NATIONAL ASSOCIATION OF MUNICIPAL ADVISORS

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