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April 11, 2011

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street
Alexandria, VA 22314

Re: MSRB Notice No. 2011-14; No. 2011-13

Dear Mr. Smith:

The National Association of Independent Public Financial Advisors ("NAIPFA") appreciates this opportunity to provide comments to the Municipal Securities Rulemaking Board ("MSRB") on proposed Rule G-36 and related interpretations (the "G-36 Notice") as well as the MSRB's proposed interpretation of Rule G-17 as it would apply to municipal advisors (the "MA Guidance"). NAIPFA addresses the MSRB's proposed interpretation of Rule G-17 as it would apply to underwriters (the "UW Guidance") in a separate letter also filed today.

NAIPFA, founded 21 years ago, is a professional organization composed of independent public finance advisory firms located across the nation. Our member firms solely and actively represent the interests of issuers of municipal securities.

PRELIMINARY STATEMENT:

Congress delegated to the SEC and the MSRB the responsibility to protect the interests of issuers, investors, and the public trust. NAIPFA believes these proposals must be read in light of and together with the various other proposals made by the SEC and the MSRB to meet that responsibility. In prior comment letters addressing (i) the registration of municipal advisors proposed by the SEC and (ii) Rule G-23 and related guidance proposed by the MSRB, NAIPFA has expressed concern that the proposals fail to recognize the realities of the marketplace and the lessons of the past. NAIPFA believes the rules proposed would impose significant regulatory burdens on firms that did not contribute in any meaningful way to the financial crisis or cause harm to issuers. At the same time, firms that directly caused or contributed significantly to the crisis will be largely free to continue the practices that led many issuers to enter into transactions that were not in their best interests but were very lucrative for the firms that recommended them.

Finally, NAIPFA is very concerned that the scope and tenor of MSRB proposed rules relating to municipal advisors reflects the desire of the MSRB's primary constituency, investment banks and

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broker-dealers, to limit the participation and influence of municipal advisors. Independent financial advisors recognize that many broker-dealers consider financial advisors to be a nuisance to the conduct of their business and regularly seek to exclude financial advisors from public finance transactions. The MSRB's proposed rules reflect this perspective by imposing relatively heavier burdens on municipal advisors than on broker-dealers.

The proposals and guidance we address in this comment letter suffer from the same flaws. They do not implement Congressional intent. They inappropriately and unnecessarily intrude on the relationship between advisors and their clients. And, most unconscionably, they fail to constrain the broker-dealers and investment banks. In short, the MSRB has placed shackles on the shepherds and told the wolves they should be nice to the sheep.

The Congressional Mandate:

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. Law No. 111-203) ("Dodd-Frank Act") amended Section 15B(c)(1) of the Securities Exchange Act of 1934 ("Exchange Act") to provide that municipal advisors have a fiduciary duty to their municipal entity clients. Section 15B(b)(2)(L)(i) of the Exchange Act directs the MSRB to establish rules with respect to municipal advisors that "prescribe means reasonably designed to prevent acts, practices, and courses of business as are not consistent with a municipal advisor's fiduciary duty to its clients."

Securities and Exchange Commission Release Number 34-63576; File S7-45-10 states Section 15B(e)(4)(A) of the Exchange Act, as amended by the Dodd-Frank Act, defines the term Municipal Advisor to mean a person (who is not a municipal entity or employee of a municipal entity) (i) that provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, or other similar matters concerning such financial products or issues, or (ii) that undertakes a solicitation of a municipal entity. The Release further states the definition of a Municipal Advisor explicitly excludes "a broker, dealer, or municipal securities dealer serving as an underwriter," as well as attorneys offering legal advice or providing services that are of a traditional legal nature and engineers providing engineering advice.

The Dodd-Frank Act defined municipal advisor activities to mean advising issuers and borrowers with respect to the structure, timing, terms, and similar matters concerning a municipal bond issue and defined underwriting activities to be purchasing and distributing securities. At this point the law and historical and legal distinction between advisory activities and underwriting activities are in accord. Advisors sit on the same side of the table as the issuer with all of the legal responsibilities that go

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along with being an advisor and underwriters sit on the opposite side of the table negotiating an arm's length transaction to purchase bonds.

The Dodd-Frank Act expanded the responsibilities of the MSRB to include the protection of municipal entities. It also required the MSRB to change the composition of its Board to one that is composed of a majority of members not affiliated with regulated entities. Accordingly, the MSRB amended its stated mission to include protection of the interests of issuers, as well as the interests of investors and the public trust. It also brought on new Board members.

The mission of the MSRB implies the duty of a fiduciary to the interests it protects. Changing the composition of the MSRB Board gave hope to issuers and independent advisors that the rules the MSRB promulgates would be less biased in favor of investment banks and broker dealers. Those hopes were dashed on February 9, 2011 when the MSRB filed with the SEC a proposed amendment to MSRB Rule G-23 and related interpretative guidance. That proposal would undermine the rule of law and subject municipal issuers to the same types of conflicts of interest the Dodd-Frank Act was enacted to prevent.

NAIPFA addressed the concerns of the organization regarding proposed Rule G-23 and interpretative guidance in its letter to the SEC dated March 11, 2011, a copy of which is attached to this correspondence. We reiterate those concerns. Furthermore, NAIPFA believes any rules regarding fair dealing, conflicts of interest, and fiduciary duty, or others for that matter, should:

1. Protect the interests of issuers, investors, and the public trust;
2. Avoid inconsistencies that place public interests at risk;
3. Be clear and easily understood by the parties that have to follow them;
4. Minimize the potential for public confusion regarding the law; and
5. Safeguard against the potential for firms to avoid the intent of the Dodd-Frank Act.

NAIPFA believes that the rules and guidance proposed by the MSRB thus far would, taken together, create a body of law which falls far short of providing the protections intended by the Dodd-Frank Act, places issuers, investors, and the public trust at risk to the types of actions the law intended to eliminate, and subjects issuers and the public to confusion and machinations of firms desiring to subvert the law.

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COMMENT:

A. Proposed Rule G-36

NAIPFA supports the proposed rule, as written. However, in view of the dynamic nature of the rulemaking process, and the fact that so much of what is being proposed is subject to the SEC's ultimate definition of "municipal advisory activity," NAIPFA expressly requests that the MSRB provide further opportunities to comment as the SEC's position crystallizes and the implications of that position become more clear.

B. The G-36 Notice and the MA Guidance

1. NAIPFA Seeks Clarification of the Relationship Between Rule G-36 and Rule G-17

The MSRB states in the G-36 Notice that advisors have both a fiduciary duty under G-36 and a responsibility under Rule G-17 to deal fairly with municipal entity clients. The MSRB goes on to note that "this Rule G-17 duty of fair dealing is subsumed within the municipal advisor's fiduciary duty, and a violation of Rule G-17 with respect to a municipal entity client would necessarily be a violation of Rule G-36." NAIPFA notes that the MSRB addresses certain matters in the MA Guidance that are not addressed, or are addressed differently, in the G-36 Notice.[1] NAIPFA notes further that the MA Guidance is, by its terms, applicable to the interactions between advisors and obligated persons. It is unclear, therefore, if the MSRB intended the obligations and/or duties of advisors to obligated persons also to be applicable to municipal entities. Accordingly, NAIPFA requests that the MSRB clarify its intent.

2. NAIPFA Objects to the MSRB's Compensation Disclosure Requirements

There is perhaps no greater example of the MSRB's misplaced zeal to "protect" issuers than its requirement that advisors warn issuers that each and every payment arrangement they enter into with an advisor is fraught with conflicts. The MSRB stated the eminently reasonable proposition that the duty of loyalty owed by an advisor to its municipal entity client "requires the municipal advisor to deal honestly and in good faith with the municipal entity and to act in the municipal entity's best

[1] For example, the MSRB in the MA Guidance cautions advisors that responses to RFPs "must fairly and accurately describe the municipal advisor's capacity, resources, and knowledge to perform the proposed municipal advisory engagement as of the time the proposal is submitted." It cites this as an example of the G-17 duty not to misrepresent or omit material facts in any representation made to an obligated person client. This example is not included in the G-36 Notice.

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interests without regard to financial or other interests of the municipal advisor." Had it stopped there, NAIPFA would happily have supported the principle.

However, the MSRB then goes on to state that "a municipal advisor must disclose all material conflicts of interest, such as those that might impair its ability to satisfy the duty of loyalty to its municipal entity client." The MSRB lists five particular "examples of the types of conflicts that must be disclosed by the municipal advisor:"

(i) Payments by municipal advisors made for the purpose of obtaining or retaining municipal advisory business;
(ii) Payments from third parties to the municipal advisor;
(iii) Payments from third parties to enlist the municipal advisor's recommendation of their services to the municipal entity;
(iv) whether the municipal advisor or an affiliate of the municipal advisor is acting as a principal in matters concerning the municipal advisory engagement; and
(v) form of compensation.

For each of the first four of these examples, the MSRB cites in footnotes various cases in which firms – virtually all of which were multi-service financial institutions – were found to have acted inappropriately and in violation of applicable federal or state law. The only category for which the MSRB did ***not*** cite an example of misconduct was with regard to the form of compensation. That is not surprising, as NAIPFA is aware of no instance in which an independent financial advisor was found to have acted to the detriment of an issuer in order to maximize its compensation under any standard compensation arrangement.

The MSRB's position is that a material conflict exists in fact through virtually any compensation arrangement. This ignores the reality that the conflict ***only*** exists if the municipal advisor is violating its fiduciary duty. Indeed, the MSRB apparently believes that even the most basic forms of compensation, *e.g.*, being paid by the hour, pose a threat to issuers. The MSRB could have highlighted the issue, warned advisors to take care not to allow any compensation arrangement to influence their recommendations to municipal entity clients, and moved on. But that was apparently not sufficient. Instead, the MSRB proposes that advisors be required to disclose these conflicts to issuers. But advisors apparently can't be trusted to do that properly either, so the MSRB wrote the disclosure for them![2] It took the form of a document entitled *Disclosure of Conflicts of Interest With*

[2] Compare the MSRB's approach with to rules put forth by the American Bar Association ("ABA") that deal with the ethical conduct of lawyers, a group of individuals who, like municipal advisors, have fiduciary duties to their clients. Rule 1.5 of the ABA Model Rules of Professional Conduct specifically addresses fees. In particular, Rule 1.5 addresses (i) unreasonable or excessive fees and provides factors for determining reasonableness, (ii) an attorney's ability to limit the scope of his representation, and (iii) contingent fees. At no point in either the rule

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Various Forms of Compensation (referred to in the G-36 Notice and this comment letter as "Appendix A"). [3]

Appendix A clearly and concisely states that every form of compensation paid by a municipal entity client to a municipal advisor creates a conflict of interest. Fixed fees, hourly fees, fees contingent on completion of a financing and fees based upon amount financed are all identified by the MSRB as problematic in their own way. It is functionally equivalent to saying "The Surgeon General has determined that using a financial advisor may be hazardous to your health." Thus, whether intended or not, the effect of providing the disclosure in the form "suggested" by the MSRB may well be to make issuers wary of financial advisors, when in fact their interests are most likely to be better served by retaining financial advisors.

The absurdity of the MSRB's approach is highlighted by – and its continued bias towards firms that underwrite bonds is evidenced by – the fact that those parties with whom the issuers deal that have real and actual (as opposed to potential) conflicts not only don't have an Appendix A of their own, but are for all intents and purposes absolved of even the need to disclose the conflicts they have. Burdensome disclosure duties are imposed upon municipal advisors who are accountable for the advice and services provided to municipal entities regarding the structure, terms, timing and other similar matters regarding the issuance of municipal securities. No similar disclosure requirements are placed on dealers serving as underwriters even though they are not accountable for the services they provide with regard to the structure, terms, timing and other similar matters regarding the issuance of municipal securities.

This is important to consider when viewed in conjunction with proposed Rule G-23, which proposes that underwriters are allowed to provide "advice" without having to comply with a fiduciary duty. The result is that an underwriter, who has an inherent conflict of interest by virtue of its role as purchaser and distributor of securities in an arm's length commercial transaction with a municipal entity, does not have to disclose that its compensation creates a conflict of interest. What is more, although municipal advisors are required to disclose matters, in writing, that do not in and of themselves create conflicts of interest, such as compensation, underwriters are not required to disclose anything in writing, even the inherent conflict of interest that exists when an underwriter

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itself or in the interpretive guidance is it required that an attorney disclose that his fee, even if contingent, may create a conflict of interest.

[3] NAIPFA appreciates that the MSRB is not directly mandating use of Appendix A, but it surely realizes – and we believe fully intends – that few firms would choose not to use it.

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provides advice to a municipal entity regarding the structure, terms, timing and similar matters with regard to the issuance of municipal securities.

NAIPFA believes that this double-standard is unacceptable. The MSRB's regulatory framework can be summarized as follows: If an individual **can** be held accountable for the services it provides regarding the structure, timing, terms and other similar matters regarding the issuance of municipal securities, the individual **must disclose**, in writing, certain matters that do **not** in and of themselves create conflicts of interest, such as the form of compensation. However, if the individual **cannot** be held accountable for the services it provides to municipal entities, the individual **may** have to make disclosures, such as those found in G-23, but these disclosures are **never** required to be in writing, even if the matter does create a material conflict of interest, such as where the underwriter is simultaneously serving as financial advisor on one transaction with an issuer and as underwriter on a different transaction with that same issuer.

Although such a regulatory framework may have been acceptable pre-Dodd-Frank, the MSRB's new mandate requires it to protect the interest of municipal entities. Therefore, the test for proposed Rule G-36, and others, is whether the rule adequately protects the interest of municipal entities. Proposed Rule G-36 as interpreted by the MSRB fails to meet this test and therefore the guidance must be amended.

The Rule, when viewed within the broader regulatory framework put forth since the enactment of Dodd-Frank, leads to the conclusion that municipal entities will be unaware as to who is protecting their interest. Based on the disclosure requirements of proposed Rule G-36 and proposed Rule G-23, will municipal entities understand that municipal advisors, who have to disclose conflicts of interest, in writing, act in their best interest, or will municipal officials believe that underwriters, who do not have to disclose anything in writing, are acting in their best interest? NAIPFA believes that the latter is more likely to occur. Rather than placing strong disclosure requirements on unaccountable underwriters, the MSRB has instead placed these requirements on municipal advisors. Doing so gives the impression that municipal advisors, not underwriters, possess the conflicts of interest. This is inconsistent with reality.

NAIPFA respectfully suggests that the G-36 Notice (and the MA Guidance) be amended to no longer require disclosures regarding "conflicts with various forms of compensation" and that Appendix A be eliminated in its entirety. Alternatively, if the MSRB determines that disclosures regarding compensation are required, NAIPFA strongly suggests that, because these disclosures are equally, if

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not more applicable to dealers serving as underwriters, similar disclosures should be required of them.[4]

At first blush, one might be tempted to argue that underwriters are not fiduciaries, and without the duty of loyalty there is no basis to compel underwriters to disclose their conflicts or their compensation. However, the MSRB in its MA Guidance imposes on municipal advisors the same duty to disclose compensation to obligated person clients under Rule G-17 as it does under G-36. It seems that fair dealing means one thing if you are a municipal advisor and something else entirely if you are an underwriter.

3. If Compensation Disclosure is Required, NAIPFA Suggests a Better Way to Do It

As noted above, NAIPFA asserts that the Appendix A requirement is unnecessary because the advisor's fiduciary duty will require that it not put its own financial interests before its client. Furthermore, the MSRB's requirement will confuse issuers because it addresses a problem that doesn't exist and inappropriately intrudes on the relationship between the advisor and its potential client. Leaving the wisdom of the requirement aside, the logistical issues raised by the disclosure proposal are themselves significant.

The MSRB would require that the disclosure be made

(i) In writing;
(ii) To officials of the municipal entity (or obligated person) with the authority to bind the municipal entity (or obligated person) by contract; and
(iii) receive written consent back;
(iv) before the municipal advisor may provide municipal advisory services.

The MSRB apparently assumes that all municipal advisory activity is undertaken only at such time as an issuer formally retains a municipal advisor to perform an agreed upon set of tasks. However, if the SEC's proposal on permanent registration is adopted, a variety of activities that typically occur prior to being retained would qualify as municipal advisory activities. Indeed, one could be deemed an advisor without ever being retained or compensated or ever having even discussed compensation.

For example, it may well be that any one of the following qualifies as municipal advisory activity:

- Meeting the executive director of a non-profit hospital at a conference and discussing with her how they plan to finance a new wing on the hospital;

[4] See NAIPFA's Comment Letter dated March 11, 2011 related to the Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities, submitted together with this Comment Letter.

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- Sending to an issuer official on an unsolicited basis a financing idea for a convention center the city is considering; or
- Responding to an RFP seeking a municipal advisor where the RFP identifies the project(s) to be financed and seeks ideas.

In which of these scenaria would it be remotely practical or even possible to have not only provided Appendix A but have received written consent to the "conflicts" back from the potential client? Obviously, the answer is none of them.

Perhaps the more appropriate way to think about this is that there can be no conflict between an advisor and its client relating to compensation before the advisor is retained for compensation. Indeed, some advisors may offer certain services absolutely free of charge and there can be no compensation-related conflict when there is no compensation. NAIPFA is prepared to accept that a fiduciary duty may attach to those services, but there is no possible benefit to be gained from - or protection afforded to an issuer by - providing Appendix A to the "client" in this circumstance.

NAIPFA also takes issue with the MSRB's overly restrictive definition of which individual(s) at the municipal entity or obligated person is required to receive and acknowledge the compensation disclosure. How is the advisor to know if the individual qualifies? What diligence is required to find out? What happens if it turns out the advisor gets it wrong?

NAIPFA believes a rational alternative to the disclosure requirement proposed by the MSRB would involve disclosure (i) of the conflicts that are actually applicable to a compensation methodology being proposed by a municipal advisor to a municipal entity client (ii) made at the time the compensation methodology is being proposed (iii) to the representative of the municipal entity designated by the municipal entity as the primary contact for the engagement.

This regime would make disclosure more meaningful, because it would relate to what is actually being proposed, when it is being proposed and to whom it is being proposed. Issuers would be free to solicit ideas from advisors and advisors would be free to offer ideas to potential clients. Only at such time as the parties actually consider engagement, and the terms of that engagement are being discussed would the disclosures need to be made, and no disclosure would be made when there is no compensation. Additionally, advisors would be permitted to rely on the apparent authority of an issuer representative when making the disclosure, provided the advisor has no reason to believe the individual with whom it is dealing lacks the requisite authority. Finally, the advisor may presume that consent to the compensation arrangement is granted if it either (a) receives an executed contract (or similar document) or a verbal acknowledgment that the terms of a written engagement letter (or similar document) have been accepted; or (b) receives written or verbal acknowledgment that it has been selected following an RFP process in which the form of compensation was disclosed and the applicable disclosure provided.

4. *The MSRB Should Clarify What it Means By Excessive Compensation*

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The MSRB states that excessive compensation violates both the duty of loyalty under G-36 and G-17's requirement to deal fairly. What the MSRB does not do is provide any guidance as to how a municipal advisor is to determine at what point compensation becomes excessive. The MSRB should provide that guidance. NAIPFA suggests that the following (or similar) criteria or considerations would be appropriate in making a determination about the reasonableness of compensation:

a. the time and labor required, the novelty and difficulty of the issue involved, and the skill requisite to perform the municipal advisory services properly;
b. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the municipal advisory; (i.e., if you take job A, does it limit your ability to obtain job B; if so, your fee can reflect that reality);
c. the fee customarily charged in the locality for similar municipal advisory services;
d. the amount involved and the results obtained;
e. the time limitations imposed by the client or by the circumstances;
f. the nature and length of the professional relationship with the client;
g. the experience, reputation, and ability of the municipal advisor or municipal advisors performing the services; and
h. whether the fee is fixed or contingent.

5. *NAIPFA Objects to the Presumption that Only Services Specifically Disclaimed Are Outside the Scope of Services Subject to a Fiduciary Duty*

The MSRB recognizes that not all advisory engagements are alike and that some are limited by the express wishes of the client. Nevertheless, the MSRB implies that only those services that an advisor specifically states in writing it is not performing or for which it is not responsible are exempt from the fiduciary duty. As noted above, there are any number of situations in which a municipal advisor may be providing municipal advisory services either without compensation or prior to being formally engaged. Indeed, the potential client may never actually engage this advisor or any advisor with regard to the matter or project that was the subject of discussion between the potential client and the advisor. In such instances, it would be obviously unreasonable for the advisor to be deemed to have had a fiduciary duty that extended beyond the limited boundaries of what the parties discussed. Accordingly, the MSRB should withdraw or clarify its statement that, unless the duty has been "expressly disclaimed . . . a municipal advisor has a duty to investigate and advise the municipal entity of alternatives to the proposed financing structure or product that are then reasonably feasible based on the issuer's financial circumstances and market conditions at the time, if those alternatives would better serve the interests of the municipal entity."

NAIPFA believes the presumption should be reversed, particularly in cases in which there is a writing that describes the services being performed. The issuer has no reason to assume that services will be performed by an advisor that are not specified in a writing when that document purports to set forth

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the services being requested or provided. At the very least, a municipal advisor should be permitted to make a blanket statement such as "only those services specifically set forth herein are within the scope of this engagement" without having to enumerate – even if it could identify - every other possible service that it is not performing.

6. *The MSRB Should Clarify the Various Due Diligence Requirements Set Forth Under Both the Fiduciary Duty of Care and the Fair Dealing Rule*

The MSRB states in various places and using different language several requirements that can be described as due diligence obligations. One, noted above, is the fiduciary "duty to investigate and advise the municipal entity of alternatives to the proposed financing structure or product that are then reasonably feasible based on the issuer's financial circumstances and market conditions at the time, if those alternatives would better serve the interests of the municipal entity." Another is the fiduciary duty to "make a reasonable inquiry as to the facts that are relevant to a municipal entity's determination of whether to proceed with a course of action." In a section titled *Advisor Not a Guarantor*, the MSRB states that the fiduciary duty of care "requires only that the advisor act competently and provide advice to the municipal entity after making reasonable inquiry into the representations of the municipal entity's counterparties, as well as then reasonably feasible alternatives to the financings or products proposed that might better serve the interests of its municipal client." And the fair dealing rules require that an advisor recommend a transaction or product to an obligated person client only if it has "concluded, in its professional judgment, that the transaction or product is appropriate for the client, given its financial circumstances, objectives, and market conditions, and must advise the client of material risks and characteristics of the structure or product."

NAIPFA believes these different formulations are unnecessarily obtuse. If, as we believe, the purpose of the guidance is to establish the general principle that an advisor must have a reasonable basis for recommending a course of action, whether because it has a fiduciary duty or under the rubric of fair dealing, the MSRB should simply say so. Similarly, if the MSRB believes that an advisor can only have a reasonable basis if it has obtained certain essential facts about the client and its objectives, it should say that, too. And, finally, if the MSRB believes that any recommendation of a course of action should include a description of the risks of that course of action, it should be equally clear about that.

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CONCLUSION:

NAIPFA believes the MSRB's entire approach to its new mission to protect issuers is wrong as a matter of law. It simply does not further and in some cases runs counter to the express provisions of the Dodd-Frank Act. The approach is also misguided because it focuses less on real-world problems than on those that the MSRB imagines issuers care about. By seeking to impose significant disclosure and other requirements on independent advisors while conspicuously exempting underwriters from similar requirements, the MSRB creates the patently false impression that independent advisors pose a greater threat to an issuer's health than underwriters do. For the reasons stated above and in NAIPFA's prior comment letters, we respectfully request that the MSRB re-think these and other rule proposals and develop a comprehensive regime that fulfills its mission.

Sincerely,

Colette J. Irwin-Knott, CIPFA
President, National Association of Independent Public Finance Advisors

cc: The Honorable Mary L. Schapiro, Commissioner
The Honorable Kathleen L. Casey, Commissioner
The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
Michael Coe, Counsel to Commissioner Aguilar
Martha Haines, Assistant Director and Chief, Office of Municipal Securities
Lynnette Hotchkiss, Executive Director, Municipal Securities Rulemaking Board

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March 21, 2011

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File Number SR-MSRB-2011-03

Dear Ms. Murphy:

The National Association of Independent Public Finance Advisors ("NAIPFA") appreciates this opportunity to provide comments to the Securities and Exchange Commission ("SEC") on proposed Rule G-23 and the accompanying interpretive notice submitted for consideration by the Municipal Securities Rulemaking Board ("MSRB").

NAIPFA, founded 21 years ago, is a professional organization of independent public finance advisory firms that provide public finance advice to municipal and non-profit entities. NAIPFA comprises thirty two member firms serving all fifty states from locations in twenty–six states. Independent public finance advisors offer a wide variety of consulting services to issuers and obligated persons. In 2009, NAIPFA members represented clients on over 2,800 separate bond issues with approximately $75 billion in proceeds.

Preliminary Statement

Since its adoption in 1977, MSRB Rule G-23 has been the subject of much discussion within the industry and in the financial press. The Rule has been modified - or ***not*** modified - several times. The concerns raised primarily related to the conflicts of interest inherent in permitting broker-dealers to serve as financial advisors then later resign to become the underwriter of the issue they helped structure. It is problematic because the firm in its role as advisor sets out to and does, in fact, gain the trust and confidence of its client. When a broker-dealer advisor suddenly resigns and shifts its role to that of an underwriter, the firm's interests are then at odds with its former municipal entity client (the issuer), because it is negotiating to purchase the bonds with a goal to resell them to investors for a profit.

On several occasions, NAIPFA has asked the MSRB to consider whether it was appropriate for a broker-dealer to provide the kind of advice that financial advisors typically provide, *i.e.*, advice with regard to the structure, timing and similar matters related to a financing, and then switch roles.[1] Among the concerns raised were that broker-dealer firms were developing relationships of trust and confidence through their actions and statements, but disclaimed legal responsibility when their municipal clients sought under local law to hold them to the fiduciary standards that others who provided similar advice were held.

In 2010, having seen that numerous municipalities suffered significant losses in connection with sometimes extremely complex financial transactions promoted by underwriters or underwriters acting as financial advisors, Congress determined that some issuers were not sophisticated enough to make

[1] See, *e.g.*, letters from NAIPFA dated October 28, 2005 and May 18, 2007, copies of which are attached.

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informed financial decisions or were taken advantage of by unscrupulous market participants. Through passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), and particularly Section 975 thereof, Congress created a new class of regulated entity – the municipal advisor – and directed the SEC and the MSRB, among others, to adopt rules to protect issuers and obligated persons. Understanding Congressional concerns and SEC initiatives, the MSRB in August 2010 proposed for comment changes to its Rule G-23. It received 73 comments, including a letter from NAIPFA supporting changes to the Rule.[2] In its current filing with the SEC, the MSRB proposes to modify Rule G-23 (the "Proposed Rule") and also to issue interpretive guidance (the "Guidance").

NAIPFA commends the MSRB for revisiting this issue. The proposed Rule takes some steps in eliminating conduct that NAIPFA and others have long recognized puts issuers and the public at risk. NAIPFA supports those changes that prohibit firms from acting as advisors and then switching roles. NAIPFA agrees with the following MSRB responses set forth in SEC Exchange Act Release No. 34-63946:

- The MSRB does not believe the proposed rule change would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act;
- The MSRB believes current Rule G-23 permits inherent conflicts of interest, which are not cured by disclosure and waiver provisions of the Rule;
- The MSRB believes that the potential negative impact on fees and market accessibility for small and/or infrequent issuers would be minimal compared to the protections that will be afforded to such issuer;
- The MSRB does not believe that exceptions should be provided for smaller offerings;
- The MSRB does not believe the use of electronic bidding platforms mitigates the conflict of interest posed by a dealer financial advisor's switching to an underwriter role;
- The MSRB does not believe requiring advance notice of competitive sale would provide adequate protections against conflicts of interest;
- The MSRB agrees that the role and interests of the dealer financial advisor are "significantly different" from the role and interests of a dealer acting as the underwriter for the same governmental unit; and
- The MSRB agrees that the issuer does not fully understand the implications of the ending of the financial advisory relationship with the issuer (which ends the dealer's fiduciary obligation to the issuer) and the arm's length relationship that is necessary due to the dealer's financial advisor becoming the underwriter of the transaction.

Unfortunately, notwithstanding clear direction from Congress, the MSRB failed to recognize the important distinction between providing advice and acting as an underwriter. Accordingly, NAIPFA objects to the Proposed Rule and Guidance to the extent it exempts from the definition of a municipal advisor all underwriters that render "advice to an issuer, including advice with respect to the structure, timing, terms and other similar matters concerning the issuance of municipal securities." Underwriters would still be able to provide the same advice as a municipal advisor without a fiduciary duty to the issuer.

As NAIPFA understands the purpose of Dodd-Frank, advice is only to be rendered to issuers by licensed municipal advisor professionals, registered with the Commission, who have appropriate expertise. Congress intended that those providing advice with respect to the *issuance of municipal securities,*

[2] See Letter dated September 30, 2010, from Steven F. Apfelbacher (the "2010 Comment Letter"), a copy of which is attached.

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including advice with respect to the structure, timing, terms, and other similar matters concerning such issues would be deemed fiduciaries with a duty to act in the best interests of the issuer client. This MSRB proposal is at variance with the purpose of the Act because the one party with potentially the most significant conflicts of interest - the underwriter – would still be permitted to give issuers advice with respect to the *issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such issues* without a corresponding fiduciary duty.

NAIPFA therefore reiterates its request set forth in the 2010 Comment Letter that the final sentence of section (b) of Rule G-23 be amended to read:

> *Notwithstanding the foregoing, for purposes of this rule, a financial advisory relationship shall not be deemed to exist when, in the course of acting as an underwriter, a broker, dealer or municipal securities dealer provides information to an issuer relating to the sale of the securities to investors such as transactional structures, the underwriter's capabilities to sell various securities, how particular terms of a security structure may affect rates and yields, and matters incidental to the underwriting of a new issue of municipal securities.*

In addition, the Guidance should make clear that the phrase "in the course of acting as an underwriter" means that the firm has either been retained by an issuer to purchase and distribute its securities, or is responding to requests for proposals or requests for qualifications from a potential issuer seeking an underwriter and has requested that such information be provided by the responding firms. In all other instances, providing "advice with respect to the structure, timing, terms and other similar matters concerning the issuance of municipal securities" would constitute financial advisory activities for purposes of Rule G-23.

NAIPFA's suggested changes to proposed Rule G-23 are consistent with the law, and consistent with the views we expressed in our comment letter to the SEC relating to municipal advisor registration.[3] Should the SEC disagree with our views and construe the underwriter's exception under §15B(e)(4)(C) of the Exchange Act to permit underwriters to provide advice to municipal entities regarding the issuance of municipal securities without either having to register or act with a fiduciary duty, NAIPFA urges the SEC to compel the MSRB to include in either Rule G-23 or the Guidance:

- Underwriters must decide prior to communicating with an issuer whether the underwriter will offer its services as an advisor or underwriter. The underwriter should not be allowed to rebut the role of municipal advisor "if the dealer clearly identifies itself as an underwriter from the earliest stages of the relationship with the issuer with respect to that issue."

- Brokers, dealers and municipal securities dealers ("underwriters") providing advice to issuers must disclose in no uncertain terms – in a document similar to Appendix A proposed within the MSRB's Proposed Rule G-36 and Rule G-17 Guidance to Municipal Advisors - that they:

[3] See letter dated February 22, 2011 from Colette Irwin-Knott, a copy of which is attached.

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- Are not acting as advisors but as underwriters;
- Are not fiduciaries to the issuer but rather counterparties dealing at arm's length;
- Have conflicts with issuers because they represent the interests of the investors or other counterparties which may result in benefits to other transaction participants at direct cost to the issuer;
- Seek to maximize their profitability and such profitability may or may not be transparent or disclosed to the issuer; and
- Have no continuing obligation to the issuer following the closing of transactions.

NAIPFA further urges that the rule changes be effective immediately upon SEC approval and not in six months as proposed. Additionally, underwriters should be prohibited from serving as municipal advisor and underwriter for an issuer at the same time. Last, changes to Rule G-23 should be considered only after the market has absorbed all regulatory changes and regulators can review objective evidence to assess any impact due only to Rule G-23.

Discussion

1. **NAIPFA objects to the MSRB's expansive view of the advisory activities in which dealers can engage without being deemed financial advisors.**

Congress was very clear about the activities that it considers to be advisory in nature. These changes are to be made in the municipal market and not within other markets. A municipal advisor is a person

> *who provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or undertakes a solicitation of a municipal entity.*

Congress also drafted its legislation to specifically include certain market participants and exempt others, at least when they are acting in certain defined and limited capacities. Thus, in the Exchange Act, Congress states that a "broker, dealer or municipal securities dealer serving as an underwriter (as defined in section 2(a)(11) of the Securities Act of 1933) is not a municipal advisor. Section 2(a)(11) provides that an "underwriter" is

> *any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.*

In short, Congress has clearly defined municipal advisory activities to mean advising issuers and borrowers with respect the structure, timing, terms and similar matters concerning a municipal bond issue. At the same time, it has defined underwriting activities to mean purchasing and distributing securities.

The distinction between advisory activities and underwriting activities has always had legal significance. Advisors sit on the same side of the table with the issuer, with all the legal responsibilities that go along with being an advisor, while the underwriter sits at arm's length on the other side of the table, negotiating

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the terms pursuant to which it will purchase the bonds with the end goal of making a profit when they are resold.[4] This distinction is further confirmed within the standard form of Bond Purchase Agreement developed by the industry. The purchase agreement makes it clear the underwriter is in an arm's length relationship with the underwriter.

The MSRB acknowledges the provisions in the law set forth above, but tries to draw lines that are inappropriate in concept and likely unworkable in practice. In the Guidance, the MSRB states that "a dealer that provides advice to an issuer with respect to the issuance of municipal securities will be presumed to be a financial advisor with respect to that issue." However, it goes on to say that the

> *presumption may be rebutted if the dealer clearly identifies itself as the underwriter from the earliest stages of its relationship with the issuer with respect to that issue. Thus, a dealer providing advice to the issuer with respect to the issuance of municipal securities (including the structure, timing and terms of the issue . . .) generally will not be viewed as a financial advisor for purposes of Rule G-23, if such advice is rendered in its capacity as underwriter for such issue. Thus, a dealer providing advice to an issuer with respect to the issuance of municipal securities (including the structure, timing and terms of the issue and other similar matters, such as the investment of bond proceeds, a municipal derivative, or other matters integrally related to the issue) generally will not be viewed as a financial advisor for purposes of Rule G-23, if such advice is rendered in its capacity as underwriter for such issue. Nevertheless, a dealer's subsequent course of conduct (e.g., representing to the issuer that it is acting only in the issuer's best interests, rather than as an arm's length counterparty, with respect to that issue) may cause the dealer to be considered a financial advisor with respect to such issue. In that case, the dealer will be precluded from underwriting that issue by Rule G-23(d).*

As a result of the way business is conducted today, the Guidance is unworkable in most situations. However, one plausible scenario in which the Guidance can work is a scenario in which the issuer has retained a financial advisor to represent its interests in connection with a contemplated financing. The advisor recommends and the issuer agrees that the best course of action is to pursue a negotiated financing. The issuer (with the assistance of the advisor) then conducts an RFP/RFQ process for the purpose of selecting the underwriter. The RFP solicits, among other things, ideas about the "structure, timing and other terms of the issue" being proposed. NAIPFA posits that providing information in that context should not cause the potential underwriter – whether it is ultimately selected or not – to be an advisor. Nor, after it is selected, should the underwriter be deemed an advisor for providing ideas about the "structure, timing and other terms of the issue." In this scenario, the issuer can readily distinguish between the roles of the advisor and the underwriter because it has engaged one of each. Where the Guidance becomes problematic is in the much more frequent scenario, the one where a potential issuer does not yet have – and may never have – an independent advisor working with it.

Issuers are routinely contacted by independent financial advisors, by firms that act only as underwriters and by firms that provide both advisory and underwriting services. Sometimes, but not always, the issuers have a prior relationship with a firm that has or is soliciting them for the purpose of obtaining their business. These contacts are often in writing but are just as likely to be oral. Topics addressed are likely to include the issuer's current financial situation and opportunities that may exist to accomplish one or more of what the firm knows or supposes to be the objectives of the issuer. The firm's communication

[4] For detailed discussions and analysis on this point, see, *e.g.,* submissions to the SEC relating to Exchange Act Release No. 34-63576 (File No. S7-45-10) from Robert Doty and Nathan R. Howard.

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with the issuer may well suggest that a particular transaction, described generally or in detail, might be advantageous to the issuer. In addition, the firm may offer to discuss the financial matters of a particular transaction more fully at a later time. Assuming that the communications described above – or an ensuing discussion – contains "advice with respect to the structure, timing, terms or other similar matters concerning the issuance of municipal securities," then, based on the Guidance as proposed, if the firm that contacted the issuer was a dealer, that firm would be presumed at that time to be a financial advisor unless it expressly identified that it was acting as an underwriter. However, the firm could *not* be acting as an underwriter at that time, because no such role would then exist.[5] **The only possible role that could exist at such a preliminary stage is that of advisor.**

In the normal course, the issuer may have discussions with several firms, some of which may be independent financial advisors who only provide financial advice and others may be dealers who sometimes serve as financial advisors and sometimes as underwriters. At the time these conversations are taking place, the issuer may not have even decided whether to pursue a transaction, let alone made any of the decisions about whether it will pursue a private loan or similar financing, a private placement or a public offering of bonds and, if the latter, whether the offering will be a competitive or negotiated bond sale. How is the dealer firm to indicate what role it is playing at such a preliminary stage? More importantly, what is the issuer supposed to think? The opportunity for confusion is great, as is the possibility that the issuer might decide to pursue a transaction using the dealer firm and never retain a financial advisor to provide the independent advice that it may have believed it already received.[6]

Congress intended to insulate municipalities from obtaining advice from individuals whose interests are contrary to those of the issuer. Therefore, NAIPFA respectfully suggests that this intent can only be realized if the exemption for underwriters under §15B(e)(4)(C) of the Exchange Act applies only when the underwriter has made clear what role it is playing in the transaction and thereafter does not influence the decision making process by providing advice or by providing information in a manner that could be perceived as advice. Notably, however, proposed Rule G-23 fails to accomplish this intent. Accordingly, we suggest, as we did in September 2010, that the final sentence of section (b) of Rule G-23 be amended to read:

> *Notwithstanding the foregoing, for purposes of this rule, a financial advisory relationship shall not be deemed to exist when, in the course of acting as an underwriter, a broker, dealer or municipal securities dealer provides information to an issuer relating to the sale of the securities to investors such as transactional structures, the underwriter's capabilities to sell various securities, how particular terms of a security structure may affect rates and yields, and matters incidental to the underwriting of a new issue of municipal securities.*

Proposed Rule G-23 only perpetuates the *status quo.* This will frustrate Congress' intent as it will leave the most vulnerable issuers open to the same abuses Congress sought to prevent with the passage of Dodd-Frank. What is more, when proposed Rule G-23 is taken together with proposed rules G-17 and G-

[5] *See* Letter from Nathan R. Howard, Esq., Municipal Advisor, WM Financial Strategies, to the Securities and Exchange Commission, dated February 22, 2011.

[6] As the MSRB itself states in its submission to the SEC supporting the proposed Rule changes, "[s]mall and infrequent issuers are, in many cases, unable to appreciate the nature of the conflict they are being asked to waive by the very dealer financial advisor that will benefit from the waiver."

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36, the potential for underwriters to wield dangerous levels of influence over municipal entities becomes clear, a result unequivocally contrary to the purpose of Dodd-Frank. As NAIPFA reads proposed Rule G-36, municipal advisors would have duties of loyalty and care to their municipal entity clients, which would include requirements that they take steps to learn the essential facts about the client's financial circumstances and objectives, only undertake assignments which they have the expertise and resources to perform, agree on the services to be performed and the compensation to be paid, disclose all conflicts, including any applicable to their compensation arrangement, and provide advice about all the feasible financing options then reasonably available. At all times the advisor must act in the best interests of the client without regard to its own financial and other interests.

Conversely, underwriters will not be bound by the dictates of proposed Rule G-36, and will be bound instead by the limited duties imposed by Rule G-17. Under proposed Rule G-17, underwriters would merely have a duty to deal fairly with the issuer, which the MSRB states is akin to a 10b-5 duty. In other words, an underwriter may not misrepresent the facts but its obligations do not include any affirmative duty to inquire into the financial circumstances and objectives of the issuer, to disclose the risks associated with a transaction it recommends or even to have any basis – reasonable or otherwise – for any transaction it recommends.[7]

Given the very limited duties the MSRB believes underwriters owe to municipal issuers, NAIPFA would argue that it not only contravenes Congressional intent but is affirmatively dangerous to extend to firms acting as underwriter the right to provide advice to issuers. Instead, as NAIPFA has stated on numerous occasions, an issuer should have the benefit of advice provided by a regulated municipal advisor whose interests are, and always will be, to do what is best for the client.

2. **NAIPFA objects to the notion of a rebuttable presumption when dealers provide advice but, if the presumption is rebuttable, dealers should be required to make affirmative disclosures of the conflicts inherent in their role as underwriter.**

For the reasons set forth above, NAIPFA asserts that the exemption from the definition of financial advisor in Rule G-23 is contrary to Dodd-Frank. However, should the SEC adopt the expansive view of what constitutes "acting as an underwriter" advanced by the MSRB, we believe that underwriters acting as financial advisors should be required to decide which role they will play with the issuer before they talk with the issuer and affirmatively disclose the conflicts inherent in their underwriting role to the issuer if that is the role they decide to purse. The MSRB highlights the conflict at the heart of the issue:

> *While underwriters have a duty of fair dealing to issuers under Rule G-17, they also have a duty to investors, whose interests are generally adverse to those of issuers.*

The MSRB also recognizes that the opportunity for confusion on the part of those issuers dealing with firms that provide a variety of services when it stated "that a dealer may not avail itself of the underwriter exception unless it maintains an arm's length relationship with the issuer." Nevertheless, the only affirmative requirement that the MSRB proposes to impose on a dealer providing advice to an issuer regarding matters related to the issuance of municipal securities is that the dealer "clearly identif[y] itself as an underwriter from the earliest stages of its relationship with the issuer with respect to that issue."

NAIPFA notes in this context the MSRB's proposals related to Rules G-36 and G-17. In particular, we note the extensive affirmative disclosure obligations the MSRB would seek to impose on municipal

[7] Underwriters have somewhat greater disclosure obligations when the transaction they recommend is "complex."

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advisors, and the lack of similar disclosures required of dealers. NAIPFA asserts that dealers providing advice should be required to do more than merely state they are acting as an underwriter to avoid being deemed a financial advisor for purposes of Rule G-23 (and otherwise). Instead, they should be required to state– in a document similar to Appendix A proposed within the MSRB's Proposed Rule G-36 and Rule G-17 Guidance to Municipal Advisors - that they:

- Are not acting as advisors but as underwriters;
- Are not fiduciaries to the issuer but rather counterparties dealing at arm's length;
- Have conflicts with issuers because they represent the interests of the investors or other counter parties which may result in benefits to other transaction participants at direct cost to the issuer;
- Total revenues and profitability may not be transparent or disclosed to the issuer; and
- Have no continuing obligation to the issuer following the closing of transactions.

NAIPFA calls on the SEC to also modify G-23 in a way that requires the underwriter acting as a financial advisor to decide before the underwriter approaches the issuer that the underwriter is presenting its services as an advisor or underwriter. This would avoid confusion on the part of the issuers as to the intentions of the underwriters acting as an advisor. Further similar conflict disclosure to the disclosure proposed for municipal advisors should be required by the underwriter if this is the role they have decided to pursue.

In addition, NAIPFA has seen situations where the underwriter acting as a financial advisor has resigned to purchase the debt issue but its financial advisor contract with the issuer remains in effect. The underwriter would then revert back to its role as financial advisor once the bonds were closed. This contract maneuver does not allow for another firm to assume the role of the financial advisor during the transaction or an opportunity to compete for the financial advisor role. Any regulatory actions should require that any contract the underwriter acting as an advisor had with an issuer be terminated when the dealer firm is hired or seeks to be hired as an underwriter to the issuer, swap counterparty or in any other role that is inconsistent with the role of a fiduciary.

3. NAIPFA objects to the MSRB's proposal that the proposed changes to Rule G-23 be effective for new issues awarded six months following approval of the Rule by the SEC.

The MSRB proposes that "the proposed rule change be made effective for new issues for which the Time of Formal Award . . . occurs more than six (6) months after the SEC approval." The stated reason for this effective date is "to allow issuers of municipal securities time to finalize any outstanding transactions that might be affected by the proposed rule change." NAIPFA believes – as apparently does the MSRB – that the substantive changes to Rule G-23 relating to role-switching are mandated by the imposition of a federal fiduciary duty and accordingly, that dealers acting in the role of advisor breach their fiduciary duty to an issuer when they switch roles to become a financial advisor. Because they had such a fiduciary duty under federal law effective October 1, 2010, NAIPFA asserts that any role-switching that occurred after that date was a violation of the Exchange Act.

Even assuming that issuers and underwriters were waiting for guidance on how the MSRB viewed Rule G-23 in light of Dodd-Frank, they were on notice in August 2010 when the MSRB proposed for comment the very changes it has now formally proposed to the SEC for adoption. The changes should be effective immediately upon approval by the SEC.

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The MSRB believes that the proposed rule would principally affect dealer financial advisors that are not small municipal advisors. Applying the rule effective on adoption would have provided sufficient time for the underwriter acting as an advisor to determine its appropriate role with an issuer. It would also provide immediate clarity to the issuer who is the party that is to benefit most from Dodd-Frank.

4. NAIPFA believes an underwriter should be prohibited from serving as a municipal advisor and underwriter for an issuer at the same time.

Within the MSRB filing, the MSRB agrees that the role and interests of the dealer financial advisor are "significantly different" from the role and interests of a dealer acting as the underwriter for the same governmental unit. Yet upon review of the comment letters, the MSRB has determined:

- Not to impose a cooling off period between the time a dealer completes a financial advisory engagement with an issuer and the time the dealer may serve as underwriter for a different issue by the same issuer. Rule G-23 is to be applied on an "issue by issue basis" so that the dealer financial advisor could serve as advisor on one issue and then serve as the underwriter on another issue for the same client even if the two issues are in the market at the same time; and
- It is appropriate that there be a one year cooling off period during which a dealer financial advisor could not serve as remarketing agent for the same issue of municipal securities. The MSRB goes on to state that a one year timeframe would more than adequately address any potential or actual conflicts of interest.

NAIPFA does not understand how there can be a conflict between the advisor/underwriter roles and a need for a cooling off period from the role as dealer financial advisor and yet the modified Rule G-23 change would allow for the underwriter acting as an advisor to undertake both activities at the same time with the same issuer. We all agree there is a conflict between the advisor/underwriter roles. Proposed Rule G-23 should be modified in a way that would force the underwriter acting as an advisor to decide which role they will play for the issuer and not be able to play both roles at the same time. NAIPFA further believes that if the one year cooling off period for remarketing conflicts is appropriate, there should be a one year cooling off period from the time an advisor underwriter terminates its role as municipal advisor and the advisor underwriter would be allowed to negotiate an issue with the issuer, act as swap counterparty or serve in any other role that is inconsistent with the role of a fiduciary. This modification would ensure that Rule G-23 would be fair and consistent in its application.

5. NAIPFA believes future changes to Rule G-23 should be considered only after the market has absorbed all regulatory changes and regulators can definitively assess any impact due only to Rule G-23.

Because the industry is having to react to and incorporate so many changes, NAIPFA respectfully requests that the SEC and MSRB not revisit Rule G-23 changes until sufficient time has elapsed to truly assess whether future changes will have the effect intended. The regulatory changes being discussed are significant and will likely change the current business models of advisors and underwriters. After the final rules of regulation have been established, there will be a period of time for the advisor and underwriters to adjust to the changes. Only when the market has adjusted to these significant changes and objective evidence has been gathered will regulators be able to assess the real impact of G-23.

Summary

We understand the pressure there is to adopt rules that meet the intent of Dodd-Frank. The fact is that Congress has determined to accept that, within the municipal market, there are municipal advisors and

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broker-dealers that serve as both municipal advisors and underwriters. In a less complicated scenario, advisors advise issuers and underwriters buy issuer bonds. This is a part of the conflict Congress intended to correct with Dodd-Frank. The MSRB agrees that the role and interests of the broker-dealer financial advisor are "significantly different" from the role and interests of a broker-dealer acting as the underwriter for the same governmental unit; yet the proposed Rule G-23 will allow broker-dealers acting as advisors to continue business as usual. NAIPFA's concern is that broker-dealers would be allowed to provide the same advice as municipal advisors without municipal advisor obligations. Broker-dealers could still be engaged by an issuer and then decide if they want to be the advisor or underwriter. Broker-dealers could work as the advisor and underwriter on different issues at the same time. It is clear that broker-dealers who act as advisors want to continue their lucrative business model. This business model of the past, however, must change if the full intent of Dodd-Frank is executed into regulation.

NAIPFA believes broker-dealers should not be allowed to provide unlimited advice without being an advisor with fiduciary duty to the issuer. As a result NAIPFA believes section (b) of Rule G-23 must be amended to provide guidance on the type of advice an underwriter can provide. Should the SEC believe, however, that underwriters have a broader exemption to provide advice, underwriters must be required to decide before they approach an issuer whether they will present themselves to the issuer as a municipal advisor or an underwriter. NAIPFA believes broker-dealers should be required to decide if they are in the advisor business or underwriting business. The broker-dealer should be able to do both but each role should follow the appropriate rules and regulations. Broker-dealers acting as advisors should not be allowed to confuse issuers as to their true role. Additionally, appropriate conflict disclosure should also be required for either role when they talk with the issuer and the rule should be effective immediately.

NAIPFA once again expresses its appreciation for the opportunity to submit its views on the MSRB's proposed Rule G-23 and interpretive guidance. We would be pleased to discuss any issues or concerns raised in this letter with representatives of the SEC. If we can be of any assistance or answer any questions, please feel free to contact me.

Sincerely,

Colette Irwin-Knott

Colette J. Irwin-Knott, CIPFA
President, National Association of Independent Public Finance Advisors

cc: The Honorable Mary L. Schapiro, Commissioner
The Honorable Kathleen L. Casey, Commissioner
The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
Michael Coe, Counsel to Commissioner Aguilar
Martha Haines, Assistant Director and Chief, Office of Municipal Securities
Lynette Hotchkiss, Executive Director, Municipal Securities Rulemaking Board