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August 19, 2019

VIA ELECTONIC MAIL

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street, NW Suite 1100
Washington, DC 20005

RE: MSRB Notice 2019-13

Dear Mr. Smith:

Acacia Financial Group, Inc. ("Acacia") is a national municipal advisory firm that serves a wide range of municipal bond issuing clients including high profile issuers, local small issuers and infrequent issuers. We appreciate the opportunity to comment on Municipal Securities Rulemaking Board (MSRB) Notice 2019-13 related to MSRB Rule G-23 in connection with the MSRB's retrospective rule review initiative.

Acacia believes that the prohibition on role switching, enacted with the 2011 amendments to Rule G-23, has been successful for its intended purpose and should remain in place. The amendments were made because the Securities and Exchange Commission (SEC) with support from the MRSB concluded that "a dealer financial advisor's ability to underwrite the same issue of municipal securities, on which it acted as financial advisor, presented a conflict that is too significant for the existing disclosure and consent." In addition, even in the case of competitive underwriting, the perception on the part of the issuers and investors that such a conflict may exist was sufficient to cause concern that permitting role switching was not consistent with "a free and open market in municipal securities" which the MSRB is mandated to protect. We believe that the reversal of Rule G-23 would undermine the intent of the Exchange Act to establish clear lines between interests that are public and interest that are private and promotes a culture of conflict that the Exchange Act serves to eliminate. Furthermore, under the Dodd Frank Act municipal advisors pursuant to G-42 are held to the highest standard of conduct as having a fiduciary duty to put its client's interest before its own. Therefore, permitting a dealer financial advisor (municipal advisor) to role switch would discount the fiduciary obligation placed on municipal advisors and create further confusion between the role of a municipal advisor and the role of an underwriter.

We do not believe that MSRB Rule G-23, as currently implemented, causes any harm to issuers, restrains their ability to engage with qualified dealers or limits market access in any way.

As recognized by both the Sec and the MSRB in 2011, the conflict presented by role switching is too great to cure by disclosure notification. Consequently, the MSRB recognized the best way to protect issuers was by eliminating this potentially abusive practice. As active municipal advisors pricing on average 2-3 deals per week, many on a competitive basis for small and less frequent issuers, we have observed no negative impact on our clients and therefore urge the MSRB to keep intact the prohibition on role switching.

Sincerely:

Kim M. Whelan
Co-President

Noreen P. White
Co-President

BDA Bond Dealers of America

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August 23, 2019

Submitted Electronically

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street NW
Washington, DC 20005

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

Dear Mr. Smith,

The Bond Dealers of America (BDA) is pleased to comment on MSRB Notice 2019-13, "Request for Comment on MSRB Rule G-23 on Activities of Dealers Acting as Financial Advisors." BDA is the only DC-based group exclusively representing the interests of securities dealers and banks focused on the U.S. fixed income markets.

We are encouraged that the MSRB has undertaken a review of Rule G-23. The nearly eight years that the current iteration of Rule G-23 has been effective have given market participants ample time to observe how the rule is functioning and where improvements and efficiencies can be implemented. In this letter we discuss several of the questions the MSRB poses in Notice 2019-13.

The BDA believes Rule G-23 generally works well and has been effective in addressing conflicts of interest that can arise on negotiated underwritings where a dealer municipal advisor (MA) would seek to serve as both an underwriter and MA on the same transaction. We have suggestions in several areas which we believe will improve the Rule without threatening any of its protections. We discuss our recommendations below.

Certain provisions of Rule G-23 warrant changes.

The BDA believes some compliance efficiencies could be gained by (i) making a clarifying change to the terminology used in the Rule; and (ii) eliminating Rule G-23 by combining key elements of Rule G-23 with the Interpretive Guidance for Underwriters under Rule G-17 and with Rule G-42, the rule that governs many other aspects of MA activity. Specific recommendations include:

- We recommend that the MSRB update the term "financial advisor" to "municipal advisor" wherever in the rule book it is appropriate and particularly in Rule G-23. "Financial advisor" and related uses of the term appear 20 times in Rule G-23, including in the rule's title. Some of the MSRB's own rules, like G-42 and D-13 use the "municipal advisor" terminology consistent with language in SEC rulemaking. Others, like G-23, use "financial advisor," which is inconsistent with

SEC terminology. The use of two different terms for persons engaged in the same activity is unnecessary and could be confusing.

- We urge the MSRB to adopt changes in the rules and interpretive guidance governing required disclosures to issuers by underwriters and dealer MAs. Interpretive guidance associated with Rule G-17 mandates that dealers provide written disclosures to issuer clients "in the earliest stages of the underwriter's relationship with the issuer." Guidance associated with Rule G-23 specifies that in order for a dealer to establish itself as an underwriter, not a MA, on a transaction, the dealer must "clearly [identify] itself in writing as an underwriter and not as a financial advisor from the earliest stages of its relationship with the issuer." Two separate requirements governing client disclosure rules are confusing and potentially conflicting. We ask that the MSRB eliminate the disclosure guidance related to Rule G-23 and consolidate all guidance related to dealer client disclosures into the guidance provided for Rule G-17.
- There is little justification for maintaining Rule G-23 as a separate rule. It would be appropriate for the MSRB to consolidate regulatory requirements for MA client relationships into a single rule, Rule G-42, and to fold the provisions of Rule G-23 and associated guidance into Rule G-42 and its guidance. The Appendix attached to this letter includes our recommended revisions to Rule G-42 incorporating provisions of Rule G-23.

We strongly oppose SEC action on a recent PFM request for guidance related to private placements. If the SEC does act, we recommend that the MSRB conform Rule G-23 to provide similar authority for dealer MAs as the SEC provides for non-dealer MAs.

The MSRB may be aware that PFM, the municipal advisory firm, has requested guidance from the SEC on the role of MAs in municipal private placement transactions.[1] Specifically, PFM has asked the SEC to publish guidance that would allow PFM and other non-dealer MAs to identify, solicit, and assess qualified investors, interact with investors, and perform coordination necessary with selected investors on private placement new issues. BDA strongly opposes PFM's request. PFM has essentially asked the SEC for permission to act as an unregistered broker dealer in performing placement agent activities, especially with respect to the function of identifying and interacting with investors. They have argued erroneously that such guidance is necessary for them to fulfill their fiduciary duty to issuers. If the SEC acts favorably on PFM's request, the full panoply of broker-dealer regulation focused on investor protection and safety and soundness would be discarded with respect to municipal private placements. We recommend that the MSRB specify in Rule G-42 or elsewhere that as far as MSRB rules go, it is impermissible for non-dealer MAs to conduct placement agent activities for their municipal issuer clients.

If the SEC does act favorably on PFM's request, non-dealer MAs would be permitted to engage in placement agent activities reserved in law and regulation for broker-dealers. However, dealer MAs would be prohibited from engaging in the same activities due to restrictions imposed by Rule G-23. Rule G-23 is clear that a dealer MA must choose between serving as MA or as underwriter/placement agent.

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[1] Letter from Cheryl Maddox, General Counsel, and Leo Karwejna, Chief Compliance Officer, PFM, to Brett Redfearn, Senior Special Counsel, and Rebecca Olsen, Director of the Office of Municipal Securities, Securities and Exchange Commission, October 30, 2018.

If the SEC acts favorably on PFM's request, we urge the MSRB to amend Rule G-23—or whatever rule in which dealer MA restrictions would be embodied—to ensure that dealer MAs would have the same authority on private placement transactions as non-dealer MAs.

The MSRB's review of Rule G-23 is welcome.

We welcome the MSRB's review of Rule G-23 as part of its retrospective rule review. We recommend specific changes to the structure and language of the Rule and associated interpretive guidance as specified above. We also recommend changing the Rule's treatment of placement agent activities if and when the SEC acts on PFM's request for guidance related to non-dealer MAs and private placements. We look forward to working with you as you move forward with respect to Rule G-23.

***

If you or your staff has any questions or need additional information, please do not hesitate contact me directly at 202 204 7901 or mnicholas@bdamerica.org. We look forward to your response.

Sincerely,

Michael Nicholas
Chief Executive Officer
Bond Dealers of America

Appendix. Suggested Edits for MSRB Rule G-42 that Incorporates Rule G-23.

(Recommended added text is underlined. Recommended deleted text is crossed through.)

(a) *Standards of Conduct*.

(i) A municipal advisor to an obligated person client shall, in the conduct of all municipal advisory activities for that client, be subject to a duty of care.

(ii) A municipal advisor to a municipal entity client shall, in the conduct of all municipal advisory activities for that client, be subject to a fiduciary duty that includes a duty of loyalty and a duty of care.

(b) *Disclosure of Conflicts of Interest and Other Information*. A municipal advisor must, prior to or upon engaging in municipal advisory activities, provide to the municipal entity or obligated person client full and fair disclosure in writing of:

(i) all material conflicts of interest, including:

(A) any affiliate of the municipal advisor that provides any advice, service, or product to or on behalf of the client that is directly related to the municipal advisory activities to be performed by the disclosing municipal advisor;

(B) any payments made by the municipal advisor, directly or indirectly, to obtain or retain an engagement to perform municipal advisory activities for the client;

(C) any payments received by the municipal advisor from a third party to enlist the municipal advisor's recommendation to the client of its services, any municipal securities transaction or any municipal financial product;

(D) any fee-splitting arrangements involving the municipal advisor and any provider of investments or services to the client;

(E) any conflicts of interest arising from compensation for municipal advisory activities to be performed that is contingent on the size or closing of any transaction as to which the municipal advisor is providing advice, or additional compensation for acting as a placement agent; and

(F) any other actual or potential conflicts of interest, of which the municipal advisor is aware after reasonable inquiry, that could reasonably be anticipated to impair the municipal advisor's ability to provide advice to or on behalf of the client in accordance with the standards of conduct of section (a) of this rule, as applicable.

If a municipal advisor concludes that it has no known material conflicts of interest based on the exercise of reasonable diligence by the municipal advisor, the municipal advisor must provide a written statement to the client to that effect.

(ii) any legal or disciplinary event that is material to the client's evaluation of the municipal advisor or the integrity of its management or advisory personnel.

Information regarding legal or disciplinary events may be disclosed for purposes of this subsection by identification of the specific type of event and specific reference to the relevant portions of the municipal advisor's most recent Forms MA or MA-I filed with the Commission if the municipal advisor provides detailed information specifying where the client may electronically access such forms.

(c) *Documentation of Municipal Advisory Relationship*. A municipal advisor must evidence each of its municipal advisory relationships by a writing or writings created and delivered to the municipal entity or obligated person client prior to, upon or promptly after the establishment of the municipal advisory relationship. The writing(s) must be dated and include, at a minimum,

(i) the form and basis of direct or indirect compensation, if any, for the municipal advisory activities to be performed;

(ii) the information required to be disclosed by section (b) of this rule;

(iii) a description of the specific type of information regarding legal and disciplinary events requested by the Commission on Form MA and Form MA-I, which includes information about any criminal actions, regulatory actions, investigations, terminations, judgments, liens, civil judicial actions, customer complaints, arbitrations and civil litigation, and detailed information specifying where the client may electronically access the municipal advisor's most recent Form MA and each most recent Form MA-I filed with the Commission;

(iv) the date of the last material change or addition to the legal or disciplinary event disclosures on any Form MA or Form MA-I filed with the Commission by the municipal advisor and a brief explanation of the basis for the materiality of the change or addition;

(v) the scope of the municipal advisory activities to be performed and any limitations on the scope of the engagement;

(vi) the date, triggering event, or means for the termination of the municipal advisory relationship, or, if none, a statement that there is none; and

(vii) any terms relating to withdrawal from the municipal advisory relationship.

(d) *Recommendations and Review of Recommendations of Other Parties*. If a municipal advisor makes a recommendation of a municipal securities transaction or municipal financial product to a municipal entity or obligated person client, it must have a reasonable basis to believe that the recommended municipal securities transaction or municipal financial product is suitable for the client, based on the information obtained through the reasonable diligence of the municipal advisor. If the review of a recommendation of another party is requested by the municipal entity or obligated person client and within the scope of the engagement, the municipal advisor must determine, based on the information obtained through the reasonable diligence of such municipal advisor, whether the municipal securities transaction or municipal financial product is or is not suitable for the client. In addition, the municipal advisor must inform the client of:

(i) the municipal advisor's evaluation of the material risks, potential benefits, structure, and other characteristics of the recommended municipal securities transaction or municipal financial product;

(ii) the basis upon which the municipal advisor reasonably believes that the recommended municipal securities transaction or municipal financial product is, or (as may be applicable in the case of a review of a recommendation) is not, suitable for the client; and

(iii) whether the municipal advisor has investigated or considered other reasonably feasible alternatives to the recommended municipal securities transaction or municipal financial product that might also or alternatively serve the client's objectives.

(e) *Specified Prohibitions*.

(i) A municipal advisor is prohibited from:

(A) receiving compensation that is excessive in relation to the municipal advisory activities actually performed;

(B) delivering an invoice for fees or expenses for municipal advisory activities that is materially inaccurate in its reflection of the activities actually performed or the personnel that actually performed those activities;

(C) making any representation or the submission of any information that the municipal advisor knows or should know is either materially false or materially misleading due to the omission of a material fact about the capacity, resources or knowledge of the municipal advisor, in response to requests for proposals or qualifications or in oral presentations to a client or prospective client, for the purpose of obtaining or retaining an engagement to perform municipal advisory activities;

(D) making, or participating in, any fee-splitting arrangement with underwriters on any municipal securities transaction as to which it has provided or is providing advice, and any undisclosed fee-splitting arrangements with providers of investments or services to a municipal entity or obligated person client of the municipal advisor; and

(E) making payments for the purpose of obtaining or retaining an engagement to perform municipal advisory activities other than: (1) payments to an affiliate of the municipal advisor for a direct or indirect communication with a municipal entity or obligated person on behalf of the municipal advisor where such communication is made for the purpose of obtaining or retaining an engagement to perform municipal advisory activities; (2) reasonable fees paid to another municipal advisor registered as such with the Commission and the Board for making such a communication as described in subparagraph (e)(i)(E)(1); and (3) payments that are permissible "normal business dealings" as described in Rule G-20.

(ii) Except as provided for in paragraphs .14, .15, and .16 of the Supplementary Material of this rule, a municipal advisor to a municipal entity client, and any affiliate of such municipal advisor, is prohibited from (1) acquiring as principal either alone or as a participant in a syndicate or other similar account formed for the purpose of purchasing, directly or indirectly, from the issuer all or any portion of such issue, or act as agent for the issuer in arranging the placement of such issue; or (2) engaging with the municipal entity client in a principal transaction that is the same, or directly related to the, issue of

municipal securities or municipal financial product as to which the municipal advisor is providing or has provided advice to the municipal entity client. The use of the term "indirectly" in this section (e) shall not preclude a municipal advisor that has a municipal advisory relationship with respect to the issuance of municipal securities from purchasing such securities from an underwriter, either for its own trading account or for the account of customers, except to the extent that such purchase is made to contravene the purpose and intent of this rule, nor shall it preclude a municipal advisor that has a municipal advisory relationship with respect to the issuance of municipal securities from serving as successor remarketing agent for such issue if the municipal advisory relationship in connection with such issue has been terminated for a period of at least one (1) year prior to such municipal advisor being selected to serve as successor remarketing agent.

(f) *Definitions*.

(i) “Advice” shall, for purposes of this rule, have the same meaning as in Section 15B(e)(4)(A)(i) of the Act, 17 CFR 240.15Ba1-1(d)(1)(ii) and other rules and regulations thereunder.

(ii) “Affiliate of the municipal advisor” shall mean, for purposes of this rule, any person directly or indirectly controlling, controlled by, or under common control with such municipal advisor.

(iii) “Municipal advisor” shall, for purposes of this rule, have the same meaning as in Section 15B(e)(4) of the Act, 17 CFR 240.15Ba1-1(d)(1)-(4) and other rules and regulations thereunder; provided that it shall exclude a person that is otherwise a municipal advisor solely based on activities within the meaning of Section 15B(e)(4)(A)(ii) of the Act and rules and regulations thereunder or any solicitation of a municipal entity or obligated person within the meaning of Section 15B(e)(9) of the Act and rules and regulations thereunder.

(iv) “Municipal advisory activities” shall, for purposes of this rule, mean those activities that would cause a person to be a municipal advisor as defined in subsection (f)(iii) of this rule.

(v) A “municipal advisory relationship” shall, for purposes of this rule, be deemed to exist when a municipal advisor enters into an agreement to engage in municipal advisory activities for a municipal entity or obligated person. The municipal advisory relationship shall be deemed to have ended on the date which is the earlier of (i) the date on which the municipal advisory relationship has terminated pursuant to the terms of the documentation of the municipal advisory relationship required in section (c) of this rule or (ii) the date on which the municipal advisor withdraws from the municipal advisory relationship.

(vi) “Municipal entity” shall, for purposes of this rule, have the same meaning as in Section 15B(e)(8) of the Act, 17 CFR 240.15Ba1-1(g) and other rules and regulations thereunder.

(vii) “Obligated person” shall, for purposes of this rule, have the same meaning as in Section 15B(e)(10) of the Act, 17 CFR 240.15Ba1-1(k) and other rules and regulations thereunder.

(viii) “Official statement” shall, for purposes of this rule, have the same meaning as in Rule G-32(d)(vii).

(ix) “Principal transaction” shall mean, for purposes of this rule, when acting as principal for one’s own account, a sale to or a purchase from the municipal entity client of any security or entrance into any

derivative, guaranteed investment contract, or other similar financial product with the municipal entity client.

Supplementary Material

.01 Duty of Care. Municipal advisors must exercise due care in performing their municipal advisory activities. The duty of care includes, but is not limited to, the obligations discussed in this paragraph .01. A municipal advisor must possess the degree of knowledge and expertise needed to provide the municipal entity or obligated person client with informed advice. A municipal advisor also must make a reasonable inquiry as to the facts that are relevant to a client's determination as to whether to proceed with a course of action or that form the basis for any advice provided to the client. A municipal advisor must undertake a reasonable investigation to determine that it is not basing any recommendation on materially inaccurate or incomplete information. Among other matters, a municipal advisor must have a reasonable basis for:

(a) any advice provided to or on behalf of a client;

(b) any representations made in a certificate that it signs that will be reasonably foreseeably relied upon by the client, any other party involved in the municipal securities transaction or municipal financial product, or investors in the municipal entity client's securities or securities secured by payments from an obligated person client; and

(c) any information provided to the client or other parties involved in the municipal securities transaction in connection with the preparation of an official statement for any issue of municipal securities as to which the municipal advisor is advising.

.02 Duty of Loyalty. Municipal advisors must fulfill a duty of loyalty in performing their municipal advisory activities for municipal entity clients. The duty of loyalty includes, but is not limited to, the obligations discussed in this paragraph .02. A municipal advisor must deal honestly and with the utmost good faith with a municipal entity client and act in the client's best interests without regard to the financial or other interests of the municipal advisor. A municipal advisor must not engage in municipal advisory activities for a municipal entity client if it cannot manage or mitigate its conflicts of interest in a manner that will permit it to act in the municipal entity's best interests.

.03 Action Independent of or Contrary to Advice. If a municipal entity or obligated person client of a municipal advisor elects a course of action that is independent of or contrary to advice provided by the municipal advisor, the municipal advisor is not required on that basis to disengage from the municipal advisory relationship.

.04 Limitations on the Scope of the Engagement. Nothing contained in this rule shall be construed to permit the municipal advisor to alter the standards of conduct or impose limitations on any of the duties prescribed herein. If requested or expressly consented to by the municipal entity or obligated person client, however, a municipal advisor may limit the scope of the municipal advisory activities to be performed to certain specified activities or services. If the municipal advisor engages in a course of conduct that is inconsistent with any such agreed upon limitations, it may result in negating the effectiveness of such limitations.

.05 Conflicts of Interest. Disclosures of conflicts of interest by a municipal advisor to its municipal entity or obligated person client must be sufficiently detailed to inform the client of the nature, implications and potential consequences of each conflict. Such disclosures also must include an explanation of how the municipal advisor addresses or intends to manage or mitigate each conflict.

.06 Relationship Documentation. During the term of the municipal advisory relationship, the writing(s) required by section (c) of this rule must be promptly amended or supplemented to reflect any material changes or additions, and the amended writing(s) or supplement must be promptly delivered to the client. This amendment and supplementation requirement applies to any changes and additions that are discovered, or should have been discovered, based on the exercise of reasonable diligence by the municipal advisor. The information described in subsection (c)(ii) of this rule is not required if the municipal advisor previously fully complied with the requirements of section (b) of this rule to disclose conflicts of interest and other information and subsection (c)(ii) would not require the disclosure of any materially different information than that previously disclosed to the client.

.07 Inadvertent Advice. A municipal advisor is not required to comply with sections (b) and (c) of this rule if the municipal advisor meets all of the following requirements. In the event that a municipal advisor inadvertently engages in municipal advisory activities for a municipal entity or obligated person and does not intend to continue the municipal advisory activities or enter into a municipal advisory relationship, the municipal advisor must, as promptly as possible after discovery of the provision of inadvertent advice, provide a document to such municipal entity or obligated person that is dated and includes:

(a) a disclaimer that the municipal advisor did not intend to provide advice and that, effective immediately, it has ceased engaging in municipal advisory activities with respect to that municipal entity or obligated person in regard to all transactions and municipal financial products as to which advice was inadvertently provided;

(b) a notification that such municipal entity or obligated person should be aware that the disclosure of material conflicts of interest and other information required by section (b) of this rule has not been provided;

(c) an identification of all of the advice that was inadvertently provided, based on a reasonable investigation; and

(d) a request that the municipal entity or obligated person acknowledge receipt of the document.

A municipal advisor utilizing this alternative must promptly conduct a review of its written supervisory and compliance policies and procedures to ensure they are reasonably designed to prevent the provision of inadvertent advice to municipal entities and obligated persons. The use of this alternative has no effect on the applicability of any provisions of this rule other than sections (b) and (c) or any other legal requirements applicable to municipal advisory activities.

.08 Applicability of State or Other Laws and Rules. Municipal advisors may be subject to fiduciary or other duties under state or other laws. Nothing contained in this rule shall be deemed to supersede any more restrictive provision of state or other laws applicable to municipal advisory activities. In addition, the specific prohibition in subsection (e)(ii) of this rule shall not apply to an acquisition as principal, either alone or as a participant in a syndicate or other similar account formed for the purpose of

purchasing, directly or indirectly, from an issuer all or any portion of an issuance of municipal securities on the basis that the municipal advisor provided advice as to the issuance because that is a type of transaction that is addressed and prohibited in certain circumstances by Rule G-23.

.09 Suitability. A determination of whether a municipal securities transaction or municipal financial product is suitable must be based on numerous factors, as applicable to the particular type of client, including, but not limited to, the client's financial situation and needs, objectives, tax status, risk tolerance, liquidity needs, experience with municipal securities transactions or municipal financial products generally or of the type and complexity being recommended, financial capacity to withstand changes in market conditions during the term of the municipal financial product or the period that municipal securities to be issued in the municipal securities transaction are reasonably expected to be outstanding and any other material information known by the municipal advisor about the client and the municipal securities transaction or municipal financial product, after reasonable inquiry.

.10 Know Your Client. A municipal advisor must use reasonable diligence, in regard to the maintenance of the municipal advisory relationship, to know and retain the essential facts concerning the client and concerning the authority of each person acting on behalf of such client. The facts "essential" to "knowing a client" include those required to:

(a) effectively service the municipal advisory relationship with the client;

(b) act in accordance with any special directions from the client;

(c) understand the authority of each person acting on behalf of the client; and

(d) comply with applicable laws, regulations and rules.

.11 Excessive Compensation. Depending on the specific facts and circumstances of the engagement, a municipal advisor's compensation may be so disproportionate to the nature of the municipal advisory activities performed as to constitute an unfair practice in violation of Rule G-17. Among the factors relevant to whether a municipal advisor's compensation is disproportionate to the nature of the municipal advisory activities performed are the municipal advisor's expertise, the complexity of the municipal securities transaction or municipal financial product, whether the fee is contingent upon the closing of the municipal securities transaction or municipal financial product, the length of time spent on the engagement and whether the municipal advisor is paying any other relevant costs related to the municipal securities transaction or municipal financial product.

.12 529 College Savings Plans, ABLE Programs and Other Municipal Fund Securities. This rule applies equally to municipal advisors to sponsors or trustees of 529 college savings plans, ABLE programs (*i.e.*, a program established and maintained by a state, or an agency or instrumentality thereof, to implement the Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014), and other municipal fund securities. All references in this rule to an "official statement" include the disclosure document for a 529 college savings plan or an ABLE program and the investment circular or information statement for a local government investment pool.

.13 Principal Transactions - Other Similar Financial Products. For purposes of subsection (f)(ix) of this rule, which defines the term "principal transaction," the phrase "other similar financial product"

includes a bank loan, but only if it is in an aggregate principal amount of $1,000,000 or more and it is economically equivalent to the purchase of one or more municipal securities.

.14 Principal Transactions – Successor Municipal Advisor. A broker, dealer, or municipal securities dealer that previously had a municipal advisory relationship with respect to an issuance of municipal securities shall not be prohibited from acquiring as principal either alone or as a participant in a syndicate or other similar account formed for the purpose of purchasing, directly or indirectly, from the issuer all or any portion of such issue, or act as agent for the issuer in arranging the placement of such issue, if the issuer engaged a successor municipal advisor, or if the municipal advisory relationship in connection with the issue has been terminated for a period of at least one (1) year.

.15 Principal Transactions – Placements with Governmental Entities. A municipal advisor shall not be prohibited from acting as agent for the issuer in arranging the placement of the entire issue with any state, local or federal governmental entity as part of a plan of financing by such entity for or on behalf of the issuer, but only if such municipal advisor does not receive compensation from any person other than with respect to municipal advisory services related to such placement and does not receive compensation from any person for underwriting any contemporaneous financing transaction directly or indirectly related to such issue undertaken by the state, local, or federal governmental entity with which such issue was placed.

.~~14~~ 16 Principal Transactions - Exception for Transactions in Specified Fixed Income Securities. Engaging in a principal transaction with a municipal entity client is not specifically prohibited under subsection (e)(ii) of this rule if:

(a) the municipal advisor is a broker-dealer registered under Section 15 of the Act, and each account as to which the municipal advisor relies on this paragraph .14 16 is a brokerage account subject to the Act, and the rules thereunder, and the rules of the self-regulatory organization(s) of which it is a member, and is an account as to which the municipal advisor exercises no investment discretion (as defined in Section 3(a)(35) of the Act), except investment discretion granted by a municipal entity client on a temporary or limited basis;

(b) neither the municipal advisor, nor any affiliate of the municipal advisor, is providing or has provided advice to the municipal entity client as to an issue of municipal securities or a municipal financial product that is directly related to the principal transaction (other than advice as to another principal transaction under circumstances meeting all the requirements of this paragraph .1416);

(c) the principal transaction is a sale to or a purchase from the municipal entity client of any U.S. Treasury security, agency debt security, or corporate debt security (as defined in paragraph .1517 of the Supplementary Material) and does not involve municipal escrow investments (as defined in 17 CFR 240.15Ba1-1(h)); and

(d) the municipal advisor either: (1) discloses to the municipal entity client in writing before the completion of the transaction the capacity in which the municipal advisor is acting and obtains the consent of the municipal entity client to such transaction or (2) executes the transaction under circumstances meeting all of the following requirements:

(A) neither the municipal advisor nor any of its affiliates are the issuer of, or, at the time of the sale, an underwriter (as defined in 17 CFR 240.15c2-12(f)(8)) of, the security;

(B) the municipal entity client has executed a written, revocable consent prospectively authorizing the municipal advisor directly or indirectly to act as principal for its own account in selling any security to or purchasing any security from the municipal entity client, so long as such written consent is obtained after written disclosure to the municipal entity client explaining: the circumstances under which the municipal advisor directly or indirectly may engage in principal transactions; the nature and significance of conflicts with its municipal entity client's interests as a result of the transactions; and how the municipal advisor addresses those conflicts;

(C) the municipal advisor, prior to the execution of each principal transaction, informs the municipal entity client, orally or in writing, of the capacity in which it may act with respect to such transaction and obtains consent from the municipal entity client, orally or in writing, to act as principal for its own account with respect to such transaction;

(D) the municipal advisor sends a written confirmation at or before completion of each such transaction that includes, in addition to the information required by 17 CFR 240.10b-10 or Rule G-15, a conspicuous, plain English statement informing the municipal entity client that the municipal advisor disclosed to the client prior to the execution of the transaction that the municipal advisor may be acting in a principal capacity in connection with the transaction, the municipal entity client authorized the transaction, and the municipal advisor sold the security to, or bought the security from, the municipal entity client for its own account;

(E) the municipal advisor sends to the municipal entity client, no less frequently than annually, written disclosure containing a list of all transactions that were executed in the client's account in reliance upon subsection (d)(2) of this paragraph ~~.14~~16, and the date and price of such transactions; and

(F) each written disclosure required by subsection (d)(2) of this paragraph .~~14~~16 includes a conspicuous, plain English statement that the municipal entity client may revoke the written consent referred to in paragraph (d)(2)(B) of this paragraph . ~~14~~16 without penalty at any time by written notice to the municipal advisor.

This paragraph .~~14~~ 16 shall not be construed as relieving in any way a municipal advisor from acting in the best interest of its municipal entity clients, nor shall it relieve the municipal advisor from any obligation that may be imposed by other applicable provisions of the federal securities laws and state law.

.~~15~~ 17 Terms Relating to the Exception in Paragraph ~~.14~~16. For purposes of paragraph ~~.14~~ 16 and this paragraph .~~15~~ 17 of the Supplementary Material:

(a) "agency" means a U.S. executive agency as defined in 5 U.S.C. 105 that is authorized to issue debt directly or through a related entity, such as a government corporation, or to guarantee the repayment of principal and/or interest of a debt security issued by another entity. The term excludes the U.S. Department of the Treasury in the exercise of its authority to issue U.S. Treasury securities;

(b) "agency debt security" means a debt security (i) issued or guaranteed by an agency, or (ii) issued or guaranteed by a government-sponsored enterprise, including a securitized product that is issued by an agency or a government-sponsored enterprise, or, for which, the principal or interest (or both) is guaranteed by an agency or a government-sponsored enterprise;

(c) “corporate debt security” means a debt security that is U.S. dollar-denominated and issued by a U.S. or foreign private issuer and, if a “restricted security” as defined in 17 CFR 230.144(a)(3), sold pursuant to 17 CFR 230.144A, but does not include a money market instrument;

(d) “government-sponsored enterprise” has the same meaning as defined in 2 U.S.C. 622(8);

(e) “money market instrument” means a debt security that at issuance has a maturity of one calendar year or less, or, if a discount note issued by an agency or a government-sponsored enterprise, a maturity of one calendar year and one day or less;

(f) “securitized product” means a security collateralized by any type of financial asset, such as a loan, a lease, a mortgage, or a secured or unsecured receivable, and includes, but is not limited to, an asset-backed security, a synthetic asset-backed security, and any residual tranche or interest of any security specified above, which tranche or interest is considered a debt security; and

(g) “U.S. Treasury security” means a security issued by the U.S. Department of the Treasury to fund the operations of the federal government or to retire such outstanding securities.

6330 Lamar Avenue, Suite 200
Overland Park, Kansas 66202

Jeff White, Managing Member
913.313.8077
jwhite@columbiacapital.com

August 19, 2019

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street NW
Washington, DC 20005

VIA ELECTRONIC DELIVERY

Dear Mr. Smith:

In its Request for Comment 2019-13 ("RFC"), the MSRB seeks input from market participants on the value and function of MSRB G-23 ("G-23") with respect to the activities of dealers acting as financial advisors. Columbia Capital Management, LLC is a non-dealer financial advisor, primarily serving issuers and borrowers in the Midwest, California and Hawaii.

As the RFC notes, the effect of G-23 was strengthened following the Dodd-Frank Act's creation of a statutory duty for municipal advisors, recognizing that the inherent conflict created when a dealer serves as both a financial advisor and underwriter with respect to the same municipal securities offering is too significant to be resolved through disclosure alone.

Columbia Capital submits that G-23 is functioning as intended. In fact, the MSRB should consider strengthening G-23, in particular as it relates to smaller and infrequent issuers. Dealers still appear to be providing advice as is evidenced by the number of bond issuances, including bond refundings, completed by smaller and infrequent issuers without a municipal advisor involved. One need only to look at the flurry of negotiated transactions, including numerous advance refundings, during November and December 2017, triggered by legislative changes to tax law, that were executed without municipal advisors. According to Bloomberg, there were 63 negotiated transactions in Missouri between November 1 and December 31, 2017. Of these, Bloomberg coded 33 as refundings. Of those 33, only five (15%), had a financial advisor involved.

Role-switching is detrimental to municipal issuers and obligated persons because it creates a fundamental conflict of interest. For example, although MSRB guidance on G-23 permits dealers to provide "plain vanilla" refunding analysis as general market information, the underwriting exclusion is not triggered until an issuer determines to undertake a transaction. The answer to, "do we do this refunding now or do we wait?" is almost certainly "advice" and likely an MSRB G-42 "recommendation" due to its call to action nature.

Our specific responses to certain questions raised in the RFC follow:

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

   In our practice, we find most dealers take their obligations under G-23 seriously and seek to find the proper exemption or exclusion when they wish to provide more than general market information. Anecdotally, we believe abuses persist, particularly for smaller or infrequent issuers/borrowers that are not aware of the anti-role switching protections or are unclear what statutory duty is imposed on a dealer providing advice under an exemption/exclusion versus a municipal advisor.

   Our clients routinely provide a path for direct dealer interaction via the IRMA exemption and resolution of the required IRMA paperwork is generally quick and streamlined. As a firm, we believe the intent of the MA Rule was to ensure this free flow of information. Our practice is to work collaboratively with dealers through the IRMA exemption to provide them with the issuer access they request.

2. **Have small and/or infrequent issuers experienced any particularized benefits or costs, such as limited choices among financial advisors or underwriters or placement agents serving their market, due to Rule G-23's prohibition on role switching? Does Rule G-23 strike the right balance between issuer protection and issuer choice?**

   The MA market remains robust and highly competitive, even for small and infrequent issuers. We do not believe G-23 imposes any additional burden or constraint on small or infrequent issuers and, in fact, provides a level of protection to the issuers and borrowers that can benefit most from the involvement of a fiduciary on their transactions. We do not believe G-23 constrains issuer choice.

5. **Does Rule G-23 prohibit any activities that would be permitted under the SEC's municipal advisor rules in ways that are contrary to the regulatory purpose underlying the rules? For example, does Rule G-23 unduly impede the activities of dealers operating under an exclusion or exemption from registration under the SEC's municipal advisor rules?**

   Our experience is that the exclusions and exemptions regime provides more or less unfettered access from dealers to issuers and borrowers. The separation of advice from execution is the only way to ensure issuers and borrowers understand the motivations of the parties providing them with advice. We do not believe G-23 prohibits activities that would be beneficial to issuers and borrowers.

6. **Should the MSRB make any amendments to the Role Switching Exceptions? For example –**

b. **Should Rule G-23 provide an exception to a dealer that avails itself of any of the exclusions or exemptions under the SEC's municipal advisor rules, such as the IRMA exemption?**
   No. The purpose of the exceptions and exclusions is to provide clearly understood, documented and legitimate avenues for the free-flow of market information without sacrificing the clear distinction between advice and execution. Returning to pre-G-23 days where dealers could simply change roles with a resignation letter, in this case adding the minor speed-bump of an additional disclosure to achieve the same result, obviates the intent of G-23, runs counter to the direction of the SEC and returns our market to one where conflicts abound.

c. **Should Rule G-23 provide an exception for competitive bid underwritings? If so, should such an exception be limited to small issuances (e.g., $15 million or less in aggregate principal amount)?**
   No. Respectfully, the underlying assumption of this question is that competitive sales magically appear in the market without thought or the need for G-42 "advice." Competitive sales should result from carefully constructed notices of sale that reflect the specific needs of the issuer or borrower, anticipated market conditions at the time of sale, tailored call provisions, and thoughtful bid restrictions to accommodate other constraints (voted limitations on par amount, policy restrictions on savings levels, the creation or preservation of imbedded call option value, etc.) A dealer constructing a notice of sale and then having the opportunity to bid on it has the incentive to structure the bid constraints in a way that benefits its approach to competitive offerings, reducing the potential value of competition to the issuer/borrower.

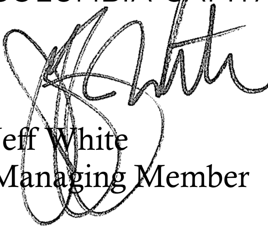
   The threshold concept also presumes that small/infrequent issuers and borrowers are less worthy of independent advice than other issuers and it certainly fails to consider the differences in markets across states. According to Bloomberg, of the 87 publicly offered issues in Kansas during the first half of 2019, 70 had par amounts less than $15 million. Of these 87 transactions, 55 were offered competitively and 46 of those competitive sales (84%) had par amounts less than $15 million.

d. **Should Rule G-23 provide an exception for a dealer financial advisor if it disengages as financial advisor and a successor financial advisor is engaged by the issuer? If so, should the rule impose a cooling off period?**
   No. We think this situation would be rife for abuse and likely deprive governmental issuers of their statutory right to advice under a fiduciary standard. How is the cooling off period documented and when does the clock start? Is there a blackout during the cooling-off period? Under what standard is the dealer operating when it says to the issuer, "I'd really like to work on this deal for you but we have to wait until the one-year anniversary of this conversation to do so"? In this circumstance, would the dealer be held to a fiduciary duty for its advice to wait or only to a fair dealing standard if the timing of the transaction ended up having negative consequences for the issuer?

9. **Rule G-23's prohibition on role switching applies on an issue-by-issue basis. Does this standard continue to be appropriate? Should the prohibition be broader or narrower? Should the MSRB provide interpretive guidance regarding what constitutes an "issuance" for this purpose, and if so, how should it be defined?**
   The issue-by-issuer approach strikes the right balance, permitting dealers flexibility to choose their desired role for an issuer.

We appreciate the opportunity to comment.

Respectfully submitted,
COLUMBIA CAPITAL MANAGEMENT, LLC



Jeff White
Managing Member

Crews&Associates
Investment Bankers

August 23, 2019

Submitted Electronically (rsmith@msrb.org)

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street
Washington, DC 20005

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

Dear Mr. Smith,

Crews & Associates, Inc. ("Crews") respectfully submits its comments in response to MSRB Notice 2019-13 "Request for Comment on MSRB Rule G-23 on Activities of Dealers Acting as Financial Advisors." We appreciate the MSRB's willingness to review Rule G-23 and the opportunity to share our observations regarding the Rule's impact and the effect of the restrictions set forth in G-23(d), specifically with respect to competitively bid public finance transactions.

We assert that the MSRB's Policy on the Use of Economic Analysis in MSRB Rulemaking, which sets forth the process by which the MSRB reviews its rules retrospectively, supports the proposed Rule changes we suggest.

1. Identifying the need for a proposed rule change and explaining how the Rule change will meet that need.

Based on our observations over the last eight years, the restrictions set forth in Rule G-23(d) are unnecessary for competitively bid issues, and in today's market, do not promote efficiency, competition and capital formation, particularly for smaller issues. Rather, that provision's application to competitively bid transactions has unnecessarily burdened competition and resulted in higher financing costs for the issuers that Rule G-23 was created to protect. In Crews' experience, Rule G-23's restriction has at times entirely eliminated the best bid, thereby penalizing both the issuer and the taxpayer.

Crews & Associates, Inc.

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NOT INSURED BY ANY FEDERAL GOVERNMENT AGENCY

2. Articulating a baseline against which to measure the likely economic impact of the proposed Rule change.

To demonstrate the economic effect of Rule G-23's restrictions, we have enclosed, as Exhibit A, a list of school district bonds that were issued from November 1, 2010 through November 1, 2011, which is the most recent time period from which factual data can be presented based on Rule G-23's effective date of November 28, 2011.[1] In each of the bond issues identified, Crews served as the Municipal Advisor and ultimately submitted the winning competitive bid with the lowest net interest cost to the issuer. As demonstrated by Exhibit A, Crews' bid saved issuers, on average, nine basis points, resulting in a total net interest savings of $1,618,879.00 in just one year. In 2011, Crews issued less than 1% of all public finance transactions in the United States. If a small firm saved issuers and taxpayers $1,618,879.00 in one year alone, it stands to reason that data from the other 99% of the market would demonstrate just how much the restrictions in Rule G-23 have cost issuers and taxpayers since November 28, 2011.

3. Identifying and evaluating alternative regulatory approaches.

The limitations and disclosure/consent requirements set forth above eliminate the potential for self-dealing and/or unmanageable conflicts of interest. Further, rules and regulations for Municipal Advisors and underwriters that have been amended and/or enacted since November 28, 2011 eliminate the need for the restriction for competitive bids. Those regulatory regimes prohibit the type of conduct Rule G-23(d) was intended to eliminate, without imposing an unnecessary burden on competition or restricting the ability of an issuer to transact business with the Municipal Advisor of its choosing.

4. Assessing the benefits and costs, both quantitative and qualitative, of the proposed Rule change and the main reasonable alternative regulatory approaches.

Although the restrictions set forth in Rule G-23 may appear to protect issuers in public finance transactions, the Rule's application to the market demonstrates that the restrictions have increased the issuance cost of borrowing without a quantitatively demonstrable offsetting benefit.

We believe the overall intent of Rule G-23 can still be achieved by limiting dealer bids to only those transactions that employ an electronic, anonymous bidding platform, and by

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[1] Although Crews could project potential savings to issuers and taxpayers based upon its five-year history of bond issues prior to the date Rule G-23's restrictions became effective, for purposes of this comment letter, Crews relies only upon actual data, rather than estimates or projections.

requiring specific disclosures and written consent from the issuer prior to the submission of any bids. These requirements would eliminate the potential for conflicts of interest and self-dealing while, at the same time, ensuring that an issuer receives the best bid.

Rule G-23, as written, forces issuers to choose between the best Municipal Advisor and the best bid, and we urge the MSRB to re-examine the Rule in keeping with our comments and supporting data.

Thank you for your willingness to consider information from a small firm on behalf of the industry and public finance issuers. We are willing to make ourselves available to answer any questions, provide further detail or discuss ways in which guardrails can be established to achieve the tenants of the Rule.

Respectfully submitted,

Don Winton
Chief Operating Officer

Enclosures

Arkansas School Bond Issues - Broker/Dealer as MA and subsequently as Underwriter

Year	# of FA Issues	# of Issues B/D Purchased	
2011*	59	17	28.8%
2010	52	10	19.2%
2009	38	13	34.2%
2008	36	12	33.3%
2007	17	5	29.4%
2006	42	14	33.3%
		Average	29.7%

*Only includes issues B/D was eligilble to bid on

2011 Sales

School District	Dated Date	Par Amount	Maturity	Winning Bid	Cover Bid	Spread to Cover	# of Bids
Conway	2/1/2011	$31,410,000	2040	5.080830	5.193219	0.112389	4
Cave City	4/1/2011	$ 970,000	2028	3.274700	3.486715	0.212015	6
Deer/Mt. Judea	7/1/2011	$ 1,550,000	2041	4.484261	4.575845	0.091584	4
Dover	8/4/2011	$ 670,000	2027	4.883547	4.911290	0.027743	3
McCrory	8/1/2011	$ 630,000	2024	2.705954	2.795679	0.089725	3
Jasper	9/1/2011	$ 925,000	2028	4.753329	4.811696	0.058367	4
Omaha	9/27/2011	$ 185,456	2028	5.154317	N/A	N/A	1
Jessieville	10/1/2011	$ 1,445,000	2030	2.874899	2.907899	0.033000	4
Booneville	10/1/2011	$ 1,415,000	2033	3.087474	3.152839	0.065365	4
Pea Ridge	10/1/2011	$ 1,475,000	2034	3.217424	3.248052	0.030628	3
Alpena	10/1/2011	$ 935,000	2035	3.270184	3.565134	0.294950	2
Two Rivers	10/1/2011	$ 2,765,000	2033	3.110074	3.136479	0.026405	4
Hot Springs	10/1/2011	$21,665,000	2036	3.456588	3.514578	0.057990	2
Stephens	11/1/2011	$ 925,000	2036	3.492430	3.674119	0.181689	3
Shirley	11/1/2011	$ 2,995,000	2036	3.467984	3.564110	0.096126	4
Elkins	11/1/2011	$ 8,155,000	2041	4.045074	4.142656	0.097582	3
Clinton	12/1/2011	$10,515,000	2041	4.110202	4.128137	0.017935	2
					Average Spread	0.093343	

2010 Sales

School District	Dated Date	Par Amount	Maturity	Winning Bid	Cover Bid	Spread to Cover	# of Bids
Lavaca	7/1/2010	$ 2,980,000	2026	3.309367	3.328820	0.019453	5
Pea Ridge	9/1/2010	$ 2,500,000	2037	3.653526	3.729084	0.075558	2
Charleston	10/1/2010	$ 6,645,000	2033	3.329740	3.607226	0.277486	2
Hillcrest	10/1/2010	$ 865,000	2027	2.958710	3.017670	0.058960	2
Prairie Grove	10/1/2010	$ 2,025,000	2027	3.094903	3.137760	0.042857	3
Conway	11/1/2010	$ 8,210,000	2040	3.944924	3.971485	0.026561	4
Harrisburg	11/1/2010	$ 1,630,000	2028	3.473881	3.593885	0.120004	2
Harrisburg	11/1/2010	$ 4,025,000	2034	3.886174	3.982971	0.096797	3
Palestine-Wheatley	11/1/2010	$ 4,975,000	2040	4.128948	4.135488	0.006540	2
Cossatot River	12/1/2010	$ 3,580,000	2029	5.378706	5.521279	0.142573	2
					Average Spread	0.086679	

As of March 6, 2015

Value of a Basis Point

Objective: An analysis of potential interest savings if the winning bid was one basis point (.01%) lower in yield. Below is the evaluation of a sample of competitively bid transactions for which Crews & Associates, Inc. observed the responsibility of Municipal Advisor.

Issuer: Pea Ridge School District
Dated Date: May 1, 2014
Par Amount: $9,990,000

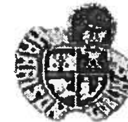
Total Debt Service	$	18,109,868.14
Total Debt Service (-1 BP)		18,088,784.39
Savings to Issuer (1 BP)	$	21,083.75
Savings to Issuer (9.3343 BP)	$	196,802.05

Issuer: Stuttgart School District
Dated Date: November 1, 2014
Par Amount: $5,040,000

Total Debt Service	$	7,645,407.43
Total Debt Service (-1 BP)		7,637,387.43
Savings to Issuer (1 BP)	$	8,020.00
Savings to Issuer (9.3343 BP)	$	74,861.09

Issuer: Harrison School District
Dated Date: December1, 2014
Par Amount: $43,390,000

Total Debt Service	$	74,976,490.80
Total Debt Service (-1 BP)		74,895,771.80
Savings to Issuer (1 BP)	$	80,719.00
Savings to Issuer (9.3343 BP)	$	753,455.36



Issuer: North Little Rock School District
Dated Date: February 1, 2015
Par Amount: $65,465,000

Total Debt Service	$	108,017,250.00
Total Debt Service (-1 BP)		107,888,427.00
Savings to Issuer (1 BP)	$	128,823.00
Savings to Issuer (9.3343 BP)	$	1,202,472.53

To provide the impact of improving the bid to the issuer from the cover bid (the second highest bid or lowest interest cost) multiply the number of basis points by the value of one basis point for total issuance savings. These are true values of 1 basis point (.01) on each of these representative issues.

Crews&Associates

EHLERS
LEADERS IN PUBLIC FINANCE

Mr. Ron Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street NW
Washington, DC
20005

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

Dear Mr. Smith

Thank you for the opportunity to comment on this request.

In 2010, Congress adopted the Dodd-Frank Act which requires the Municipal Securities Rulemaking Board (MSRB) to protect municipal entity issuers. This is reflected in the MSRB's mission statement which is "To protect investors, municipal entities and the public interest ...." We believe the approval of MSRB Rule G-23 in 2011 by the MSRB Board was a great first step in protecting municipal entity issuers and public interest. We do not believe any change to the Rule's prohibition on role switching is warranted. Smaller and/or infrequent municipal entity issuers are less likely than larger and/or more frequent issuers to understand the conflict presented when their municipal advisor is also allowed to underwrite the same issue. We believe this Rule has been and should continue to be an important protection of municipal entity issuers as well as protecting the public interest.

Ehlers previously commented on the Rule in 2011 and we find that our comments still hold true. Fundamentally, the fiduciary duty a municipal advisor has to its municipal entity clients is too significant for any disclosure or consent provisions to cure and allow a municipal advisor to stepdown and switch roles to become the underwriter for the same municipal security transaction. We are not aware not aware of any problems that small and/or infrequent issuers have had with hiring municipal advisors and being able to sell their bonds since the 2011 amendments became effective. We believe that this is due to the creation of the role of municipal advisor as part of the Dodd-Frank Act and MSRB municipal advisor rules since 2011 that require a municipal advisor to know their client and recommend a suitable solution.

Prior to the changes in 2011, Rule G-23 allowed for role switching in negotiated deals if it was disclosed and allowed dealer-MAs to remain as MAs while bidding on competitive offerings if the issuer consented. Prior to 2011, we never saw an issuer who not did consent to switching roles or allowing the MA firm to bid. Ehlers opposes any changes that would provide underwriters with an exception to Rule G-23, whether that is any form of role switching, a competitive bid offering or size of issuance. Any changes to Rule G-23 would reopen the door to significant possible potential conflict and abuse. Prohibiting these activities is the only way to ensure municipal entity issuers and the public interest are protected.

Our experience in underwriter driven states is that without a municipal advisor acting in a fiduciary capacity to the issuer, underwriter compensation, other issuance costs and the terms of issues end up being heavily weighted to the benefit of the investor vs. the issuer. Rule G-23 as it is written does not impair dealer activities to underwrite bonds. Any loosening of the Rule would only give the underwriter the opportunity to underwrite more issues in conflict with protections to be afforded municipal entity issuers under the Dodd-Frank Act.

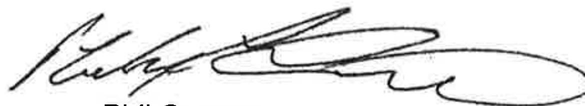
MSRB Rule G-23 is to prevent the underwriter from being engaged by a client in a manner unrelated to the underwriter role and then using that engagement relationship to secure their role as an underwriter. We would also suggest that the MSRB expand MRSB Rule G-23 to provide guidance to the underwriter on those activities that are outside and within the scope of the underwriter exclusion within the Securities Exchange Commission (SEC) Municipal Advisor Rule which was effective July 1, 2014.(1)

Specifically, the SEC MA Rule prohibits "(5) advice on bond election campaign". We however continue to see underwriters, through their associated firms, provide bond election advice for municipal security issuers even though we believe the SEC MA rule prohibits this type of advice. In all situations where we see this relationship, once the associated underwriter firm provides election advice, the underwriter firms ends up negotiating the security issue. We believe the MSRB should make it clear in MSRB Rule G-23 that election advice, like role switching, is prohibited.

Related to the election advice, the MSRB has been collecting information on bond ballet campaign contributions. MSRB Rules relating to political campaign contributions establish strict limitations regarding firm and individual campaign donations to elected officials but do not address donations to bond election campaigns. While violating these strict limitations results in a two-year lock-out, the MSRB Rules do not address bond ballet campaign contributions, which is as clearly pay to play activity. In these instances, it is clear that bond ballet campaign contributions is pay to play activity that helps either the MA or underwriter be hired. MSRB Rules should be clarified and strengthened to ensure that this abusive practice does not continue.

Thank you for allowing us to comment on this important topic. Our firm's sixty-four years as a financial advisor and GFOA's best practice concur that the underwriter and municipal advisor roles are separate, adversarial roles that cannot be provided by the same party. We hope this approach continues within MSRB Rule G-23.

Sincerely,



Phil Cosson
Ehlers Board Chairman

(1) See pages 165-168 of the 777-page SEC Municipal Advisor Rule.
(2) See page 167 of the SEC Municipal Advisor Rule.

Comment on Notice 2019-13

from Stan Kramer, First Kentucky Securities Corp.

on Tuesday, August 13, 2019

Comment:

Financial Advisors that are also broker Dealers ought to have the right to bid on competitive issues as long as the sale has been advertised on national platforms, (ie; IPREO, Bloomberg, state sponsored calendars). This is important, especially to small issuers whose offerings have limited appeal due to the issue size. The FA is the entity with the most knowledge about the issuer and would probably produce a better bid for their client under many circumstances.

Government Finance Officers Association
660 North Capitol Street, Suite 410
Washington, D.C. 20001 202.393.8467

August 19, 2019

Mr. Ronald Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street, N.W. Suite 1000
Washington, D.C. 20005

Re: MSRB Regulatory Notice 2019-13

Dear Mr. Smith:

The Government Finance Officers Associations ("GFOA") appreciates the opportunity to comment on the Municipal Securities Rulemaking Board's (MSRB) Rule G-23. The GFOA represents over 20,000 state and local government finance professionals across the United States, many of whom issue municipal securities, and therefore is very interested in this rulemaking.

GFOA has commented in the past on Rule G-23[1] and subsequent interpretative guidance[2], as the MSRB's work in this area is very important to municipal securities issuers. Rule G-23, in particular, is representative of rulemaking that helps the MSRB fulfill its mission to protect issuers. The GFOA has encouraged the MSRB to adopt rules that prohibit a municipal advisor (MA) from resigning and becoming the underwriter for the transaction. GFOA's Best Practices[3], which address the issues contained within the Rule, serve as the basis of our response, as well as discussions with members of our Governmental Debt Management Committee.

As GFOA stated in its September 2010 letter, the financial (municipal) advisor has a fiduciary responsibility – in both competitive and negotiated sales – to its issuer client. An underwriter's fiduciary responsibility is to the investor – not the issuer. Prohibiting role switching ensures that the issuer is represented throughout the transaction by a municipal advisor whose sole responsibility is to issuers. Since G-23 was strengthened in 2011 we believe that the Rule has served its purpose to protect issuers. This letter serves to reinforce our position and to reiterate ways the Rule can further strengthen these protections.

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[1] GFOA G-23 2010 Comment Letter referenced throughout

[2] March 2011, SEC GFOA Comment Letter
June 2011, SEC GFOA Comment Letter

[3] See GFOA Best Practices (among others): Selecting and Managing Underwriters for Negotiated Bond Sales, Selecting and Managing Municipal Advisors, Selecting and Managing the Method the Method of Sale for Municipal bonds

GFOA has long stated and continues to support the following G-23 principles: A municipal advisor on a transaction may not resign and become underwriter on a transaction, nor can the same firm bid on the competitive sale of the bonds. It is an unmanageable conflict for the same firm to provide municipal advisor and underwriting services on the same transaction.

GFOA would suggest – as we did in 2011 - that in order to strengthen issuer protections provided in Rule G-23, a municipal advisory firm should not be allowed to serve as a MA on an issuer's transaction and then serve as an underwriter on a separate transaction or credit of the same issuer. Allowing a firm to serve as a MA for one transaction and then as underwriter on another represents conflict of interest challenges to the issuer and its staff. For instance, serving as municipal advisor for an issuer's general obligation credit and then as underwriter for an issuer's appropriation credit could question the MA's fiduciary responsibility to the issuer and provide the firm with other inside and unfair advantages.

Leaders of the Governmental Debt Management Committee have expressed concerns that the MSRB may reverse the 2011 changes to Rule G-23[4]. We again, oppose any efforts to dilute the effectiveness of the Rule and the changes that were made eight years ago. GFOA wishes to make ourselves available to have conversations with staff and the Board – and be aware of their ongoing questions and concerns related to the multiple issues raised in the proposed Rule.

Thank you again for the opportunity to comment. Please feel free to contact me at ebrock@gfoa.org or (202) 393-8467 if you have any questions on or would like to discuss any of the information provided in this letter.

Sincerely,

Emily Swenson Brock
Director, Federal Liaison Center

[4] See, 5/19/2019 Bond Buyer article - https://www.bondbuyer.com/news/could-msrb-review-of-g-23-revive-shady-practice-of-role-switching

KPM FINANCIAL

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Municipal Securities Rulemaking Board
Attn: Mr. Ronald W. Smith, Corporate Secretary
1300 I Street NW
Washington, DC 20005

Re: Response to Comments on MSRB Rule G-23

Dear Mr. Secretary:

On May 20, 2019, the Municipal Securities Rulemaking Board ("MSRB") published a Request for Comment on MSRB Rule G-23 on Activities of Dealers Acting as Financial Advisors. We intend to provide comments relating to the practice of acting as either Placement Agent or Underwriter (collectively "Underwriter") to the issuer of municipal securities ("Issuer") while contemporaneously acting as Financial Advisor to the Obligated Person on the same issue. While we believe Rule G-23, in conjunction with Rule G-17 and the Municipal Advisory Regulations, has benefited the municipal marketplace in general, we feel that there remain "loop holes" in the regulations that negatively impact the integrity of the MSRB rules. In particular, the way MSRB regulations are currently written, some firms continue to act as both Underwriter and Financial Advisor on the same issuance of municipal securities.

MSRB rules currently prohibit municipal professionals from acting as both Underwriter and Financial Advisor to an Issuer relating to the same issuance of municipal securities. Providing advice directly to an Issuer while also serving as Underwriter on the same issuance would create too many unavoidable conflicts of interest including, but not limited to, advice given to the Issuer regarding, (i) whether the bond sale should be competitive or negotiated, (ii) whether an Underwriter is required if placing bonds directly with an investor, (iii) whether the Underwriter's fees are fair and reasonable, and (iv) whether the pricing or structure of the securities is fair and reasonable. Typically under an Obligated Person structure, the Obligated Person's Financial Advisor is the only party to a transaction providing "advice" in that transaction. Even though the Financial Advisor technically is engaged by the Obligated Person, they are providing the same advice they would if engaged by the Issuer directly.

Interpretive guidance on rule G-23 makes it clear that the rule is only applicable to rendering advice to *Issuers*. This same guidance makes clear that in most cases advice provided to Obligated Persons would not be deemed as advice to the Issuer. This distinction between Issuers and Obligated Persons allows the same firm to be engaged as Underwriter to an Issuer while acting as Financial Advisor to the Obligated Person. In theory, as Advisor to the Obligated Person, the firm cannot negotiate directly with the purchaser(s) of the municipal securities as this would make them an Advisor to the same Issuer with whom they are serving as Underwriter. This role is reserved for the Underwriter or a Financial Advisor to the Issuer, should one exist.

This does not prevent the Financial Advisor to the Obligated Person from negotiating directly with the purchaser of the securities regarding the placement of Municipal Financial Products integrally relating to the same issuance. The provider of Municipal Financial Products is often the same as the purchaser of the municipal securities. This creates a situation where the Advisor to the Obligated Person can negotiate directly with the potential purchaser of the securities without running afoul of the existing regulations. The MSRB has recognized that the fiduciary responsibility owned by an advisor to an Issuer would make this conflict of interest too difficult to mitigate through disclosures and consents; however, the same dual-role situation can exist by simply engaging with the Obligated Person as Financial Advisor rather than the Issuer directly.

We believe this loop hole in the rules reduces the effectiveness of Rule G-23 in addressing its primary purpose of mitigating conflicts of interest that exist when a dealer acts as both Financial Advisor and Underwriter with respect to the same issue. We suggest this conflict of interest could be mitigated by amending Rule G-42(e)(ii) to expand the prohibition on engaging in a principal transaction with municipal entities with whom a municipal advisory relationship exists to further prohibit engaging in principal transactions with municipal entities where a municipal advisory relationship exists with the "*municipal entity client* <u>*or*</u> *with an obligated person directly responsible for making loan payments to the municipal entity client relating to the same issuance of municipal securities.*" Regardless of the conflict of interest disclosures made, we believe these corporate transactions are generally run by the corporation or its advisors and most corporations do not appreciate the gravity of the conflict of interest that exists when the only advisor in a transaction is ultimately the Underwriter of the same securities.

Sincerely,

Jay Saunders
Director
KPM Financial, LLC

KUTAKROCK

Kutak Rock LLP
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JOSHUA P. MEYER

August 16, 2019

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

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

Dear Ms. Galloway:

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

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

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

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

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

By way of example, the MSRB has stated that a financial advisor may, among other things, create a term sheet for an investor RFP of RFQ process[1], and, most ambiguously, act as a a "finder" in connection with the placement of municipal securities, citing the Securities and Exchange Commission's well documented revocation of a no-action letter relating to Dominion Resources[2]. As neither the SEC nor the MSRB has fully articulated its stance on what constitutes the act of "finding" or what the activities of a "finder" might be, it leaves financial advisors in a peculiar spot in a transaction, particularly in a private placement or direct purchase with a bank or financial institution. In MSRB Notice 2011-37 (August 3, 2011), in describing the denial of certain no-action letters with similar facts to the Dominion Resources no-action letter, the MSRB states that the denial of those no-action letters was because "all involved situations in which various parties had introduced the issuers of securities to investors and/or participated in negotiations with those investors, and received transaction based compensation." Thus, the MSRB has taken the stance that a financial advisor may act as a "finder"—but may not introduce the issuer of securities to an investor. It would seem that the act of "finding" an investor for a municipal client is synonymous with introducing the issuer of securities to an investor. Accordingly, it is understandable why it is difficult for a financial advisor to understand what is permissible under Rule G-23 as the MSRB's guidance on Rule G-23 seems to directly conflict.

While our firm certainly understands Rule G-23s aim at addressing the conflicts of interest that exist when a dealer acts as both a financial advisor and as an underwriter with respect to the same issue, Rule G-23 is unduly burdening financial advisors' fiduciary obligation[3] with respect to providing services to an issuer client. In addition, as the ambiguous regulatory landscape now exists, financial advisors have to toe the line between being a "finder" and serving as a true fiduciary for an issuer client (as MSRB Rule G-42 ("Rule G-42") requires) and obtaining the most efficient, cheapest cost to capital for a client—which, in certain circumstances, is through a direct placement with a bank or financial institution. Any hesitation

[1] *See* Exchange Act Release No. 70462, 78 Fed. Reg. 67468 (November 12, 2013) at 67509.
[2] *See* MSRB Notice 2011-37 (August 3, 2011).
[3] *See* MSRB Rule G-42(a)(ii).

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

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

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

Very truly yours,

Joshua P. Meyer

August 7, 2019

Ronald W. Smith, Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street NW
Washington DC 20005

Re: MSRB Notice 2019-13, Request for Comment on MSRB Rule G-23

Ladies and Gentlemen:

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

LYRB is an independent financial advisory firm which has elected, since its inception 23 years ago, to be regulated as a broker dealer and, therefore, has been and remains subject to MSRB regulations. We are now also registered as a municipal advisor with the Securities and Exchange Commission and the MSRB pursuant to Rule 15Ba1-2 of the Commission.

LYRB does not underwrite or purchase securities for our own account or for sale to others nor do we carry customer accounts of any kind. We do not participate as a co-manager or member of selling groups and do not act as a remarketing agent. We are a major financial advisor in the State of Utah and work in some other states as well. LYRB has acted as a financial advisor on hundreds of transactions with a volume of over $12 billion. These transactions run the gamut from small to large, and include general obligation bonds, various types of revenue and tax backed bonds, revenue and bond anticipation notes, and taxable and tax-exempt bonds in both fixed rate and variable rate structures.

The Request for Comment on Rule G-23 ("Request for Comment") generally invites consideration of the subject matter of Rule G-23, in light of current practice and Rule G-42. We herein outline preliminary thoughts. More detailed responses may be needed, depending on what changes, if any, the MSRB ultimately proposes to Rule G-23.

In general, we do not perceive that Rule G-23, as currently implemented, presents significant problems (with one exception, noted below) for the bond industry. The changes made earlier in the decade were salutary and eliminated abuses and loopholes which, in some local markets, had been exploited by some dealers to the detriment of some municipal issuers. These gains should not be lost in any revisions made.

However, we note that Rule G-23 is at heart a conflict of interest rule. Accordingly, the bulk of present Rule G-23 could be presented as a note or illustration to the conflict of interest rules embodied in G-42. If this seems like "streamlining", we would have no concerns with it.

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Any weakening of the present prohibitions, wherever they appear, would invite a return to former abuses.

More specifically, we respond to some of the specific items set out in Notice 2019-13:

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

   The rule has been effective. Prior abuses have, so far as we are aware, been significantly curtailed, if not eliminated.

2. Have small and/or infrequent issuers experienced any particularized benefits or costs, such as limited choices among financial advisors or underwriters or placement agents serving their market, due to Rule G-23's prohibition on role switching? Does Rule G-23 strike the right balance between issuer protection and issuer choice?

   We serve some smaller issuers and have not seen difficulties due to prohibition of role switching. On the contrary, it has been a protection and strikes a reasonable balance between issuer protection and choice, at least as we have seen.

3. Considering the implementation of MSRB's and SEC's municipal advisor rules, are there ways the MSRB could achieve Rule G-23's purpose without retaining it as a standalone rule? For example, should the MSRB eliminate Rule G-23 and address any need for regulatory requirements and exceptions through enhancements to other MSRB rules, such as Rule G-42?

   The functional aspects of G-23 could be transferred to Rule G-42, if done correctly. As always, the devil is in the details.

4. Should the MSRB make any amendments to the Role Switching Exceptions? For example-

   a. Does the Bond Bank Exception remain appropriate: Should this exception be broader or narrower?
   b. Should Rule G-23 provide an exception to a dealer that avails itself of any of the exclusions or exemptions under the SEC's municipal advisor rules, such as the IRMA exemption?
   c. Should Rule G-23 provide an exception for competitive bid underwritings? If so, should such an exception be limited to small issuances (e.g., $15 million or less in aggregate principal amount)?
   d. Should Rule G-23 provide an exception for a dealer financial advisor if it disengages as financial advisor and a successor financial advisor is engaged by the issuer? If so, should the rule impose a cooling off period?

We recommend no changes. This seems to be working well. If disengagement (with or without a cooling off period) is allowed, it would facilitate dealers falling into tacit "you scratch my back, then I'll scratch yours" arrangements as they deal with issuers where they may have underwriting arrangements or advisory engagements.

5. Rule G-23's prohibition on role switching currently extends to dealer financial advisors acting as a placement agent for the issuance of municipal securities.

    a. As it pertains to placement agent activities, is the prohibition sufficiently clear as to what activities are, or are not, permissible for dealer financial advisors? Should the MSRB provide interpretive guidance regarding the scope of activities that a dealer financial advisor may perform under Rule G-23 without being regarded as a placement agent for purposes of the rule's prohibition on role switching?

    b. If Rule G-23 were eliminated as a standalone rule, with any substantive requirements being moved to Rule G-42 or another MSRB rule, should the MSRB should the MSRB modify Rule G-42 or such other rule to address any permitted or prohibited placement agent activities by a municipal advisor insofar as MSRB rules are concerned?

This Rule is clear, assuming that customary financial advisory activities undertaken in a direct purchase sale are not improperly treated as "placement agent" activities. If an advisor is acting as an issuer's fiduciary advisor in seeking purchasers for the issuer's paper, is paid by the issuer (and <u>not</u> by the purchaser) and does not act for a purchaser, there should be no question under G-23 or G-42 of the presence of "placement agent" activities and a consequent conflict of interest. Any attempt to force this type of legitimate representation into a role as "placement agent" and then disqualify the advisor for a non-existent conflict of interest would result in all direct purchase transactions where a fiduciary advisor is involved having to accommodate a separate professional or firm solely to act as placement agent so that the fiduciary advisor does not get "tagged" with this role even though the advisor is acting solely for and on behalf of the issuer. This would increase the cost of each such transaction to the issuer with no value coming to that issuer for the increased expense. No changes made should inadvertently cause such an interpretation to be made.

6. Rule G-23's prohibition on rule switching applies on an issue-by-issue basis. Does this standard continue to be appropriate? Should the prohibition be broader or narrower? Should the MSRB provide interpretive guidance regarding what constitutes an "issuance" for this purpose, and if so, how should it be defined?

While other standards might work. The current one seems relatively problem free. If it ain't broke, don't fix it.

We may have additional comments if an actual change is proposed.

Lewis Young Robertson & Burningham, Inc.

By: ______________________________
Principal

August 19, 2019

Ronald W. Smith
Secretary
Municipal Securities Rulemaking Board
1300 I Street NW, Suite 1000
Washington, DC 20005

RE: MSRB Notice 2019-13

Dear Mr. Smith:

The National Association of Municipal Advisors ("NAMA") appreciates the opportunity to comment on MSRB Notice 2019-13 regarding MSRB Rule G-23 ("Rule") as part of the MSRB's retrospective review of its rules and guidance. NAMA represents independent municipal advisory firms and individual municipal advisors ("MA") from around the country.

NAMA is supportive of the MSRB's commitment to undertaking a meaningful and far-reaching retrospective review of its rulebook to ensure that regulation within its jurisdictional mandate is as effective, up-to-date and efficient as possible while maintaining high standards of investor and issuer protection. While in many cases such a review will naturally provide opportunities to make adjustments to existing rules and guidance to address emerging investor or issuer protection concerns, changes in market practices, development of new products, or other factors, in some cases the review will reinforce the conclusion that current requirements continue to be effective and therefore should be maintained.

NAMA strongly believes that, as amended in 2011, Rule G-23 has been effective in eliminating the conflicts of interest that would arise if a firm acting as MA to an issuer were to then become the underwriter in the transaction. We believe that such role-switching creates conflicts that defy effective mitigation and therefore materially interfere with an MA's fulfillment of its fiduciary duty to its issuer client. Thus, we oppose any changes to the Rule as currently written and interpreted, and we believe that the MSRB should emphasize to the market the importance of strict adherence to its requirements and restrictions.

NAMA addresses below the specific questions posed by the MSRB in Notice 2019-13:

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

As noted above, NAMA believes that, since the 2011 amendments to Rule G-23 have been in place, the prohibition on role switching has been extremely successful in eliminating the fundamental conflict inherent in changing roles from MA to underwriter without causing any negative impacts to issuers or investors.

2. **Have small and/or infrequent issuers experienced any particularized benefits or costs, such as limited choices among financial advisors or underwriters or placement agents serving their market, due to Rule G-23's prohibition on role switching? Does Rule G-23 strike the right balance between issuer protection and issuer choice?**

Yes, NAMA believes that Rule G-23 strikes the right balance between issuer protection and issuer choice. NAMA members are not aware of any problems that small and infrequent issuers have had with hiring MAs and being able to sell their bonds since the 2011 amendments became effective. Any concerns of costs to small and/or infrequent issuers (if such costs do in fact exist) are far outweighed by better protection against conflicts and predatory practices, and we believe that the rule should remain intact.

3. **Considering the implementation of the MSRB's and SEC's municipal advisor rules, are there ways the MSRB could achieve Rule G-23's purpose without retaining it as a standalone rule? For example, should the MSRB eliminate Rule G-23 and address any need for regulatory requirements and exceptions through enhancements to other MSRB rules, such as Rule G-42?**

Rule G-23 speaks to a specific subset of MAs, those that are also broker-dealers, and to behavior limited to those circumstances, and that sets it apart from Rule G-42, which focuses on the full universe of MAs and MA advisory activities. The MSRB's rulebook includes numerous separate rules for broker-dealers each of which may apply to the particular subset of broker-dealers engaging in the specific activities that are the subject of such rule. There is no significant reason for MA requirements to be aggregated into a single, increasingly complex rule, just as there is no reason to aggregate multiple existing broker-dealer rules into a single, more complex rule for broker-dealers. Thus, at this time, NAMA does not see a benefit of eliminating this standalone Rule.

However, if the MSRB wishes to consider placing the tenets of Rule G-23 into another existing rule, we would suggest Rule G-11, which governs broker-dealers' primary offering practices and already includes specific requirements and prohibitions in the context of underwriting activities. If the MSRB insists on moving the prohibitions and requirements of Rule G-23 into Rule G-42, it would be important that (i) such change not result in any weakening of the existing provisions of Rule G-23, and (ii) such change not be limited to broker-dealers acting in a principal capacity as part of the rule's list of prohibited principal transaction under Rule G-42(e)(ii), as it is critical that the core conflicts purpose of Rule G-23 be maintained regardless of whether the broker-dealer acts as principal (underwriter) or agent (placement agent).

4. **If Rule G-23 continues as a standalone rule, what are the ways in which Rule G-23 should be better aligned to the municipal advisor rules? Should Rule G-23 incorporate the defined terms and key terms of art of the MSRB's and SEC's municipal advisor rules? Are there terms in the MSRB's and SEC's municipal advisor rules that should not be incorporated in Rule G-23?**

The MSRB should work to replace any references to "financial advisors" with "municipal advisors" as the terms should be clearly understood to mean the same thing, especially within Rule G-23. As all municipal advisors are now regulated in the same manner without reference to whether they are independent or broker-dealer MAs, the MSRB should update the Rule and guidance to simply refer to "municipal advisors." If the MSRB does not view the two terms as equivalent, it should explain the differences and make the rationale for such distinction clear to market participants. Any differences between the two terms should be opened for public comment. We also believe that any proposed change should be consistent with the SEC's Municipal Advisor Rule.

5. **Does Rule G-23 prohibit any activities that would be permitted under the SEC's municipal advisor rules in ways that are contrary to the regulatory purpose underlying the rules? For example, does Rule G-23 unduly impede the activities of dealers operating under an exclusion or exemption from registration under the SEC's municipal advisor rules?**

NAMA believes that Rule G-23 does not impair broker-dealer activities and is unaware of any inconsistencies between the Rule and the exclusions or exemptions under the SEC's municipal advisor rules. In fact the SEC's Municipal Advisor Rule goes into greater detail in defining what is within and outside the underwriter exclusion. This greater detail is consistent with Rule G-23 as written.

6. Should the MSRB make any amendments to the Role Switching Exceptions? For example –

a. Does the Bond Bank Exception remain appropriate? Should this exception be broader or narrower?

NAMA believes that the current exceptions should remain.

b. Should Rule G-23 provide an exception to a dealer that avails itself of any of the exclusions or exemptions under the SEC's municipal advisor rules, such as the IRMA exemption?

Neither the SEC nor the MSRB has provided any guidance as to whether or how Rule G-23 might apply where a broker-dealer has appropriately availed itself of an exclusion or exemption from registration under the SEC's municipal advisor rules. To the extent that the regulators view a broker-dealer that has taken advantage of such an exclusion or exemption as still being considered a financial advisor under Rule G-23, we believe that the vast majority of broker-dealers are not aware of that view and could, under some circumstances, run the risk of inadvertently violating Rule G-23, depending on the specific facts and circumstances. If the MSRB believes that Rule G-23 does still apply where a broker-dealer has availed itself of an exclusion or exemption under the SEC's municipal advisor rules, it should provide clear guidance on the circumstances under which that might be the case. We believe that using the term "municipal advisor" rather than "financial advisor" in Rule G-23 as we suggest above may help resolve any ambiguity around how Rule G-23 and the SEC's Municipal Advisor Rule operate together.

c. Should Rule G-23 provide an exception for competitive bid underwritings? If so, should such an exception be limited to small issuances (e.g., $15 million or less in aggregate principal amount)?

NAMA opposes any changes that would provide underwriters with an exception to Rule G-23 in the context of a competitive bid offering, including for small issues. In fact the small and/or infrequent issuers were indentified in the 2011 approval as the beneficiaries of amended Rule G-23. We are not aware of any new data supporting the need for such an exception. We believe that any circumstances where there are insufficient bids should be addressed by the issuer's MA – whether a broker-dealer or an independent MA – fulfilling the tenents of Rule G-42 knowing their client and recommending suitable transactions, rather than allowing largely unmitigatable conflicts to be introduced into the relationship. An MA relationship built on the implicit notion that the issuer's MA can act as the buyer of last resort would create negative incentives that would serve to distort the MA's clear-eyed pursuit of its client's best interest and would be a significant step backwards for issuer protection.

d. Should Rule G-23 provide an exception for a dealer financial advisor if it disengages as financial advisor and a successor financial advisor is engaged by the issuer? If so, should the rule impose a cooling off period?

NAMA opposes allowing a firm to resign from being an MA and becoming the underwriter, even if another MA is hired. This would likely create increased operational, timing and cost burdens on issuers as they introduce a new party into a transaction that must be given the opportunity to independently develop its own objective advice on behalf of the issuer, and also would open up problematic new types of conflicts or avenues for taking advantage of issuers (such as through undisclosed arrangements between the resigning and successor MA firms). Such an exception would amount to a regulatory workaround in search of a problem to fix.

NAMA does not support any type of cooling off period that would allow the same firm to serve as MA and then underwriter in any capacity.

7. Rule G-23's prohibition on role switching currently extends to dealer financial advisors acting as a placement agent for the issuance of municipal securities.

As noted above, NAMA does not support allowing dealer MAs from being able to switch their role from MA to placement agent. The same unmitigated conflict is still present.

a. As it pertains to placement agent activities, is the prohibition sufficiently clear as to what activities are, or are not, permissible for dealer financial advisors? Should the MSRB provide interpretive guidance regarding the scope of activities that a dealer financial advisor may perform under Rule G-23 without being regarded as a placement agent for purposes of the rule's prohibition on role switching?

The range of permissible services for an MA to provide to an issuer seeking to privately place its new issue should not differ based on whether the MA is a broker-dealer or is an independent MA. NAMA believes that it is the SEC, not the MSRB, that has the authority to provide guidance on what activities constitute permissible MA activities and what activities are solely viewed as broker-dealer activities, and to resolve how any overlapping activities between the two categories of regulated entities should be appropriately addressed.

b. If Rule G-23 were eliminated as a standalone rule, with any substantive requirements being moved to Rule G-42 or another MSRB rule, should the MSRB modify Rule G-42 or such other rule to address any permitted or prohibited placement agent activities by a municipal advisor insofar as MSRB rules are concerned?

NAMA currently does not see the benefit of merging Rule G-23 into Rule G-42. However, as we noted above, if the MSRB insists on moving the prohibitions and requirements of Rule G-23 into Rule G-42, it would be critical that (i) such change not result in any weakening of the existing provisions of Rule G-23, and (ii) such change not be limited to broker-dealers acting in a principal capacity, but instead explicitly apply when the broker-dealer acts as agent, such as serving as placement agent. Public review and comment on such a proposal would also be necessary.

8. In the context of a dealer acting as a financial advisor, are there ways the MSRB could improve the efficiency and effectiveness of disclosures and related documentation requirements under Rules G-23 and G-42 and the Rule G-17 Interpretive Notice while preserving issuer protection?

Prior to the changes in Rule G-23 in 2011, the Rule allowed for role switching as long as it was disclosed. NAMA does not support retreating to a place where – through disclosures – role switching would be permissible. Recent changes to Rule G-17 improve the disclosure standards from underwriters and placement agents to issuers. The current Rule G-42 disclosure requirements for MAs strike the appropriate balance with regard to the disclosures that MAs should and must provide to issuers. If the MSRB determines to consolidate disclosures required of underwriters and placement agents under Rule G-17 with the disclosures described in the MSRB's November 27, 2011 guidance on Rule G-23, we believe such consolidation should be done only to place the disclosure requirements under a single rule and must not result in any weakening of the disclosures themselves or of the ramifications for failing to provide such disclosures for purposes of Rule G-23. Similarly, if the MSRB determines to consolidate documentation requirements of Rule G-23(c) with the parallel requirements of Rule G-42(c), we believe such consolidation should be done only to place the documentation requirements under a single rule and must not result in any weakening of the standards for documentation themselves.

9. Rule G-23's prohibition on role switching applies on an issue-by-issue basis. Does this standard continue to be appropriate? Should the prohibition be broader or narrower? Should the MSRB provide interpretive guidance regarding what constitutes an "issuance" for this purpose, and if so, how should it be defined?

There may be some merit to considering whether to broaden the role-switching prohibition beyond the current issue-by-issue prohibition. We would currently defer to the views of issuers on whether the current issue-by-issue prohibition should be made more strict, and then have the MSRB determine if such a change should be proposed.

10. Should the MSRB retire any interpretive guidance related to Rule G-23? What aspects of Rule G-23's interpretive guidance should be updated and/or retained? For any interpretive guidance that is not retired, should the MSRB recast the interpretive guidance as a single publication? Are there topics related to Rule G-23 about which the MSRB should provide new or additional interpretive guidance?

Other than ensuring that existing guidance is updated as needed to reflect any Rule changes the MSRB might ultimately make, we are not aware of the need to expand, modify or retire any existing guidance. We strongly believe that any interpretive activities must be conducted through the standard MSRB notice for comment and rulemaking process and be subject to SEC approval.

One area where the MSRB may wish to consider providing changes to the Rule or guidance is in the situation when an MA may serve in that capacity for a borrower in a conduit finaning and also serve as underwriter to the issuer in the same transaction. Currently this behavior is permissible, but we believe that it would be beneficial for the MSRB to highlight how such a situation should be handled in light of the disclosure and related requirements of Rules G-17 and G-42. The MSRB may also wish to consider prohibiting such activity, or allow for discussion thereof, to determine if this activity is a conflict that can not be well mitigated or with respect to which further regulatory safeguards should be considered.

We appreciate this opportunity to share our thoughts on MSRB Rule G-23. In summary, we believe the Rule as currently written is effective and should not be changed. We would welcome the opportunity to talk with MSRB staff and Board members about NAMA's position on this matter.

Sincerely,

Susan Gaffney
Executive Director

August 14, 2019

VIA ELECTRONIC MAIL
Mr. Ronald W. Smith, Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street, NW
Washington, DC 20005

Re: MSRB Notice 2019-13: Request for Comment on MSRB Rule G-23 on Activities of Dealers Acting as Financial Advisors

Ladies and Gentlemen of the Board:

Phoenix Advisors, LLC, is a multistate, independent municipal advisor firm headquartered in Bordentown, New Jersey, currently employing thirteen Municipal Advisor Representatives. We fully appreciate the needs of smaller issuers; we have regularly appeared ranked among the top 10 Municipal Advisors on Small Issues in the *Bond Buyer*. We appreciate the opportunity to respond to the MSRB's request for comments, and to express our opposition to changes to MSRB Rule G-23 that would reinstate role switching by dealer municipal advisors and reintroduce the attendant conflicts that existed before the 2011 amendments to G-23.

We are aware of the argument that dealer municipal advisors, if permitted to switch roles, might shield smaller or infrequent issuers from limited access to markets or municipal advisor services, but our experience shows that this shield is unnecessary. Our firm counts among its issuer clients hundreds of smaller issuers and numerous infrequent issuers, none of whom have encountered any decline in market access resulting from the 2011 amendments to MSRB Rule G-23. In any event, the question of market access for these types of issuers becomes academic when municipal advisors perform effectively.

The interests of municipal entity issuers are served best when municipal advisors owe a fiduciary duty throughout their engagements with their clients. It would constitute a disservice to an issuer client if the municipal advisor were permitted to abandon its duties of loyalty and care at the most critical moment in the engagement, move to the opposite side of the table, and pursue its interests as the underwriter, notwithstanding the requirements of G-17. Afterall it indeed can be argued that it is the smaller or infrequent issuer that most needs the duty of loyalty and care. The conflict created by role switching would not be mitigated by the requirement for written disclosures or consents, nor by the hiring of a replacement municipal advisor. To think a replacement advisor could adequately serve an issuer when the transaction is likely to

have been structured by the underwriter bidding on the issue is foolhardy. The prohibition on role switching successfully addresses these issues with no impairment of dealer activities and with no harm to issuers.

It might further be argued that the prohibition should be expanded to address the blurring of the lines between municipal advisor and underwriter. It should be impermissible for dealer municipal advisors to serve contemporaneously as municipal advisor on one transaction and as underwriter on another transaction for the same issuer.

Phoenix Advisors staunchly opposes any dilution or rescission of the 2011 amendments to Rule G-23, believes that the prohibitions on role switching are appropriate and effective, and that issuers have enjoyed better protection against conflicts and predatory practices since the implementation of the 2011 amendments.

Sincerely,

David B. Thompson, CEO

From: Li, Richard <rsli@milwaukee.gov>
Sent: Wednesday, January 29, 2020 4:18 PM
To: David Hodapp <dhodapp@msrb.org>; Leah Szarek <lszarek@msrb.org>
Subject: Rule G-23 & Competitive Sales

In 2011 Rule G-23 governing Financial Advisors was amended to prohibit Financial Advisors from purchasing underwriting an issue of the Issuer. Prior to the amendment, with the Issuer's permission, the Financial Advisor (now Municipal Advisor, or MA) could competitively bid on an Issuer's offering.

I can appreciate the change in protecting the issuer from MA's that would somehow affect the deal to favor their own underwriting desk. However, it has had an unintended chilling effect on firms willing to provide MA services. Prior to 2011, the City of Milwaukee received 4 responses from firms to provide MA services, two of which were Broker Dealer firms. After the rule change, the two BD firms did not respond because they wanted the ability to underwrite the City's debt.

We would appreciate it if the MSRB would consider an amendment to G-23 that would provide an additional exception to G-23(d)(i), such as:
(iv) Notwithstanding subsection (d)(i), a broker, dealer, or municipal securities dealer (the MA) that has a financial advisory relationship with respect to the issuance of municipal securities shall not be prohibited from participating in a competitive underwriting of the Issuer if: (a) The Issuer approves the participation of the MA in a competitive bid; (b) the notice of competitive sale includes a notice that the MA may bid on the issue; and (c) in the last 3 competitive sales of the issuer, each sale received at least 3 qualified bids, excluding the any bid of the MA, that were no higher than the winning bid by the larger of: (1) 5 basis points; or (2) 1/2 basis points times the number of years to the average life of the issue. Note: the winning bid can be one of the 3 non-MA bids, and no more than 1 sale per day shall be considered. If the conditions are met, the MA may bid, and the MA's bid may only be opened and considered if at least 3 qualified bids are received, excluding the MA's bid, and at least 2 non-MA qualified bids are no higher than the lowest non-MA bid plus the larger of: (1) 5 basis points; or (2) 1/2 basis point times the number of years to the average life of the issue.

Richard Li
(414) 286-2319
(414) 286-0653 fax

ROBERT W. DOTY

988 Placid Court
Annapolis, MD 21012
Email: robert.doty@agfs.com
Telephone: (916) 761-3432

August 19, 2019

Municipal Securities Rulemaking Board
1300 I Street, NW
Washington, DC 20005

Attention: Mr. Ronald W. Smith
Corporate Secretary

Re: Comments on MSRB Rule G-23 and Rule G-42—Activities of Municipal Advisors

Ladies and Gentlemen:

I am submitting these comments as requested by the Municipal Securities Rulemaking Board (MSRB or Board) in its Notice 2019-13, *Request for Comment on MSRB Rule G-23 on Activities of Dealers Acting as Financial Advisors* (May 20, 2019).

Thank you for this opportunity. I appreciate it. The subject matter presents critical and pivotal crossroads regarding whether the important protections for municipal bond issuers that the Dodd-Frank Act was intended to provide will be diluted significantly.

The Board's review of Rule G-42, especially in the context of Rule G-23's conflict of interest provisions, offers an opportunity also for a careful consideration of Rule G-42's conflict of interest provisions and selected other provisions in general. Among other issues, the review of Rule G-23 and Rule G-42 offers the opportunity to consider whether dealer municipal advisors should be able to bid in the same competitive bond offerings in which the dealer advisors provide advice to their clients. As discussed in this letter, I oppose such bidding as offering excessive opportunities for abuse without the benefit of purported benefits. It would represent a substantial backward step from the positive action taken by the Board in 2011 to prohibit completely financial advisors from serving as underwriters and placement agents.

The Board's review also presents an opportunity to consider carefully within the context of Rules G-23 and G-42 requests by municipal advisors for regulatory permission to engage in activities commonly considered to fall within the purview of dealers, as underwriters and placement agents. Such activities include, when securities are involved, identifying and soliciting investors other than through the traditional competitive bid process, selling bonds directly to investors through negotiation, and negotiating bond terms in direct discussions with investors. At the same time, municipal advisors may be receiving compensation contingent upon completion

of the bond sales, a form of payment typically associated with underwriters and placement agents.

If not delineated appropriately, any such regulatory permission would risk turning municipal advisors away from the focus of providing sound and unbiased advice regarding *whether* bonds should be issued and sold. Instead, municipal advisors could become financial firms working virtually "in-house" for issuer and obligated person clients primarily interested in closing transactions in order to collect contingent compensation. Such a misplaced focus would defeat the goals of the Dodd-Frank Act to provide municipal entities and obligated persons with access to "advisors" who are dedicated to serve solely in the best interests of their clients, as opposed to just another form of bond sales personnel.

In my litigation consulting activities, I have seen claims that an advisor need only assist an issuer in selling bonds, without responsibility to warn the issuer about serious transactional risks. Such attitudes defeat the purpose of issuer retention of municipal advisors.

In essence, if municipal advisors wish to serve in dealer capacities, they should register as dealers and accept their responsibilities under Rule G-23 and otherwise. If they persist in declining to register, Rule G-23 and other rules applicable to dealers should be enforced against them anyway.

In addition, as discussed in this letter, experience with real life municipal advisor activities demonstrate that conflicts of interest are much more varied, common and serious than identified at the time Rule G-42 was first conceived and also when Rule G-23 was first adopted in the early days of the Board's activities and then was amended in 2011.

I hope that my comments stimulate a review not only of Rule G-23 and the sound principles underlying the Rule in its current form, but also a careful review and re-thinking of portions of both Rule G-23 and Rule G-42, especially areas relating to municipal advisor responsibilities to public entity clients and conflict of interest and risk disclosures. In particular, I urge that the Board use this opportunity to re-consider the disclosures required regarding conflicts of interest, both to strengthen the disclosure process and also to take into account a wide variety of serious conflicts of interest that may not have been identified sufficiently explicitly at the time of the proposal and adoption of either Rule G-23 or Rule G-42, but that have subsequently come to light in real life circumstances.

I believe that I have had unique interactions with Rule G-23 and actions of underwriters and financial advisors (today, known as municipal advisors) throughout my more than 40 years of active participation in the municipal securities market. In that connection, I believe that I have distinctive perspectives that few others have. In certain respects, I may be able to provide useful information that few others can provide.

It is relevant that I served as General Counsel of the Government Finance Officers Association (GFOA) in the 1970s when Rule G-23 was first proposed and adopted, that I served as an underwriter with three regional dealer firms in the 1980s and 1990s, giving me the opportunity to view the actions of underwriters in relation to Rule G-23, and that, from the 1990s

into the 2010s, I served as a financial advisor (municipal advisor) in my own firm, American Governmental Financial Services Company, and also in 2012 and 2013 as General Counsel of Government Financial Strategies, Inc. prior to my cessation of financial/municipal advisory activities in 2013. Since 2013, I have served solely as a litigation consultant in municipal bond related cases, a number of them involving financial/municipal advisors. Before 2013, I also served as a litigation consultant, but as noted, not exclusively. I also have served as a bond, issuer, disclosure, investor, underwriter and trustee counsel.

I describe below my varied experiences and perspectives arising from what I consider to be an unusual combination of activities as an issuer representative, underwriter and financial/municipal advisor.

Given circumstances, I am taking this opportunity to communicate with the MSRB and its staff, and hopefully indirectly the Commission and the market, on certain matters of considerable interest to me. Therefore, I am presenting as much relevant information and analysis as I deem potentially useful regarding Rule G-23 and Rule G-42. I also present background and other information I consider relevant to the discussion, with a view to the foundations underlying municipal advisors' fiduciary relationships with their clients.

Rule G-42 Does Not "Create" Municipal Advisors' Fiduciary Duty

Because I have encountered in my litigation consulting activities significant confusion among municipal advisors in this regard, I note that the federal fiduciary duty of municipal advisors to their public entity clients is a statutory duty. In that connection, Section 15B(c)(1) of the Securities Exchange Act, as amended in 2010 by the Dodd-Frank Act provides:

> A municipal advisor and any person associated with such municipal advisor shall be deemed to have a fiduciary duty to any municipal entity for whom such municipal advisor acts as a municipal advisor, and no municipal advisor may engage in any act, practice, or course of business which is not consistent with a municipal advisor's fiduciary duty or that is in contravention of any rule of the Board.

In addition, Section 15B(a)(5) of the 1934 Act contains a special antifraud provision directed at municipal advisors, as follows:

> No municipal advisor shall make use of the mails or any means or instrumentality of interstate commerce to provide advice to or on behalf of a municipal entity … with respect to … the issuance of municipal securities … in connection with which such municipal advisor engages in any fraudulent, deceptive, or manipulative act or practice.

Several courts have held that municipal advisors have fiduciary duties to their clients under state law. I am not aware of any judicial decision holding that financial/municipal advisors generally do not have fiduciary duties to their clients. Further, long prior to the enactment of the Dodd-Frank Act, the Commission engaged in significant enforcement activity, in the process recognizing state law fiduciary principles.

Municipal advisors also are subject, of course, to MSRB Rule G-17's broad fair dealing mandate and antifraud prohibition that may lead to liability in connection with dealings with non-clients.

The federal fiduciary duty, which as noted is a statutory duty, did not arise from MSRB Rule G-42, but is largely, although not totally, explained in the Rule. Some municipal advisors do not understand this important distinction.

MSRB Rule G-42, which became effective on June 23, 2016, provides guidance and assistance to municipal advisors on how to satisfy the statutory fiduciary duty, which pre-existed Rule G-42. To be precise, MSRB Rule G-42 does not "create" or "impose" the federal fiduciary duty, including the duty of care and the duty of loyalty, but rather, as described in the statute, "prescribe[s] means reasonably designed to prevent" municipal advisors from committing acts inconsistent with the federal fiduciary duty (which as noted was already in effect when Rule G-42 was adopted), and to provide assistance and guidance to municipal advisors in that respect.

In that connection, Securities Exchange Act §15B(b)(2) provides:

> *The Board shall propose and adopt rules* to effect the purposes of this title with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers and advice provided to or on behalf of municipal entities or obligated persons by brokers, dealers, municipal securities dealers, and municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors. *The rules of the Board, as a minimum, shall*:
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> * * *
>
> (L) with respect to municipal advisors—
>
> (i) *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 … [Emphasis added.]

Shortly following the Dodd-Frank Act's effectiveness with respect to municipal advisors, including the fiduciary duty, the Board described its rulemaking role regarding the fiduciary duty as follows:[1]

> The Dodd-Frank Act provides that MSRB rules for municipal advisors must, among other things: … prescribe means *reasonably designed to prevent acts, practices, and*

[1] MSRB Notice 2010-47, *Application of MSRB Rules to Municipal Adv*isors (Nov. 1, 2010). See also MSRB Notice 2012-25, *Securities and Exchange Commission Approves Interpretive Notice on the Duties of Underwriters to State and Local Government Issuers* (May 7, 2012) ("act in the best interests of the issuer without regard to its own financial or other interests").

> *courses of business that are not consistent with a municipal advisor's fiduciary duty* to its municipal entity clients … . [Emphasis added.]

The Board stated further that it:

> expects to provide guidance on the definition of "municipal advisor" and what it means for a municipal advisor to have a fiduciary duty to a municipal entity, *as provided for in the Dodd-Frank Act*. [Emphasis added.]

In a footnote, the Board added:

> Municipal advisors should note that, pursuant to Section 15B(c)(1) of the Exchange Act*, they are subject to a federal fiduciary duty to their municipal entity clients as of October 1, 2010, even before MSRB rulemaking on the subject*. [Emphasis added.]

Thus, Rule G-42 did not create the federal fiduciary duty, or define the duty in its totality. Rather, the fiduciary duty is contained in the statute (and state law). Rule G-42 provides certain guidance regarding compliance with the federal statutory duty.

In proposing Rule G-42, the Board recognized that its role is to provide guidance and assistance to municipal advisors in satisfying their statutory obligations. For example, the Board stated:[2]

> [T]he Dodd-Frank *Act itself specifically establishes that a fiduciary duty is owed* by a municipal advisor to its municipal entity clients.
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> * * *
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> *Draft Rule G-42 elaborates on the duties* of a municipal advisor, including the fiduciary duties of a municipal advisor towards its municipal entity clients.
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> * * *
>
> The Supplementary Material in the draft rule *provides guidance* on the meaning of the duty of care and the duty of loyalty.
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> * * *
>
> *The Dodd-Frank Act establishes a federal regulatory regime* that requires municipal advisors to register with the SEC, grants the MSRB certain regulatory authority over municipal advisors, and *imposes, among other things, a federal statutory fiduciary duty on municipal advisors when advising municipal entity clients*. Municipal advisors advising municipal entities are prohibited from engaging in any act, practice, or course of business which is not consistent with that fiduciary duty. In addition, *Congress directed that the MSRB develop rules reasonably designed to*

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[2] MSRB Notice 2014-01, *Request for Comment on Draft MSRB Rule G-42, on Duties of Non-Solicitor Municipal Advisors* at 3, 5, 7, 17-18, 22 (Jan. 9, 2014). [Emphasis added.] See also MSRB Notice 2014-12, *Request for Comment on Revised Draft MSRB Rule G-42, on Duties of Non-Solicitor Municipal Advisors* (July 23, 2014).

> *prevent acts, practices, or courses of business by municipal advisors that are inconsistent with their fiduciary duty*, as applicable. Neither the Dodd-Frank Act nor the recently adopted SEC Final Rule prescribe the duties and obligations of municipal advisors beyond a general statement that municipal advisors shall be deemed to have a fiduciary duty to any municipal entity for whom the municipal advisor acts as a municipal advisor. Therefore, there is *a need for regulatory guidance* with respect to the duties of municipal advisors and the prevention of breaches of a municipal advisor's fiduciary duty to its municipal entity clients. …
>
> The MSRB believes that by articulating specific standards of conduct and duties for municipal advisors, *draft Rule G-42 will assist municipal advisors in complying with the statutorily-imposed requirements* of the Dodd-Frank Act, and help prevent failures to meet those requirements. The draft rule is expected to aid municipal entities and obligated persons that choose to engage municipal advisors in connection with their issuances of municipal securities as well as transactions in municipal financial products by promoting higher ethical and professional standards of such advisors. The MSRB also believes that articulating standards of conduct and duties of municipal advisors will enhance the ability of the MSRB and other regulators to oversee the conduct of municipal advisors, as contemplated by the Dodd-Frank Act. [Emphasis added.]
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> * * *
>
> Although *the statute imposed this fiduciary duty*, it does not describe or clarify its elements. *Draft Rule G-42 can be viewed as establishing guidance and clarification* with respect to this fiduciary duty and potentially *prescribing means designed to prevent breaches of this duty*.
>
> * * *
>
> The MSRB believes that the *draft rule provides needed guidance and clarification with respect to the standards of conduct and duties of a municipal advisor that would meet the purposes of the Dodd-Frank Act*. The draft rule also prescribes for municipal advisors *means that may prevent breaches of these duties*. Therefore, this *guidance* provides a benefit to municipal advisors who could otherwise face greater uncertainty about the standards of conduct and duties required to meet certain of the requirements of the Dodd-Frank Act, particularly, as noted, given the regulatory framework for municipal securities regulation involving multiple enforcement organizations.

In other words, Rule G-42 is a means to an end—guiding and assisting municipal advisors in complying with their statutory fiduciary duty, which is expressed in principles-based terms and exists independently of Rule G-42. Rule G-42 is not, in and of itself, the end product in the definition of the extent and content of municipal advisors' fiduciary duties.

In considering how the principles of Rule G-23 may interact with Rule G-42, it may be useful to consider some general principles applicable to the relationships between municipal advisors and their clients. One set of principles is contained in the state common law of agency. There are further principles of fiduciary duty that follow my brief summary of certain agency principles.

<u>Municipal Advisors as Agents</u>

Although it is rarely discussed in the municipal securities market in explicit terms, and so far as I can determine, not at all by the Board, it is important, in describing the fiduciary duty of municipal advisors, to recognize that municipal advisors are virtually always agents of their clients, both municipal entity clients and obligated person clients.[3]

Agents are fiduciaries under common law. The common law fiduciary duty principles applicable to municipal advisors are strict and demanding. I urge the Board to consider carefully whether Rule G-23 and Rule G-42 recognize those principles appropriately in all material respects for purposes of the federal statutory duty, especially with respect to municipal advisor disclosure of, and client consents to, conflicts of interest and associated risks.

The **RESTATEMENT OF AGENCY THIRD** §1.01 defines "agent," as follows:

<u>§1.01 Agency Defined</u>

> *Agency is the fiduciary relationship* that arises when one person (a "principal") manifests assent to another person (an "agent") that *the agent shall act on the principal's behalf and subject to the principal's control*, *and the agent manifests assent* or otherwise consents so to act. [Emphasis added.][4]

While, in a purely theoretical sense, municipal advisors possibly may avoid agency status by not dealing with third persons on behalf of the advisors' clients, in reality, this is an almost

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[3] As a side note, I make the same observation regarding agency roles of bond counsel and disclosure counsel, as well as local counsel, to municipal entities.

[4] See also *In the Matter of Daisy Systems, Inc*., 97 F. 3rd 1171 (9th Cir. 1996), in which the Court of Appeals for the Ninth Circuit opined under California law that confidentiality is an element of a fiduciary relationship and held that a financial advisor to a sophisticated corporation would have a fiduciary duty if the trial court found that the advisor had functioned as an agent ("Should a factfinder determine from the record that an agency relationship existed between the parties, … then a fiduciary relation should be presumed to exist.")

The Court stated:

> Two important issues of fact that must be resolved before it can be determined whether a fiduciary relationship existed between Daisy and Bear Stearns are the *questions of agency and confidentiality*. As *confidentiality is an element of a fiduciary relationship …* resolution of the fiduciary question in this case will turn in part on whether Daisy reposed confidences in Bear Stearns. *Moreover*, among the terms of Bear Stearns' retention was a provision stating that *it would be acting on Daisy's behalf. Should a factfinder determine from the record that an agency relationship existed between the parties*, …, *then a fiduciary relation should be presumed to exist*. [Emphasis added.]

See further *SEC v. Cochran, et al*., 214 F.3d 1261 (10th Cir. 2000) ("When one party expressly or implicitly agrees to act as an agent or broker on behalf of another party, *Oklahoma law imposes on the agent a fiduciary duty to disclose to the principal all material facts within the scope of the agency*.") [Emphasis added.]

impossible occurrence. Further, municipal advisors provide advice on behalf of, and purportedly in the best interests of, their clients.[5]

Municipal advisors routinely consent contractually to represent and advise their municipal securities issuer clients both during the offering process and on a continuing basis, to act on behalf of and subject to the control of the advisors' issuer clients, and to communicate on the issuer clients' behalves with many third parties such as, among others, bond counsel, local issuer counsel, auditors, bond trustees, rating agencies, private obligors in conduit bond issues, bond banks, information providers (*e.g*., in gathering economic, demographic and other statistical data for official statements), and investors making inquiry.

Municipal advisors also have relationships with municipal entities to provide specialized expert financial advisory services to, and solely in the best interests of, the municipal entities without regard to the advisors' own financial or other interests. There is a common imbalance of knowledge and expertise between the advisors and their clients. In part as a result of municipal advisors' inducement to municipal entities to rely upon the advisors, typically the clients place a high degree of trust and confidence in the advisors.

The clients control the actions of municipal advisors by retaining the ultimate approval of recommendations made by the advisors and by the ability to terminate the contracts between them in the event of unsatisfactory service.

<u>Municipal Advisors Must Warn Against Risk—Silence Is Not an Option for Fiduciaries</u>

Municipal advisors acting, among other things, as agents are recognized by municipal market practitioners as fiduciaries, as well as by market and legal authority. This means that municipal advisors have a duty to provide information affirmatively to their clients[6] Although for

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[5] I note that, insofar as state law is relevant, these facts and circumstances apply in municipal advisors' relationships with obligated person clients, as well as municipal entity clients.

[6] As discussed below, the **RESTATEMENT OF AGENCY THIRD** makes clear that agents are fiduciaries, have a duty to act solely in their principals' best interests, and have an affirmative duty to provide information to the principals, even if the agents believe that the principals know or are able to discover the information on their own.

The general rule relating to business dealings conducted by principals dealing at arms'-length, such as underwriters, and by other non-fiduciary professionals, is set forth in the **RESTATEMENT OF TORTS SECOND**, §551(1), as follows:

> (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question. [Emphasis added.]

The **RESTATEMENT'S** § 551(2), however**,** distinguishes fiduciary relationships from normal business dealings in that fiduciaries, unlike typical business persons, including non-fiduciary professionals, have an affirmative duty to speak, as follows:

> (2) *One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated*,
>
> (a*) matters known to him that the other is entitled to know because of a fiduciary* or other similar *relation of trust and confidence* between them[.] [Emphasis added.]

Robert Fippinger agrees in his authoritative two-volume treatise, **THE FEDERAL SECURITIES LAW OF PUBLIC FINANCE**, Ch. 14, Fraud Concepts in Public Finance, §§14:11 at 14-163, 14:11.5 at 14-182, 14:11.7 at 14-194 (Practising Law Institute), as follows:

> In a case of nondisclosure, Anglo-American law tilts in favor of the person choosing to remain silent *requiring an affirmative duty to speak only in limited circumstances in which the defendant has a special relationship* to the person injured or situations in which the nondisclosure substantially mimics a misrepresentation. *Among these special relationships is that of a fiduciary having duties of loyalty and care to a beneficiary*.
>
> * * *
>
> To prevent a breach of fiduciary duty from also being fraudulent conduct *it is necessary for the fiduciary to disclose information material to a beneficiary's decision to act or refrain from acting* in a business transaction prior to the time the beneficiary acts or refrains from acting.
>
> * * *
>
> *Fiduciary fraud is an exception to the general rule* that a person is ordinarily entitled to remain silent despite possessing information that would be material to another. *If a person is in a "fiduciary or other similar relation of trust and confidence" there is a duty to disclose the material facts*, and *failure to make the disclosure is fraud*. [Footnote omitted; emphasis added.]

The **RESTATEMENT OF AGENCY THIRD** §8.01 states a general fiduciary principle applicable to agents:

§ 8.01 General Fiduciary Principle

> *An agent has a fiduciary duty to act loyally for the principal's benefit* in all matters connected with the agency relationship. [Emphasis added.]

The **RESTATEMENT'S** Comment to §8.01 states in part that an agent must "subordinate the agent's interests to those of the principal and place the principal's interests first," citing as a "breach of the agent's duties of loyalty to the principal" "an agent's failure to provide material information to the principal," as follows:

> the general fiduciary principle requires that the agent subordinate the agent's interests to those of the principal and place the principal's interests first as to matters connected with the agency relationship.

* * *

An agent's failure to provide material information to the principal may facilitate the agent's breach of the agent's duties of loyalty to the principal.

* * *

Unless the principal consents, the general fiduciary principle … also requires that an agent refrain from using the agent's position … to benefit the agent … . [Emphasis added.]

The **RESTATEMENT** §8.06 speaks to how agents are able to obtain effective consents from their principals regarding conflicts of interest through full material disclosure of specific information and informed client consents, as follows:

<u>§8.06 Principal's Consent</u>

(1) Conduct by an agent that would otherwise constitute a breach of duty as stated in §§ 8.01 … does not constitute a breach of duty if the principal consents to the conduct, *provided that*

(a) *in obtaining the principal's consent, the agent*

(i) *acts in good faith*,

(ii) *discloses all material facts that the agent knows, has reason to know, or should know* would reasonably affect the principal's judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and

(iii) *otherwise deals fairly* with the principal; and

(b) *the principal's consent concerns either a specific act or transaction*, or acts or transactions of a specified type that could reasonably be expected to occur in the ordinary course of the agency relationship. [Emphasis added.]

The **RESTATEMENT'S** Comment to §8.06 describes client consents, as follows:

The validity of the principal's consent turns in many respects on the agent's conduct in obtaining it.

* * *

[W]hen a principal consents to specific transactions or to specified types of conduct by the agent, the principal has a focused opportunity to assess risks that are more readily identifiable.

* * *

A principal may consent to an agent's receipt of a material benefit in connection with … actions taken on behalf of the principal or otherwise through the agent's use of position.

The **RESTATEMENT** §8.08 discusses the agent's duties of "care, competence and diligence," especially "[i]f an agent claims to possess special skills of knowledge," as municipal advisors commonly claim on their websites and in other advisor communications to clients, as follows:

§ 8.08 Duties of Care, Competence, and Diligence

> Subject to any agreement with the principal, *an agent has a duty to the principal to act with the care, competence, and diligence* normally exercised by agents in similar circumstances. Special skills or knowledge possessed by an agent are circumstances to be taken into account in determining whether the agent acted with due care and diligence. *If an agent claims to possess special skills or knowledge, the agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents with such skills or knowledge*. [Emphasis added.]

The **RESTATEMENT** §8.11 discusses further the agent's affirmative duty to provide information to the principal:

§8.11 Duty to Provide Information

> An agent has a *duty to use reasonable effort to provide the principal with facts* that the agent knows, has reason to know, or should know when
>
> (1) subject to any manifestation by the principal, *the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal*[.] [Emphasis added.]

The **RESTATEMENT'S** Comment to §8.11 states that the agent's duty to provide information to the principal requires the agent to do so even if the agent believes "that the principal could, through investigation, have ascertained the truth independently," noting that an agent's potential benefit "if a principal completes a transaction may tempt the agent not to furnish information," adding "such disclosure, to be effective, must be made to a disinterested decisionmaker who has authority within the organization," as follows:

> A principal has a right to rely on advice given by an agent and on the agent's accurate transmission of material information to the principal. *It is not a defense to an agent's breach of duty to transmit material information that the principal could, through investigation, have ascertained the truth independently*.
>
> … *[I]t is possible that the benefit that an agent anticipates receiving if a principal completes a transaction may tempt the agent not to furnish information to the principal when the agent believes that the principal might on that basis reconsider the transaction or its terms, with results unfavorable for the agent*.
>
> * * *
>
> In an organizational setting, such *disclosure, to be effective, must be made to a disinterested decisionmaker* who has authority within the organization to determine whether the agent's conduct is consistent with the organization's interests. [Emphasis added.]

purposes of the Dodd-Frank Act, the statutory federal fiduciary duty is imposed only upon municipal advisors to municipal entities, for state law purposes, as discussed in this letter, the common law fiduciary duty is not so limited.[7]

One of the core roles and responsibilities of municipal advisors is to inform their issuer clients about risks relevant to the advisors' scope of services (as well as other risks of which the advisors are aware or should be aware) and to educate the clients about how to manage, mitigate and avoid such risks. Such risks were present in activities accommodated by Rule G-23 in its prior form, and could re-emerge if advisors are permitted again to serve as underwriters.[8]

Prior to the enactment of the federal fiduciary duty in the Dodd-Frank Act, municipal issuers were subject to repeated abuses and incompetence by their bond financial advisors, who have been from the date of effectiveness of the Dodd-Frank Act the core municipal advisors.[9] In particular, advisors failed to warn and inform their issuer clients adequately regarding transactional risks of complex financial transactions. Warning clients about transactional risks is one of the central motivating purposes supporting enactment of the Dodd-Frank Act's municipal advisor provisions.

The municipal advisory relationship is one of a highly specialized expert character. Municipal advisors should possess the ability to recognize risks that clients may not recognize or at least may not appreciate fully. Among other things, municipal advisory clients expect their municipal advisors to perform professional investigations in support of recommendations the advisors make to the municipal entity clients and to communicate affirmatively in order fully to inform the issuers of information that the municipal advisors know, or should know is important to the issuers. It does not matter that the advisors may think the clients could discover the

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[7] When and if municipal entities or obligated persons bring civil actions against municipal advisors, those actions almost invariably will involve state law claims.

[8] Even now, as discussed below, despite warnings by the Board and the Commission, some municipal advisors, including advisors who are not registered as broker-dealers, receive contingent compensation while identifying and soliciting potential investors and negotiating bond terms, thus serving as placement agents for their clients.

[9] See, *e.g.*, Van Natta, "*Firm Acted a Tutor as It Sold Risky Deals to Towns*" (New York Times Apr. 8, 2009) (citing many small Tennessee communities that had lost money from complex derivatives transactions); Selway, "*Pennsylvania Should Ban Municipal Derivatives Deals (Update1)*" (Bloomberg.com Nov. 18, 2009) (the Auditor General "made the call after an audit of the Bethlehem Area School District found that officials lost at least $10.2 million by entering into interest-rate swaps tied to variable-rate bonds, based on an analysis of just two of the district's 13 deals. Since the Legislature explicitly legalized such trades in 2003, school districts, towns and other localities in the state have entered into derivative deals on $15 billion of debts.")

information on their own—the advisors must take affirmative action to provide the information themselves as the clients' fiduciaries.[10]

Although there are certain superficial similarities, the negligence standard of the fiduciary duty of care to disclose risks is much more extensive than mere professional negligence prevention for non-fiduciary professionals. This is still a negligence standard for municipal advisors, but in the context of the fiduciary duty, the standard is stronger than it would be for non-fiduciary professionals.

Indeed, although prior to the enactment of the Dodd-Frank Act bond financial advisors and other municipal advisors were subject, as were other professionals, to the potential for claims for professional negligence, the federal fiduciary duty created by the Dodd-Frank Act has transformed the municipal securities market by providing a uniform national standard that is enforceable by the SEC.

Municipal bond issuers rely heavily upon their municipal advisors, and municipal advisors readily accept their fiduciary duties as a key component of their relationships with their municipal entity clients.[11]

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[10] See the discussion above of the fiduciary duty to provide information to the beneficiaries of fiduciary relationships, including among other things, the **RESTATEMENT OF AGENCY THIRD**, §8.11, and the Comment thereto, which states:

> It is not a defense to an agent's breach of duty to transmit material information that the principal could, through investigation, have ascertained the truth independently.

Tamar Frankel states in **LEGAL DUTIES OF FIDUCIARIES: DEFINITIONS, DUTIES AND REMEDIES** at 149-50 (Fathom Publishing Co. 2012) that "The entrustor does not have to ask; the fiduciary must inform and report," as follows:

> The *duty of the fiduciary to disclose information* about the … exercise of entrusted power is not limited to those situations in which the fiduciary was engaged in conflict of interest transactions or violated other rules. *It is a duty to tell the entrustor how the fiduciary is providing the services and what happened to the entrustment, regardless of whether the entrustor asked for the information. The entrustor does not have to ask; the fiduciary must inform and report*. [Emphasis added.]

The **RESTATEMENT OF TORTS SECOND** §551, cited in n. 6 above, states the principle that a party in a fiduciary relationship cannot remain silent, but is obligated affirmatively to provide important information to the beneficiary of the relationship.

As quoted above, in **THE SECURITIES LAW OF PUBLIC FINANCE**, Robert Fippinger described the effect of then **RESTATEMENT'S** analysis, as follows:

> If a person is in a "fiduciary or other similar relation of trust and confidence" there is a duty to disclose the material facts, and failure to make the disclosure is fraud.

[11] See GFOA, **RECOMMENDED PRACTICE—SELECTING FINANCIAL ADVISORS** (2008); GFOA's **BEST PRACTICE—SELECTING AND MANAGING MUNICIPAL ADVISORS** (Feb. 2014) ("A municipal advisor represents the issuer in the sale of bonds, and unlike other professionals involved in a bond sale, has an

Because so many municipal issuers do not have bond structuring capabilities, and bond issuance is one of their greatest financial obligations, if not the greatest, the fiduciary duty of care of bond financial advisors and other municipal advisors is an essential protection for municipal bond issuers who rely on the advisors to disclose risks and benefits associated with bond structure alternatives.[12]

Key distinctions of the fiduciary duty of care establishing the negligence standard for municipal advisors from mere professional negligence for non-fiduciary professionals include the following:

- Unlike non-fiduciary professionals, the municipal advisor has an affirmative duty to speak, not only to avoid misleading statements. The municipal advisor, as a fiduciary, does not have the option to remain silent on important relevant matters, and unlike non-fiduciary professionals, cannot omit to inform the issuer client of important relevant information.[13]

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explicit fiduciary duty to the issuer per the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). … The Government Finance Officers Association (GFOA) recommends that issuers hire a municipal advisor prior to the undertaking of a debt financing unless the issuer has sufficient in-house expertise and access to current bond market information."); **RECOMMENDED PRACTICE—SELECTING UNDERWRITERS FOR NEGOTIATED BOND SALES** (2008); **BEST PRACTICE—SELECTING AND MANAGING UNDERWRITERS FOR NEGOTIATED BOND SALES** (2014) ("Issuers must keep in mind that the roles of the underwriter and the municipal advisor are separate, adversarial roles and cannot be provided by the same party. There is no federal law establishing an underwriter's fiduciary responsibility to the issuer."), and **RECOMMENDED PRACTICE—SELECTING UNDERWRITERS FOR NEGOTIATED BOND SALES** (2008) ("A financial advisor represents only the issuer and has a fiduciary responsibility to the issuer.")

See also the **CODE OF PROFESSIONAL CONDUCT AND ETHICS** of the National Association of Municipal Advisors, stating, among other things, that:

> NAMA members are expected to understand and conduct themselves in a manner that meets and exceeds federal regulatory standards, state or local laws, or other applicable duties that apply to Municipal Advisors. This includes abiding by the federal fiduciary duty, where the interests of the client must come first and be above the interests of the individual MA or the MA Firm. In addition to federal regulations, Municipal Advisors must follow all state and local laws and codes that apply in the jurisdiction where they practice. In the event of a conflict in law or regulation, NAMA members must comply with the more strict law or regulation.

[12] It is also an important protection for municipal bond investors because the issuers are able to issue bonds based upon municipal advisors' expert bond structure advice.

[13] See the resources cited in nn. 6 and 10 above.

- Unlike non-fiduciary professionals, the municipal advisor must act and communicate solely in the best interests of the municipal issuer without regard to the financial or other interests of the municipal advisor.[14]

- Unlike non-fiduciary professionals, the municipal advisor must provide important information to the client, even if the client does not ask for the information and even when the advisor believes that the client could discover the information on its own.[15]

- In addition to the fiduciary duty of care, unlike non-fiduciary professionals, municipal advisors are subject to the duty of loyalty requiring them to avoid conflicts of interest as to which the municipal issuer client has not consented on a

[14] In 2012, the MSRB described distinctions between the underwriters' and municipal advisors' roles, as follows:

> unlike a municipal advisor, the underwriter does not have a fiduciary duty to the issuer under the federal securities laws and is, therefore, not *required by federal law to act in the best interests of the issuer without regard to its own financial or other interests …*
>
> [MSRB Notice 2012-25, *Securities and Exchange Commission Approves Interpretive Notice on the Duties of Underwriters to State and Local Government Issuers* (May 7, 2012).] [Emphasis added.]

[15] See the resources cited in nn. 6 and 10 above.

fully-informed basis.[16] Significantly, the burden is on the municipal advisor to prove disclosure of, and client consents to, conflicts of interest.[17]

Thus, the fiduciary duty pervades the relationship and all activities and communications of municipal advisors with their issuer clients.

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[16] Tamar Frankel identifies in **FIDUCIARY LAW** at 106-07 (Oxford University Press 2011) the duties of fiduciaries to their beneficiaries (which she calls "entrustors"), as follows:

- The *duty of loyalty*, relating to entrusted … power.
- The *duty of care*, relating to the *quality and care of fiduciaries' performance* of their services.

Based on the duty of loyalty are a number of additional duties:

- The *duty to follow and abide by the directives of entrustment* with respect to the entrusted power … .
- The *duty to act in good faith* in performing fiduciary services.

* * *

- The *duty to … disclose relevant information* to the entrustors.
- The *duty to treat entrustors fairly*. [Footnotes omitted; emphasis added.]

The **RESTATEMENT OF AGENCY THIRD** §8.01 states a general fiduciary principle applicable to agents:

<u>§ 8.01 General Fiduciary Principle</u>

> *An agent has a fiduciary duty to act loyally for the principal's benefit* in all matters connected with the agency relationship. [Emphasis added.]

[17] The **RESTATEMENT OF AGENCY THIRD'S** Comment to §8.06 states that "An agent has the burden of establishing that the principal consented," as follows:

> *An agent has the burden of establishing that the principal consented* to the agent's acquisition of a material benefit. *The rule entitles the principal to assume that the agent will make the disclosures requisite to effective consent by the principal*. [Emphasis added.]

This fundamental principle should be embedded in Rule G-23 and Rule G-42.

In other words, municipal advisors must make disclosure of conflicts of interest in a readily-understandable manner. Moreover, the municipal entity's official receiving the disclosure must not be conflicted and must be an official with real authority, not an underling or just another agent.

Rule G-23 and Rule G-42 should require, through explicit provisions, that municipal advisors make clear, understandable disclosure to client officials with full authority to provide effective consents.[18]

As noted above, the federal fiduciary duty was enacted due to many serious abuses committed by municipal advisors who had expected mere professional negligence, as measured by non-fiduciary standards, and the difficulties of litigation for municipal entities to protect the advisors from liability for nondisclosure prior to the financial crisis of 2007 to 2009. Large numbers of municipal entities suffered significantly adverse financial consequences from having entered into complex transactions on the basis of incompetent, and often conflicted, advice and with excessive, and often undisclosed, risks. Municipal entities' financial advisors failed to alert the entities affirmatively regarding the significant risks, while advising the entities in positive terms about transactions with inadequate care and investigation. [19]

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[18] Importantly, it bears repeating that the **RESTATEMENT OF AGENCY THIRD'S** Comment to §8.11 states that:

> In an organizational setting, such *disclosure, to be effective, must be made to a disinterested decisionmaker* who *has authority within the organization to determine whether the agent's conduct is consistent* with the organization's interests. [Emphasis added.]

In other words, the municipal entity's official(s) receiving the disclosure must not be conflicted and must possess real decision-making authority, as opposed to junior officials or other agents.

[19] Municipal entities now have much greater protection under the national uniformity provided by federal law both through the federal fiduciary duty of due care and the duty of loyalty, which may be enforceable not only by the issuers, but also by the SEC.

As stated by Robert Fippinger in his treatise, **THE FEDERAL SECURITIES LAW OF PUBLIC FINANCE**:

> [T]he substantive obligations of a section 15B(c)(1) municipal advisor fiduciary are to be articulated as a matter of federal law. This conclusion is important because it means that a single standard can be established without the necessity of relying on the fiduciary duty law of fifty different states in which various transactions occur.
>
> [R. Fippinger, **THE FEDERAL SECURITIES LAW OF PUBLIC FINANCE**, Ch. 11, Municipal Advisor Regulation at §11:12.1, p. 11-97 (Practising Law Institute, New York, Rel. #6, 9/17); see also §11:1.1, p. 11-9, stating, "The statutory fiduciary duty is a federal standard that applies in addition to any state law impositions of a fiduciary duty … ."]

An application of the fiduciary duty of due care is illustrated by an enforcement action brought by the Securities and Exchange Commission enforcing the federal fiduciary duty of due care against a municipal advisory firm, Municipal Finance Services, Inc., and two officials of the firm, in SEC Rel. No. 81475, IA-4758 (Aug. 24, 2017), when the firm and its officers failed to advise a municipal securities issuer affirmatively and appropriately in connection with a bond offering in 2013 of the need to disclose information to investors ("Section 15B(c)(1) of the Exchange Act imposes upon municipal advisors and their associated persons a fiduciary duty to their municipal entity clients, and prohibits them from engaging in any act, practice or course of business that is not consistent with their fiduciary

I also note that, as discussed below, the federal fiduciary duty set forth in the Dodd-Frank Act reaches responsible municipal advisor officials, including the individual advisors violating the fiduciary duty and, importantly, controlling persons of a municipal advisory firm, which a professional negligence cause of action often would not reach.

To summarize, municipal entities issuing bonds into the market need the expert services of municipal advisors, including warnings regarding risks. Of the estimated 50,000 municipal bond issuers,[20] the vast majority are small or unsophisticated in terms of municipal finance and bond structuring, or both. In a democracy, the public agencies function with elected or appointed governing bodies and key staff who are everyday people who, even of successful in one or another field, commonly know little or nothing about municipal finance. The public agencies generally also lack access to expensive software and municipal market data and information resources necessary to structure bond issues appropriately.

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duty. *Fiduciaries must* act in the utmost good faith and *use reasonable care to avoid misleading clients.* … MFSOK willfully breached its fiduciary duty.") [Emphasis added.]

That enforcement action based on the statutory fiduciary duty of care would not have been possible under federal law prior to the enactment of the fiduciary duty in the Dodd-Frank Act.

Additional post-Dodd-Frank Act SEC actions enforcing the duty of loyalty against municipal advisors (most of which relate to bond issues prior to the adoption of Rule G-42) include: *Barcelona Strategies LLC, et al.*, SEC Rel. Nos. 34-83191, IA 33093 (May 9 2018) (failure to disclose relationship with bond counsel in bond issues in 2013, misleading advertising); *In the Matter of Central States Capital Markets LLC*, et al., SEC Rel. Nos. 34-77369, IA-4352, IC-32027 (March 15, 2016) (arising from activities in 2011, including an undisclosed relationship with an underwriter); *In the Matter of School Business Consulting, Inc., et al*., SEC Rel. Nos. 34-78054, IC-32147 (June 13, 2016) (arising from activities initiated in 2010, including an undisclosed relationship between a municipal advisor and a school consultant); and *In the Matter of Keygent LLC, et al*., SEC Rel. No. 34-78053 (June 13, 2016) (arising from activities initiated in 2010, including an undisclosed relationship between a municipal advisor and a school consultant);*In the Matter of Malachi Financial Products, Inc., et al*., SEC Rel. Nos. 34-83607 (July 9, 2018) and *In the Matter of Porter Bingham*, SEC Rel. No. 34-83608 (July 9, 2018) (municipal advisor and its principal failed to disclose to the advisor's issuer client that the advisor had received payments in May 2015 from an underwriter the advisor recommended to the client and the advisor submitted in 2015 fraudulent invoices for services the advisor had not performed); and *In the Matter of Dale Scott & Co., et al*., SEC Rel. No. 34-86393 (July 16, 2019); *In the Matter of Oetken*, SEC Rel. No. 34-86395 (July 16, 2019); and *In the Matter of School Services of California*, SEC Rel. No. 34-86396 (July 16, 2019) (undisclosed relationships between a municipal advisor and school consultants serving as unregistered solicitors).

[20] Schapiro, "*Speech by SEC Chairman: Address before the New York Financial Writers' Association Annual Awards Dinner*" (June 18, 2009) ("nearly 50,000 state and local issuers").

See also SEC Rel. No. 34-62184A at 7-8 (May 26, 2010), 75 F.R. 33100 at 33101 (June 10, 2010) ("there are approximately 51,000 state and local issuers of municipal securities, ranging from villages, towns, townships, cities, counties, and states, as well as special districts, such as school districts and water and sewer authorities.")

As stated in GFOA's **BEST PRACTICE—SELECTING AND MANAGING MUNICIPAL ADVISORS** (Feb. 2014):

> *State and local governments engage municipal advisors to assist in the structuring and issuance of bonds … .*
>
> *A municipal advisor represents the issuer in the sale of bonds, and unlike other professionals involved in a bond sale, has an explicit fiduciary duty to the issuer* per the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).
>
> * * *
>
> The Government Finance Officers Association (GFOA) *recommends that issuers hire a municipal advisor prior to the undertaking of a debt financing unless the issuer has sufficient in-house expertise* and access to current bond market information.
>
> * * *
>
> *The GFOA recommends that issuers select municipal advisors on the basis of merit* using a competitive process and that issuers review those relationships periodically. [Emphasis added.]

<u>Contingent Compensation</u>

It is important to keep in mind that more than a few bond issues are conducted and closed without advice from *any* transaction participant—financial or legal—who does not receive contingent compensation. In those transactions, no participant is able to speak up to urge the issuer to exercise care regarding the presence of risks without incurring the potential delay in receipt of compensation or even the termination of the transaction and complete or substantial loss of compensation.

If municipal advisors are permitted to underwrite the bonds issued by their clients, one question is whether the advisor/underwriter will be permitted to retain two forms of compensation, regardless of whether contingent or noncontingent. Another question is how contingencies may be tolerated, especially if an advisor now may be motivated by two contingent fees in order to close the bond issue.

A further question arises in the context of municipal advisors who receive compensation contingent on transactional completion while identifying investors in negotiated bond offerings, selling bonds through negotiation (as opposed to competitive bid procedures typical for municipal advisors), and negotiating bond terms directly with securities investors. The contingent compensation radically increases the pressures on municipal advisors to complete transactions, as opposed to providing optimal advice solely in the best interests of the advisors' clients as to whether a transaction is wise, is the best alternative, needs modification that may introduce delay, or should be investigated further.

Some contingent fees should be prohibited completely, regardless of disclosure. For example, fees based upon transactional size, which are a typical form of underwriting and placement agent compensation, should not be permitted at all.[21]

In addition, if fees are linked to bond issue closings, municipal advisors and lawyers may work for many months on bond transactions without the prospect of receiving compensation unless bond issues close. That is a tremendous conflict of interest. The individuals working on the transactions are human beings who must make a living. If they do not close the transactions in which they receive contingent fees, they may be unable to continue long in business. In addition, they are subject internally to often intense pressure from firm members and partners to close the transactions so their firms can be paid. Not only that, but other transaction participants may be highly critical of, and may exert substantial pressure opposing, transactional (and compensation) delays or terminations.

The conflicts are especially pernicious in those transactions that are complex and that present difficult questions associated with issuer risks. That is specifically when unbiased advice is especially required and most significant.

It is crucial in those difficult transactions that someone who does not have a stake in the completion of the transaction speak up to warn the issuer of risks, the potential consequences of the risks, and the need to exercise care. Indeed, the Dodd-Frank Act municipal advisor provisions were enacted in part in response to abuses that occurred prior to the financial crisis in complex financial transactions without warnings to issuers—especially small, inexperienced and infrequent issuers—regarding the risks they were assuming, often completely unknowingly.

Even when issuers may acknowledge generally that there are risks present, they may not fully understand the specific nature or the severity of the risks. The issuers may need an expert financial advisor to provide that information to them.[22]

If such warnings may result in delays and even in uncompleted transactions, it is because that is exactly what is needed for small, unsophisticated, poorly-advised or careless issuers.

The risks of contingent compensation are risks that some issuers may fail to understand adequately.

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[21] Such fees are illegal for financial advisors in California. California Government Code §§53592 (referring to "the basis of compensation for the financial advisory services to be rendered, which … *shall be on a basis other than as a percentage of the amount of the bonds to be sold*.") [Emphasis added.]

[22] See the citations in the preceding notes regarding the obligation of a fiduciary to provide important information to the issuer clients even when an advisor may believe the issuer knows or is able to discover the information on its own.

Although some municipal advisors receive contingent fees, still other municipal advisors decline to do so due to the inherent conflict of interest that may destroy or affect adversely their independence.

It is true that one can describe conflicts associated with virtually any form of compensation. For example, hourly fee structures may create a motivation to pad the time charged on a transaction. That may result in a few hundred, or even thousand, dollars of unearned, or at least excess, compensation.

Those risks and conflicts pale, however, in comparison to the risks and conflicts associated with contingent municipal advisor compensation. Contingent compensation conflicts may lead to the closing of transactions that are unwise. Issuers experiencing defaults or litigation may incur many hundreds of thousands, or millions, of dollars of liability and costs in the form of lawyers' fees and fees of other consultants for re-structurings, workouts or litigation.

It is easy, and misleading to blame issuers alone for this state of affairs. No one may inform the issuers, however, that alternative fee structures are possible. Instead, transaction participants may simply proceed to conduct the transactions on the assumption, without making inquiry about the issuers' informed preferences and without disclosing risks of contingent fees, that contingent fees are what the issuers want. The issuers may have no reason to know that they could have a choice in fee structures or that they should exercise additional care when confronted with contingent advisory fees.

Further, no one may inform issuers that noncontingent fees are payable from bond proceeds. Issuers may believe that fees cannot be covered by bond proceeds. Given the terms of Rule G-42 leaving, in the view of some municipal advisors, disclosure of contingent fee conflicts optional, no one may inform the issuers or their governing bodies of the existence of the conflict of interest inherent in contingent fees. No one may inform the issuers that alternative fee structures may result in lower fees.[23]

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[23] For example, Rule G-42, Supplementary Information .11, Excessive Fees, states:

> *Among the factors relevant to whether a municipal advisor's compensation is disproportionate* to the nature of the municipal advisory activities performed are … *whether the fee is contingent upon the closing* of the municipal securities transaction or municipal financial product … . [Emphasis added.]

Indeed, ironically, the MSRB mandates stronger conflict disclosure by underwriters, who are not fiduciaries, regarding contingent compensation than disclosure by municipal advisors who are fiduciaries.[24]

GFOA recognized conflicts of interest of municipal advisors associated with contingent fees payable only when transactions close. For that reason, GFOA stated as early as 2008, prior to the enactment of the Dodd-Frank Act, that "Generally, financial advisory fees should not be paid on a contingent basis," because the conflicted "advice … might unnecessarily lead to the issuance of bonds," as follows: [25]

> **Basis of Compensation.** Fees paid to financial advisors *should be on an hourly or retainer basis*, reflecting the nature of the services to the issuer. *Generally, financial advisory fees should not be paid on a contingent basis* to remove the potential incentive for the municipal advisor to provide advice that *might unnecessarily lead to the issuance of bon*ds.
>
> [GFOA, **RECOMMENDED PRACTICE—SELECTING FINANCIAL ADVISORS** (2008).] [Emphasis added.]

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[24] Rule G-42(b) states the following requirements regarding municipal advisor disclosure regarding contingent compensation, suggesting that municipal advisors may not be automatically required under federal law to disclose conflicts associated with contingent compensation:

> A municipal advisor must, prior to or upon engaging in municipal advisory activities, provide to the municipal entity or obligated person client full and fair disclosure in writing of:
>
> (i) all material conflicts of interest, including: …
>
> (E) *any conflicts of interest arising from compensation* for municipal advisory activities to be performed *that is contingent on the size or closing of any transaction* as to which the municipal advisor is providing advice[.] [Emphasis added.]

In contrast, the Board stated, at least in explicit terms, a more robust description of disclosures required to be made by underwriters, who are not fiduciaries, regarding contingent compensation, as follows:

> The underwriter *must disclose* to the issuer *whether its underwriting compensation will be contingent on the closing* of a transaction. It *must also disclose* that compensation that is contingent on the closing of a transaction or the size of a transaction *presents a conflict of interest*, because *it may cause the underwriter to recommend a transaction that it is unnecessary or to recommend that the size of the transaction be larger than is necessary*.
>
> MSRB, *Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities* (Aug. 2, 2012). [Emphasis added.]

Why is this stronger form of disclosure not required of municipal advisors, who are after all fiduciaries? Could it not be required in connection with the review of Rule G-23?

[25] Those views of municipal securities issuers continue in effect today. See GFOA's **BEST PRACTICE—SELECTING AND MANAGING MUNICIPAL ADVISORS** (Feb. 2014).

Although GFOA also recognized that "this may be difficult given the financial constraints of many issuers," that statement did not eliminate the conflict of interest and the important responsibility of municipal advisors to disclose the conflict to the issuer clients, to inform the clients of the associated risks, or to obtain the clients' fully-informed consent to the conflict and associated risks.

I note that issuers, including financially-stressed issuers, routinely pay noncontingent compensation outside the bond offering context to auditors, engineers, lawyers and other professionals.

To emphasize the seriousness of the conflicts of interest for municipal entities, GFOA added in both 2014 and 2008 that:

> In the case of contingent compensation arrangements, *issuers should undertake ongoing due diligence to ensure that the financing plan remains appropriate* for the issuers needs. [Emphasis added.]

Recall that the purported need for "ongoing due diligence to ensure that the financing plan remains appropriate" by the issuer occurs when payment of noncontingent compensation "may be difficult given the financial constraints of many issuers." In other words, precisely the issuers that likely are the ones most in need of unbiased advice are the ones who are cautioned to engage in "ongoing due diligence." They are precisely the parties who will suffer the most in the event of untoward occurrences.

While there are municipal issuers that may prefer contingent fee structures, there are municipal advisors that never propose any other fee structure to the advisors' clients and that never give municipal issuers a choice, which some issuers may accept after being informed of the conflicts and associated risks. Indeed, many issuers—regardless of whether they are financially-stressed or financially-sound—have never received any fee proposal from a municipal advisor other than a contingent fee structure.

Moreover, GFOA's caution regarding financially-stressed issuers undermines directly GFOA's description in its **BEST PRACTICE** of why municipal issuers should retain municipal advisors, as follows:

> The Government Finance Officers Association (GFOA) recommends that issuers hire a municipal advisor prior to the undertaking of a debt financing *unless the issuer has sufficient in-house expertise and access to current bond market information*. Issuers *should assure themselves* that the selected *municipal advisor has the necessary expertise to assist the issuer in determining the best type of financing* for the government, selecting other finance professionals, planning the bond sale and successfully selling and closing the bonds. [Emphasis added]

One must ask how an issuer that does not have "sufficient in-house expertise and access to current bond market information" is able to conduct effective "ongoing due diligence to ensure that the financing plan remains appropriate."

In addition to the fiduciary duty of care, unlike non-fiduciary professionals, municipal advisors, of course, are also subject to the duty of loyalty. Advisors have a duty to avoid significant conflicts of interest as to which the municipal issuer client has not consented on a fully-informed basis. Municipal advisor conflicts of interest deprive municipal entities of key benefits of independent professional advice.

As stated by Tamar Frankel with reference to conflicts of interest, "[F]iduciaries must put entrustors on notice that, in connection with the specified transaction, entrustors cannot rely on their fiduciaries," as follows:

> When fiduciaries wish to engage in conflict of interest transactions and seek their entrustors' consent, *the entrustors must fend for themselves. Their right to rely on their fiduciaries must be eliminated.*
>
> * * *
>
> *[F]iduciaries must put entrustors on notice* that, in connection with the specified transaction, entrustors cannot rely on their fiduciaries.
>
> * * *
>
> *[F]iduciaries who seek waivers of their fiduciary duties must put entrustors on notice* that the entrustors can no longer rely on them in the matter, and that the entrustors must assume full responsibility for defending their own interests."[26] [Emphasis added.]

The **RESTATEMENT OF AGENCY THIRD**, §8.06, requires that, when a principal consents to an agent's conflict of interest, certain requirements apply, including the following:

> (a) in obtaining the principal's consent, the agent (i) acts in good faith, (ii) *discloses all material facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment* unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and (iii) otherwise deals fairly with the principal … [Emphasis added.]

The Board should consider whether its current Rule G-42 provision relating to disclosure of conflicts arising from municipal advisor contingent compensation effectuates those principles. Recall that the agent has the burden of proving the consent of the principal to a conflict of interest.

Contingent municipal advisor compensation also is a concern for investors who want issuers to receive sound issuance advice in structuring and issuing bonds. The National Federation of Municipal Analysts called in 2001 for disclosure to investors of conflicts of

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[26] Tamar Frankel, **LEGAL DUTIES OF FIDUCIARIES—DEFINITIONS, DUTIES AND REMEDIES** at 158-160 (Fathom Publishing Co. 2012).

interest in NFMA's **RECOMMENDED BEST PRACTICES IN DISCLOSURE FOR GENERAL OBLIGATION AND TAX-SUPPORTED DEBT** at 7 (2001), as follows:

> Provide the name of the firm and the individuals along with the city and state of their office for each professional who assisted in the preparation and sale of the securities. This would include parties *such as a financial advisor… . If there are any known or suspected conflicts of interest among the professionals and/or the issuer such should be clearly described.* [Emphasis added.]

In 2015, NFMA re-emphasized the importance of disclosure to investors of conflicts of interest specifically arising from municipal advisors' contingent fees in NFMA's **WHITE PAPER ON THE DISCLOSURE OF POTENTIAL CONFLICTS OF INTEREST IN MUNICIPAL FINANCE TRANSACTIONS**, stating, "Contingent compensation is especially undesirable … for municipal advisors … who are expected to be independent in the provision of advice or services to issuers or in the structuring of municipal securities," as follows:

> Transaction participants may enter into contingent compensation arrangements with payments conditioned on the successful closing or funding of … municipal finance transactions; [or] the delivery of work products … .
>
> *Contingent compensation is especially undesirable … for municipal advisors … who are expected to be independent in the provision of advice or services to issuers or in the structuring of municipal securities. …*
>
> *Payment arrangements that are contingent on the "success" of a financial transaction clearly pose credit and other risks* because these arrangements often entangle the opinion or advice required to complete municipal finance transactions, removing its independence. *Historically, compensation arrangements in municipal finance transactions that hinged on transactional completion have been associated with poorly structured bond issues* … to the detriment of municipal investors, as well as issuers … . [Emphasis added; footnotes omitted.]

I urge the Board to consider requiring the following important disclosures to municipal advisory clients in connection with contingent municipal advisor compensation:

- Contingent compensation presents a conflict of interest, in that it creates a potential motivation to close transactions that should be considered carefully and that may present risks to municipal entities

- The presence of contingent compensation may require the client to monitor the transaction and the advice the client receives from the municipal advisor more carefully than the client might do in the absence of contingent compensation

- The potential conflict of interest may negate the ability of the client to assert claims against the municipal advisor for failure to act solely in the best interests of the client without regard to the financial or other interests of the municipal advisor

- Noncontingent compensation structures are available and should be considered by issuers, with a specific requirement that the municipal advisors offer noncontingent compensation options to clients in the form of hourly compensation, with or without a cap, or fixed noncontingent compensation or both

- Clients are able to pay noncontingent compensation from bond proceeds

- Contingent compensation is a basis to be considered in determining the amount of the compensation and may justify a higher compensation than would be payable in the form of noncontingent compensation

Rule G-23 or Rule G-42.

At present, I am indifferent as to whether the Board should decide to retain Rule G-23 as a separate rule or should fold it into Rule G-42.

The key issue for me is to retain the principal of a complete separation between municipal advisory services and underwriting services.

As discussed in this letter, I also believe that, in this context, the Board could beneficially review Rule G-42 in a number of respects to improve its coverage of actual practices by municipal advisors.

My Initial Experience with Rule G-23

In the late 1970s, I served as General Counsel to the GFOA. At that time, the MSRB was in its initial stages of organization and rule proposal and adoption. Even then, more than 40 years ago, the MSRB recognized that financial advisors to municipal bond issuers had a fiduciary duty to the advisors' clients. This is illustrated by releases by the MSRB in the 1970s and 1980s describing, as long as 40 years ago, the fiduciary character of the relationships between financial advisors and their issuer clients.[27]

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[27] See, *e.g.*, MSRB Filing of Proposed Fair Practice Rules with SEC on Sept. 20, 1977, stating:

> *As a financial advisor, the municipal securities professional acts in a fiduciary capacity as agent for the governmental unit*, assisting it in determining its debt structure, determining when and under what circumstances to market its securities, and preparing or assisting in the preparation of documents to be used in connection with the sale of its securities. The existence of such an arrangement is evidenced by an agreement, written or otherwise, for the municipal securities professional to render financial advisory services to the governmental unit for a fee or other compensation or in expectation of compensation. …
>
> *The role and interests of a securities professional acting as financial advisor to a governmental unit are significantly different from the role and interests of a securities professional acting as an underwriter or as a purchaser in a private placement*. For example, *as agent for the issuer, a financial advisor* would normally seek to achieve the lowest possible interest cost for the issuer, while an underwriter, acting as principal for its own account, would normally want to establish yields which make the securities attractive for resale to others. Other marketing features,

In my representation of GFOA, when the MSRB proposed an absolute prohibition in Rule G-23 of financial advisors also serving as underwriters to issuer clients, I received a number of communications specifically from issuer officials in the State of Texas who had been told by their financial advisors that the proposal would harm issuers by limiting the advisors from serving as underwriters. One argument was that the advisors knew more about the clients' bonds than did other firms, and therefore, the advisors would be the best underwriters for their clients. I also received a contact from an advisor in the State of Connecticut. I heard from no other issuer officials one way or the other about the proposal.

On the basis of the contacts I received from those issuer officials, I opposed the complete prohibition on behalf of GFOA.

As explained below, based upon additional information I learned later, I now consider that to have been a major error on my part.

In part on the basis of my opposition on behalf of GFOA, the MSRB adopted, instead of the complete prohibition, a requirement that dealers serving as financial advisors first resign, make certain disclosures to their clients regarding conflicts of interest, and obtain written acknowledgements from the clients regarding receipt of the disclosures.

I later discovered, as described below, that the "disclosures" advisors/underwriters provided pursuant to Rule G-23 were made in a perfunctory manner. I also discovered that the "consenting" issuer officials were poorly-equipped to evaluate the subject matter or its significance and had little or no understanding of what they had been told in the disclosures or of what the officials were signing in "consent" documents buried in a mass of other documentation. The subject rarely, if ever, was explained to the issuers' governing bodies, and the issue was not discussed for the governing bodies or the signing officials in a substantive manner. Neither the underwriters nor the bond counsel serving the issuers explained the significance of the issue.

Permitting Competitive Bids under Rule G-23

On the surface, the concept of permitting financial advisors to submit bids in competitive offerings suggests that issuers would benefit from having an additional bidder. What could be the disadvantage?

The argument has been advanced that permitting the additional role would increase the number of bidders in competitive bids to the issuers' advantage.

I suggest respectfully that the asserted "benefit" is illusory.

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important from an underwriting perspective, may conflict with an independent determination of the same matters from the perspective of. the issuer.

Commerce Clearing House, Municipal Securities Rulemaking Board Manual Transfer Binder '77-'87 Decisions ¶10,030 at 10,377 (Sept. 20, 1977); see also ¶10,003 referring to "the high level of fiduciary responsibility owed by securities professionals to issuers they advise." [Emphasis added.]

I suggest the following practices discussed below, among others, for careful consideration:

- Use of advisory status as a misleading step toward underwriting
- Structuring bonds for marketing by advisors' underwriting desks, rather than the market as a whole
- Inadequate disclosure and client consent practices regarding the advisors' conflicts of interest and associated risks
- Advisors' division of the market among firms
- Courtesy bids
- Naturally lower levels of bidding due to smaller bond principal

"Get Yourself Hired as Financial Advisor, Then Switch to Underwriter."

After my work with GFOA, my next significant encounters with Rule G-23 arose from my services as an investment banker in the Rocky Mountain Region and in Texas.

One of the first pieces of advice I received from my supervisors as an underwriter was to "Get yourself hired as financial advisor, then switch to underwriter." Indeed, I found that was a standard practice followed by many underwriting firms. I declined to follow that advice.

These underwriters and their competitors did not regard the financial advisory role as a fiduciary role, but rather as a stepping stone to gaining retention as underwriters while posing as advisors to the issuers.

The disclosures required by Rule G-23 were considered to be perfunctory, if they were made at all. Indeed, when I pointed out to one issuer that its financial advisor, in switching to underwriter, had failed to make the required disclosures, the bankers in my own firm became angry that the subject even had been raised.

This former practice under Rule G-23 as it formerly existed should be a specific concern if the Rule (or corresponding provisions of Rule G-42) were to permit municipal advisors to underwrite bond issues, even in competitive bid settings.

The Problem of Secretive "Disclosure," and the Role of Bond Counsel.

I learned then, and throughout my career, that the issuers' acknowledgements of receipt of Rule G-23 disclosures were made typically in a form buried in stacks of multiple closing documents organized and presented to issuer officials by bond counsel. Often, the closing documents consisted of hundreds of pages that overwhelmed many issuer officials.

Sometimes, the language was part of larger, lengthy and complex omnibus documents. The disclosures were generally not even mentioned orally, except at times to "explain," but only in a

general sense, that the resignations were for the issuers' benefit. Issuer officials simply were told that the change in roles was made because the advisors' firms were the best equipped and most knowledgeable firms to serve as underwriters in the transactions. Issuer officials routinely executed the acknowledgments along with many other documents in an atmosphere of rushing to assemble everything quickly for the closing (through which transaction participants would receive their contingent fees).

Beyond the obscure "disclosure," there was no effort by any party, including the financial advisors/underwriters and the issuers' own bond counsel, to point out the conflicts of interest involved in the resignation and the switch in roles from financial advisor to underwriter. No one questioned or challenged the financial advisors' assertions that the resignations were in the issuers' interest. Bond counsel, whose fees also often depended on completion of the closing, remained silent. Bond counsel had no desire to alienate the underwriter (f/k/a the financial advisor) from whom bond counsel frequently obtained business as underwriter counsel in other transactions.

Thus, the resignations occurred with the technical, but generally unknowing, acknowledgement of issuers, often small and infrequent issuers that are so pervasive in the municipal bond market.

This former practice under Rule G-23 as it formerly existed should be a specific concern if the Rule (or corresponding provisions of Rule G-42) were to permit municipal advisors to underwrite bond issues again, even in competitive bid settings.

"What Can My Firm Sell?"

I found that some dealer firms routinely presented themselves as "advisors" with the issuers' best interests at heart. For example, staff of one influential statewide dealer organization routinely referred to its members as "our financial advisors," even though bond underwriting was how the members of that organization typically made their money.

The financial advisors in that atmosphere focused on what their own firms could sell as underwriters, not on what bond structures were in the best interests of the issuer clients.

Thus, it was a common practice for the front-line bankers structuring the transactions to consult with their own underwriting desks about bond structural issues with the firm's own inventory and sales capabilities as the focal points.

The interests of other underwriting firms often would be ignored completely. Those other firms customarily would not express any interest in the bond issues because they knew they could not obtain the business. Instead, those other firms focused on their own transactions with their own issuer clients in which the firms switched roles from financial advisors to underwriter.

This former practice under Rule G-23 as it formerly existed should be a specific concern if the Rule (or corresponding provisions of Rule G-42) were to permit municipal advisors to underwrite bond issues, even in competitive bid settings.

<u>Avoidance of Competitors and Competition among Financial/Municipal Advisors.</u>

I also found that a definite noncompetitive attitude was reflected in market practices in which financial advisors would enter into contracts that automatically renewed upon reaching their term and that continued in existence generally even when the financial advisors resigned to underwriter specific bond issues.

Although state law may have prevented interference in *existing* contracts, it was my experience as an underwriter that financial firms would refrain from contacting clients of other firms, even if only seeking to be considered *once the then-current contracts with other firms reached their term*. Such contacts were considered to be "unethical," with the result that competition among financial advisors and underwriters was severely limited to the disadvantage of municipal issuers. I recall expression of views strongly against making contacts with other firms' clients. There were concerns that the financial advisors of those clients, when functioning as underwriters, would refrain from selling bonds to the contacting firms in a role as selling dealers during bond offering periods and from trading bonds in the secondary market. A senior underwriting official called it "shooting yourself in the foot." In that atmosphere, municipal issuers were denied the benefits of competition.

This practice under Rule G-23, as it formerly existed, should be a specific concern if the Rule (or corresponding provisions of Rule G-42) were to permit municipal advisors to underwrite bond issues again, even in competitive bid settings. I doubt seriously whether competition could flourish even in competitive bids when advisors/underwriters structure bonds for their own underwriting desks and investor clientele.

Rather than increasing the number of bids issuers would receive, in many instances, I would expect that, by permitting advisors to bid as underwriters, effective competition would be reduced.

I note that, even today, a similar anticompetitive practice by nondealer municipal advisors belonging to the National Association of Municipal Advisors (NAMA) should also be a concern. NAMA states, as an "ethical" obligation of municipal advisors pursuant to NAMA's **CODE OF PROFESSIONAL CONDUCT AND ETHICS**, that:

> Municipal Advisors shall meet or exceed professional standards related to business conduct and strive to: … *Respect existing* contracts and *relationships of clients and prospective clients with* other professionals, including *other Municipal Advisors.* [Emphasis added.]

Putting aside antitrust implications of an "ethical" requirement that discourages municipal advisors from contacting issuers in *relationships* (not merely contractual relationships) and even *prospective relationships* with other municipal advisory firms, NAMA's Code presents significant issues for consideration by the Board and the Commission, as well as the Government Finance Officers Association. Municipal bond issuers should be able to receive the benefits of a fully competitive market. NAMA's **CODE OF PROFESSIONAL CONDUCT AND ETHICS**, if practiced literally, represents a restraint on trade that should not be permitted.

If NAMA's members consider this practice to be "ethical," then dealer advisors are equally likely to divide the market among themselves as they had done previously.

The potential for this practice under Rule G-23 as it formerly existed should be a specific concern if the Rule (or corresponding provisions of Rule G-42) were to permit municipal advisors to underwrite bond issues again, even in competitive bid settings.

Courtesy Bids

Another issue is that of potential cooperation among firms to submit courtesy bids. Based upon my experience as underwriter, and hearing conversations within firms, I do not doubt that such cooperation can exist, given a climate in which firms mutually assist each other in maintaining client relationships through division of the market.

Firms that agree not to compete among themselves in order to protect each other's client relationships will readily engage in such practices.

I firmly believe that the vast majority of firms and individuals involved in the municipal securities market are honorable people who seek to conduct business in an ethical manner. Nevertheless, the history of actions by some municipal advisors and underwriters affecting competition adversely in relation to LIBOR pricing, investment contract bidding, land-based securities, sales of derivatives to unsophisticated issuers, auction rate securities, pennying and, as most recently alleged, but not yet proved, the VRDO market indicates that concern regarding courtesy bidding in competitive bond underwriting is not at all far-fetched.

Smaller Bond Issues and Lower Number of Bids

It is not surprising that smaller issuers and smaller bond issues may attract a smaller number of bids.

In smaller bond issues, financial advisors are unlikely to expend as much effort to attract bids as they do in larger more visible bond issues. A $5 million or $10 million bond issue is unlikely to provide the same motivation to a financial advisor to seek bids from multiple underwriters as is a $100 million bond issue.

I question whether a change to permit financial advisors to resign in order to submit bids in competitive offerings will result in improved outcomes for municipal entities.

In my experience as a financial advisor, smaller and infrequent issuers had no difficulty in attracting interest from multiple firms. I often rejected dealer proposals and sought and obtained superior competing dealer bond purchase proposals, even for issuers that rarely entered the market or were new to the market.

If issuers are not receiving a sufficient number of bid submissions or underwriting proposals, then I suggest that the issuers' advisors are not providing suitable services to their municipal entity clients. In other words, the lower number of bids attracted by municipal

advisors in smaller bond issues is likely due to a failure to work as hard as necessary to produce more bids.

<u>"You Have No Claim. As Underwriter, We Had No Duty to Inform or Warn You."</u>

In my litigation consulting experience, I have encountered a number of arguments advanced to protect underwriters after they had already served as financial advisors.

One such argument was that, because the financial advisor had resigned to serve as underwriter, the advisor no longer owed a responsibility to provide advice in the best interests of the municipal entity client. That argument was advanced in connection with a proceeding challenging an advisor's advice provided during the advisors' service as advisor. The argument was that the switch in roles resulted in a lower level of protection for the issuer with the issuer's purported full consent.

This practice under Rule G-23 as it formerly existed should be a specific concern if the Rule (or corresponding provisions of Rule G-42) were to permit municipal advisors to underwrite bond issues again, even in competitive bid settings.

In particular, if dealer (or nondealer) financial advisors are permitted to resign in order to serve as underwriters or placement agents, the Board must define whether advisors' fiduciary responsibilities survive the change in roles, and if so how and to what degree.

<u>Bond Banks and Similar Vehicles.</u>

The principles of Rule G-23 need improvement in certain respects, regardless of whether the Rule survives or is combined with Rule G-42. One area deserving additional consideration is when advisors assist issuer clients in placing bonds with bond banks or similar vehicles. The Board's current re-examination of Rule G-23 offers an opportunity to consider this subject.

One area to consider is the role of underwriters of bond banks. I do not object to allowing financial advisors to assist municipal entity clients in borrowing directly from bond banks or other similar vehicles in which financial advisors do not have a financial interest. I do have a concern, however, relating to bond banks when financial advisors do, in fact, have financial interests in those entities, disclosed or undisclosed.

In my litigation consulting, I became aware that Rule G-23 allows financial advisors to continue to work as advisors on bond bank financings for municipal entities and then to serve as underwriters of the bond bank's bond issues through which the municipal entities are borrowing. A bond bank is not the "issuer" served by the financial advisor *as advisor*, and so Rule G-23 does not appear to reach this conflict of interest. This practice inherently involves the same or a closely similar conflict of interest to serving as underwriter for the municipal entity's bonds directly.

In other words, the financial advisor has a conflicting motivation to earn two fees—one as financial advisor to the municipal entity and the other as underwriter of the bonds issued by the bond bank to which the advisor steered the issuer for financing. The issuer's participation in the

bond bank's pool increases the total par amount of the bond bank's bonds and, thereby, the underwriting compensation received by the firms, including the advisor, underwriting the bond bank's bonds.

That is a conflict of interest that should be prohibited, just as direct underwritings and placements of the issuer's bonds are prohibited.

Bonds of Obligated Person Clients

Obligated persons are not the governmental "issuers" of the conduit bond issues in which the obligated persons receive financing.

It does not appear that Rule G-23, as framed at present, protects obligated person clients of financial advisors who may wish to underwrite the governmental issuers' bonds. Although pursuant to SEC Rule 131 and 3b-5, obligated persons are considered to be "issuers" of loan, lease and installment agreements into which the obligated persons enter in connection with conduit bond issues, the obligated persons may not be "issuers" for purposes of Rule G-23. Certainly, it is not clear.

At the time Rule G-23 was first adopted, conduit bonds, although issued to some extent at the time, were not as prevalent as they are today. This change in market conditions should be recognized.

Obligated person clients of municipal advisors/financial advisors should have the same protections pursuant to Rule G-23 (or Rule G-42) as do municipal entity advisory clients.

Wide Range of Conflicts of Interest Relevant to Rule G-42

In my litigation consulting, I have become aware of a wide range of conflicts of interest of municipal advisors that were not generally identified at the time of the original adoption of Rule G-42.

I suggest respectfully that the Board review both Rule G-23 and Rule G-42 carefully to provide guidance and assistance to municipal advisors regarding disclosure of, and obtaining effective client consents regarding, these and other previously unanticipated conflicts of interest and associated risks.

The following is a summary of certain previously unidentified municipal advisor conflicts of interest:

- *Pre-election conflicts of interest*

  In some bond issues involving bond elections, for example in school district and other voter approved bond issues, municipal advisors are offering simultaneously to municipal entities complex fee structures consisting of multiple tiers of compensation arrangements. This occurs, for example, in connection with some California general

obligation bond issues. The first tier of such compensation is a fee contingent on whether the issuer decides to conduct a bond election and the election is successful.

This form of contingent compensation creates a motivation for the advisor to engage in sales activities, as opposed to providing unbiased advice, both with respect to the issuer's calling an election and again with the electorate as to how to vote. The advisor has a motivation to convince the municipal entity to issue bonds and to convince the electorate to approve the bonds, as opposed to providing unbiased advice regarding *whether* to issue bonds at all or what principal amount, whether a proposed structure is the best alternative, whether a proposal needs modification that may introduce delay, or whether a proposed structure should be investigated further.

To receive payment of this fee, the advisor must "sell" the issuer, generally the issuer's governing body, and then the electorate, on the need or desirability of bond issuance.

Unless the municipal entity decides to issue bonds (and the electorate approves), the advisor will not be paid this contingent fee, despite what may be months of work creating and making presentations and attending meetings, often at locales far removed from the advisors' offices, purporting to analyze whether the issuer could benefit from and pay a bond issue appropriately. For example, an advisor may tilt a presentation either for or against bond issuance or a particular bond structure or bond size depending on how a voter survey sponsored or conducted by the advisor is conducted or interpreted to an issuer and its governing body.

These are complex factual settings about which there is little discussion. I believe these settings deserve further careful consideration.

The bottom-line issue for the Board to consider is whether municipal advisors fulfill their fiduciary duties by functioning as sales personnel in promoting bond issuance. If so, the fiduciary duty may be rendered meaningless.

- *Bond election conflicts of interest*

  Again, having convinced the issuer's governing body to call an election, in order for the municipal advisor to receive the first-tier contingent fee, the advisor also must convince the electorate to approve issuance of the bonds. Like the issuer's governing body, at this stage the electorate is functioning as a key element of the issuer's governance structure. It likely would violate the advisor's fiduciary obligation to mislead the electorate, and it certainly would be unfair within the scope of Rule G-17.

  In connection with bond elections, some municipal advisors obtain separate retention *as advocates* by election campaign committees that favor bond issuance. Remember that these same "advisors" purportedly had a fiduciary duty to their municipal entity clients to provide sound balanced advice regarding *whether* even to call a bond election. Supposedly, the advisors are required, after the election, once again to provide sound balanced advice regarding completion of bond issuance.

During the election, however, which is sandwiched between pre- and post-election service to the municipal entity client, the advisors now may be providing to bond election committees—as a loss leader—in-kind below cost (taking into account staff salaries) services as advocates for bond issuance. That is because election committees consisting of local volunteers relying on citizen contributions commonly pay the advisors at an extremely low fixed rate of compensation that may be only a few hundred, or perhaps thousand, dollars, in contrast with the typically much more substantial compensation the municipal advisors receive in connection with bond issuance in the tens of thousands of dollars. This is the second-tier of some advisory fee structures.

The low second-tier fixed election compensation may be essentially for reimbursing a portion of the advisor's costs in traveling to the locality and providing campaign assistance and materials, ignoring the in-kind contribution of municipal advisor officer and staff salaries during the election campaign.

This retention places an advisor in the position of directly *advocating* the bond election, not in the position of *advising* either the issuer's governing body or the electorate about whether the issuer could beneficially issue bonds.

In my litigation consulting, I have seen evidence of municipal advisors sending senior officers to a locality to coordinate election campaign activities, providing campaign training and literature, coordinating telephone activities, and even engaging in explicit campaign activities as advocates, such as holding campaign signs on street corners. The issuers may be located at a distant location from the advisors' offices, requiring significant travel, lodging and meal expenses. The advisors' officers may work intensively for many days in order to achieve a successful election.

Clearly, in such circumstances, the advisors are not providing unbiased advice.

Recall that the advisor will not be paid pursuant to the contingent first-tier pre-election compensation described above that the advisor is to receive from the municipal entity, unless the electorate approves the bond issuance. Where is the balance in the advisors' advice now that the advisors are unabashed sales personnel in relation to the electorate?

Could not third parties, as is sometimes the case already, provide the election advocacy services, so that the municipal advisors—fiduciaries—are able to remain unbiased?

As noted, all of this election work may generate a very low rate of fixed compensation payable by the campaign committee. It creates a motivation to convince the electorate to approve the bond issue, with typical election campaign tactics, so the advisor will be able to make up for the expensive in-kind contribution of labor to the election campaign as a loss leader.

I have seen bond election proponents threaten to cease their support for bond issuance without withdrawal of literature prepared by an advisor that the proponents deemed false and misleading. If those allegations are true, misleading campaign literature cannot be consistent with the fiduciary duty of municipal advisors, and once again, it certainly would be unfair. Municipal advisors need to be cautioned about these possibilities.

I reiterate that, at this point, the electorate has an important role, as an internal element of the issuers' governance structures, to approve the bond issues. Without positive action by the electorate, the issuers will not be able to issue the bonds. In this sense, voters have certain similarities to shareholders of private companies who are protected by proxy and other rules with respect to significant corporate actions, such as charter amendments, mergers and acquisitions.

If an election is successful, it will lead to the advisor's receipt of the pre-election contingent compensation and, in addition, assuming the bonds are issued, a third-tier additional post-election contingent compensation upon the closing of one or more bond issues.

Advisors are unlikely to disclose to municipal entity clients any of these conflicts of interest or the associated risks that the municipal entity may be issuing bonds needlessly or excessively.[28] Rule G-42 does not recognize the diversity of these conflicts.

- *Multiple fee conflicts of interest*

Another form of compensation—the third tier— reflecting conflicts of interest is one that may result in the payment of multiple contingent closing fees to a municipal advisor, if the advisor cannot issue and close, in a single bond issue, all of the principal amount of bonds the advisor recommends during the pre-election period. The fee structure is expressed as "$X per bond issue."

The advisor expects to collect the full amount of the fee in each of the multiple bond issues, rather than apportioning the fee among bond issues.

This form of contingent compensation creates a motivation for the advisor to recommend the issuance of an aggregate principal amount of bonds that cannot be issued at one time. That is because the property values within the issuer's jurisdiction may not support that full amount of bonds due to state law limitations on tax rates or bond amounts. If, however, as often occurs, property values increase in the future, additional bond issues may be issued at a later date and the advisor may be able to

[28] See GFOA, **RECOMMENDED PRACTICE—SELECTING FINANCIAL ADVISORS** (2008); GFOA's **BEST PRACTICE—SELECTING AND MANAGING MUNICIPAL ADVISORS** (Feb. 2014) ("Generally, municipal advisory fees should not be paid on a contingent basis to remove the potential incentive for the municipal advisor to provide advice that might unnecessarily lead to the issuance of bonds.")

receive an additional contingent closing fee at that later date without having to solicit the electorate again. So, like a construction contractor discussing potential home improvements with the homeowner, the advisor may "suggest" to the issuer that the issuer may wish to undertake additional improvements that could be included in the principal amount of bonds submitted to the electorate for approval. Sometimes, multiple bond issues may be appropriate for the issuer, of course. The point is for the issuer to be made fully aware of the advisor' conflict of interest and associated risks.

In making its presentation to the issuer, the advisor may manipulate election survey results and other information so as to convince the municipal entity that it will be able, based upon a tax rate recommended by the advisor, to finance the costs of projects additional to the municipal entity's immediate needs

Thus, the first-tier pre-election phase of contingent compensation, and the election campaign committee's low second-tier fixed compensation as a loss leader become intertwined with the advisor's expectation of multiple third tier post-election contingent closing fees.

The municipal entity would be much better off if it received unbiased advice regarding the need for, planning, sizing, structuring and issuance of bonds, instead of advice based upon the multiple forms of contingent compensation about which the municipal entity is not informed and is not offered any choice.

The essence of these issues, which may involve appropriate actions by advisors, is that advisors be fully aware of and discharge responsibly their fiduciary and fair dealing roles.

- *Dependence on underwriters for bond structuring*

There are other unfortunate facts and circumstances in which a municipal advisor becomes dependent upon underwriters for assistance in modeling bond issues. For example, shockingly I have seen facts and circumstances in which a very active advisor is unable to operate municipal finance software sufficiently to provide unbiased advice to the advisors' issuer clients regarding bond structure alternatives. The advisor, although owning the necessary software, is aware (but does not disclose to the issuer) that the advisor simply is unable to prepare reliable alternative bond structuring scenarios for the client. Certainly, this presents significant issues of competency. Instead, the advisor must rely upon underwriting firms to produce bond structuring models. The underwriting firms, of course, are concerned with their own interests, including obtaining retention by the issuer and structuring bonds they are best able to sell.

In this atmosphere, the municipal advisor is unable to make unbiased recommendations to the advisor's municipal entity clients regarding whether to utilize competitive bids or negotiated sales. In the event of negotiated sales, which are virtually inevitable in a context in which the advisor is not competent to operate the

software appropriately on behalf of the advisor's clients, the advisor also inevitably will recommend retention by the issuer clients of the specific underwriters upon whom the advisor is dependent.

Competitive Bids vs. Negotiated Sales

I understand that proposals have been made to the Board to expand competitive bidding in Rule G-23 by allowing dealer financial advisors to serve as underwriters.

The issue of competitive bidding versus negotiated sales is one much debated in the municipal securities market. Despite the controversy, there is definitive evidence that competitive bidding provides superior pricing in certain definable circumstances.

Bond pricing is extremely important to municipal bond issuers. Bond pricing is a core role and responsibility of municipal advisors functioning as financial advisors. I suggest respectfully that the Board reinforce consideration and information regarding advisors' key responsibilities in this area. Simply because a number of differing types of financial firms have significant competing financial interests in this subject matter is not a reason to avoid responsibility.

I am not someone who believes that competitive bidding always is best. I believe there are good arguments for negotiated sales in certain definable circumstances in order to allow an underwriter to be involved intimately with the issuer so as to investigate and appreciate to a greater extent the subtleties of the circumstances surrounding certain bond issues.

The following exemplify such circumstances:

- The issuer is new or unfamiliar to the market
- The issuer has experienced significant financial difficulties
- The issuer's reputation has suffered in the market, perhaps due to poor financial management or to a failure to honor commitments (such as failing to appropriate funds in an appropriation-based bond issue)
- The bonds are low rated, such as below BBB+/Baa1
- The offering is unusually complex
- The bonds are not commoditized bonds[29] with structures familiar to the market
- The offering presents unusual circumstances requiring especially careful analysis and disclosure

[29] By "commoditized" bonds, I mean bonds that have a sound, credit-worthy structure familiar to and well-accepted in the market.

There is a substantial body of unbiased peer-reviewed academic research, conducted and published repeatedly over many years, and even decades, supporting the superior pricing municipal issuers can receive in certain definable competitive bid circumstances. There also is contradicting research, generally funded by industry parties with financial interests in challenging those unbiased academic results.

Some municipal advisors do not utilize competitive bids simply because they do not know how to do it. Others do not utilize competitive bids because they want to maintain relationships with certain underwriters—a conflict of interest. Those motivations do not place the best interests of the advisors' clients first.

Although the task is difficult and not for the faint-hearted, I believe that the Board should hold municipal advisors' feet to the fire on this issue that means so much in terms of affordability and cost savings to municipal entities, especially smaller, unsophisticated and financially-stressed issuers.

Part of the problem is that market participants debating this issue generally approach it on an all or nothing basis. Those are extreme positions that fail to different among bond issues. I do recognize that there are individual offerings, and even periods in the market when competitive bids may not always be superior, but as a general rule the superior pricing consistently holds true, and municipal advisors, as financial experts should be required to exercise their professional judgment appropriately.

Under Rule G-23 and Rule G-42, financial/municipal advisors should be recommending competitive bids, except in definable circumstances, such as those I have outlined above, or unless they are able to demonstrate otherwise that negotiated bids are likely to produce superior results in a specific bond issue.

If an offering is one of essentially commoditized bond structures issued by a financially-sound issuer familiar to the market and if the bonds are rated BBB+/Baa1 or higher, then there should be a bias in favor of competitive bidding barring demonstrable circumstances. This is particularly true, for example, for tax-supported bonds and bonds payable from revenues of well-established utility systems with an established positive history of operations.

<u>Role of State Law and Common Law.</u>

The Dodd-Frank Act imposed the statutory federal fiduciary duty on municipal advisors for purposes of federal law.

Some municipal advisors do not recognize that fiduciary duties also may apply to them under state or other laws, whether statutory or common law.

In the municipal securities market, many financial advisors recognized long prior to the enactment of the Dodd-Frank Act that they had fiduciary duties to municipal bond issuers. This was made clear in enforcement proceedings and judicial decisions dating back to the 1990s. For example, the SEC and the United States Department of Justice enforced fiduciary duties of

financial advisors and obtained favorable decisions in federal district courts and administrative law tribunals and in the 1st, 9th, 10th and 11th federal circuit courts.[30]

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[30] See, *e.g.*, *United States v. Ferber*, 966 F. Supp. 90 (D. Mass. 1997) (criminal case; failure to disclose to sophisticated clients financial advisor's interest in recommended interest rate swaps with third party; discusses state law); *United States v. deVegter*, 198 F.3d 1324 (11th Cir. 1999) (indictment sufficiently alleged fiduciary duty; failure to disclose to sophisticated client payments from underwriter in connection with financial advisor's ranking of proposing underwriters); and *SEC v. Rauscher Pierce Refsnes, Inc*., 17 F. Supp. 2d 985 (D. Ariz. 1998) (motion to dismiss denied; SEC's complaint alleged misstatement in tax certificate, failure to disclose role as principal, excessive markup, profit from sale of recommended escrow investments, and potential loss of tax exemption; discusses state law); *SEC v. Cochran, et al*., 214 F.3d 1261 (10th Cir. 2000) (reversed judgment in favor of defendants and remanded case; failure to disclose to client receipt of payments from seller of recommended investments; cites fiduciary duty of agents under state law); and *In the Matter of Wheat First Securities, Inc., et al.*, SEC Initial Decision Rel. No. 155 (Dec. 17, 1999), *aff'd*. in SEC Rel. No. 34-48378 (Aug. 20, 2003) (Commission Opinion) (Administrative Law Judge and Commission decisions—failure to disclose role of lobbyist in financial advisor's gaining retention by issuer despite representation that no lobbyist had been used). But see *U.S. v. Cochran*, 109 F.3d 660 (10th Cir. 1997) (reversing criminal conviction for nondisclosure of remuneration the defendant received from an investment provider based on evidence that one client did not rely on the defendant for advice regarding investments and another was not shown to have been harmed); *In the Matter of Public Finance Consultants, Inc., et al*., SEC Initial Decision Rel. No. 274 (Feb. 25, 2005) (Administrative Law Judge decision—financial advisor's scope of services approved by issuer's Board of Directors did not include providing advice on disclosure in Official Statement).

See also *In the Matter of Daisy Systems, Inc*., 97 F. 3rd 1171 (9th Cir. 1996) (financial advisor to sophisticated corporate client would be presumed to be a fiduciary under state law, if served as agent; confidential relationship cited as a factor); and *Miami v. Benson*, 63 So.2d 916 (Fla. 1953) (against public policy under state law for financial advisor to serve as underwriter).

See also settled pre-Dodd-Frank Act SEC enforcement actions against financial and investment advisors to municipal entities and against advisors' officers, often applying state or other laws in *In the Matter of Lazard Freres & Co., LLC, et al*., SEC Rel. No. 34-36419 (Oct. 26, 1995) (financial advisory firm breached fiduciary duty to sophisticated clients by failing to inform the clients of advisor's interest in interest rate swaps recommended with third party); *SEC v. Ferber*, SEC Lit. Rel. No. 15193 (Dec. 19, 1996) (financial advisor breached fiduciary duty to sophisticated clients by failing to inform the clients of advisor's interest in interest rate swaps recommended with third party); *In the Matter of deVegter*, SEC Rel. Nos. 33-8645, 34-53009, IA-2465, IC-27196 (Dec. 22, 2005) (failure to disclose to sophisticated client payments from underwriter in connection with financial advisor's ranking of proposing underwriters); *In the Matter of Irby*, SEC Rel. No. 34-39362 (Nov. 26, 1997) (although not informed of payments by underwriter to senior officer, junior officer of financial advisor aided and abetted violation by altering ranking of proposing underwriters upon direction by supervisor); *SEC v. Stifel, Nicolaus & Co., Inc*., SEC Lit. Rel. No. 14587 (Aug. 3, 1995) (failure to disclose to client and misstatements regarding receipt of payments from seller of recommended investments; jeopardy to tax-exemption of bond interest); *SEC v. Cochran, et al*., SEC Lit Rel. No. 16063 (Feb. 17, 1999) (failure to disclose to client and misstatements regarding receipt of payments from seller of recommended investments; jeopardy to tax-exemption of bond interest); *In the Matter of Nelson*, SEC Rel. Nos. 33-7635, 34-40984 (Jan. 27, 1999) (junior officer of financial advisor prepared letter to inform client of payments received in connection with recommended investments, but supervisor failed to send the

As stated by Robert Fippinger in his authoritative treatise, **THE FEDERAL SECURITIES LAW OF PUBLIC FINANCE**:

> The statutory fiduciary duty is a federal standard that applies *in addition to any state law* impositions of a fiduciary duty … .
>
> [R. Fippinger, **THE FEDERAL SECURITIES LAW OF PUBLIC FINANCE**, Ch. 11, Municipal Advisor Regulation at §11:1.1, p. 11-9 (Practising Law Institute, New York, Rel. #6, 9/17).] [Emphasis added]

In Supplementary Material .08 to its Rule G-42, the Board recognizes the application of state law fiduciary duties and defers to stricter state law and other requirements, as follows:

> **.08 Applicability of State or Other Laws and Rules.** Municipal advisors may be subject to fiduciary or other duties under state or other laws. *Nothing contained in this rule shall be deemed to supersede any more restrictive provision of state or other laws* applicable to municipal advisory activities. … [Emphasis added.]

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letter despite informing junior officer that supervisor would take care of it; junior banker aided and abetted violation by not informing client); *In the Matter of Vonfeldt*, SEC Rel. No. 34-41697 (Aug. 3, 1999) (despite warning signs, supervisor failed to investigate firm's receipt and nondisclosure of payments from seller of recommended investments; jeopardy to tax-exemption of bond interest); *In the Matter of Milbrodt*, SEC Rel. Nos. 33-7455, 34-39121 (Sept. 24, 1997) (lack of expertise and inadequate due diligence to support purported independent expert report prepared for issuer; failure to disclose relationship with recommending underwriter); *In the Matter of Allen*, SEC Rel. Nos. 33-7456, 34-39122 (Sept. 24, 1997) (lack of expertise and inadequate due diligence to support purported independent expert report prepared for issuer; failure to disclose relationship with recommending underwriter); *SEC v. Black, et al*., SEC Lit. Rel. No. 15591 (Dec. 15, 1997) (investment advisor's alleged solicitation and mismanagement of school district and other governmental entity funds in connection with collateralized investment agreement and misrepresentations regarding agreement); *SEC v. Salema, et al*., SEC Lit. Rel. No. 14421 (Feb. 23, 1995) and *SEC v. Rudi, et al*., SEC Lit. Rel. 15202 (Dec. 30, 1996) (individual financial advisors and firm received kickbacks from underwriter paid through a finder); *In the Matter of William R. Hough & Co*., SEC Rel. Nos. 33-7826, 34-42634 (Apr.6, 2000) (failure to disclose interest in recommended escrow investments; jeopardy to tax-exemption of bond interest; state law cited)*; In the Matter of Rauscher Pierce Refsnes, Inc., et al*., SEC Rel. Nos. 33-7844, 34-42644, IA-1863 (Apr. 6, 2000) (failure of financial advisor and individual officer to disclose role as principal, excessive markup, profit from sale of recommended escrow investments, and jeopardy to tax-exemption of bond interest); *In the Matter of Lazard Freres LLC*, SEC Rel. 33-7671, 34-41318 (Apr. 21, 1999) (failure to disclose excessive markups in connection with escrow investments, reducing refunding savings to the bond issuer; state law cited); *In the Matter of O'Brien Partners, Inc*., SEC Rel. Nos. 33-7594, 34-1772 (Oct. 27, 1998) (failure to make full disclosure of, and misrepresentation in connection with, interest in recommended escrow investments; state law cited); *In the Matter of Arthurs Lestrange & Co., Inc. et al*., SEC Rel. Nos. 33-7775, 34-42148 (Nov. 17, 1999) (failure to make full disclosure of interest in recommended escrow investments and related fee-splitting); and *In the Matter of Reger, et al*., SEC Rel. No. 33-7973 (Apr. 23, 2001) (failure to disclose payment arrangement in connection with selection of broker-dealer to provide escrow investments; jeopardy to tax-exemption of bond interest).

The Board also observed this distinction in Rule G-42, Supplementary Material **.14 Principal Transactions**, regarding principal transactions between municipal advisors and municipal entities, stating:

> This paragraph .14 shall not be construed as relieving in any way a municipal advisor from acting in the best interest of its municipal entity clients, *nor shall it relieve the municipal advisor from any obligation that may be imposed by other applicable provisions of the federal securities laws and state law*. [Emphasis added.]

Municipal advisors recognize the applicability of state law requirements. For example, the **CODE OF PROFESSIONAL CONDUCT AND ETHICS**, of the National Association of Municipal Advisors states that:

> In addition to federal regulations, Municipal Advisors must follow all state and local laws and codes that apply in the jurisdiction where they practice. In the event of a conflict in law or regulation, NAMA members must comply with the more strict law or regulation.

The Board may wish to continue to observe these distinctions in order to inform the market appropriately. This is especially apt in connection with Rule G-23, since, in addition to requirements imposed by the Rule, state or other laws may impose additional fiduciary responsibilities on municipal advisors/financial advisors.

I note also that state common law may (and likely does) impose a fiduciary duty on municipal advisors to obligated persons. This is another area in which municipal advisors could benefit from explicit guidance by the Board.

Placement Agents and Remarketing Agents.

The Dodd-Frank Act amended Section 15B of the Securities Exchange Act of 1934 to impose a fiduciary duty on municipal advisors to municipal entities for purposes of federal law. In SEC Release No. 34-70462 (Nov. 12, 2013), the Securities and Exchange Commission interpreted the term "municipal advisor" to exclude underwriters engaged in underwriting activities. The Commission extended that exclusion to placement agents.

In doing so, however, the Commission observed that "a placement agent may have other duties, including a fiduciary duty to its client, that arise as a matter of common law or another statutory or regulatory regime."[31] The same logic would apply to other agents for municipal entities and obligated persons, as well, such as remarketing agents.

Likewise, the MSRB has observed that state law may place a fiduciary duty on placement agents, even when federal law does not do so. For example, the Board stated in MSRB Notice 2012-38, *Guidance on Implementation of Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities* (July 18, 2012), that underwriters are

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[31] SEC Rel. No. 34-70462, 78 FR 67468, at 67515, n. 628 (Nov. 12, 2013).

required to disclose to municipal entities that the underwriters do not have a fiduciary duty to the municipal entities.

The Board added, however, that:

> In a private placement where a dealer acting as placement agent takes on a true agency role with the issuer and does not take a principal position (including not taking a "riskless principal" position) in the securities being placed, the disclosure relating to an "arm's length" relationship would be inapplicable and may be omitted *due to the agent-principal relationship between the dealer and issuer that normally gives rise to state law obligations*– whether termed as a fiduciary or other obligation of trust. [Emphasis added.]

Again, the same logic would apply to remarketing agents.

In other words, the agency relationships of placement agents and remarketing agents may give rise to fiduciary duties under state law. In my experience, some placement agents and remarketing agents may rely solely on the SEC release, and may overlook the potential application to them of fiduciary duties under state law.[32]

The Board may wish to continue to observe these distinctions, as well as the distinctions noted above between federal and state law as applicable to municipal advisors, in order to inform the market appropriately.

Nondealer Municipal Advisors Serving as Dealers.

Rule G-23 applies to dealers. Many municipal advisors are not dealers or at least are not registered as dealers.

It is readily apparent, however, that some municipal advisors continue to believe that they are able to serve as brokers and dealers in placing their municipal entity clients' securities directly with investors, although the advisors are not registered as such. These advisors may openly solicit and identify bond purchasers, receive compensation contingent upon completion of the offering, negotiate bond terms with the investors, and undertake other roles and responsibilities of underwriters and placement agents.

In particular, municipal advisors' receipt of contingent compensation in the context of identifying potential investors in negotiated bond offerings, selling bonds directly to investors, and negotiating bond terms directly with investors presents especially troublesome issues. As noted earlier, the contingent compensation radically increases the pressures on municipal

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[32] Regarding fiduciary duties under state law, see generally, the **RESTATEMENT OF AGENCY THIRD**, especially Chapter 8; Tamar Frankel, **LEGAL DUTIES OF FIDUCIARIES—DEFINITIONS, DUTIES AND REMEDIES** (Fathom Publishing Co. 2012) and **FIDUCIARY LAW** (Oxford University Press 2011); and Mecham, **A TREATISE ON THE LAW OF AGENCY INCLUDING NOT ONLY A DISCUSSION OF THE GENERAL SUBJECT, BUT ALSO SPECIAL CHAPTERS ON ATTORNEYS, AUCTIONEERS, BROKERS AND FACTORS** (reprinted by Wentworth Press 2016).

advisors to complete transactions, as opposed to providing optimal advice solely in the best interests of the advisors' clients as to whether a transaction is wise, is the best alternative, needs modification that may introduce delay, or should be investigated further.

Although the Board and the Commission both have spoken to this issue on a number of occasions,[33] it is inevitable that, someday, there will be very surprised municipal advisors who discover, despite the warnings, that they cannot function in this manner.

The process of combining or coordinating Rule G-23 with Rule G-42 should not overlook this not uncommon compliance failure by some nondealer financial/municipal advisors. Although the advisors cannot avoid compliance with Rule G-23 simply by failing to register as broker-dealers, the advisors should be brought explicitly into regulatory coverage.

Control Persons and Aiders and Abettors

Municipal advisor personnel, as well as municipal advisor firms, are subject to qualification, registration and regulation by the Board and the Commission and to enforcement by the Commission. Some municipal advisor personnel are supervisors or owners (*e.g*., key shareholders or partners, even if not active supervisors) subject to additional regulation.

It is helpful always to remember that control persons, which likely includes many municipal advisor supervisors and owners, are subject to special liability provisions in the Securities Exchange Act of 1934. Section 20(a) of the Act contains the following regarding control persons:

> *Every person who, directly or indirectly, controls any person* liable under any provision of this title or of any rule or regulation thereunder *shall also be liable jointly and severally with and to the same extent as such controlled person* to any person to whom such controlled person is liable (including to the Commission in any action brought under paragraph (1) or (3) of section 21(d)), *unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation* or cause of action. [Emphasis added.]

Without going into a detailed analysis of the control person provision, it is sufficient to state that the Courts have not required absolute control or actual participation in the primary violation.[34] Rather, the ability to influence the policies and actions of a party with primary

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[33] See, *e.g*., MSRB Notice 2011-37, *Financial Advisors, Private Placements, and Bank Loans* (Aug. 3, 2011); MSRB Release, *MSRB Warns About Application of Federal Securities Laws to Private Placements in the Municipal Market; "Bank Loans" May Be Municipal Securities* (Aug. 3, 2011).

[34] See *Draney v. Wilson, Morton, Assaf & McElligott*, 597 F. Supp. 528, 530-531 (D. AZ 1983), stating:

> The Ninth Circuit has interpreted this term "controlling person" to require proof of (1) a "power to influence" the controlled person … .

liability often is sufficient. As often construed, the burden of proof on the issue of good faith and absence of inducement rests on the control person.[35]

Going forward, especially bearing in mind that complete dominance is not required to establish "control," municipal advisor supervisors and other potential control persons need to be aware of their unique exposure and burdens posed by control person liability, which some may not anticipate.

The control provision does not depend on enforcement by the Commission, although the Commission is able to enforce it, but in addition the liability of control persons is available in private actions, when and if those may be brought.

In addition, with potentially broader application, Section 20(e) of the Securities Exchange Act provides, as follows:

> PROSECUTION OF PERSONS WHO AID AND ABET VIOLATIONS—For purposes of any action brought by the Commission under paragraph (1) or (3) of section 21(d) [relating to enforcement action by the Commission], *any person that knowingly or recklessly provides substantial assistance to another person in violation* of a provision of this title, or of any rule or regulation issued under this title, *shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided*. [Emphasis added.]

Thus, secondary liability of municipal advisor personnel is not limited to control persons. Personnel who act intentionally or with recklessness, as defined by the Courts to aid and abet primary violations, are subject to secondary liability in enforcement actions brought by the Commission (but not in private actions).

Some municipal advisor personnel are unaware of the control person and aider and abettor liability provisions. The Board may wish to bring the provisions to the advisors' attention. In any event, in providing guidance and assistance in Rules G-23 and G-42 to municipal advisor firms and their personnel, the Board may find it useful to keep these provisions in mind.

<u>Conclusion</u>

In summary, it important to realize that MSRB Rule G-42 does not create the federal fiduciary duty of municipal advisors to municipal entities. The fiduciary duty is created in the Securities Exchange Act of 1934. Instead, Rule G-42 (and in a sense, Rule G-23) provides guidance on how financial/municipal advisors may comply with the statutory duty created in the Dodd-Frank Act and contained in the Securities Exchange Act of 1934. In many cases, municipal advisor responsibilities under federal and state law may extend beyond Rules G-23 and G-42.

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[35] See *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1575 (9th Cir. 1990), stating:

> According to the statutory language, once the plaintiff establishes that the defendant is a "controlling person," then the defendant bears the burden of proof to show his good faith. [Footnotes omitted.]

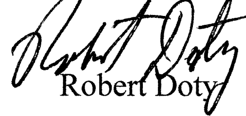
Some municipal advisors do not recognize the distinction between Rule G-42 and the statutory fiduciary duty, and may assume incorrectly that the entirety of their fiduciary duty is contained in Rules G-23 and G-42 and certain other Board rules, as opposed to the broad prophylactic of the fiduciary duty and antifraud provisions in the 1934 Act.

Rules G-23 and G-42 also do not create the fiduciary duty of financial/municipal advisors or of placement agents and remarketing agents under state law or certain other laws.

Nevertheless, the principles set forth in Rules G-23 and G-42 do provide important guidance with which municipal advisors should comply. In reviewing Rule G-23 and Rule G-42, I urge respectfully that the Board consider carefully a number of significant issues discussed in this letter. Those include discussing more explicitly the responsibilities of municipal advisors to warn issuers against transactional risks, the differentiation between the responsibilities of dealer and nondealer advisors as advisors, and municipal advisors' appropriate roles in selling bonds. I also urge consideration of the broad diversity of potential municipal advisor conflicts of interest, some of which have not been discussed generally.

Thank you again for this opportunity to submit comments regarding Rule G-23 and Rule G-42. In this letter, I have attempted to provide food for thought by the MSBR as it examines Rules G-23 and G-42. I hope that my comments are taken as a positive contribution as the Board discharges its responsibilities.

Yours very truly,



Robert Doty

August 19, 2019

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street NW
Suite 1000
Washington, DC 20005

Re: MSRB Notice 2019-13: Request for Comment on MSRB Rule G-23 on Activities of Dealers Acting as Financial Advisors

Dear Mr. Smith,

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates this opportunity to provide input on the Municipal Securities Rulemaking Board's ("MSRB") Request for Comment (the "Request") on MSRB Rule G-23 on Activities of Dealers Acting as Financial Advisors.[2] In connection with the ongoing retrospective review of its rules and guidance, the MSRB is seeking comment on Rule G-23, revisited last in 2011,

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[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

[2] MSRB Notice 2019-13 (May 20, 2019).

and its interaction with the more recent municipal advisor regulatory framework and other rules and guidance adopted or updated since then. As always, we welcome a retrospective review of rules to ensure that they reflect current market practices, do not create unwarranted burdens on market participants, and are appropriately harmonized with other rules. We applaud the MSRB's choice to review Rule G-23 with a goal to appropriately update the rule in light of the adoption of the SEC's municipal advisory regulatory framework and eliminate any inconsistencies between the two. We share common ground with the MSRB in this goal, and hope our comments are helpful to update the rule to reflect Congress' intent of municipal advisor regulation and issuer protection. Below are our responses to select questions posed in the Request.

Responses to Select Questions Posed in the Request

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

   SIFMA's members implemented the role-switching prohibition and currently utilize the exceptions, which should be preserved and expanded in a revised rule as described in our responses to other questions posed by the MSRB. With respect to placement agent activity in relation to the role-switching prohibition, please see our responses to Questions 3 and 7 below.

3. ***Considering the implementation of the MSRB's and SEC's municipal advisor rules, are there ways the MSRB could achieve Rule G-23's purpose without retaining it as a standalone rule? For example, should the MSRB eliminate Rule G-23 and address any need for regulatory requirements and exceptions through enhancements to other MSRB rules, such as Rule G-42?***

SIFMA's members do not have a strong opinion whether Rule G-23 remains as a standalone rule or is eliminated and incorporated into other rules, primarily G-42, though they recognize that principles of regulatory construction may favor that G-23 be eliminated to streamline similar or related requirements. More importantly, our members are more concerned about G-23's substance as opposed to the form it takes, including preserving and expanding the exceptions to the role-switch prohibition for them to serve the market effectively; ensuring that it is consistent with other rules; and that it is uniformly applicable to all parties operating in the same or similar roles.

The current construct – a newer municipal advisory framework for dealer and non-dealer municipal advisors existing with an older Rule G-23 applicable to dealer municipal advisors only – has resulted in confusion over role clarity, i.e., what is and is not permitted when acting in a certain role. For example, as we have seen recently with the interpretive request made to the SEC by PFM, non-dealer municipal advisors believe that, because they are subject to a fiduciary standard, they can act as a placement agent for the same issue on which they are serving in the capacity of an municipal advisor, even though dealer municipal advisors are prohibited from this role-switching under G-23. SIFMA submitted a response to the PFM letter objecting to the request, pointing out, in part, that the same principles that compel the role-switching prohibition for dealer municipal advisors apply equally to non-dealer municipal advisors acting in the same role.

In addition, SIFMA's members strongly believe that the current role-switching exceptions should carry over. This includes the bond bank exception; the remarketing exception; and the exception specifically allowing a dealer municipal advisor to buy the bonds from the issuance from another syndicate member for its own account or for the account of customers so long as it is not an effort to become an indirect underwriter contrary to the role-switching prohibition. The reasons for these exceptions remain valid; they have served the market well, offering municipal issuers choice, flexibility, and as a result, lower cost financing. As discussed in our response to Question 6.d., additional exceptions should be added as well.

In the appendices to this letter, we offer how the MSRB could amend G-23 if it is kept as a standalone rule (Appendix A) or how to integrate it into G-42 (Appendix B) to incorporate our comments.

4. ***If Rule G-23 continues as a standalone rule, what are the ways in which Rule G-23 should be better aligned to the municipal advisor rules? Should Rule G-23 incorporate the defined terms and key terms of art of the MSRB's and SEC's municipal advisor rules? Are there terms in the MSRB's and SEC's municipal advisor rules that should not be incorporated in Rule G-23?***

The MSRB should take this opportunity to eliminate the term "financial advisor" and adopt the term "municipal advisor" uniformly across its rulebook. Having separate terms is a vestige of the past and it is confusing. Adopting a uniform term would also resolve any ambiguity that could be interpreted to suggest there is a distinction between financial advisors and municipal advisors.

We recommend defining municipal advisor and municipal advisory services by reference to the definition of those terms under the Exchange Act and the rules, regulations, and interpretive guidance thereunder. This would ensure consistency between the relevant SEC and MSRB regulatory regimes and would make clear that a dealer providing advice under *any* municipal advisor exemption would not be subject to the role-switching prohibition under Rule G-23, which we address in our response to Question 5 below.

Doing so would require that the MSRB harmonize other rules, such as Rules G-3 and G-37; however, we believe that G-23 can be updated without having to update other rules at the same time. Separately, without knowing the "key terms of art," we cannot comment on which ones should be hypothetically incorporated into a standalone Rule G-23.

5. ***Does Rule G-23 prohibit any activities that would be permitted under the SEC's municipal advisor rules in ways that are contrary to the regulatory purpose underlying the rules? For example, does Rule G-23 unduly impede***

the activities of dealers operating under an exclusion or exemption from registration under the SEC's municipal advisor rules?

The term "financial advisor" is confusing in the context of G-23 given the SEC's municipal advisor rules. It could (and we believe it may) be the basis of an interpretation that a dealer providing municipal advice in reliance on the IRMA exemption would be prohibited from acting as a placement agent or underwriter for the same issue because it would still be considered a financial advisor for the purpose of G-23's role-switching prohibition. We do not believe this interpretation is correct or appropriate; it would be completely inconsistent with the SEC's municipal advisor rules that do not require dealers relying on the IRMA exemption to register as municipal advisors. This interpretation would also result in the MSRB usurping the SEC's decision to exempt dealers from registration to the detriment of issuers.

6. ***Should the MSRB make any amendments to the Role Switching Exceptions? For example –***

    a. ***Does the Bond Bank Exception remain appropriate? Should this exception be broader or narrower?***

    The Bond Bank Exception as currently written remains appropriate and is utilized by our members. The exception allows dealer municipal advisors to fulfill the purpose of these statutorily authorized entities and, importantly, may provide issuers a more cost-effective means of borrowing. In addition, this exception remains appropriate because dealer municipal advisors do not have a conflict of interest that could harm either the issuer or investor.

    b. ***Should Rule G-23 provide an exception to a dealer that avails itself of any of the exclusions or exemptions under the SEC's municipal advisor rules, such as the IRMA exemption?***

    Please see our response to Question 5.

    d. ***Should Rule G-23 provide an exception for a dealer financial advisor if it disengages as financial advisor and a successor financial advisor is***

engaged by the issuer? If so, should the rule impose a cooling off period?

We believe that additional exceptions should be provided when a dealer municipal advisor, after providing issue-specific advice[3], is disengaged either by termination or the end of the contract term and the issuer engages a successor municipal advisor. Once an issuer engages a successor municipal advisor, the predecessor dealer municipal advisor that provided issue-specific advice should be able to engage in underwriting activities for that issue. Given that the issuer is independently represented by a successor municipal advisor that can provide advice on upcoming issuances, and the fact that the role-switching prohibition applies on an issue-by-issue basis, we believe there should be a clear exception for the predecessor municipal advisor to underwrite an issue on which it previously provided advice.

In the event that the issuer does not engage a successor municipal advisor, then the dealer municipal advisor that provided issue-specific advice should be able to engage in underwriting activities after a one-year cooling off period, the same as the remarketing exception's cooling off period.

These exceptions would address the situation[4] where a dealer municipal advisor provides advice on the financing terms of an issue, such as an airport, but that issue for a variety of reasons does not come to market until after the dealer has been disengaged and a successor municipal advisor is advising the issuer, or at least a year has passed. We believe that these exceptions would provide clarity to market participants about the obligations, or lack thereof, owed to issuers when a dealer municipal advisor is disengaged after providing issue-specific advice. They should be allowed because relevant

[3] Advice, as that term is defined in SEC Rule 15Ba1-1(e), with respect to the structure, timing, terms and other similar matters concerning the issuance of municipal securities.

[4] This situation likely involves the largest most sophisticated program issuers that have lengthy plans of finance and rotate among advisors every few years or choose from among a pool.

conflicts of interest are addressed by the presence of a successor municipal advisor or sufficiently mitigated by a cooling off period.

7. ***Rule G-23's prohibition on role switching currently extends to dealer financial advisors acting as a placement agent for the issuance of municipal securities.***

   a. ***As it pertains to placement agent activities, is the prohibition sufficiently clear as to what activities are, or are not, permissible for dealer financial advisors? Should the MSRB provide interpretive guidance regarding the scope of activities that a dealer financial advisor may perform under Rule G-23 without being regarded as a placement agent for purposes of the rule's prohibition on role switching?***

   Please see our response to Question 5. SIFMA supports the rule's current construct which prohibits a municipal advisor from serving as placement agent for the same issuance of municipal securities, assuming that non-dealer municipal advisors are similarly prohibited from serving in both roles. Given the SEC's ongoing consideration of this issue, the MSRB should defer its review of this issue. We believe it may be more appropriate for the SEC than the MSRB to provide guidance on what constitutes placement agent activities under the Exchange Act.

   b. ***If Rule G-23 were eliminated as a standalone rule, with any substantive requirements being moved to Rule G-42 or another MSRB rule, should the MSRB modify Rule G-42 or such other rule to address any permitted or prohibited placement agent activities by a municipal advisor insofar as MSRB rules are concerned?***

   We feel it is critical that all the exceptions to Rule G-23 be preserved, and examination of permissible or prohibited placement agent activities should be deferred until the SEC's consideration of the issue.

8. ***In the context of a dealer acting as a financial advisor, are there ways the MSRB could improve the efficiency and effectiveness of disclosures and***

related documentation requirements under Rules G-23 and G-42 and the Rule G-17 Interpretive Notice while preserving issuer protection?

Yes, we believe that the MSRB could improve the efficiency and effectiveness of disclosures required under its rules. The rulebook contains disclosure requirements in multiple rules and guidance, which creates a compliance challenge for SIFMA's members as they work earnestly to comply with the various disclosure requirements. Having these requirements spread throughout several rules, sometimes with minor differences between them, can lead to unnecessarily duplicative and voluminous disclosures, which are neither efficient nor effective for dealers and issuers alike. We welcome further discussion with the MSRB to create harmonized – in both content and timing – disclosure requirements and interpretive guidance to lessen the compliance challenges while still providing meaningful disclosures to issuers.

9. ***Rule G-23's prohibition on role switching applies on an issue-by-issue basis. Does this standard continue to be appropriate? Should the prohibition be broader or narrower? Should the MSRB provide interpretive guidance regarding what constitutes an "issuance" for this purpose, and if so, how should it be defined?***

This standard continues to be appropriate. The MSRB should not provide interpretive guidance regarding what constitutes an "issuance" for this purpose. "Issuance" should be defined by the SEC.

10. ***Should the MSRB retire any interpretive guidance related to Rule G-23? What aspects of Rule G-23's interpretive guidance should be updated and/or retained? For any interpretive guidance that is not retired, should the MSRB recast the interpretive guidance as a single publication? Are there topics related to Rule G-23 about which the MSRB should provide new or additional interpretive guidance?***

SIFMA's suggested rule changes in the appendices, particularly Appendix A, incorporate or, in some instances, may obviate some of Rule G-23's 2011 Guidance. If the MSRB retains the guidance, it is appropriate to address an inconsistency

between the 2011 Guidance, Rule G-42 and SEC guidance. The 2011 Guidance states:

> In addition to engaging in underwriting activities, it shall not be a violation of Rule G-23(d) for a dealer that states that it is acting as an underwriter with respect to the issuance of municipal securities *to provide advice with respect to the investment of the proceeds of the issue, municipal derivatives integrally related to the issue, or other similar matters concerning the issue*.[5] (emphasis added).

Rule G-42 and the SEC's guidance[6], however, deem these activities to be outside the underwriter's function for purposes of the underwriter's exemption from the advisor rules. If probably makes sense to address this inconsistency and/or consider the effect of the municipal advisor rules, as noted elsewhere, in the interpretive guidance.

Finally, when addressing the 2011 Guidance, one piece of guidance that the MSRB should retain is the guidance that Rule G-23 does not apply when the municipal advisor's client is a conduit borrower, rather than the issuer.[7] This guidance continues to be useful to market participants.

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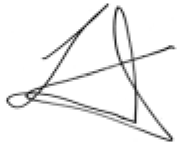
[5] MSRB Guidance on the Prohibition on Underwriting Issues of Municipal Securities for Which a Financial Advisory Relationship Exists under Rule G-23 (Nov. 27, 2011).

[6] 78 Fed. Reg. 67512-13 (Nov. 12, 2013).

[7] *See* Notice on Application of Board Rules to Financial Advisory Services Rendered to Corporate Obligors on Industrial Development Bonds (May 23, 1983); *see also* SEC Release No. 34-63946 (File No. SR-MSRB-2011-03), 76 FR 10926, 10935 (Feb. 28, 2011).

We would be pleased to discuss any of these comments in greater detail, or to provide any other assistance that would be helpful. If you have any questions, please do not hesitate to contact the undersigned at (212) 313-1130 or (202) 962-7300.

Sincerely,



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Appendix A

Suggested Edits for a Retained, Standalone MSRB Rule G-23

(a) *Purpose*. The purpose and intent of this rule is to establish ethical standards and disclosure requirements for brokers, dealers, and municipal securities dealers who act as ~~financial~~ municipal advisors to issuers with respect to the issuance of municipal securities.

(b) ~~Financial~~ Municipal *Advisory Relationship.* For purposes of this rule, a ~~financial~~ municipal advisory relationship shall be deemed to exist when a broker, dealer, or municipal securities dealer ~~renders or~~ enters into an agreement memorialized in a writing satisfying the requirements of Rule G-42(c) to ~~render~~ engage in ~~financial~~ municipal advisory ~~or consultant services~~ activities (as that term is defined in SEC Rule 15Ba1-1(e)) ~~to~~ for or on behalf of a~~n issuer~~ municipal entity or obligated person~~-~~with respect to the issuance of municipal securities, including advice with respect to the structure, timing, terms and other similar matters concerning such issue. For purposes of this rule, a ~~financial~~ municipal advisory relationship shall not be deemed to exist when the broker, dealer or municipal securities dealer~~, in the course of acting as an underwriter and not as a financial advisor, a broker, dealer or municipal securities dealer~~ renders advice to an issuer, including advice with respect to the structure, timing, terms and other similar matters concerning the issuance of municipal securities after having taken the steps necessary to establish or perfect an exemption or exclusion from the registration requirements under Rule 15Ba1-1 of the Act, or applicable rulemaking authority or guidance.

~~(c) *Agreement with Respect to Financial Advisory Relationship*. Each financial advisory relationship shall be evidenced by a writing entered into prior to, upon or promptly after the inception of the financial advisory relationship (or promptly after the creation or selection of the issuer if the issuer does not exist or has not been determined at the time the relationship commences). Such writing shall set forth the basis of compensation, if any, for the financial advisory services to be rendered, including provisions relating to the deposit of funds with or the utilization of fiduciary or agency services offered by such broker, dealer, or municipal securities dealer or by a person controlling, controlled by, or under common control with such broker, dealer, or municipal securities dealer in connection with the rendering of such financial advisory services and shall be delivered to the issuer.~~

(d) *Prohibition on Engaging in Underwriting Activities*.

(i) Subject to provisions of subsections (d)(ii) and (iii), no broker, dealer, or municipal securities dealer that has a ~~financial~~ municipal advisory relationship with respect to the issuance of municipal securities shall acquire as principal either alone or as a participant in a syndicate or other similar account formed for the purpose of purchasing, directly or indirectly, from the issuer all or any portion of such issue, or act as agent for the issuer in arranging the placement of such issue.

(ii) Notwithstanding subsection (d)(i), a broker, dealer, or municipal securities dealer that previously had a municipal advisory relationship with respect to an issuance of municipal securities shall not be prohibited acquiring as principal either alone or as a participant in a syndicate or other similar account formed for the purpose of purchasing, directly or indirectly, from the issuer all or any portion of such issue, or act as agent for the issuer in arranging the placement of such issue, if the issuer engaged a successor municipal advisor, or if the municipal advisory relationship in connection with the issue has been terminated for a period of at least one (1) year.

(iii) Notwithstanding subsection (d)(i), a broker, dealer, or municipal securities dealer that has a ~~financial~~ municipal advisory relationship with respect to the issuance of municipal securities shall not be prohibited from acting as agent for the issuer in arranging the placement of the entire issue with any state, local or federal governmental entity as part of a plan of financing by such entity for or on behalf of the issuer, but only if such broker, dealer or municipal securities dealer does not receive compensation from any person other than with respect to ~~financial~~ those municipal advisory services related to such placement and does not receive compensation from any person for underwriting any contemporaneous financing transaction directly or indirectly related to such issue undertaken by the state, local, or federal governmental entity with which such issue was placed.

(~~iii~~v) The limitations set forth in this section (d) shall also apply to any broker, dealer, or municipal securities dealer controlling, controlled by, or under common control with the broker, dealer, or municipal securities dealer having a financial advisory relationship with respect to the issuance of municipal securities. The use of the term "indirectly" in this section (d) shall not preclude a broker, dealer, or municipal securities dealer that has a ~~financial~~ municipal advisory relationship with respect to the issuance of municipal securities from purchasing such securities from an underwriter, either for its own trading account or for the account of customers, except to the extent that such purchase is made to contravene the purpose and intent of this rule.

(e) *Remarketing Activities.* No broker, dealer, or municipal securities dealer that has a ~~financial~~ municipal advisory relationship with an issuer with respect to the issuance of municipal securities shall act as the initial remarketing agent for such issue; provided, however, that this section shall not prohibit such broker, dealer, or municipal securities dealer from thereafter serving as successor remarketing agent for such issue if the ~~financial~~ municipal advisory relationship in connection with such issue has been terminated for a period of at least one (1) year prior to such broker, dealer, or municipal securities dealer being selected to serve as successor remarketing agent.

(f) *Applicability of State or Local Law*. Nothing contained in this rule shall be deemed to supersede any more restrictive provision of state or local law applicable to the activities of ~~financial~~ municipal advisors.

Appendix B

Suggested Edits for MSRB Rule G-42 that Incorporates G-23

(a) *Standards of Conduct*.

(i) A municipal advisor to an obligated person client shall, in the conduct of all municipal advisory activities for that client, be subject to a duty of care.

(ii) A municipal advisor to a municipal entity client shall, in the conduct of all municipal advisory activities for that client, be subject to a fiduciary duty that includes a duty of loyalty and a duty of care.

(b) *Disclosure of Conflicts of Interest and Other Information*. A municipal advisor must, prior to or upon engaging in municipal advisory activities, provide to the municipal entity or obligated person client full and fair disclosure in writing of:

(i) all material conflicts of interest, including:

(A) any affiliate of the municipal advisor that provides any advice, service, or product to or on behalf of the client that is directly related to the municipal advisory activities to be performed by the disclosing municipal advisor;

(B) any payments made by the municipal advisor, directly or indirectly, to obtain or retain an engagement to perform municipal advisory activities for the client;

(C) any payments received by the municipal advisor from a third party to enlist the municipal advisor's recommendation to the client of its services, any municipal securities transaction or any municipal financial product;

(D) any fee-splitting arrangements involving the municipal advisor and any provider of investments or services to the client;

(E) any conflicts of interest arising from compensation for municipal advisory activities to be performed that is contingent on the size or closing of any transaction as to which the municipal advisor is providing advice, or additional compensation for acting as a placement agent; and

(F) any other actual or potential conflicts of interest, of which the municipal advisor is aware after reasonable inquiry, that could reasonably be anticipated to impair the municipal advisor's ability to provide advice to or on behalf of the client in accordance with the standards of conduct of section (a) of this rule, as applicable.

If a municipal advisor concludes that it has no known material conflicts of interest based on the exercise of reasonable diligence by the municipal advisor, the municipal advisor must provide a written statement to the client to that effect.

(ii) any legal or disciplinary event that is material to the client's evaluation of the municipal advisor or the integrity of its management or advisory personnel.

Information regarding legal or disciplinary events may be disclosed for purposes of this subsection by identification of the specific type of event and specific reference to the relevant portions of the municipal advisor's most recent Forms MA or MA-I filed with the Commission if the municipal advisor provides detailed information specifying where the client may electronically access such forms.

(c) *Documentation of Municipal Advisory Relationship*. A municipal advisor must evidence each of its municipal advisory relationships by a writing or writings created and delivered to the municipal entity or obligated person client prior to, upon or promptly after the establishment of the municipal advisory relationship. The writing(s) must be dated and include, at a minimum,

(i) the form and basis of direct or indirect compensation, if any, for the municipal advisory activities to be performed;

(ii) the information required to be disclosed by section (b) of this rule;

(iii) a description of the specific type of information regarding legal and disciplinary events requested by the Commission on Form MA and Form MA-I, which includes information about any criminal actions, regulatory actions, investigations, terminations, judgments, liens, civil judicial actions, customer complaints, arbitrations and civil litigation, and detailed information specifying where the client may electronically access the municipal advisor's most recent Form MA and each most recent Form MA-I filed with the Commission;

(iv) the date of the last material change or addition to the legal or disciplinary event disclosures on any Form MA or Form MA-I filed with the Commission by the municipal advisor and a brief explanation of the basis for the materiality of the change or addition;

(v) the scope of the municipal advisory activities to be performed and any limitations on the scope of the engagement;

(vi) the date, triggering event, or means for the termination of the municipal advisory relationship, or, if none, a statement that there is none; and

(vii) any terms relating to withdrawal from the municipal advisory relationship.

(d) *Recommendations and Review of Recommendations of Other Parties*. If a municipal advisor makes a recommendation of a municipal securities transaction or municipal financial product to a municipal entity or obligated person client, it must have a reasonable basis to believe that the

recommended municipal securities transaction or municipal financial product is suitable for the client, based on the information obtained through the reasonable diligence of the municipal advisor. If the review of a recommendation of another party is requested by the municipal entity or obligated person client and within the scope of the engagement, the municipal advisor must determine, based on the information obtained through the reasonable diligence of such municipal advisor, whether the municipal securities transaction or municipal financial product is or is not suitable for the client. In addition, the municipal advisor must inform the client of:

(i) the municipal advisor's evaluation of the material risks, potential benefits, structure, and other characteristics of the recommended municipal securities transaction or municipal financial product;

(ii) the basis upon which the municipal advisor reasonably believes that the recommended municipal securities transaction or municipal financial product is, or (as may be applicable in the case of a review of a recommendation) is not, suitable for the client; and

(iii) whether the municipal advisor has investigated or considered other reasonably feasible alternatives to the recommended municipal securities transaction or municipal financial product that might also or alternatively serve the client's objectives.

(e) *Specified Prohibitions*.

(i) A municipal advisor is prohibited from:

(A) receiving compensation that is excessive in relation to the municipal advisory activities actually performed;

(B) delivering an invoice for fees or expenses for municipal advisory activities that is materially inaccurate in its reflection of the activities actually performed or the personnel that actually performed those activities;

(C) making any representation or the submission of any information that the municipal advisor knows or should know is either materially false or materially misleading due to the omission of a material fact about the capacity, resources or knowledge of the municipal advisor, in response to requests for proposals or qualifications or in oral presentations to a client or prospective client, for the purpose of obtaining or retaining an engagement to perform municipal advisory activities;

(D) making, or participating in, any fee-splitting arrangement with underwriters on any municipal securities transaction as to which it has provided or is providing advice, and any undisclosed fee-splitting arrangements with providers of investments or services to a municipal entity or obligated person client of the municipal advisor; and

(E) making payments for the purpose of obtaining or retaining an engagement to perform municipal advisory activities other than: (1) payments to an affiliate of the municipal advisor for a direct or indirect communication with a municipal entity or obligated person on behalf of the municipal advisor where such communication is made for the purpose of obtaining or retaining

an engagement to perform municipal advisory activities; (2) reasonable fees paid to another municipal advisor registered as such with the Commission and the Board for making such a communication as described in subparagraph (e)(i)(E)(1); and (3) payments that are permissible “normal business dealings” as described in Rule G-20.

(ii) Except as provided for in paragraphs .14, .15, and .16 of the Supplementary Material of this rule, a municipal advisor to a municipal entity client, and any affiliate of such municipal advisor, is prohibited from (1) acquiring as principal either alone or as a participant in a syndicate or other similar account formed for the purpose of purchasing, directly or indirectly, from the issuer all or any portion of such issue, or act as agent for the issuer in arranging the placement of such issue; or (2) engaging with the municipal entity client in a principal transaction that is the same, or directly related to the, issue of municipal securities or municipal financial product as to which the municipal advisor is providing or has provided advice to the municipal entity client. The use of the term "indirectly" in this section (e) shall not preclude a municipal advisor that has a municipal advisory relationship with respect to the issuance of municipal securities from purchasing such securities from an underwriter, either for its own trading account or for the account of customers, except to the extent that such purchase is made to contravene the purpose and intent of this rule, nor shall it preclude a municipal advisor that has a municipal advisory relationship with respect to the issuance of municipal securities from serving as successor remarketing agent for such issue if the municipal advisory relationship in connection with such issue has been terminated for a period of at least one (1) year prior to such municipal advisor being selected to serve as successor remarketing agent.

(f) *Definitions.*

(i) “Advice” shall, for purposes of this rule, have the same meaning as in Section 15B(e)(4)(A)(i) of the Act, 17 CFR 240.15Ba1-1(d)(1)(ii) and other rules and regulations thereunder.

(ii) “Affiliate of the municipal advisor” shall mean, for purposes of this rule, any person directly or indirectly controlling, controlled by, or under common control with such municipal advisor.

(iii) “Municipal advisor” shall, for purposes of this rule, have the same meaning as in Section 15B(e)(4) of the Act, 17 CFR 240.15Ba1-1(d)(1)-(4) and other rules and regulations thereunder; provided that it shall exclude a person that is otherwise a municipal advisor solely based on activities within the meaning of Section 15B(e)(4)(A)(ii) of the Act and rules and regulations thereunder or any solicitation of a municipal entity or obligated person within the meaning of Section 15B(e)(9) of the Act and rules and regulations thereunder.

(iv) “Municipal advisory activities” shall, for purposes of this rule, mean those activities that would cause a person to be a municipal advisor as defined in subsection (f)(iii) of this rule.

(v) A “municipal advisory relationship” shall, for purposes of this rule, be deemed to exist when a municipal advisor enters into an agreement to engage in municipal advisory activities for a municipal entity or obligated person. The municipal advisory relationship shall be deemed to have ended on the date which is the earlier of (i) the date on which the municipal advisory

relationship has terminated pursuant to the terms of the documentation of the municipal advisory relationship required in section (c) of this rule or (ii) the date on which the municipal advisor withdraws from the municipal advisory relationship.

(vi) “Municipal entity” shall, for purposes of this rule, have the same meaning as in Section 15B(e)(8) of the Act, 17 CFR 240.15Ba1-1(g) and other rules and regulations thereunder.

(vii) “Obligated person” shall, for purposes of this rule, have the same meaning as in Section 15B(e)(10) of the Act, 17 CFR 240.15Ba1-1(k) and other rules and regulations thereunder.

(viii) “Official statement” shall, for purposes of this rule, have the same meaning as in Rule G-32(d)(vii).

(ix) “Principal transaction” shall mean, for purposes of this rule, when acting as principal for one’s own account, a sale to or a purchase from the municipal entity client of any security or entrance into any derivative, guaranteed investment contract, or other similar financial product with the municipal entity client.

Supplementary Material

.01 Duty of Care. Municipal advisors must exercise due care in performing their municipal advisory activities. The duty of care includes, but is not limited to, the obligations discussed in this paragraph .01. A municipal advisor must possess the degree of knowledge and expertise needed to provide the municipal entity or obligated person client with informed advice. A municipal advisor also must make a reasonable inquiry as to the facts that are relevant to a client’s determination as to whether to proceed with a course of action or that form the basis for any advice provided to the client. A municipal advisor must undertake a reasonable investigation to determine that it is not basing any recommendation on materially inaccurate or incomplete information. Among other matters, a municipal advisor must have a reasonable basis for:

(a) any advice provided to or on behalf of a client;

(b) any representations made in a certificate that it signs that will be reasonably foreseeably relied upon by the client, any other party involved in the municipal securities transaction or municipal financial product, or investors in the municipal entity client’s securities or securities secured by payments from an obligated person client; and

(c) any information provided to the client or other parties involved in the municipal securities transaction in connection with the preparation of an official statement for any issue of municipal securities as to which the municipal advisor is advising.

.02 Duty of Loyalty. Municipal advisors must fulfill a duty of loyalty in performing their municipal advisory activities for municipal entity clients. The duty of loyalty includes, but is not limited to, the obligations discussed in this paragraph .02. A municipal advisor must deal honestly and with the utmost good faith with a municipal entity client and act in the client’s best interests without regard to the financial or other interests of the municipal advisor. A municipal advisor must not

engage in municipal advisory activities for a municipal entity client if it cannot manage or mitigate its conflicts of interest in a manner that will permit it to act in the municipal entity's best interests.

.03 Action Independent of or Contrary to Advice. If a municipal entity or obligated person client of a municipal advisor elects a course of action that is independent of or contrary to advice provided by the municipal advisor, the municipal advisor is not required on that basis to disengage from the municipal advisory relationship.

.04 Limitations on the Scope of the Engagement. Nothing contained in this rule shall be construed to permit the municipal advisor to alter the standards of conduct or impose limitations on any of the duties prescribed herein. If requested or expressly consented to by the municipal entity or obligated person client, however, a municipal advisor may limit the scope of the municipal advisory activities to be performed to certain specified activities or services. If the municipal advisor engages in a course of conduct that is inconsistent with any such agreed upon limitations, it may result in negating the effectiveness of such limitations.

.05 Conflicts of Interest. Disclosures of conflicts of interest by a municipal advisor to its municipal entity or obligated person client must be sufficiently detailed to inform the client of the nature, implications and potential consequences of each conflict. Such disclosures also must include an explanation of how the municipal advisor addresses or intends to manage or mitigate each conflict.

.06 Relationship Documentation. During the term of the municipal advisory relationship, the writing(s) required by section (c) of this rule must be promptly amended or supplemented to reflect any material changes or additions, and the amended writing(s) or supplement must be promptly delivered to the client. This amendment and supplementation requirement applies to any changes and additions that are discovered, or should have been discovered, based on the exercise of reasonable diligence by the municipal advisor. The information described in subsection (c)(ii) of this rule is not required if the municipal advisor previously fully complied with the requirements of section (b) of this rule to disclose conflicts of interest and other information and subsection (c)(ii) would not require the disclosure of any materially different information than that previously disclosed to the client.

.07 Inadvertent Advice. A municipal advisor is not required to comply with sections (b) and (c) of this rule if the municipal advisor meets all of the following requirements. In the event that a municipal advisor inadvertently engages in municipal advisory activities for a municipal entity or obligated person and does not intend to continue the municipal advisory activities or enter into a municipal advisory relationship, the municipal advisor must, as promptly as possible after discovery of the provision of inadvertent advice, provide a document to such municipal entity or obligated person that is dated and includes:

(a) a disclaimer that the municipal advisor did not intend to provide advice and that, effective immediately, it has ceased engaging in municipal advisory activities with respect to that municipal entity or obligated person in regard to all transactions and municipal financial products as to which advice was inadvertently provided;

(b) a notification that such municipal entity or obligated person should be aware that the disclosure of material conflicts of interest and other information required by section (b) of this rule has not been provided;

(c) an identification of all of the advice that was inadvertently provided, based on a reasonable investigation; and

(d) a request that the municipal entity or obligated person acknowledge receipt of the document.

A municipal advisor utilizing this alternative must promptly conduct a review of its written supervisory and compliance policies and procedures to ensure they are reasonably designed to prevent the provision of inadvertent advice to municipal entities and obligated persons. The use of this alternative has no effect on the applicability of any provisions of this rule other than sections (b) and (c) or any other legal requirements applicable to municipal advisory activities.

.08 Applicability of State or Other Laws and Rules. Municipal advisors may be subject to fiduciary or other duties under state or other laws. Nothing contained in this rule shall be deemed to supersede any more restrictive provision of state or other laws applicable to municipal advisory activities. In addition, the specific prohibition in subsection (e)(ii) of this rule shall not apply to an acquisition as principal, either alone or as a participant in a syndicate or other similar account formed for the purpose of purchasing, directly or indirectly, from an issuer all or any portion of an issuance of municipal securities on the basis that the municipal advisor provided advice as to the issuance because that is a type of transaction that is addressed and prohibited in certain circumstances by Rule G-23.

.09 Suitability. A determination of whether a municipal securities transaction or municipal financial product is suitable must be based on numerous factors, as applicable to the particular type of client, including, but not limited to, the client's financial situation and needs, objectives, tax status, risk tolerance, liquidity needs, experience with municipal securities transactions or municipal financial products generally or of the type and complexity being recommended, financial capacity to withstand changes in market conditions during the term of the municipal financial product or the period that municipal securities to be issued in the municipal securities transaction are reasonably expected to be outstanding and any other material information known by the municipal advisor about the client and the municipal securities transaction or municipal financial product, after reasonable inquiry.

.10 Know Your Client. A municipal advisor must use reasonable diligence, in regard to the maintenance of the municipal advisory relationship, to know and retain the essential facts concerning the client and concerning the authority of each person acting on behalf of such client. The facts "essential" to "knowing a client" include those required to:

(a) effectively service the municipal advisory relationship with the client;

(b) act in accordance with any special directions from the client;

(c) understand the authority of each person acting on behalf of the client; and

(d) comply with applicable laws, regulations and rules.

.11 Excessive Compensation. Depending on the specific facts and circumstances of the engagement, a municipal advisor's compensation may be so disproportionate to the nature of the municipal advisory activities performed as to constitute an unfair practice in violation of Rule G-17. Among the factors relevant to whether a municipal advisor's compensation is disproportionate to the nature of the municipal advisory activities performed are the municipal advisor's expertise, the complexity of the municipal securities transaction or municipal financial product, whether the fee is contingent upon the closing of the municipal securities transaction or municipal financial product, the length of time spent on the engagement and whether the municipal advisor is paying any other relevant costs related to the municipal securities transaction or municipal financial product.

.12 529 College Savings Plans, ABLE Programs and Other Municipal Fund Securities. This rule applies equally to municipal advisors to sponsors or trustees of 529 college savings plans, ABLE programs (*i.e.*, a program established and maintained by a state, or an agency or instrumentality thereof, to implement the Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014), and other municipal fund securities. All references in this rule to an "official statement" include the disclosure document for a 529 college savings plan or an ABLE program and the investment circular or information statement for a local government investment pool.

.13 Principal Transactions - Other Similar Financial Products. For purposes of subsection (f)(ix) of this rule, which defines the term "principal transaction," the phrase "other similar financial product" includes a bank loan, but only if it is in an aggregate principal amount of $1,000,000 or more and it is economically equivalent to the purchase of one or more municipal securities.

.14 Principal Transactions – Successor Municipal Advisor. A broker, dealer, or municipal securities dealer that previously had a municipal advisory relationship with respect to an issuance of municipal securities shall not be prohibited from acquiring as principal either alone or as a participant in a syndicate or other similar account formed for the purpose of purchasing, directly or indirectly, from the issuer all or any portion of such issue, or act as agent for the issuer in arranging the placement of such issue, if the issuer engaged a successor municipal advisor, or if the municipal advisory relationship in connection with the issue has been terminated for a period of at least one (1) year.

.15 Principal Transactions – Placements with Governmental Entities. A municipal advisor shall not be prohibited from acting as agent for the issuer in arranging the placement of the entire issue with any state, local or federal governmental entity as part of a plan of financing by such entity for or on behalf of the issuer, but only if such municipal advisor does not receive compensation from any person other than with respect to municipal advisory services related to such placement and does not receive compensation from any person for underwriting any contemporaneous financing transaction directly or indirectly related to such issue undertaken by the state, local, or federal governmental entity with which such issue was placed.

.~~14~~ 16 Principal Transactions - Exception for Transactions in Specified Fixed Income Securities. Engaging in a principal transaction with a municipal entity client is not specifically prohibited under subsection (e)(ii) of this rule if:

(a) the municipal advisor is a broker-dealer registered under Section 15 of the Act, and each account as to which the municipal advisor relies on this paragraph .~~14~~ 16 is a brokerage account subject to the Act, and the rules thereunder, and the rules of the self-regulatory organization(s) of which it is a member, and is an account as to which the municipal advisor exercises no investment discretion (as defined in Section 3(a)(35) of the Act), except investment discretion granted by a municipal entity client on a temporary or limited basis;

(b) neither the municipal advisor, nor any affiliate of the municipal advisor, is providing or has provided advice to the municipal entity client as to an issue of municipal securities or a municipal financial product that is directly related to the principal transaction (other than advice as to another principal transaction under circumstances meeting all the requirements of this paragraph .~~14~~16);

(c) the principal transaction is a sale to or a purchase from the municipal entity client of any U.S. Treasury security, agency debt security, or corporate debt security (as defined in paragraph .~~15~~17 of the Supplementary Material) and does not involve municipal escrow investments (as defined in 17 CFR 240.15Ba1-1(h)); and

(d) the municipal advisor either: (1) discloses to the municipal entity client in writing before the completion of the transaction the capacity in which the municipal advisor is acting and obtains the consent of the municipal entity client to such transaction or (2) executes the transaction under circumstances meeting all of the following requirements:

(A) neither the municipal advisor nor any of its affiliates are the issuer of, or, at the time of the sale, an underwriter (as defined in 17 CFR 240.15c2-12(f)(8)) of, the security;

(B) the municipal entity client has executed a written, revocable consent prospectively authorizing the municipal advisor directly or indirectly to act as principal for its own account in selling any security to or purchasing any security from the municipal entity client, so long as such written consent is obtained after written disclosure to the municipal entity client explaining: the circumstances under which the municipal advisor directly or indirectly may engage in principal transactions; the nature and significance of conflicts with its municipal entity client's interests as a result of the transactions; and how the municipal advisor addresses those conflicts;

(C) the municipal advisor, prior to the execution of each principal transaction, informs the municipal entity client, orally or in writing, of the capacity in which it may act with respect to such transaction and obtains consent from the municipal entity client, orally or in writing, to act as principal for its own account with respect to such transaction;

(D) the municipal advisor sends a written confirmation at or before completion of each such transaction that includes, in addition to the information required by 17 CFR 240.10b-10 or Rule G-15, a conspicuous, plain English statement informing the municipal entity client that the

municipal advisor disclosed to the client prior to the execution of the transaction that the municipal advisor may be acting in a principal capacity in connection with the transaction, the municipal entity client authorized the transaction, and the municipal advisor sold the security to, or bought the security from, the municipal entity client for its own account;

(E) the municipal advisor sends to the municipal entity client, no less frequently than annually, written disclosure containing a list of all transactions that were executed in the client's account in reliance upon subsection (d)(2) of this paragraph .~~14~~16, and the date and price of such transactions; and

(F) each written disclosure required by subsection (d)(2) of this paragraph .~~14~~16 includes a conspicuous, plain English statement that the municipal entity client may revoke the written consent referred to in paragraph (d)(2)(B) of this paragraph .~~14~~16 without penalty at any time by written notice to the municipal advisor.

This paragraph ~~.14~~ 16 shall not be construed as relieving in any way a municipal advisor from acting in the best interest of its municipal entity clients, nor shall it relieve the municipal advisor from any obligation that may be imposed by other applicable provisions of the federal securities laws and state law.

.~~15~~ 17 Terms Relating to the Exception in Paragraph .~~14~~16. For purposes of paragraph .~~14~~ 16 and this paragraph .~~15~~ 17 of the Supplementary Material:

(a) "agency" means a U.S. executive agency as defined in 5 U.S.C. 105 that is authorized to issue debt directly or through a related entity, such as a government corporation, or to guarantee the repayment of principal and/or interest of a debt security issued by another entity. The term excludes the U.S. Department of the Treasury in the exercise of its authority to issue U.S. Treasury securities;

(b) "agency debt security" means a debt security (i) issued or guaranteed by an agency, or (ii) issued or guaranteed by a government-sponsored enterprise, including a securitized product that is issued by an agency or a government-sponsored enterprise, or, for which, the principal or interest (or both) is guaranteed by an agency or a government-sponsored enterprise;

(c) "corporate debt security" means a debt security that is U.S. dollar-denominated and issued by a U.S. or foreign private issuer and, if a "restricted security" as defined in 17 CFR 230.144(a)(3), sold pursuant to 17 CFR 230.144A, but does not include a money market instrument;

(d) "government-sponsored enterprise" has the same meaning as defined in 2 U.S.C. 622(8);

(e) "money market instrument" means a debt security that at issuance has a maturity of one calendar year or less, or, if a discount note issued by an agency or a government-sponsored enterprise, a maturity of one calendar year and one day or less;

(f) "securitized product" means a security collateralized by any type of financial asset, such as a loan, a lease, a mortgage, or a secured or unsecured receivable, and includes, but is not limited to, an asset-backed security, a synthetic asset-backed security, and any residual tranche

or interest of any security specified above, which tranche or interest is considered a debt security; and

(g) “U.S. Treasury security” means a security issued by the U.S. Department of the Treasury to fund the operations of the federal government or to retire such outstanding securities.

Speer Financial, Inc.
INDEPENDENT MUNICIPAL ADVISORS
ESTABLISHED 1954

KEVIN McCANNA *Chairman* | DANIEL FORBES *President* | RAPHALIATA McKENZIE *Senior VP* | MAGGIE BURGER *Senior VP* | ANTHONY MICELI *Senior VP* | LARRY BURGER *Vice President* | MARK JERETINA *Vice President*

August 19, 2019

Mr. Ronald W. Smith, Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street NW
Washington D.C., 20005

Re: MSRB Rule G-23 Activities of Dealers Acting as Financial Advisors

Dear Mr. Smith,

Thank you for the opportunity to provide comments to the MSRB regarding Rule G-23 and the Activities of Dealers Acting as Financial Advisors.

Speer Financial, Inc. ("Speer") is an Independent Municipal Advisor and is not affiliated with any Broker/Dealer firm. Speer was founded in 1954, by Paul Speer who left his career as Bond Counsel to fill a void in the municipal world for independent advice to municipal issuers, without conflicts of interest. Speer has operated under this same philosophy for over 60 years and believes strongly that municipal issuers deserve a Municipal Advisor with a fiduciary responsibility to them.

The Rule G-23 Amendment in 2011 was well drafted and a welcome change to the municipal market. This amendment addressed many of concerns that Speer had about Broker/Dealer firms acting as Municipal Advisors and then switching roles in order to then purchase the bond issue as a broker/dealer. A firm should under no circumstances be able to provide municipal advice in a fiduciary capacity and then later in the relationship be able to switch roles and purchase the bond issue, even in a competitive bond sale. Not only does this present a conflict of interest, but it further confuses our municipal issuer clients as to the specific roles that each participant plays in a transaction.

Speer stands behind Rule G-23 in its current format (amended version 2011) and does not wish to see any changes made at this time. We believe the Dodd-Frank Wall Street Reform and Consumer Protection Act did a good job of identifying the need for a fiduciary role for the Municipal Advisor.

In response to your request for comments we have provided some information from our firm that you may find helpful in your review of this Rule:

- Municipal issuers have more information today about the roles each party plays in the municipal securities transaction based on the disclosures required by dealers. The municipal issuer is informed up front making it clear for them what each party's purpose is in the transaction and what information they may or may not provide.

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- Speer's primary focus is in midwestern states, primarily Illinois and Iowa. Many of our clients are small or infrequent issuers. We do not believe there has been any cost increase to municipal issuers because of Rule G-23.
- Speer believes that the MSRB should keep Rule G-23 as it stands today and not attempt to combine it with Rule G-42.
- Speer does not support any additional exceptions to role switching as you review this Rule.
  - An exception for competitive bid underwritings should not be enacted in any size issuance; there is plenty of competition in the market even in small issuer areas to support competitive markets without allowing role switching.
  - The average number of bidders in competitively bid sales for Speer Financial in both 2018 and 2019 is five per sale.
- Speer does not support any dealer municipal advisor from being able to resign and underwrite the same issuance in any circumstance.

We would encourage you to reach out to our firm if you have any questions about the statements we have made in this letter. Thank you for the opportunity to comment on Rule G-23.

Sincerely,

SPEER FINANCIAL, INC.

Daniel Forbes
President

STATE OF FLORIDA
DIVISION OF BOND FINANCE

RON DESANTIS
GOVERNOR

ASHLEY MOODY
ATTORNEY GENERAL

JIMMY PATRONIS
CHIEF FINANCIAL OFFICER

NIKKI FRIED
COMMISSIONER OF AGRICULTURE

J. BEN WATKINS III
DIRECTOR

September 3, 2019

Mr. Ronald Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street NW
Washington, DC 20005

Re: Comments on MSRB Rule G-23

Dear Mr. Smith:

This letter is in response to the Municipal Securities Rulemaking Board's (MSRB) Request for Comment on MSRB Rule G-23 on Activities of Dealers Acting as Financial Advisors. As a frequent issuer and market participant, the State of Florida has not experienced any negative market effects from the provisions of Rule G-23. In fact, the present rule has been effective in protecting the integrity of the marketplace and issuers by eliminating any confusion about who the dealers and municipal advisors are working for and whose interests they represent. Role-switching creates a conflict of interest that cannot be overcome, and the MSRB should not take any action that would dilute the provisions of Rule G-23 that provide the important issuer protections contemplated by the Dodd-Frank Act.

Thank you for your consideration.

Very truly yours,

J. Ben Watkins III

STATE BOARD OF ADMINISTRATION | 1801 HERMITAGE BOULEVARD, SUITE 200 | TALLAHASSEE, FLORIDA 32308
OFFICE (850) 488-4782 | FAX (850) 413-1315 | WEBSITE: WWW.SBAFLA.COM/BOND

August 14, 2019

Ronald W. Smith, Corporate Secretary
Municipal Securities Rulemaking Board
100 I Street NW
Washington D.C. 20005

Re: Notice 2019-13, Request for Comment on Rule G-23

Ladies and Gentlemen,

Zions Public Finance, Inc. and Zions Bank Public Finance are jointly submitting these comments to the Board. Zions Public Finance, Inc. is a registered Municipal Advisory firm and is a wholly-owned subsidiary of Zions Bancorporation, N.A. a nationally-chartered banking institution dba Zions Bank. Zions Bank Public Finance is a division of Zions Bancorporation, N.A. and is a registered bank-dealer.

The Request for Comment dated May 20, 2019 invites market participants to comment generally, but also in response to several specific questions. Our comments are as follows:

In our opinion, Rule G-23 has been generally effective in curbing abuses from broker-dealers attempting to switch roles from Municipal Advisor to Underwriter. We think these prohibitions should not be watered down but should remain in place and even potentially be strengthened.

An area that could be strengthened is illustrated by the following example. We have recently seen cases where a broker-dealer is hired as Municipal Advisor, provides specific advice concerning the financing of a project, then the issuer determines (perhaps with the advice of the Municipal Advisor) to finance the project through a separate interlocal entity with which the broker-dealer has an underwriting contract. Because the issuer is now a separate entity, the broker-dealer feels free to act as underwriter for the project. This activity seems to at least violate the spirit of G-23 and should be more explicitly prohibited in any new or revised rulemaking.

We now respond to some of the specific questions you ask in the Request for Comment:

One South Main Street, 18th Floor | Salt Lake City, UT 84133-1109 | Telephone: 801.844.7373 | FAX: 801.844.4484

Question 3.

Considering the implementation of MSRB's and SEC's municipal advisor rules, are there ways the MSRB could achieve Rule G-23's purpose without retaining it as a standalone rule? For example, should the MSRB eliminate Rule G-23 and address any need for regulatory requirements and exceptions through enhancements to other MSRB rules, such as Rule G-42?

We feel that the provisions of Rule G-23 could fit nicely within Rule G-42 as long as such a move does not change the substance of its provisions.

Question 5.

Rule G-23's prohibition on role switching currently extends to dealer financial advisors acting as placement agent for the issuance of municipal securities.

a. As it pertains to placement agent activities, is the prohibition sufficiently clear as to what activities are, or are not permissible for dealer financial advisors? Should the MSRB provide interpretive guidance regarding the scope of activities that a dealer financial advisor may perform under Rule G-23 without being regarded as a placement agent for purposes of the rule's prohibition on role switching?

In our opinion, this aspect of the rule needs to be clarified. We have interpreted the rule to allow a Municipal Advisor to prepare and distribute a request for bids package for a direct purchase sale and to evaluate and provide advice to the issuer regarding the subsequent bids, as long as the advisor is acting in its advisory role, is paid by the issuer and not by the purchaser, is not affiliated with the purchaser, and does not negotiate specific terms of the bid absent the presence of the issuer. The ability to provide this type of service is not sufficiently clear in the rule.

We would strongly object to any attempt to restrict this type of activity to that of a "placement agent". Such a restriction would introduce higher costs and burden the transaction without any corresponding benefit to the issuer or the process.

Question 6.

Rule Should the MSRB make any amendments to the Role Switching Exceptions? For example –

c. Should Rule G-23 provide an exception for competitive bid underwritings? If so, should such an exception be limited to small issuances (e.g., $15 million or less in aggregate principal amount)?

In our opinion, issuers would benefit from an additional bid, even if it came from a firm affiliated with its Municipal Advisor. This is especially true for smaller, infrequent issuers. If the bidding platform is

secure, and the winning bid is based on a pre-determined formula, we see little opportunity for abuse.

d. *Should Rule G-23 provide an exception for a dealer financial advisor if it disengages as financial advisor and a successor financial advisor is engaged by the issuer? If so, should the rule impose a cooling off period?*

No such exception should be made. It would be immediately abused by teams of broker-dealers and advisors acting in concert.

Thank you for the opportunity to provide comment on this Rule. Feel free to contact us with any questions you may have.

Sincerely,

James Livingston
Executive Vice President

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