's supervisory, compliance and training procedures. In order to properly discharge their supervisory duties and minimize their risk of "control person" liability, dealers may feel obligated to subject consultants to the same day-to-day supervision and restrictions on their activities as apply to regular employees.

The consequence of this, of course, would be that consultants could not continue to perform the types of services that they offer today. For example, although a primary reason to use a consultant currently may be that the dealer does not have or cannot afford an office in the same geographic area as the consultant, the dealer may be required either to establish such an office in order to properly supervise the consultant, or not retain the consultant at all. Similarly, although dealers currently may seek to use certain consultants on an *ad hoc* basis to provide specialized expertise or know-how, under the proposed amendments it will be much more difficult to retain consultants on this basis when doing so may require them to become qualified under MSRB Rule G-3 and incorporated into the firms' compliance and supervisory systems.[14]

These limitations on the use of consultants therefore will have adverse consequences for dealers as well as issuers. In our view, legitimate concerns regarding the political contributions and compensation of consultants should not be addressed in a manner that effectively eliminates the benefits consultants offer. Instead, as described above, we recommend these concerns be addressed more directly by placing Rule G-37 type restrictions on consultants and by limiting their ability to receive success-based compensation.

IV. Status of Certain Technical Professionals

We strongly urge that the current exemption under MSRB Rule G-38 for legal, accounting and engineering professionals be explicitly retained.[15] In particular, these persons should not be subject to the provisions of MSRB Rule G-37 and should not be required to become associated persons of a dealer. As the MSRB has previously acknowledged, these professionals offer dealers unique technical expertise and are retained to provide legitimate

---

[14] MSRB rules require that municipal securities representatives meet stringent qualification requirements, including information, examination and continuing education requirements, among others. The Notice suggests that some "solicitors" may not be required to qualify as municipal securities representatives. Notice at 3. If the MSRB adopts its proposed amendments, it would be helpful for the MSRB to clarify when a person who satisfies the "solicitation" test is not thereby conducting activities of a municipal securities representative.

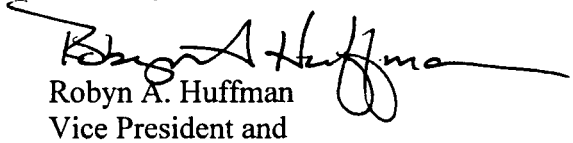
[15] Current MSRB Rule G-38(a) specifically excludes from the definition of "consultant" "any person whose sole basis of compensation from the [dealer] is the actual provision of legal, accounting or engineering advice, services or assistance in connection with the municipal securities business that the [dealer] is seeking to obtain or retain."

services that dealers cannot provide in-house.[16] In light of the technical and limited nature of the services such persons provide, requiring dealers to supervise and otherwise treat these professionals as associated persons would impose significant hardship and expense for dealers that do not appear to be justified by any compelling regulatory purpose.

* * *

Goldman Sachs appreciates the opportunity to comment on the Notice. Should you have any questions regarding any of the matters discussed in this letter, please do not hesitate to contact the undersigned at (212) 902-9957.

Sincerely,



Robyn A. Huffman
Vice President and
Associate General Counsel
Goldman, Sachs & Co.

---

16 See, e.g., SEC Release No. 34-36522 (Nov. 28, 1995), 60 Fed. Reg. 62275, 62277-78 (Dec. 5, 1995).

Goldman, Sachs & Co. | One New York Plaza | New York, New York 10004
Tel: 212-902-9957 | Fax: 212-428-1134 | e-mail: robyn.huffman@gs.com

Robyn A. Huffman
Managing Director
Associate General Counsel

Goldman Sachs

December 15, 2004

Mr. Ernesto A. Lanza
Senior Associate General Counsel
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, Virginia 22314

Re: MSRB Notice 2004-32, Revised Draft Amendment to MSRB Rule G-38 Relating to Solicitation of Municipal Securities Business (September 29, 2004)

Dear Mr. Lanza:

Goldman, Sachs & Co. ("Goldman Sachs") welcomes this opportunity to comment on the revised proposal by the Municipal Securities Rulemaking Board (the "MSRB") to heighten the regulatory requirements applicable to individuals or entities ("solicitors") engaged by brokers, dealers and municipal securities dealers ("dealers") to obtain municipal securities business.[1]

Under proposed MSRB Rule G-38, dealers would be prohibited from making payments for the solicitation of municipal securities business other than to their "associated persons." A solicitor that is not already an associated person (i.e., an "independent solicitor") must enter into an agreement with the dealer that requires solicitation activities undertaken for the dealer to be subject to the supervision of the dealer. If an independent solicitor is an institution, Rule G-38 would also apply to the solicitation activities conducted by the employees of the independent solicitor (collectively, "solicitor personnel").

We appreciate and support the MSRB's efforts to create a regulatory framework for solicitors that would promote fair practices and professionalism in the municipal securities markets, while recognizing the expertise and services solicitors can provide. Nevertheless, we remain concerned that the MSRB's proposal, in its current form, leaves unresolved a number of

---

[1] MSRB Notice 2004-32, Revised Draft Amendment to MSRB Rule G-38 Relating to Solicitation of Municipal Securities Business (September 29, 2004), as corrected by MSRB Notice 2004-33 (October 12, 2004), available at http://www.msrb.org/msrb1/whatsnew/RevRuleG-38Solicitation.htm (collectively, the "Notice").

important and difficult questions. Accordingly, we encourage the MSRB to consider the alternative approach for regulating solicitors described below.

A. Making Independent Solicitors "Associated Persons" is Unworkable.

We fully support the view expressed in the comment letter submitted by The Bond Market Association (the "BMA") that requiring independent solicitors and their personnel to become "associated persons" of the dealer is an approach fraught with ambiguity and uncertainty, would have a number of unintended and adverse regulatory and business consequences and would be very difficult, if not impossible, to implement.[2] Our chief concerns are as follows:

First, we agree with the BMA that by making an independent solicitor an "associated person," Rule G-38 may trigger requirements or liabilities for the dealer significantly beyond those set forth under the MSRB's rules and for activities unrelated to municipal securities. For example, under MSRB Rule G-27 (which the Notice explicitly states would apply to solicitors), dealers would have responsibility for compliance by associated persons with all applicable Exchange Act rules. Various other Exchange Act provisions and SRO rules also impose extensive obligations on dealers with respect to their associated persons.[3]

The MSRB appears to presume that independent solicitors would be "associated persons" *only* for the limited purposes of their municipal securities solicitation activities. There is significant uncertainty, however, as to whether the MSRB, once it has caused solicitors to become "associated persons" within the meaning of the Exchange Act and relevant SRO rules, has the authority to limit the scope of this "associated person" status for purposes of non-municipal securities activities, or whether such limitation could or would be respected by courts or the other relevant regulatory agencies. In our view, this uncertainty presents a significant regulatory risk for dealers that is unnecessary given the availability of a reasonable alternative approach described in Part B below.

Second, even assuming that an independent solicitor's "associated person" status can be limited to its municipal securities activities, it is not clear which of the many MSRB rules that apply to "associated persons" should in practice apply to independent solicitors. The MSRB makes clear that it seeks to "apply the basic standards of fair practice and professionalism embodied in MSRB rules to the process by which municipal business is solicited,"[4] but it also states generally that solicitors must "conform their municipal securities activities to *all*

---

2 See Letter to Ernesto A. Lanza, Esq. from Lynnette Kelly Hotchkiss, Senior Vice President and Associate General Counsel of the BMA (Dec. 15, 2004).

3 For example, dealers may have supervisory liability for the activities of a solicitor (under Section 15(b)(4)(E) of the Exchange Act) and may be subject to sanctions for failure to institute supervisory procedures designed to prevent the improper use of material non-public information by solicitors and their personnel (under Section 15(f) of the Exchange Act).

4 Notice at 2.

applicable MSRB rules."[5] We believe there is a fundamental ambiguity as to which rules can or should apply to independent solicitors, which in turn will make it very difficult for dealers to know how to comply with revised MSRB Rule G-38.

Third, there is significant uncertainty as to how a dealer would in fact discharge its supervisory obligations with respect to independent solicitors that are associated persons. Many of the relevant MSRB rules applicable to associated persons appear to contemplate natural persons rather than entities. Although in most instances a dealer's supervisory obligations with respect to individuals are relatively clear, the scope of those obligations with respect to associated persons who are entities is not at all well defined. In addition, regardless of whether the independent solicitor is a natural person or an entity, there is uncertainty as to the scope of a dealer's supervisory obligations when the solicitor is in fact acting on behalf of multiple dealers at the same time.[6] The MSRB offers no practical guidance on very important issues such as how a dealer can track, on a real-time basis, whether it or some other dealer has responsibility for solicitation activities that may benefit more than one dealer.[7]

B. The MSRB Should Instead Mandate Contractual Limitations on Solicitor Conduct.

We support the BMA's proposal that the MSRB modify its rulemaking to eliminate the "associated person" requirements and instead require that a dealer's contract with an independent solicitor set forth certain standards clearly identified by the MSRB that must be followed by the solicitor. This approach would ensure that solicitor conduct is appropriately restrained without unnecessarily introducing all regulatory requirements applicable to "associated persons" into the dealer-solicitor relationship.

The particular standards or requirements that would govern solicitor activity should be made explicit by the MSRB to provide greater regulatory certainty for dealers and solicitors. In identifying these standards, the MSRB should take into account the practical limitations on a dealer's ability to oversee an independent solicitor in the same manner as it would supervise an employee. In addition, the standards made applicable to solicitors should be narrowly focused on activities undertaken exclusively for the dealer. For example, solicitors should not be required to comply with MSRB Rule G-41 (anti-money laundering compliance programs) because it would be impractical for a dealer to monitor such compliance without reviewing activities of the solicitor that are unrelated to the dealer's business.

A number of mechanisms could be established to help enforce solicitor compliance with the applicable standards, including: requiring dealers to terminate arrangements with solicitors who are not following those standards; requiring solicitors to certify compliance

---

5 Notice at 9 (emphasis added).

6 Notice at 3-4.

7 This uncertainty is compounded by the fact that proposed Rule G-38 would apply to any activities taken by an independent solicitor "in furtherance of the interests of" the dealer – even if such activities are not undertaken *solely* for that dealer.

to dealers on a regular basis; requiring reporting by dealers of any non-compliance to the MSRB; and prohibiting the use of independent solicitors who have been so reported within the last few years. We believe that these types of penalties would provide very effective incentives for solicitors to comply with the MSRB's sales standards on a consistent basis.

C. Solicitors That Are Otherwise Regulated Should be Exempted from Regulation as Solicitors.

Regardless of whether the MSRB adopts the approach discussed in Part B above, independent solicitors whose activities are already subject to extensive regulatory oversight should be exempt from the requirements of proposed Rule G-38. Specifically, solicitation payments to persons and entities (such as registered broker-dealers or banks) subject to a regulatory framework designed to ensure that they observe high standards of fair practice and professionalism in their day-to-day securities-related activities should be exempted from the requirements of MSRB Rule G-38. Superimposing additional regulatory requirements on such persons and entities would have little, if any, benefit while forcing dealers to spend significant financial and other resources to comply with the newly-proposed MSRB requirements.

D. The Exemption for Technical Professionals Should be Retained.

The MSRB proposes to eliminate the current exclusion in the definition of "consultant" for certain technical professionals.[8] We believe this exclusion provides much needed clarity in light of the MSRB's expansive definition of the term "solicitation," which would include any direct or indirect communication with an issuer for the purpose of obtaining or retaining municipal securities business.[9] Given the broad range of activities technical professionals usually perform on behalf of issuers while retained by dealers, situations may arise in which there will be uncertainty as to whether even their purely technical services constitute solicitation.[10] Regardless of the approach taken by the MSRB, therefore, we encourage the MSRB to retain an appropriate exclusion from the scope of its Rules for the provision of legal, accounting or engineering advice and assistance.

---

8 See Rule G-38(a)(i)(B). The MSRB states that "[s]o long as such persons are not being paid directly or indirectly for their solicitation activities (i.e., they are paid solely for their provision of legal, accounting or engineering services with respect to the issue), they would not become subject to revised draft Rule G-38." Notice at 13.

9 Indeed, the MSRB has already interpreted the term "solicitation" so broadly as to include merely attending a presentation regarding the dealer's municipal finance capabilities. See Notice at 11; Rule G-37 Questions and Answers IV.10-13.

10 For example, are lawyers representing dealers acting as independent solicitors if (as designated underwriters counsel) from time to time they have independent communications with the issuer (such as communications regarding which dealer to engage)?

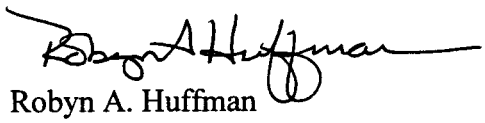
E. Solicitors' Political Contributions Should be Restricted without Making Solicitors Municipal Finance Professionals.

We support the BMA's recommendation that solicitors should not be treated as municipal finance professionals but should be prohibited from making political contributions that are currently reportable under MSRB Rule G-38. Specifically, the agreement between a dealer and its solicitor could prohibit the solicitor from making a contribution to an official of an issuer during the 6-month period preceding or following the solicitor's solicitation of municipal securities business from such issuer (subject to an appropriate *de minimus* exemption for contributions by individuals to candidates for whom they are entitled to vote). Additionally, dealers could be prohibited from hiring a solicitor to solicit a particular issuer if the solicitor has made a contribution to an official of such issuer during the previous 6 months.

* * *

Goldman Sachs appreciates the opportunity to comment on the Notice. Should you have any questions regarding any of the matters discussed in this letter, please do not hesitate to contact the undersigned at (212) 902-9957.

Sincerely,



Robyn A. Huffman
Managing Director and
Associate General Counsel
Goldman, Sachs & Co.

The PNC Financial Services Group, Inc.
249 Fifth Avenue
One PNC Plaza, 21st Floor
Pittsburgh, PA 15222-2707

412 768-4251 Tel
412 705-2679 Fax
james.keller@pnc.com

James S. Keller
Chief Regulatory Counsel

June 4, 2004

BY OVERNIGHT COURIER AND FACSIMILE

Ernesto A. Lanza, Esq.
Senior Associate General Counsel
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, Virginia 22314

RE: Comments to Proposed Rule G-38 Amendments

Dear Mr. Lanza:

PNC Capital Markets, Inc. ("PNCCM"), a wholly-owned broker-dealer subsidiary of The PNC Financial Services Group, Inc. ("PNC"), Pittsburgh, Pennsylvania, appreciates this opportunity to respond to the notice ("Notice") issued by the Municipal Securities Rulemaking Board ("MSRB") on April 5, 2004, in which the MSRB proposes draft amendments to Rule G-38 (MSRB Notice 2004-11). PNC is one of the largest diversified financial organizations in the United States, with $74.1 billion in total assets as of March 31, 2004. Its major businesses include community banking, corporate banking, real estate finance, asset-based lending, wealth management, and global fund processing services.

PNCCM provides a broad range of financial products and services to large and mid-sized businesses, institutions and government entities within PNC's core markets (Pennsylvania, Delaware, New Jersey, Ohio, Indiana, Massachusetts, Florida and Kentucky) and across the United States. It's Public Finance Group provides financial advisory services and underwrites and distributes debt securities for government, health care, non-profit and educational issuers. PNCCM is a registered broker-dealer with the Securities and Exchange Commission ("SEC") pursuant to Securities Exchange Act of 1934 ("Securities Exchange Act"). PNCCM is also a member of the National Association of Securities Dealers, Inc. ("NASD") and is registered as a municipal securities dealer with the Municipal Securities Rulemaking Board ("MSRB").

PNCCM has participated in the preparation of the comment letter by The Bond Market Association ("Association"), and supports the views that are set forth in the Association's letter. In addition to joining in the Association's letter, PNCCM thought it would be helpful to address each of the questions raised in the MSRB's Request for Comments. The following bulleted questions were posed by the MSRB in its Request for Comments on amended MSRB Rule G-38. PNCCM's response to each question follows.

- **Is the solicitation of municipal securities business from issuers on behalf of dealers a legitimate role for individuals or entities that are independent from such dealers and that operate outside the broker-dealer regulatory scheme?**

  Depending upon the definition of "solicitation" that is used, it may be entirely legitimate for individuals or entities that are independent of dealers to solicit municipal securities business from issuers on behalf of those dealers. Therefore, it is imperative that solicitation be better defined.

  For example, there is a difference between communications to determine whom in a organization should be contacted to begin a discussion of potential municipal securities business and to facilitate an introduction, on the one hand, and the more direct process of attempting to have that first call accepted and subsequently develop a dialogue on the needs of an issuer and capabilities of a municipal finance professional and their firm, on the other. The use of independent contractors who are familiar with the particular organizational dynamics of a municipal issuer to help identify the appropriate person with whom to speak regarding ideas for financings is entirely legitimate, and could be cost effective for both the issuer and the dealer.

  Also, in certain circumstances, issuer officials might more readily listen to an independent party and consider a subsequent call and meeting, than if they were directly approached by a municipal securities dealer representative. Many municipal securities dealer firms find that the only way to gain initial access is through a consultant as intermediary to an issuer official.

- **Are there benefits derived from such an independent role that outweigh the concerns regarding the potentially negative impact of consultants on the integrity of the municipal securities market?**

  The use of independent consultants provides a way for issuer officials to manage with whom they should speak and provides municipal securities dealer firms with a way to manage the time spent trying to have the first call accepted and the dialogue begun. Consultants can serve as independent sources of information for the issuer official to query regarding the reputation and track record of various municipal securities dealer firms. Based on this advice, a limited number of dealer firms are usually selected for further consideration in what is an effective management of time on the issuer official's part.

  The potentially negative impact of the use of consultants is created where issuer officials use consultants as a substitute for their own due diligence on behalf of their constituents. The leveraging of these consultants by issuer officials as a

source of contributions is a problem that should be dealt with by the various legislatures, and not the MSRB or the dealer community.

- **Are there ways that the current rule could be amended that would preserve the integrity of the municipal securities market more effectively than the draft amendment?**

  The current rule could be amended to limit dealers to using only licensed firms as consultants. This would require the MSRB to expand the definition of the municipal securities business to include consultant services to issuer officials in connection with the issuance of securities. The MSRB would then require those independent consultants to register as municipal securities consultants subject to the rules of the MSRB.

- **Is requiring that a person be an associated person sufficient to address concerns regarding supervision and adherence to standards of fair practice, or should the rule require that a solicitor be an actual employee of the dealer?**

  The status of (1) an "associated person" under the SEC, (2) a person engaged in municipal finance business under Rule G-37, or (3) a person engaged in municipal securities activities under Rule G-3 is different and each requires a different level of supervision. The MSRB should revisit these concepts and better define the supervisory responsibilities for each. The concept of employment is significantly different from association: employment brings with it employment law considerations in addition to supervision. Many firms choose to retain and use independent contractors as consultants rather than as employees for reasons entirely unrelated to the issues raised by the MSRB. The manner in which consultants are retained in part determines whether they are associated persons.

- **What would be the legal and business impact of requiring a solicitor to be an employee of the dealer, rather than an associated person of that dealer?**

  When an individual is an employee, as opposed to an independent contractor, significant additional expenses are incurred (e.g., payroll taxes, unemployment, benefits, retirement, insurance), and the person's salary reflects only a portion of the full cost of employment. In addition, in many cases status as an employee can preclude such a person from working for any other municipal securities dealer in the same capacity, because of regulatory constraints on outside business activities and/or of a firm's policies on confidentiality, conflicts of interest and non-competes. Because many consultants currently have multiple clients for whom they provide a communication and referral service, they would be unable to function in this role for anyone else if they were employees of a broker-dealer.

- **Would requiring that a solicitor be an associated person of a dealer effectively limit such solicitor to working for only one dealer (or only for affiliated dealers)? If so, is this appropriate?**

  We believe that requiring a solicitor to be an associated person, and hence under the direct control of the dealer, the solicitor would be limited to working for one dealer at a time because of concerns regarding potential conflicts of interest and other regulatory considerations (NYSE and NASD) over outside employment. Otherwise, authorizing such associated persons to engage in outside business activities, outside employment and taking on obligations that would require confidential treatment for multiple clients would also create concerns. A dealer's oversight and control of an associated person or an employee would ordinarily be expected to be much more extensive than the oversight or controls placed on an independent contractor.

- **Would the limitations imposed by draft new Rule G-38 have different impacts on different categories of dealers (*e.g.*, broker-dealer vs. bank dealer, large vs. small firm, national vs. regional firm, etc.)?**

  MSRB rule has permitted certain types of dealers (bank dealers, bank affiliated dealers) to exclude significant segments of their affiliate employee population as being outside the separately identifiable department or division (SIDD) for bank dealers, and outside the registered subsidiary for bank-affiliated broker-dealers. Such dealers have developed structures and controls to exclude and insulate affiliated bank personnel from engaging directly in municipal securities activities.

  The proposed changes to Rule G-38 would negatively impact the ability of affiliated companies to conduct banking business and make referrals. It would require dealers to disassemble the structures and controls that have been created to address requirements of the rule.

  Under the amended rule, a significant number of affiliate bank employees who are expected by the affiliate to make referrals in the course of conducting bank business would become a Municipal Finance Professional ("MFP") of the dealer. Each would be considered an associated person but would not fit the description of a dealer employee who is under direct control and supervision of the dealer.

  Such affiliate bank employees would be required to function within two supervisory structures, that of the bank and of the dealer. It is not at all clear when such associated persons would be functioning on behalf of the dealer and when they would be functioning on behalf of the affiliate bank in providing the full range of banking products and services to issuers. Such confusion would lead to duplicative oversight for little benefit. Just as with independent contractors,

many discussions with issuer officials that may touch upon the existence or identity of a dealer firm occur without the direct involvement or knowledge of the dealer, and not at the direction of the dealer. In many cases, the discussion with a client that begins regarding deposit, credit or other banking products is steered by the client toward a broad range of topics including financing alternatives and financing providers.

- **Would the limitations imposed by draft new Rule G-38 have different impacts on different categories of persons seeking to solicit municipal securities business for dealers (*e.g.*, individuals vs. companies)? Could a company that formerly served as a consultant continue to solicit municipal securities business for dealers under the requirements of draft new Rule G-38?**

  Contractual and control issues are raised when an entire firm may become associated rather than individual employees. In most cases, independent contractors are used to conduct consultant activities, including communications with issuer officials, because such services are seen as purchased services. Services are contracted for and purchased frequently in many lines of business. Rarely is a service provider expected to submit to the broad, direct control and supervision by the contracting entity other than for those activities directly related to those services.

  The supervisory rules do not anticipate associated persons conducting registerable municipal securities business away from the dealer, so they do not address selective supervision. There is an expectation that a municipal securities dealer is responsible for everything an associated person does involving municipal securities activities.

  A dealer purchasing a service, such as consulting, does not directly purchase the entity providing it. The service provider is simply being paid to take a discrete action or complete a task. The adequacy of the provider's performance is what can be controlled through compensation or the withholding of it. Supervision of the service provider's actions is at most dictated by requirements in the written agreement that require them to comply with all applicable laws and regulations.

- **Are there circumstances where MSRB rules (other than Rule G-37) should not apply to non-employee associated persons' municipal securities activities?**

  MSRB Rules are applied primarily to the registered dealer, and involve administration of a supervisory structure that is imposed on the associated person employed by the dealer. Each associated person is expected to be aware of, and function within, the supervisory structure and manage his or her actions as needed. The municipal securities activities of non-employee associated persons

should be controlled and supervised only to the extent that those activities are conducted at the request of, on behalf of, and with the knowledge of the requesting dealer. Certainly, the imposition of supervisory oversight by a dealer with respect to actions taken by an associated person on behalf of another dealer should not be required. Otherwise, this could lead to confusion regarding responsibility, conflicting directions and a lack of accountability for compliance by the contending dealers involved.

The MSRB rules that should be applied are those that directly involve the municipal securities activities the non-employee associated person has been requested to conduct by the municipal securities dealer. The alternative would impose various requirements that do not directly support or control the activities for which the employee has been identified as a MFP.

- **Do consultants under existing Rule G-38 engage in any types of activities that would be considered municipal securities representative activities under Rule G-3 (a)(i) if undertaken by an associated person of a dealer? Should Rule G-3 (a)(i) be amended to make the act of soliciting municipal securities business (without more) an activity that requires qualification as a municipal securities representative?**

  Depending upon the services to be provided by the consultant, and limitations agreed upon between the municipal securities dealer and the consultant, these consultant activities may not rise to the level anticipated by Rule G-3 as registerable. Rule G-3 should be amended to describe more clearly those activities, including solicitation, that would trigger the requirements of the rule.

- **Where a solicitor is an employee of a dealer's affiliate that is subject to another regulatory regime (*e.g.*, a bank affiliate), what is the nature of the supervision applicable to such person under such regime with respect to the person's municipal securities activities?**

  Where an employee of a dealer's affiliate is engaged in soliciting municipal securities at the request of and on behalf of the dealer, the employee is currently deemed to be an MFP. They have been positioned as dual employees who are subject to supervision by both entities. Their activities on behalf of and at the request of the dealer are supervised by the dealer. Their activities on behalf of the affiliate are supervised by the affiliate. This dual reporting structure creates certain challenges in identifying and attributing roles and actions to the appropriate entity.

  Certain problems have arisen, however, where actions are taken without directive or awareness of the dealer, and the employee later makes the dealer aware of the action in anticipation of some form of compensation. In certain of those instances that compensation has been withheld because it was undertaken without the express authorization of the dealer.

- **Would the draft amendments have an impact on who will continue to solicit municipal securities business on behalf of dealers? If so, would this have a beneficial or detrimental impact on the municipal securities market?**

  The draft amendments would have a potentially profoundly negative impact on the market and on those who would be permitted to solicit municipal securities business on behalf of dealers. Any contribution made by a consultant to an issuer official (in addition to a contribution made to an official the consultant was retained to solicit) could now potentially create a ban where none was previously required.

  The current Rule requires reporting of contributions where there is nexus between a contribution recipient and target of such solicitation. Under the amended Rule these previously unreported (and therefore potentially unknown to the dealer) contributions have the potential to result in a two-year ban for the dealer who employed the consultant. It is unclear whether a decision to not employ the consultant (as transition from the role of retained consultant) would change the outcome and avoid the need to impose the ban.

  Additionally, contributions made on behalf of other non-municipal dealer clients of the consultant, which are entirely permissible, could have the effect of creating a two-year ban for the dealer.

  A dealer would be required either to terminate the consultant's contract and not consider the consultant as an associated person or to begin to observe the ban. This may require that the dealer withdraw from pending municipal securities business and remain absent from the market as a participant with regard to that issuer for the balance of the two year period. If this were widespread, the effect on the market would be reduced access to some firms by issuers and issuer officials who they normally rely on as underwriter, placement agent, remarketing agent or financial advisor in issuing their securities. This would also reduce competition for these services, reduce access to required market expertise and increase the cost of issuance. This could further be affected due to longer lead times and decreased market capacity to conduct negotiated municipal underwritings for a period after the imposition of this amended Rule.

- **Would the draft amendments have an impact on the behavior of solicitors toward issuers? If so, would this be beneficial or detrimental to the market?**

  The draft amendments would more closely align solicitors with individual dealers and result in decreased access to issuer officials. As indicated previously, the benefit of an independent solicitor to an issuer official is as a filter for information, reputation/opinion and contextual understanding. A brief conversation with an individual who represents multiple dealers can assist an

issuer official in determining with whom the official should discuss issuance opportunities and how much time should be allotted given the number of firms involved. If a solicitor is directly aligned with a particular dealer firm, an issuer official's ability to use this solicitor as a sounding board is compromised. As a result, this objective, independent discussion is less likely to occur. Solicitors would be challenged to find ways to maintain access to issuer officials and continue to provide them with this intelligence provider and fact-finding role.

- **Should parties other than the issuer (such as financial advisors, bond counsel, conduit borrowers or other governmental borrowers) be explicitly listed in the definition as persons to whom communications are directed?**

  Expansion of the list of parties with whom communications are directed would not serve to enhance the goal of the Rule. The Rule currently focuses on solicitation of issuer officials for municipal securities business by persons who are not otherwise MFPs. The Rule attempted to link the impact of political contributions by such other persons with their enhanced ability to be successful in soliciting business in conversations with issuer officials. This linkage was drawn based on assumptions that a contribution to an issuer official would encourage an issuer official to appoint the dealer represented by the consultant. Rule G-37 has consistently precluded dealers from indirectly doing what they may not do directly in connection with soliciting municipal securities business.

  Rather than attempt to describe more finely to whom a consultant may communicate by broadening the potential effected audience, the goal should be to describe what types of communications are of concern. As indicated previously, the concept of solicitation has not been defined carefully enough. If the concern is with leveraging a contribution through discussions with other transaction participants, then the Rule should address the concern. The Rule was intended to eliminate the preferential treatment of dealers by issuer officials because of contributions to such issuer officials, either by dealers or through consultants retained by such dealers. Conversations of consultants with other, secondary participants of a particular municipal securities issue can be numerous and many times can be somewhat casual or brief. Inclusion of such conversations with other transaction participants involving a proposed or pending transaction would not serve to enhance the goal of the Rule.

- **Should a communication with a conduit borrower to hire a dealer as an underwriter for a private activity bond issue where the issuer ultimately must approve the underwriter for the issue be considered an indirect communication with the issuer?**

In private activity bond underwriting transactions, the borrowers select the underwriter in the process of developing the financing unless the issuing authority steps in and makes a determination or requires a certain appointment.

In most cases, the underwriter and borrower approach the issuing authority for approval to serve as conduit issuer on a transaction already in hand. The issuing authority, provided certain conditions are met, approves the issuance.

If in the process of developing such a transaction, a consultant is asked to assist in contacting and identifying appropriate issuing authorities, contributions by the consultant to the issuer official should continue to be identified or prohibited.

Communication with the issuer should be the focus of any Rule condition and should not extend to a conduit borrower.

- **Are the examples provided above to illustrate the concept of intent in connection with solicitations helpful in explaining the scope of the definition? Should other circumstances be considered?**

  These examples are helpful only in expanding the scope of the definition. Discussions with private activity borrowers should not be considered to be communications with issuer officials.

- **If an associated person of a dealer approaches an issuer representative to inform the issuer that the dealer has municipal securities capabilities and provides to the issuer representative contact information for dealer personnel who handle municipal securities business, should such a communication be considered a solicitation by such associated person?**

  This communication, if limited to the information noted above, should not be considered to be solicitation, even if directed toward an issuer official.

- **Does draft Rule G-38 draw an appropriate line between those communications that would or would not constitute solicitations? Would the rule effectively prohibit any types of contacts that are important for the marketplace, or does it fail to reach certain types of communications that can call into question the integrity of the municipal securities market?**

  The amended Rule draws an increasingly more complicated line between such communications. Certain contacts and types of communications described in the amendments, which are necessary for the proper conduct of due diligence and effective use of time by issuer officials, would be limited by these amendments. Communication should never be limited if it serves to advance the proper conduct of due diligence. If a contribution or other payment is required to be made in order to obtain access, or permit communication, then that contribution should be

prohibited. This would hopefully force the issuer official to eliminate the requirement for such contributions.

- **Would it be appropriate for draft new Rule G-38 to include the same types of exemptions provided in existing Rule G-38? If so, should such exemptions be conditioned on the existence of a formal arrangement with the dealer that has been disclosed to the issuer? Are there additional conditions that should be imposed in connection with such an exemption?**

  The amended Rule eliminates the requirement for a contractual writing between the associated person and the dealer describing the reporting and disclosure obligations of each party. This eliminates a potentially effective control presented by public disclosure of such information.

  Certain exemptions in the current Rule should be retained and expanded in the amended Rule. Many of the relationships that are subject of these exemptions are subjects of disclosure in the Official Statement for such transactions. Duplicative agreements to define such relationships, with their attendant complications in attempting to describe these relationships (associated versus employed versus retained), would not serve to enhance the goal of the Rule.

- **Are there other parties or roles that call for such an exemption?**

- **Should the rule limit its reach solely to those persons who have an agreement or understanding with a dealer to solicit municipal securities business in exchange for payment?**

  The Rule should not condition involvement of a person to solicit municipal securities business on existence of an agreement or an understanding that includes such consideration. The concepts of association, employment and retention should instead be better defined and rationalized to allow administration of the Rule by clearly identifying the relationship of the parties involved and the nature of the agreement between them.

- **Should the rule limit only cash compensation, or only certain types of non-cash compensation?**

  The Rule should limit only cash compensation, as cash or other forms of direct compensation are typically used in contractual undertakings. By extending the limitation to various non-cash and non-immediate compensation arrangements, the use of these entirely appropriate arrangements is disrupted with little enhancement.

- **Should payment by the issuer from bond proceeds to persons who have solicited municipal securities business for a dealer be considered an indirect payment by the dealer?**

As described previously, the role of independent solicitor serves the issuer official by facilitating objective selection of dealers for initial conversations. This is a service that could properly be paid for by the issuer as part of its selection process.

- **Is it appropriate for the rule to limit *quid pro quo* arrangements where the dealer engages a non-associated person for a different engagement of municipal securities business?**

  Appropriateness would be dependent upon whether the decision to engage such a non-associated person was at the direction of the issuer official. Dealers should be permitted flexibility in the way in which non-associated persons are deployed and compensated. It would also depend upon the role such person would serve and the extent to which his or her activity is in connection with the municipal securities business.

- **Instead of prohibiting payment to solicitors who are not associated with the dealer, should the rule prohibit the dealer from engaging in any municipal securities business where such business has been solicited by a non-associated person of the dealer?**

  A dealer should not be prohibited from engaging in municipal securities business where such business was solicited by a non-associated person of the dealer, especially where the solicitation was not at the request of or on behalf of the dealer. We are not certain what a "non-associated person of the dealer" is.

- **Would the process of soliciting business for dealers become less transparent to issuers, the marketplace and the public if dealers were to take solicitors on as associated persons subject to the requirements of Rule G-37 as opposed to remaining subject to the consultant requirements of existing Rule G-38?**

  Solicitors who become associated persons and cease to be retained consultants would be less visible to market participants. The agreement and its required disclosures of contributions and compensation required under the current Rule is effective in providing disclosure to the market, the issuer, and the public. Termination of this agreement would be required as a part of becoming an associated person and/or employee. Termination of this agreement would remove this information from the public domain.

- **Would the benefits of subjecting such solicitors to the fair practice standards and supervisory requirements of MSRB rules (including the potential ban on municipal securities business as a result of their non-*de minimis* contributions) outweigh this potential loss of public information?**

  Dealers will most likely find it not cost effective to continue the use of such solicitors if required to bring them under the full impact of various fair practice and supervisory controls many of which would not be applicable. Solicitors are

expected to adhere to rules and regulations applicable to them, including MSRB Rules, should they engage in registerable municipal securities business. This is in addition to contractual requirements in the consultant agreement. The benefit of requiring the dealer to police the solicitor more actively is not outweighed by the loss of this public information.

- **Should more information about an associated person's arrangements with dealers be made public through revised Form G-37 or be required to be provided to issuers? For example, should the MSRB maintain disclosure requirements regarding compensation arrangements and payments made to solicitors who are associated persons but not employees of a dealer?**

  Please see previous comments regarding solicitor status as associated, employed, or retained in response to the second bullet on page 3 of this letter.

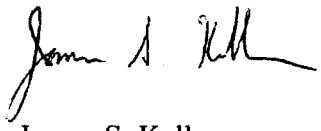
- **Should the MSRB establish any recordkeeping requirements in connection with draft new Rule G-38?**

  No additional recordkeeping is required beyond that currently required for associated persons engaged in municipal securities activities.

* * *

We have attempted to be responsive to each of the questions set forth in the MSRB Request for Comments. Please feel free to contact Richard Briner (412-762-8270) or the undersigned if you have questions regarding the contents of this letter. Thank you for the opportunity to comment on this MSRB proposed rule.

Sincerely,



James S. Keller

cc: Richard H. Briner
Thomas Henson
Charlotte McLaughlin
PNC Capital Markets, Inc.

John J. Wixted, Jr.
The PNC Financial Services Group, Inc.

SEASONGOOD&MAYER, LLC
SPECIALISTS IN PUBLIC FINANCE SINCE 1887

300 Mercantile Library Bldg.
414 Walnut Street
Cincinnati, Ohio 45202-3910
(513) 621-2000 • FAX (513) 621-5259

May 20, 2004

Mr. Christopher Taylor
Executive Director
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, Virginia 22314

Dear Kip:

First of all let me compliment you on finally attempting to continue to level the playing field in the municipal securities industries. To paraphrase an article in the Bond Buyer by one major national firm, "it is cheaper to hire a consultant in the pursuit of business rather than hire professionals to pursue that same business."

From our perspective this has been exactly what has happened in many areas of the Country. Any review of the awarding of senior managed business would conclude that the use of in-state lobbyists by firms has been very effective.

We applaud the effort to make these changes. On the other hand, we continue to be struck by the fact that for dealer firms any individual who solicits business must be licensed and registered with the NASD. It is our belief that the requirement of registration should be imposed on anyone soliciting securities business. This approach, which we believe should be extended to every facet of the securities industry, not just municipal securities, including Financial Advisors, both municipal and corporate, money managers, etc., would in our opinion help in bringing our industry back to where it belongs, that is in the hands of securities professionals.

Our Response to Specific Questions

Role of Consultants in the Municipal Securities Market

- *Is the solicitation of municipal securities business from Issuers on behalf of dealers a legitimate role for individuals or entities that are independent from such dealers and that operate outside the broker dealer regulatory scheme?* No – they should be registered securities representatives.
- *Are there benefits derived from such an independent role that outweigh the concerns regarding the potentially negative impact of consultants on the integrity of the municipal securities market?* Absolutely not. Benefits to who?
- *Are there ways that the current rule could be amended that would preserve the integrity of the municipal securities market more effectively than the draft amendment?* Yes – require registration.

Becoming an Associated Person

- *Is requiring that a person be an associated person sufficient to address concerns regarding supervision and adherence to standards of fair practice or should the rule require that a solicitor be an actual employee of the dealer?* Yes - more difficult to prove – how would this be challenged in the self-policing area? That is the problem of the employer.
- *What would be the legal and business impact of requiring a solicitor to be an employee of the dealer, rather than an associated person of that dealer?* None.
- *Would requiring that a solicitor be an associated person of a dealer effectively limit such solicitor to working for only one dealer (or only for affiliated dealers)?* Yes *If so, is this appropriate?* Yes.
- *Would the limitations imposed by draft new Rule G-38 have different impacts on different categories of dealers (e.g., broker-dealer vs. bank dealer, large vs. small firm, national vs. regional firm, etc.)?* Outcome should be same for all.
- *Would the limitations imposed by draft new Rule G-38 have different impacts on different categories of persons seeking to solicit municipal securities business for dealers (e.g., individuals vs. companies)? Could a company that formerly served as a consultant continue to solicit municipal securities business for dealers under the requirements of draft new Rule G-38?* If different impact resulted in a consistent outcome, isn't that what is desired?
- *Are there circumstances where MSRB rules (other than Rule G-37) should not apply to non-employee associated persons' municipal securities activities?* No.
- *Do consultants under existing Rule G-38 engage in any types of activities that would be considered municipal securities representative activities under Rule G-3(a)(i) if undertaken by an associated person of a dealer? Should Rule G-3(a)(i) be amended to make the act of soliciting municipal securities business (without more) an activity that requires qualification as a municipal securities representative?* Yes.
- *Where a solicitor is an employee of a dealer's affiliate that is subject to another regulatory regime (e.g., a bank affiliate), what is the nature of the supervision applicable to such person under such regime with respect to the person's municipal securities activities?* Now none. We believe that if a dealer bank or otherwise solicits business from an individual(s) who control municipal securities business, they be designated a municipal profession.
- *Would the draft amendments have an impact on who will continue to solicit municipal securities business on behalf of dealers? If so, would this have a beneficial or detrimental impact on the municipal securities market?* Beneficial.
- *Would the draft amendments have an impact on the behavior of solicitors toward issuers? If so, would this be beneficial or detrimental to the market?* Yes, beneficial. What about G-2?

Definition of Solicitation

- *Should parties other than the issuer (such as financial advisors, bond counsel, conduit borrowers or other governmental borrowers), be explicitly listed in the definition as persons to whom communications are directed?* Yes.
- *Should a communication with a conduit borrower to hire a dealer as an underwriter for a private activity bond issue where the issuer ultimately must approve the underwriter for the issue be considered an indirect communication with the issuer?* Yes.
- *Are the examples provided above to illustrate the concept of intent in connection with solicitations helpful in explaining the scope of the definition? Should other circumstances be considered?* Does not address real life situations and how do you prove it?
- *If an associated person of a dealer approaches an issuer representative to inform the issuer that the dealer has municipal securities capabilities and provides to the issuer representative contact information for dealer personnel who handle municipal securities business, should such a communication be considered a solicitation by such associated person?* Yes, definitely. Tying!
- *Does draft Rule G-38 draw an appropriate line between those communications that would or would not constitute solicitations? Would the rule effectively prohibit any types of contacts that are important for the marketplace, or does it fail to reach certain types of communications that can call into question the integrity of the municipal securities market?* All contact by third parties should be considered solicitation.

Exemptions from Definition of Solicitation

- *Should the rule limit its reach solely to those persons who have an agreement or understanding with a dealer to solicit municipal. Securities business in exchange for payment?* No – it should include Financial Advisors, etc.
- *Should the rule limit only cash compensation, or only certain types of non-cash compensation?* All compensation.
- *Should payment by the issuer from bond proceeds to persons who have solicited municipal securities business for a dealer be considered an indirect payment by the dealer?* Yes.
- *Is it appropriate for the rule to limit* quid pro quo *arrangements where the dealer engages a non-associated person for a different engagement of municipal securities business?* Yes.
- *Instead of prohibiting payment to solicitors who are not associated with the dealer, should the rule prohibit the dealer from engaging in any municipal securities business where such business has been solicited by a non-associated person of the dealer?* No – too hard to police.

Disclosure

- *Would the process of soliciting business for dealers become less transparent to issuers, the marketplace and the public if dealers were to take solicitors on as associated persons subject to the requirements of Rule G-37 as opposed to remaining subject to the consultant requirements of existing Rule G-38?* No.
- *Would the benefits of subjecting such solicitors to the fair practice standards and supervisory requirements of MSRB rules (including the potential ban on municipal securities business as a result of their* non-de minimis *contributions) outweigh this potential loss or public information*? No – we are at a loss as to understand the implied contribution of a consultant to issuers!
- *Should more information about an associated person's arrangements with dealers be made public through revised Form G-37 or be required to be provided to issuers? For example, should the MSRB maintain disclosure requirements regarding compensation arrangements and payments made to solicitors who are associated persons but not employees of a dealer?* Yes, but they should be employees.

In closing, we do appreciate the effort of the MSRB in trying to rectify a situation that has effectively exempted many major national firms and banking institutions from the G-37. We firmly believe registration is the answer.

Very truly yours,

Gordon Reis III
Managing Principal

GR:ar

SEATTLE-NORTHWEST
SECURITIES CORPORATION
The Region's Premier Investment
Banking Firm Since 1970

May 19, 2004

Mr. Christopher Taylor
Executive Director
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA 22314

Re: Proposed Changes to Rule G-38

Dear Mr. Taylor:

Seattle-Northwest Securities Corporation ("SNW") submits these comments in response to MSRB Notice 2004-11 (April 5, 2004) in connection with the proposed amendment to Rule G-38. SNW supports the Board's efforts to review the role of consultants in the Municipal Securities marketplace to ensure a fair and equitable business environment for all.

Although we believe it would be important to clarify a few details, SNW supports the proposed changes to Rule G-38. We believe that the changed Rule would have little, if any, impact on the manner in which SNW conducts its business. Moreover, we believe that removing the opportunity for improper conduct by consultants would result overall in an improved environment for issuance of municipal securities.

Our only concerns with the proposed modifications fall into two areas:

First, as the interpretive letters to the prior G-38 made clear, we believe the revised Rule should continue to distinguish between, on the one hand, legitimate legislative and administrative lobbying efforts by professional lobbyists and, on the other, the solicitation of municipal business by consultants. In the realm of State and local politics, lobbyists working for SNW on a legislative matter could provide position papers or have face-to-face discussions with a variety of officials, some of whom might be issuers, concerning SNW's position on these issues. We would like it to be crystal clear that such lobbying activities do not constitute the solicitation of business for the municipal securities firm.

A related concern arises from the fact that lobbyists generally have a multiplicity of clients as well as their own political agendas. It would be unfair to restrain lobbyists from exercising their political voice by binding them to the MSRB rules for all of

their clients, simply because one of their clients happens to be a municipal securities firm. Similarly, a broker-dealer should not be penalized because a lobbyist made a political contribution on behalf of one of its other clients. Accordingly, we believe lobbying should be expressly excluded from the scope of new Rule G-38.

A way to do this would be to exclude lobbying activities from the definition of solicitation and communication. Lobbying could be defined as direct or indirect communications by or on behalf of a municipal securities professional in connection with legislative or rulemaking proceedings. In addition, the person making such communication could not solicit business for its broker-dealer client.

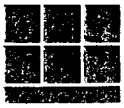
On a separate matter, we believe that any modification to Rule G-38 should be prospective only. The proposed revision to the Rule creates a new standard of wrongful behavior under the rules. Behavior by consultants that would not have constituted a violation in 2003 would constitute a violation in 2004. It would be unfair to penalize a broker-dealer by foreclosing work for an issuer, because of conduct that was not wrongful at the time, but became wrongful after the conduct occurred.

With these clarifications, SNW would support the modifications to the Rule.

Sincerely yours,

Maud Daudon
Managing Director
Investment Banking

John Rose
President and CEO



SEATTLE-NORTHWEST SECURITIES CORPORATION

The Region's Premier Investment Banking Firm Since 1970

December 13, 2004

Mr. Ernesto A. Lanza
Senior Associate General Counsel
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA 22314

Re: Proposed Changes to Rule G-38

Dear Mr. Lanza:

As you may recall, Seattle-Northwest Securities Corporation ("SNW") previously submitted comments regarding the proposed amendment to Rule G-38. In light of the MSRB's further revisions to and comments on the proposed Rule, SNW would like to reiterate its position on the issues. In short, SNW fully supports the Board's efforts to guide the role of consultants in the Municipal Securities marketplace, in order to ensure a fair and equitable business environment for all. SNW believes that the changed Rule would have little, if any, impact on the manner in which SNW conducts its business. Moreover, we believe that limiting the opportunity for improper conduct by consultants would result overall in an improved environment for issuance of municipal securities.

SNW remains concerned that traditional government lobbying activities, which are unassociated with the solicitation of business, could create confusion under the Rule. Indeed, we believe that deleting from the prior Rule the references to potentially shielded legal, accounting and engineering services, likely will lead to more rather than less confusion. SNW agrees with the MSRB's comment that the legal, accounting and engineering exemptions, while not blanket exemptions, would be carried forward under the new Rule. Moreover, SNW believes that a lobbyist's services would similarly fall within the shield created by the rule. SNW believes that the clarity of the Rule would be enhanced by clearly stating the three prior exemptions as activities that do not constitute solicitation, and adding legislative lobbying to those three exemptions.

We are appreciative that the MSRB intends to apply the revised Rule only prospectively. SNW continues to support this goal and would urge the MSRB to continue this approach with the revised Rule.

Accordingly, subject to the above clarification regarding the lobbyist and other exemptions, SNW supports the revisions to the Rule.

Very truly yours,

Maud Smith Daudon
Managing Director
Investment Banking

John Rose
President and CEO

Law Department
MAC: N9305-173
1700 Wells Fargo Center
Sixth and Marquette
Minneapolis, MN 55479

Bruce Moland
Vice President and
Assistant General Counsel
(612) 667-9410
(612) 667-6082 (Fax)
Bruce.U.Moland@WellsFargo.com

June 2, 2004

Mr. Ernesto A. Lanza
Senior Associate General Counsel
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, Virginia 22314

Re: Draft Amendment to MSRB Rule G-38

Dear Mr. Lanza:

Wells Fargo & Company ("Wells Fargo") is a financial services company that owns commercial banks in 23 Western and Midwestern states and is the parent company of two municipal securities broker/dealer firms. Wells Fargo's municipal securities business is fairly limited in scope. In addition to bidding on competitive bid underwritings, Wells Fargo does a very limited amount of negotiated governmental general obligation or revenue bond underwriting business. The majority of its business is the leasing of equipment and other items such as fire trucks and computers to government units. These leases are sold in one or more pieces to institutional and high net worth accredited individual investors. Wells Fargo also engages in the municipal finance business through various conduit programs and industrial development bond programs.

We generally support the proposed ban on Rule G-38 Consultants. The proposed ban on the use of consultants has the benefit of removing the ability of a dealer to indirectly evade the "pay to play" prohibitions applicable to the firm itself and its municipal securities professionals through the use of consultants. However, we are concerned about the proposed definition of solicitation in the draft amendment to Rule G-38 as it relates to conduit borrowers.

We agree with and appreciate the examples contained in the MSRB's release that merely informing an issuer that an affiliated company is a municipal securities dealer or that a conduit borrower should consider an industrial development bond or other conduit financing through a municipal issuer is not solicitation. However, we are concerned that communication with a conduit borrower could be or would be considered indirect communication with an issuer for purposes of Rules G-37 and G-38. In our experience, bank relationship officers will have discussions with a corporate or nonprofit borrower regarding financing alternatives. In that process, the banker may contact a municipal finance professional at the affiliated broker/dealer to discuss the eligibility of the project for tax exempt financing. After a financing plan is discussed and if the project qualifies, the municipal finance professional will then present the project to an issuer that is

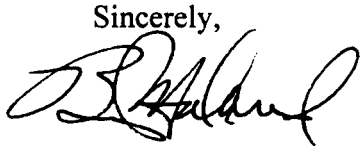
qualified to issue bonds for the project. The conduit borrower would not have any influence over the issuer or the even selection of the issuer. In almost all cases, that selection is dictated by applicable state and local laws. In many of these cases, the bank would also be directly providing a credit enhancement for the underwriting, such as a letter of credit.

As noted in the commentary accompanying the proposal, the proposed draft amendment to Rule G-38 implies that any conduit borrower could be deemed to be an agent of the issuer for purposes of Rule G-37 and Rule G-38. This implies that the full panoply of G-37 reporting requirements and prohibitions could be applicable to a banker who is not a municipal finance professional and who merely communicates with a conduit borrower and has no contact or communication with the issuer or an official of the issuer. We urge the MSRB to make clear that conduit borrowers would not be considered agents of the issuer. Rules G-37 and G-38 are designed to prevent "pay to play" in the selection of municipal securities underwriters. We see no reason or justification to expand the definition of solicitation by implication or otherwise to treat conduit borrowers as agents of an issuer for purposes of these rules.

Wells Fargo serves many of the least populated states and we have a limited number of municipal finance offices and personnel. In order to serve smaller communities and address their needs for financing especially equipment financing, our bankers need to be able to communicate and meet with officials of issuers and refer municipal security matters to municipal finance professionals in our municipal securities broker dealer firms. However, we don't want to have them become qualified as municipal securities representatives. We recognize that such contact and communication makes them subject to solicitor municipal securities professional reporting and other requirements under Rule G-37 if business is referred to the municipal securities dealer. These bankers provide a great service to their local communities by making officials of issuers aware of tax exempt equipment leasing and other financing opportunities available through the broker dealer. The commentary to the proposed draft amendment to Rule G-38 recognizes that the designation of a banker as a solicitor municipal securities professional does not require that the person qualify as a municipal securities representative unless the person's activities "rise to the level" of those listed in Rule G-3(a)(i). This distinction is very important to us and we heartily support it.

We appreciate the opportunity to comment on this draft amendment to MSRB Rule G-38.

Sincerely,



Bruce Moland
Vice President and
Assistant General Counsel

BM:llk
Corresp/2004/amendG-38

WELLS FARGO

Law Department
MAC: N9305-173
1700 Wells Fargo Center
Sixth and Marquette
Minneapolis, MN 55479

Bruce Moland
Vice President and
Assistant General Counsel
(612) 667-9410
(612) 667-6082 (Fax)
Bruce.U.Moland@WellsFargo.com

December 15, 2004

Via E-mail elanza@msrb.org
and DHL Express Mail

Mr. Ernesto A. Lanza
Senior Associate General Counsel
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, Virginia 22314

Re: Revised Draft Amendments to MSRB Rule G-38

Dear Mr. Lanza:

This responds to the request of the Municipal Securities Rulemaking Board ("MSRB") for comments on its revised draft amendments to Rule G-38 issued on September 29, 2004.

Wells Fargo & Company (Wells Fargo) is a financial services company that owns commercial banks in 23 Western and Midwestern states and is the parent company of two municipal security dealer firms. Wells Fargo's municipal securities business is limited in scope. In addition to bidding on competitive bid underwritings, Wells Fargo does a very limited amount of negotiated general obligation underwriting business. The majority of its business is the leasing of equipment and other items such as fire trucks and computers to government units. These leases are sold in one or more pieces to institutional and high net worth accredited individual investors. Wells Fargo also engages in the municipal finance business through various conduit programs and industrial development bond programs.

The original draft amendments issued in April, 2004 would have had minimal impact on the way that Wells Fargo operates its referral program with employees of Wells Fargo banks. Employees of affiliated banks and companies have been considered associated persons of our municipal securities dealer firms as a result of the *Fifth Third Securities* enforcement action. This revised proposal, however, raises a number of questions and concerns regarding our programs.

First and foremost, we are concerned that a bank affiliated with our municipal securities dealers could become an entity "independent solicitor" under this proposal if employees of the bank make referrals to an affiliated municipal securities dealer and

receive any compensation for such referral. We have been advised by the staff of the American Bankers Association that based upon discussions with MSRB staff this is not the intent. It is important to Wells Fargo that this be made very clear in the final rule.

We do not object to having our municipal securities dealers enter into "independent solicitor" contracts with individual bankers who have contact or communicate with municipal security issuers on behalf of an affiliated municipal securities dealer and pursuant to which they agree to provide information regarding political contributions. This is our current practice. The number of commercial bankers involved, however, is small, less than 300, out of over 150,000 employees of the various Wells Fargo companies and banks.

We would not want any of the political action committees ("PACs") sponsored or organized by Wells Fargo to become subject to Rules G-37 and G-38. Currently municipal finance professionals, including bankers who are solicitor municipal finance professionals, do not contribute to the PACs; and the municipal security dealer firms and municipal finance professionals have no control over the PACs or any influence over their political contributions. These PACs are not used to obtain or retain municipal securities business.

Under proposed Rule G-38, it would appear that the mere receipt of compensation from an affiliate dealer in connection with the referral of municipal securities business could make the bank an independent solicitor. In such circumstances, if the bank is merely acting as a conduit for payments from an affiliate dealer to bank employees, we do not believe the bank should be deemed an independent solicitor with all the ramifications that such status entails. We urge the MSRB to make clear in the final rules that referral or finder's fees to a bank employee who is an "independent solicitor" for purposes of Rules G-38 may be made through the bank without the bank itself becoming an "independent solicitor". The bank as the employer of the banker would merely pass the payment through to the banker for inclusion in the person's income. This would avoid separate tax and other reporting that would be required if payment could not be made through the bank.

Wells Fargo serves many of the least populated states and has only a limited number of municipal finance offices and personnel. In order to serve smaller communities and address their needs for financial services including a broad array of banking services, as well as financing especially equipment financing, our local commercial bankers communicate and meet with officials of issuers. When appropriate these bankers refer municipal security matters to municipal finance professionals in our municipal securities broker dealer firms. We do not object to subjecting these bankers to the contribution reporting requirements or other limitations of solicitor municipal finance professionals under Rule G-37. As we understand this proposal, bankers would not be subject to qualification or licensing as municipal or general securities representatives merely because they have contact and communication with officials of issuers on behalf of an affiliated dealer. Imposing licensing requirements on bankers engaged in these very limited activities, would have a chilling effect and reduce the number of bankers able to

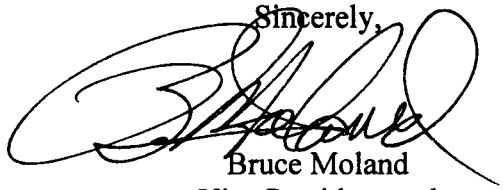
assist local communities in exploring the benefits of municipal securities financing. Likewise, we are concerned that the imposition of the supervisory requirements of Rule G-27, as proposed, for bankers that become independent solicitors may have a chilling effect. Imposing supervision requirements on these bankers will be very burdensome. These bankers provide a great service to their local communities by making officials of issuers aware of tax exempt equipment leasing and other financing opportunities available through an affiliated broker dealer. It would be unfortunate if communities had less access to the benefits of municipal securities financing because of the imposition of additional licensing and/or supervisory requirements on local bankers.

In addition, we appreciate the discussion in the commentary accompanying the proposal regarding the definition of "solicitation" including the examples of certain limited communications with official of issuers that would not be deemed to be solicitation but rather acceptable inform and refer activity. However, in our view, these examples are more limiting than necessary. For the most part, the examples limit the associated person to reacting to requests from officials of issuers. We also believe that a bank employee who does not have contact or communicate with an official of an issuer but rather informs the municipal securities dealer of an underwriting opportunity and gets paid a referral fee should not be treated as a solicitor or deemed to have engaged in a solicitation. Moreover, we do not believe that persons making such passive referrals should be subject to supervision by the municipal securities dealer under Rule G-27.

Finally, we are very concerned about the proposed inclusion of conduit borrowers under the proposal. While we understand that conduit borrowers should not be used to circumvent the prohibitions and limitations of Rules G- 37 and G-38, we are concerned that the proposal is too broad and is unworkable in practice. We urge the MSRB to eliminate the conduit borrower communications from the final rule.

We appreciate the opportunity to comment on the revised draft amendments to MSRB Rule G-38.

Sincerely,



Bruce Moland
Vice President and
Assistant General Counsel

BM:llk