Subject: File Number SR-MSRB-2011-03
June 23, 2011
From: Joy A. Howard
Principal, WM Financial Strategies

I am writing in response to the request for comments on the amendments to the MSRB's Rule G-23 that will preclude a financial advisor from terminating its financial advisory relationship with an issuer and subsequently serving as the underwriter. In the interest of keeping these comments brief, I am attaching and making reference to my previous comments that were submitted to the Commission on March 18, 2011.

I am pleased that the MSRB has amended Rule G-23 in a manner that will reduce some of the conflicts of interest relating to activities of broker-dealers serving as financial advisors. Regrettably, the proposed amendments leave open many opportunities for broker-dealers to continue to switch roles between acting as a financial advisor and as an underwriter. In particular, there are no restrictions of any kind preventing a broker-dealer from serving in dual capacities to a single issuer as long as two or more transactions are involved. For example, a voter approved $20,000,000 general obligation bond transaction could be subdivided into two $10,000,000 issues in which one is sold by competitive bidding and one is sold later by a negotiated sale. Assume that for the first issue the broker-dealer serves as a financial advisor and, after establishing a trusted advisory relationship with the issuer, the broker-dealer "advises" the issuer that it should serve as the underwriter for the second issue. This represents just one example of a significant conflict of interest that will remain under the amended rule.

It is my understanding that Rule G-23 is intended to prevent conflicts of interest rather than attempting to define the services or "advice" that may be rendered by an underwriter. It is also my understanding that the Commission will clarify what services (i.e., the normative standards of conduct) that may be provided by an underwriter when it finalizes the rule for the Permanent Registration of Municipal Advisors. Hopefully, the clarification will amend or limit the scope of certain aspects of Rule G-23 in order to bring Rule G-23 into conformity with the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act").

To be clear as to the inconsistencies that exist between proposed Rule G-23 and the Act, consider the following:

Amended Rule G-23, Section (b) reads as follows:

> *Financial Advisory Relationship.* For purposes of this rule, a financial advisory relationship shall be deemed to exist when a broker, dealer, or municipal securities dealer renders or enters into an agreement to render financial advisory or consultant services to or on behalf of an issuer 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 advisory relationship shall not be deemed to exist when, 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.

Under the Act, the term "Municipal Advisor" is defined as any individual who provides "advice with respect to the structure, timing, terms and other similar matters concerning such financial products or issues". The Act excluded from the definition of Municipal Advisor a "broker, dealer, or municipal securities dealer serving as an underwriter (as defined in section 2(a)(11) of the Securities Act of 1933) (15 U.S.C. 77b(a)(11))." The definition of "underwriter" under Section 2(a)(11) of the Securities Act of 1933 **does not include** "a person that provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues."

The "advice" permitted to be provided by underwriters under Rule G-23 is not consistent with the foregoing definition of underwriter since the definition of underwriter in Section 2(a)(11) **does not** include any reference to "advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues." In conflict with Rule G-23 is the MSRB's own definition of "underwriter," which is included at the end of my March 18, 2011 comments.[1]

The Guidance included with Rule G-23 states that a dealer that clearly identifies itself in writing as an underwriter will not be considered to be a financial advisor. Rule G-23 goes on to state that "[t]he writing must make clear that the primary role of an underwriter is to purchase, or arrange for the placement of, securities in an arm's-length commercial transaction between the issuer and the underwriter and that the underwriter has financial and other interests that differ from those of the issuer."

The MSRB assumes that a broker-dealer serving as an underwriter will, on one hand, provide "advice" to municipal entities, but on the other hand cannot cause the issuer to think that the broker-dealer's advice is in the municipal entity's best interest. It is difficult to imagine that infrequent small issuers will grasp that an underwriter who is providing advice is not acting in their best interest. It is difficult to imagine that the vague and modest disclosure that underwriters must make to issuers pursuant to the Guidance will protect the interests of issuers. This reality will only be further exacerbated by the fact that unlike other conflicts of interest rules, proposed Rule G-23 does **not** require the underwriter to present the "writing to officials of the issuer with the authority to bind the issuer by contract with the underwriter in a manner designed to

[1] It is my understanding that traditionally, underwriters have provided these services in the corporate securities market; however, there are a variety of reasons why the municipal securities market is different from its corporate securities counterpart, and as such, the role of individuals in the municipal market should conform to the unique aspects of the municipal market. For a more thorough discussion of this, *see* Letter from Nathan R. Howard, Esq. to SEC File No. S7-45-10, Feb. 22, 2011, at 1-2.

make clear to such officials the subject matter of such disclosures and their implications for the issuer."[2]

As presently written, Rule G-23 significantly reduces the distinction between Municipal Advisors (financial advisors) and underwriters thereby making the market less transparent and susceptible to conflicts of interest and abuse. As presently drafted municipal entities will not understand the difference in advice received from a trusted advisor acting in a fiduciary capacity and the "advice" provided by an underwriter. I urge the Commission to clarify that the services that may provided by an underwriter that extend beyond the buying and selling of municipal securities are limited to the provision of ideas and information that are incidental to an underwriting of an issue of municipal securities.

[2] MSRB Notice 2011-12 (February 14, 2011), Request for Comment on Draft Interpretive Notice Concerning the application of MSRB Rule G-17 to Underwriters of Municipal Securities.

March 18, 2011

Subject: File Number SR-MSRB-2011-03
From: Joy A. Howard
Principal, WM Financial Strategies

I am writing in response to the request for comments on the proposed changes to the MSRB's Rule G-23 that will preclude a financial advisor from terminating its financial advisory relationship with an issuer and subsequently serving as the underwriter.

Rule G-23 was designed principally to minimize the prima facia conflict of interest that exists when a broker, dealer, or municipal securities dealer ("broker-dealer") acts as both a financial adviser and underwriter. In its *Notice of Filing of Fair Practice Rules*, dated September 20, 1977, the MSRB identified some of these conflicts. When adopted, Rule G-23 alleviated **only** the most egregious conflicts of interest.

The long overdue amendments are intended to further reduce these conflicts; however, additional modifications are required to protect the interests of municipal entities and to comply with the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Act").

The municipal securities provisions of the Act are intended to change market practices that have resulted in conflicts of interest, pay-to-play activities, lack of transparency, and abusive transactions that have harmed the finances of municipal entities. Rather than embracing the market improvements envisioned by Congress, in amending Rule G-23 the MSRB preserves historical practices.

Consequently, I am submitting the following comments and requesting further amendments to Rule G-23 that are consistent with the Act and necessary in order for the MSRB to achieve its new mission of protecting the interests of municipal entities as well as investors.

Comment: Section (b) of Rule G-23 should be eliminated or amended.

Under the proposed amendments to Rule G-23, Section (b) of Rule G-23 ("Section (b)") reads as follows:

> *Financial Advisory Relationship.* For purposes of this rule, a financial advisory relationship shall be deemed to exist when a broker, dealer, or municipal securities dealer renders or enters into an agreement to render financial advisory or consultant services to or on behalf of an issuer 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 advisory relationship shall not be deemed to exist when, in the course of acting as an underwriter, 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.

With the passage of the Act, Section (b) is obsolete and obscures the distinct roles of Municipal Advisors and underwriters. Therefore, Section (b) should be rewritten or entirely omitted.

By definition, under the Act, if an individual provides "advice with respect to the structure, timing, terms and other similar matters concerning such financial products or issues" the individual is acting as a Municipal Advisor. The Act excluded from the definition of Municipal Advisor a "broker, dealer, or municipal securities dealer serving as an underwriter (as defined in section 2(a)(11) of the Securities Act of 1933) (15 U.S.C. 77b(a)(11))." The definition of "underwriter" under Section 2(a)(11) of the Securities Act of 1933 **does not include** "a person that provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues."

This reading of the Section 2(a)(11) definition of underwriter, which **does not** include any reference to "advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues," is consistent with the MSRB's published definition of "underwriter," which is included at the end of this writing.

Rule G-23 would be less ambiguous if Section (b) is deleted in its entirety. As an alternative, Rule-G-23 could be clarified by omitting the first sentence and modifying the second sentence such that a broker-dealer would be required to submit to the municipal entity, prior to providing any services, a letter of understanding or other written document that (i) defines the broker-dealer's role, and (ii) indicates that the broker-dealer is not serving in a fiduciary capacity but rather in an arms length commercial transaction.

In addition, if, in connection with the proposed rule for the Permanent Registration Of Municipal Advisors, the Securities and Exchange Commission (the "Commission") offers clear guidance as to what services can be offered by a broker-dealer without being included in the definition of "Municipal Advisor," Section (b) will likely be unnecessary. As noted above, Section (b) suggests that an underwriter may provide the same services that are now reserved for Municipal Advisors under the Act. Without further clarifications regarding the distinction between the services provided by a Municipal Advisor and those provided by an underwriter, municipal entities may **assume** that there is no distinction. In fact, infrequent and small issuers are likely to **assume** that an underwriter is serving as an advisor and representing their best interests.

The inclusion of Section (b) in Rule G-23 simply confuses the distinction between Municipal Advisors and underwriters thereby making the market less transparent and susceptible to conflicts of interest and abuse. Infrequent small issuers will not understand the distinction and will assume that an underwriter is acting in their best interest, a result that is clearly inconsistent with the intent of the Act. Major revisions are required to Section (b) in order to enhance the intent of the Act and to provide clarity and disclosures that permit municipal issuers to make informed decisions.

Comment: Section (c) of Rule G-23 should be eliminated or amended.

Section (c) of Rule G-23 ("Section (c)"), as proposed, reads as follows:

> *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.

Prior to passage of the Act, there was no definition of Municipal Advisor. Consequently, Section (c) was necessary in order to define when a broker-dealer was serving as a financial advisor. With the passage of the Act, Section (c) is no longer necessary. By definition, under the Act, if an individual provides "advice with respect to the structure, timing, terms and other similar matters concerning such financial products or issues" the individual is acting as a Municipal Advisor.

Furthermore, in the Securities and Exchange Commission's Release No. 34-63576 (the "Release") the Commission stated that:

> In defining the term Municipal Advisor in Exchange Act Section 15B(e)(4), Congress did not distinguish between those Municipal Advisors who are compensated for providing advice and those who are not compensated for providing advice. Thus, consistent with Congress's definition of the term Municipal Advisor, the Commission does not believe the issue of whether a Municipal Advisor is compensated for providing municipal advice should factor into the determination of whether the Municipal Advisor must register with the Commission.[1]

Since the Act makes it clear that an individual that provides advice with respect to "the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters" is a Municipal Advisor and the Commission's Release makes it clear that an individual will be treated as a Municipal Advisor regardless of whether these services are free, a written agreement is unnecessary for purposes of determining whether the broker-dealer is a financial advisor.

[1] Securities Exchange Act Release No. 63576 (December 20, 2010), ("Registration of Municipal Advisors"), at 33

In fact, based on the definition of Municipal Advisor contained in the Act and the clarifications provided by the Commission in the Release, Section (c) can be totally eliminated. With the elimination of Section (c) it is understood that any individual that provides advice to or on behalf of a municipal entity or obligated person with respect the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters would be deemed to be a Municipal Advisor regardless or whether the relationship has been set forth in writing.

Requiring a Municipal Advisor to enter into a contract is not consistent with other rules being proposed by the MSRB. On February 14, 2011, the MSRB released proposed Rule G-36 which seeks to define fiduciary duty of Municipal Advisors. The proposed rule specifically discusses certain events that must transpire under Rule G-36 "if there is no engagement letter."

As an alternative to eliminating Section (c), and as noted above, to prevent confusion among municipal entities, Rule G-23 could require broker-dealers that intend to serve as a municipal entity's underwriter to provide a written letter of understanding or other written communication that (i) defines their role as an underwriter, and (ii) indicates that as an underwriter the firm is not serving as an advisor and is not serving as a fiduciary but rather in an arms length commercial transaction.

As noted under the MSRB's Guidance, as set forth below, a broker-dealer will not be deemed to be an advisor if it "clearly identifies itself as an underwriter from the earliest stages of its relationship with the issuer." Unless the broker-dealer describes this relationship in writing, the broker-dealer's role as an underwriter will **not** be clearly identified.

Comment: The Guidance is confusing and requires modification.

To compensate for the lack of clarity by which Rule G-23 was drafted, the MSRB has added a "Guidance on the Prohibition on Underwriting Issues of Municipal Securities for Which a Financial Advisory Relationship Exists Under Rule G-23" (the "Guidance"), which states:

> For purposes of Rule G-23, a dealer that provides advice to an issuer with respect to the issuance of municipal securities will be presumed to be a financial advisor with respect to that issue. However, that presumption may be rebutted if the dealer clearly identifies itself as an underwriter from the earliest stages of its relationship with the issuer with respect to that issue. Thus, a dealer providing advice to an issuer with respect to the issuance of municipal securities (including the structure, timing, and terms of the issue and other similar matters, such as the investment of bond proceeds, a municipal derivative, or other matters integrally related to the issue) generally will not be viewed as a financial advisor for purposes of Rule G-23, if such advice is rendered in its capacity as underwriter for such issue. Nevertheless, a dealer's subsequent course of conduct

(*e.g.*, representing to the issuer that it is acting only in the issuer's best interests, rather than as an arm's length counterparty, with respect to that issue) may cause the dealer to be considered a financial advisor with respect to such issue. In that case, the dealer will be precluded from underwriting that issue by Rule G-23(d).

The Guidance creates ambiguities and contradictions rather than clarifying the distinct roles among Municipal Advisors and underwriters. The following is a brief discussion of some of these contradictions and ambiguities:

1) The Guidance states "For purposes of Rule G-23, a **dealer that provides advice to an issuer with respect to the issuance of municipal securities will be presumed to be a financial advisor with respect to that issue**."

This statement supports our suggestion that a Municipal Advisory relationship should be deemed to exist without any written agreement. Furthermore, this statement contradicts Section (c) of Rule G-23 because under Section (c), a Municipal Advisory relationship must be evidenced in writing. The Guidance and Rule G-23 should be revised to make it clear that a broker-dealer that provides advice to an issuer with respect to the issuance of municipal securities will be deemed to be a financial advisor regardless of whether the financial advisory relationship has been formalized in writing. This is consistent with the definition of Municipal Advisor contained in the Act which is not dependent on contracts. Therefore, to avoid the contradiction between Rule G-23 and the Guidance, as well as the Act, Section (c) should be eliminated or revised.

2) The Guidance states that the presumption that the dealer is a financial advisor "may be **rebutted** if the dealer clearly identifies itself as an underwriter from the earliest stages of its relationship with the issuer with respect to that issue."

Merriam-Webster defines rebutted as "to contradict or oppose by formal legal argument, plea, or countervailing proof." What formal arguments or countervailing proof will be provided? Will the arguments and proof be in writing? What oral statements must be made? How will undocumented statements improve market transparency? Will small issuers understand that the broker-dealer has provided proof to **rebut** its fiduciary duty?

3) The Guidance states that the presumption that the dealer is a financial advisor "may be rebutted if the dealer **clearly identifies itself as an underwriter** from the earliest stages of its relationship with the issuer with respect to that issue."

The Guidance does not describe how a dealer "clearly identifies itself as an underwriter." Will this be in writing? Will plain English be required? Will the underwriter be required to disclose that it is serving "as an arm's length counterparty"? Will the underwriter be required to state that it is not serving in the "issuer's best interest"? Will small municipal entities be provided sufficient written documentation to understand the relationship?

4) The Guidance states that "a dealer's **subsequent course of conduct** (*e.g.*, representing to the issuer that it is acting only in the issuer's best interests, rather than as

an arm's length counterparty, with respect to that issue) may cause the dealer to be considered a financial advisor with respect to such issue."

When does "subsequent" occur? What "subsequent course of conduct" causes the broker-dealer to become a financial advisor? What types of actions, suggestions or recommendations cause the underwriter to become a financial advisor? What statements made by an underwriter would infer that the underwriter is serving in the issuer's best interest? Are written proclamations the basis of the conclusion? Will oral statements be understood by most municipal entities? Can the underwriter suggest that a particular structure or financing vehicle is the best for the municipal issuer without becoming a financial advisor?

5) The Guidance states that "a dealer's subsequent course of conduct (*e.g.*, representing to the issuer that it is acting only in the issuer's best interests, rather than as an arm's length counterparty, with respect to that issue) **may cause the dealer to be considered a financial advisor with respect to such issue.**"

What happens if the dealer's subsequent actions cause the dealer to be considered a financial advisor? Will the dealer be required to continue in the role of a financial advisor? Will a financial advisory contract then be required? What if the dealer is not a registered municipal advisor? Will the dealer be required to assist the municipal entity in selecting a new underwriter? Will the transaction be cancelled until a new financial advisor and underwriter are selected? Should a dealer that is not registered as a municipal advisor ever be allowed to provide advice on the structure, terms, timing or other similar matters since the dealer may inadvertently cross the line and become a financial advisor?

6) The Guidance states that "a dealer's subsequent course of conduct (*e.g.*, representing to the issuer that it is acting only in the issuer's best interests, rather than as **an arm's length counterparty**, with respect to that issue) may cause the dealer to be considered a financial advisor with respect to such issue."

What statements made by a broker would infer that the broker is **not** acting solely in an arm's length commercial transaction?

7) The Guidance states that a dealer's subsequent course of conduct (*e.g.*, representing to the issuer that it is acting only in the issuer's best interests, rather than as an arm's length counterparty, with respect to that issue) may cause the dealer to be considered a financial advisor with respect to such issue. **In that case, the dealer will be precluded from underwriting that issue by Rule G-23(d).**

Will the underwriter be required to disclose from the "earliest stages of its relationship" that if the municipal entity believes it is serving in the "issuer's best interest" the firm will not be permitted to underwrite the bonds?

With respect to the foregoing and to highlight these ambiguities, we encourage all readers of our comments to take a moment and complete the following multiple choice questionnaire:

Question #1: Which of the following statements can an underwriter make to a municipal entity in an effort to convince the municipal entity to enter into a negotiated sale rather than selling the bonds by competitive bidding?

1. We suggest a negotiated sale.
2. We recommend a negotiated sale.
3. We recommend a negotiated sale but we aren't suggesting that our recommendation is correct.
4. We recommend a negotiated sale but this may not be in your best interest.

Question #2: Which of the following statements can an underwriter make to a municipal entity in an effort to convince the municipal entity to acquire bond insurance?

1. We suggest acquiring bond insurance.
2. We suggest bond insurance because that is the structure our investor clients like.
3. We recommend acquiring bond insurance.
4. We recommend bond insurance but other underwriters may be able to offer equally low yields without insurance.

Question #3: Which of the following statements may an underwriter make to a municipal entity in an effort to solidify the issuance of non-callable bonds?

1. We suggest non-callable bonds.
2. We suggest non-callable bonds because that is the structure our investor clients like.
3. We recommend non-callable bonds.
4. We recommend non-callable bonds but other underwriters may be able to offer the same yields even if the bonds are callable.

Question #4: On the day of sale, which of the following statements may an underwriter make regarding its proposed rates and yields?

1. Here are our proposed final rates and yields.
2. Here are our proposed final rates and yields which are the best our firm can offer.
3. Here are our proposed excellent rates and yields and we don't think another firm could do better.

Question #5: If an underwriter represents that it is working in the municipal entity's best interest, who will notify the MSRB or the Commission?

1. The municipal entity that believes the underwriter is their advisor.
2. The underwriter.
3. None of the above.

Question #6: If the underwriter's "subsequent course of conduct" precludes underwriting the issue pursuant to Rule G-23(d) and the issue has already been completed, which of the following outcomes will subsequently occur?

1. The broker-dealer will be fined for failure to withdraw as underwriter.
2. No fines will be imposed on the broker-dealer, but the broker-dealer will have to rescind the sale (i.e., the issuer will have to reimburse the broker-dealer for the purchase price of the securities).
3. Fines will be imposed on the broker-dealer and the broker-dealer will have to rescind the sale (i.e., the issuer will have to reimburse the broker-dealer for the purchase price of the securities).
4. None of the above.

Rather than clarifying Rule G-23, the Guidance creates contradictions and ambiguities.

Section (b) states "a financial advisory relationship shall not be deemed to exist when, in the **course of acting as an underwriter**, a broker, dealer or municipal securities dealer renders advice to an issuer, including advice with respect to the structure, timing, terms and other similar matters concerning the issuance of municipal securities." What is the meaning of the phrase "course of acting as an underwriter?" How is this reconciled with the MSRB's definition of the term "underwriting period" which is defined as "the period during which an underwriting syndicate is **considered to be engaged** in the underwriting process?" Does the "course of acting as an underwriter" begin sooner and if so when? Is there a time limit (e.g. over a two year period can an underwriter prepare a capital plan, structure the issue for a bond election, structure the bond issue and underwrite the issue)? Does the Guidance encourage municipal entities to select underwriters rather than municipal advisors in order to obtain free "advice"?

The Guidance does not describe how a dealer will "**clearly identify itself as an underwriter."** In fact, the Guidance makes the distinction virtually impossible by suggesting that either a Municipal Advisor or an underwriter can provide advice with respect to the structure, timing, terms, and other similar matters concerning the issuance of municipal securities. Through the Guidance the distinction between an underwriter and Municipal Advisor is eliminated.

As noted hereinbefore, as drafted, Rule G-23 attempts to preserve past practices rather than accepting the changes envisioned by the Act. In so doing, Rule G-23 creates untenable situations for underwriters and defeats the MSRB's new mission of protecting municipal issuers.

The lack of distinction between the "advice" provided by a Municipal Advisor and "advice" provided by an underwriter reduces market transparency and the distinct roles we believe were intended by the Act. Concepts such as "rebutted," "course of an underwriting," and "subsequent actions" all create ambiguities in which an underwriter will not know when it has crossed the line and becomes a financial advisor. This lack of

clarity hinders a municipal entity from understanding when it is receiving services from a trusted advisor in a fiduciary capacity and a broker-dealer in an arm's length commercial transaction.

The MSRB assumes that a broker-dealer serving as an underwriter on one hand will provide "advice" to municipal entities, but on the other hand cannot cause the issuer to think that the broker-dealer's advice is in their best interest. It is difficult to imagine that an infrequent small issuer will grasp that an underwriter who is providing advice is not acting in their best interest regardless of the disclosures made by the underwriter. What is more, by not requiring underwriters to make disclosures in writing, the MSRB only exacerbates this reality.

Comment: There should be no transition period for prohibiting role switching.

As early as 2005, SEC Commissioners and staff members indicated that switching roles from financial advisor to an underwriter is a conflict of interest. In proposing the amendments to Rule G-23, the MSRB has acknowledged this conflict of interest. Although broker-dealers are fully aware of the conflict of interest, since 1977 Rule G-23 has explicitly authorized role switching.

In its notice 2010-42, dated October 1, 2010, the MSRB stated that financial advisors "are subject to a federal fiduciary duty to their municipal entity clients as of today, even before MSRB rulemaking on the subject." Consequently, any broker-dealer that has served as a financial advisor on and after October 1, 2010, and subsequently switched to serving as an underwriter has already violated their fiduciary responsibility. Accordingly, to clarify and reinforce the fiduciary duty, a transition period should not be permitted.

Comment: Rule G-23, as amended, retains significant conflicts of interest by failing to place any restrictions on the activities of a broker-dealer serving as a financial advisor that subsequently serves as an underwriter on a different transaction.

Some broker-dealers serve as financial advisor with the objective of establishing a relationship with the issuer that will ultimately enable the company to serve as the underwriter for subsequent transactions. Proposed Rule G-23 does not resolve the conflicts of interest created when one firm serves in two different capacities, potentially at the same time. For example, consider an issuer planning the sale of two distinct general obligation bond issues. For the first issue the broker-dealer financial advisor arranges a competitive sale of the bonds. For the second issue, the broker-dealer serves as the underwriter. The questions that arise include, among others, the following: How was the determination made to sell the second issue without competitive bidding? Was the determination made while the broker-dealer was still financial advisor for the first issue? Did the municipal entity fully understand that for the second issue the recommendation relating to the method of sale was not made by the broker-dealer acting in a fiduciary capacity?

For these reasons, Rule G-23 should include a period of time before a broker-dealer serving as a financial advisor can switch to serving as an underwriter. I respectfully request that the Commission consider requiring a two-year ban from the date the financial advisory relationship expires or is terminated. A two-year ban would eliminate the conflicts of interest that exist when a broker-dealer undertakes a financial advisory relationship for the sole purpose of switching to underwriter on a later transaction.

There is a precedent for establishing a two-year ban. The MSRB has determined that its board members are independent when the individual has had no material business relationship with any municipal securities broker, municipal securities dealer, or Municipal Advisor within the last two years. Similarly, under the MSRB's Rule G-37, when broker-dealers make certain political contributions, the firm is banned from underwriting for a period of two years. The MSRB has determined that the nexus between a political contribution and "pay-to-play practices" is removed after two years. Likewise, the nexus between financial advisory services and underwriting is removed after two years. The precedent for a two-year ban exists and a two-year ban in the case of Rule G-23 would ensure that conflicts of interest will be eliminated.

Comment: WM Financial Strategies supports the absence of exceptions for competitive sales and small issuers in the proposed Rule G-23.

In a competitive sale, the financial advisor's responsibilities include creating competition by distributing bidding documents to potential bidders, advertising the sale and contacting bidders in order to secure the largest number of bids possible for the transaction. The amended rule G-23 insures that a financial advisor will fulfill their responsibility to aggressively work to secure the largest number of bids possible. Public perceptions of improprieties will be eliminated since there will no longer be either the incentive or the possibility that the financial advisor will be the only bidder.

The MSRB has also properly determined that there should be no exceptions for small or infrequent issuers. Small and infrequent issuers will be the primary beneficiaries of the revised Rule G-23. Small and infrequent issuers are less knowledgeable about the capital markets and consequently are the least likely issuers to understand the conflicts of interest that arise when a financial advisor switches to serving as an underwriter.

It is possible, that there could be isolated situations in which an exceptionally small issuer with poor credit experiences difficulty in obtaining bids. However, if broker-dealer financial advisors are allowed to switch to underwriters, the exception would effectively allow for broker-dealer financial advisors to breach their fiduciary duty. Creating such an exception would encourage broker-dealer financial advisors to structure and market the transaction in a fashion that could insure their success as the winning bidder rather than seeking to obtain the largest number of bids possible.

MSRB'S DEFINITION OF TERMS

The MSRB's website includes a glossary of terms. The following definitions were extracted verbatim from the MSRB's website on February 20, 2011.

COMPETITIVE SALE – A method of sale where underwriters submit proposals for the purchase of a new issue of municipal securities and the securities are awarded to the underwriter or underwriting syndicate presenting the best bid according to stipulated criteria set forth in the notice of sale. The underwriting of securities in this manner is also referred to as a "public sale" or "competitive bid."

FINANCIAL ADVISOR – With respect to a new issue of municipal securities, a consultant who advises the issuer on matters pertinent to the issue, such as structure, timing, marketing, fairness of pricing, terms and bond ratings. A financial advisor may also be employed to provide advice on subjects unrelated to a new issue of municipal securities, such as advising on cash flow and investment matters. The financial advisor is sometimes referred to as a "fiscal consultant" or "fiscal agent." A broker-dealer that acts as a financial advisor is subject to MSRB rules.

NEGOTIATED SALE – The sale of a new issue of municipal securities by an issuer directly to an underwriter or underwriting syndicate selected by the issuer. A negotiated sale is distinguished from a sale by competitive bid, which requires public bidding by the underwriters. Among the primary points of negotiation for an issuer are the interest rate, call features and purchase price of the issue. The sale of a new issue of securities in this manner is also known as a negotiated underwriting.

UNDERWRITE or UNDERWRITING – The process of purchasing all or any part of a new issue of municipal securities from the issuer and offering such securities for sale to investors**.**

UNDERWRITER – A broker-dealer that purchases a new issue of municipal securities from the issuer for resale in a primary offering. The underwriter may acquire the securities either by negotiation with the issuer or by award on the basis of competitive bidding.

UNDERWRITING PERIOD – For purposes of MSRB rules and SEC Rule 15c2-12, the period during which an underwriting syndicate is considered to be engaged in the underwriting process. During this period, certain special underwriting rules apply. The underwriting period commences upon the earlier of the first submission to the syndicate of an order for the securities or the purchase of the new issue from the issuer. The underwriting period usually ends upon the later of the closing of the underwriting or the sale of the last of the securities by the syndicate. If the new issue is underwritten by a sole underwriter, the underwriting period is considered ended for purposes of MSRB rules by the later of the closing or the 21st calendar day after the date of the first submission of an order.