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of Bond Lawyers

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February 22, 2013

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, Virginia 22314

Re: NABL Comments in Response to MSRB Notice 2012-63

Dear Mr. Smith:

The National Association of Bond Lawyers ("NABL") submits the following comments relating to MSRB Notice 2012-63 (December 19, 2012) (the "Request"), in which the Municipal Securities Rulemaking Board (the "MSRB") solicited comments to determine whether any of its rules and related interpretive guidance "should be revised or restated due to changes in market practices or conditions, or to be more closely aligned with rules of other self-regulatory organizations or government agencies so as to promote more effective and efficient compliance." The comments were prepared by an *ad hoc* subcommittee of NABL members comprised of those individuals listed on Exhibit A and were approved by NABL's Board of Directors.

NABL is a nonprofit organization comprised of approximately 2800 members. It exists to promote the integrity of the municipal market by advancing the understanding of and compliance with the various laws affecting public finance.

Because many of the MSRB's Rules address areas of the municipal bond market for which NABL members do not render advice, we have limited our comments to those General, or "G" Rules, which NABL members have found require interpretation in order for us to provide legal advice to our clients. We also are mindful that the MSRB has asked specific questions regarding MSRB Rules and interpretive guidance, and, in certain instances, we have addressed those questions with our comments.

If NABL can provide further assistance, please do not hesitate to contact Bill Daly in our Washington, D.C., office at (202) 503-3300.

Thank you in advance for your consideration of these comments.

Sincerely,

Scott R. Lilienthal

NABL COMMENTS IN RESPONSE TO MSRB NOTICE 2012-63

GENERAL SUGGESTIONS

Our general suggestions are as follows:

1. **The General Rules should be reorganized so that the subcategories into which the rules are currently classified become part of their nomenclature and the current numbering system is abandoned.**

The 2013 Rule Book divides the G Rules into five categories:

"Professional Qualification" rules establishing qualifications for conducting business (Rules G-2 through G-5);

"Fair Practice" rules protecting investors, municipal entities, obligated persons and the general public (Rules G-10, G-11, G-13, G-17 through G-24, G-25 through G-31, G-35, G-37 through G-39 and G-43);

"Uniform Practice" rules ensuring consistent behavior of regulated entities in the marketplace (Rules G-12, G-15, G-26, G-28 and G-33);

"Market Transparency" rules providing for full and timely flow of information to the marketplace (Rules G-14, G-32 and G-34); and

"Regulated Entity Administration" rules setting internal requirements for firms (Rules G-1, G-6 through G-16, G-16, G-27 and G-40 through G-41).

NABL would suggest that the MSRB consider reorganizing the G Rules by integrating an acronym for each of the categories into the Rule and re-numbering the Rules. For example, the Fair Practice Rules could then be denoted by a number G and then the subcategory abbreviation "FP," followed by a number. Thus, Rule G-10 would become Rule GFP-1, Rule G-11 would become Rule GFP-2, etc. Rule G-2, a Professional Qualification rule, would become Rule GPQ-1, etc.

The benefit of this change would be twofold. First, each of the Rules dealing primarily with a particular category of activity would be codified into its own section, facilitating research into compliance with the MSRB Rules. Second, when additional Rules are added (for example, the proposed Rule G-47), it would become the last Rule within a category rather than the last Rule among all G-Rules.

2. **In order to provide a "case law" background for each of the General Rules, each Rule should provide a listing of and/or links to enforcement actions by FINRA and the SEC (and, if possible, the bank regulatory agencies) relating to violations of that Rule.**

Because the MSRB's Rules are not enforced by the MSRB, but by other organizations (i.e., FINRA for securities firms, the OCC, the Federal Reserve or the FDIC for banks, and the SEC for municipal advisors, all securities firms and banks), it would be extremely helpful to be

able to access enforcement actions in order to be able to learn from others' mistakes, and provide additional context for application of that Rule. As is stated in the Rule Book, one of the MSRB's support activities is "the delivery of information products that assist these other regulatory authorities in their surveillance, examinations and enforcement actions." The information flow resulting from these regulatory authorities' enforcement actions should run back to the MSRB and made available.

3. **Prior forms of each Rule should be included in the Rule Book (particularly if past Interpretive Guidance applicable to outdated Rules is contained in the Rule Book), or the date of amendment should be indicated.**

Once a Rule has been amended (for example, Rule G-23), there should be (as is the case with most State statutory codes) a way to trace its "legislative history" so that the interpretive guidance and/or enforcement actions based on the prior form of the Rule have the proper context. We would suggest that the prior forms of a Rule be included following the interpretive guidance for each Rule.

4. **Each of the MSRB Forms should appear in the Rule Book.**

Presumably, because Forms G-32 and G-40 are submitted using EMMA and Gateway, respectively, they do not appear in the Rule Book. For the sake of completeness, NABL suggests that these two forms, as well as Form RTRS, should be made available in the Rule Book.

5. **Interpretive notices and letters should be given numerical designations rather than simply referred to by date.**

The current form of the Rule Book sets forth each Rule, followed by Interpretive Guidance consisting of "Interpretive Notices" listed in ascending chronological order, followed by interpretive letters, also listed in ascending chronological order. Interpretations which are applicable to more than one Rule are cited at the end of each Rule.

NABL suggests that the MSRB re-classify each of the Notices and Letters so that they simply are given a number/date and year designation and are moved to a separate publication (or site). For example, the January 26, 2004 Rule G-30 Interpretation, "Review of Dealer Pricing Responsibilities," could be renamed "Notice 2004-0126 – Rule G-30" or Notice [Year]-[insert the appropriate number in chronological order]-Rule [Number].

6. T**he MSRB should review interpretive guidance which is at least 20 years old (or which interpret Rules which have been revised) for relevance.**

In some cases, the accompanying interpretations date from the initial promulgation of the Rules in 1975. If interpretive letters are retained behind each Rule as is the current format, NABL suggests that they be arranged in descending chronological order, rather than the current ascending chronological order. NABL also suggests that if an intervening amendment was made to the Rule following the publication of the interpretive letter, the amendment be noted in the listing of interpretive letters in order to provide context.

7. **The MSRB should review interpretive guidance to determine whether the language should be incorporated into the Rules for clarity.**

The MSRB's recent announcement in Notice 2013-04 that it would create a new Rule G-47 in order to codify current guidance on the obligations of dealers to disclose material information about municipal securities to customers is part of an overall effort to

> [C]onsolidate the current obligations into one easy to follow rule. The structure of the proposed rule (rule language followed by supplementary material) is the same structure used by FINRA and other self-regulatory organizations ("SROs"). The MSRB intends to follow this new structure for all of its rules going forward, in order to streamline the rules, harmonize the format with that of other SROs, and make the rules more flexible and easier for dealers and municipal advisors to understand and follow.

NABL suggests that the MSRB review all of its past interpretive guidance to determine whether this guidance should be integrated into a Rule.

8. **The MSRB should review all of its Rules with particular consideration for the impact the Rules may have on municipal entities and obligated persons and whether clarification is needed for their benefit.**

As the mission of the MSRB was only recently expanded by the Dodd-Frank Act to include the protection of municipal entities and obligated persons[1], NABL suggests that the MSRB review its Rules from the perspective of municipal entities and obligated persons in order to see whether certain Rules should be clarified in order to ensure that the rules are not unduly burdensome to issuers.

For example, Rule G-34 and its requirement that CUSIPs be obtained for all new issues of municipal securities which are acquired by a broker, dealer or municipal securities dealer for the purpose of "distribution" requires clarification. The implication is that, if a lending financial institution obtains CUSIPs for a bank loan, then the lending financial institution has plans to make a distribution, which would satisfy one of the "municipal security" criteria set forth in MSRB Notice 2011-52, *Potential Applicability of MSRB Rules to Certain "Direct Purchase" and "Bank Loans"* (September 12, 2011). If the issuer wants to avail itself of the (d)(1) "private placement" exemption from SEC Rule 15c2-12, should the issuer prohibit lending financial institutions from applying for CUSIPs? It would be helpful if the MSRB were to provide guidance with "safe harbor" examples for issuers who might be adversely affected, and not protected, by an MSRB Rule.

9. **The MSRB should make the training materials for examination and enforcement staff available, either as an appendix to the Rule Book or as an online learning tool.**

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[1] The MSRB had previously interpreted Rule G-17 to require brokers, dealers, and municipal securities dealers to deal fairly with all persons, including issuers of municipal securities. See MSRB Notice 2010-42 (October 1, 2010), *Expanded MSRB Mission; Rulemaking for Municipal Advisors*, fn 1.

NABL is appreciative of the training which the MSRB undertakes each year for dealers. NABL suggests that this training could be enhanced if the training materials, which the MSRB provides to FINRA and the other regulatory agencies, are also made available to brokers, dealers, municipal securities dealers, municipal advisors and attorneys. NABL believes that these suggestions will promote more efficient compliance by brokers, dealers, municipal securities dealers and municipal advisors, and will allow for a greater understanding by municipal entities and investors of the responsibilities and duties owed to them.

SPECIFIC SUGGESTIONS

Our specific G Rule suggestions, which NABL is making in order to point out our concerns that the rules may cause an unnecessary burden on municipal market participants, are as follows:

1. Rule G-17, Conduct of Municipal Securities and Municipal Advisory Activities

Rule G-17, commonly referred to as the "fair dealing" rule, reads, in its entirety,

> In the conduct of its municipal securities or municipal advisory activities, each broker, dealer, municipal securities dealer, and municipal advisor shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice.

The remaining 45 pages under the Rule G-17 heading in the 2013 Rule Book consist of interpretive guidance with respect to the Rule.

As the MSRB stated in its March 30, 2007 interpretive notice on customer protection obligations in connection with the sale of municipal securities (and has repeated on other occasions in other interpretive guidance),

> At the core of the MSRB's customer protection rules is Rule G-17 which provides that, in the conduct of its municipal securities activities, each dealer shall deal fairly with all persons and shall not engage in any deceptive, dishonest or unfair practice. The rule encompasses two basic principles: an ***anti-fraud prohibition similar to the standard set forth in Rule 10b-5*** adopted by the Securities and Exchange Commission under the Securities Exchange Act of 1934, and ***a general duty to deal fairly even in the absence of fraud***. All activities of dealers must be viewed in light of these basic principles, regardless of whether other MSRB rules establish specific requirements applicable to such activities. (emphasis added)

Our concern is that the interpretive guidance for Rule G-17 does not set forth any standards for meeting this general duty of "fairness" under Rule G-17. This lack of standards imposes an undue burden on brokers, dealers and municipal securities dealers and therefore may adversely affect the marketplace for tax-exempt bonds. NABL suggests that the MSRB review Rule G-17 and establish, at the very least, a negligence standard which must be met in order to find a Rule G-17 violation. In order to establish this standard, the MSRB should outline, either

through interpretive guidance or another Rule, the minimal procedures which an underwriter should adopt and follow in order to meet the "fairness" standard of Rule G-17.

2. **Rule G-23, Activities of Financial Advisors**

Although the expected SEC action to define the term "municipal advisor" may result in more clarity, Rule G-23's relatively recent revisions have left some issues for which interpretive guidance would be helpful.

For example, prior to the November 23, 2011 amendments to Rule G-23(d) provided a procedure by which brokers, dealers or municipal securities dealers could disengage from a financial advisory relationship and serve as underwriters for an issue. Although this disengagement procedure has been deleted from the amended Rule G-23, a broker, dealer or municipal securities dealer which is serving as a financial advisor is not expressly prohibited from "disengaging" and serving as an underwriter for the issue for which it provided financial advice. May it disengage as long as a successor financial advisor is appointed? Is there a waiting period?[2] If an individual leaves a firm which is serving as a financial advisor for an issue, may the firm which that individual joins serve as underwriter for that same issue? Does the term "control," as used in paragraph (d) require a majority percentage of ownership, or may a firm serving as broker, dealer or municipal securities dealer and serving primarily as an underwriting firm hold a de minimis equity position in a financial advisory firm?

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MSRB guidance on these issues would be helpful. NABL welcomes the opportunity to provide these comments and hopes that, if the MSRB forms a task force to review and revise MSRB rules, NABL will be asked to participate.

[2] See, e.g., Rule G-23(e), which provides for a one-year period following disengagement from a financial advisory relationship before a broker, dealer or municipal securities dealer may serve as successor remarketing agent for an issue in which it provided financial advisory services.

Exhibit A

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