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June 24, 2011

The Honorable Mary J. Shapiro, Chair
The Honorable Kathleen L. Casey, Member
The Honorable Elisse B. Walter, Member
The Honorable Luis A. Aguilar, Member
The Honorable Troy A. Paredes, Member

Securities and Exchange Commission
100 F St NE
Washington, DC 20549

Re: MSRB Rule G-23; File Number SR-MSRB-2011-03

Dear Commissioners:

Public Financial Management, Inc., a registered municipal advisor, by letter dated February 25, 2011, submitted to the Commission that the "Guidance" which the Municipal Securities Rulemaking Board attached to amended Rule G-23 distorted the definition of "municipal advisor" as stated in Section 975 of the Dodd-Frank Act in a way that is impossible to reconcile with the Commission's own pronouncements on the scope of municipal advice in the context of a municipal securities underwriting. A copy of our February 25, 2011 letter with relevant citations is enclosed for reference.

We believe that the final amendments to Rule G-23 and to the "Guidance", doubtless informed by, and now approved by the Commission in Release No. 34, 6454, will be beneficial to municipal issuers by preserving the broad scope of fiduciary protection extended by the Dodd-Frank Act. The Commission deserves appreciation for the statesmanlike way it affirmed that although certain advisory activities by brokers might not trigger the consequences of Rule G-23, the approved Rule and Guidance leaves open "whether the provision of * * * such advice would subject the dealer to a fiduciary duty as a "municipal advisor" (76 Fed. Reg. 32351 (June 3, 2011)).

We regret, on the other hand, that the present resolution exposes municipal issuers, our clients, to the now universal importuning by brokers seeking to have governments waive their fiduciary rights. One example of the

waiver which one of the largest brokerage firms in the Country requires municipal entities to sign is sufficient:

> "We [the municipal issuer] acknowledge that neither [the brokerage firm] nor any of its associated persons is acting as a municipal advisor and their opinions and views are not intended to be, and do not constitute, advice within the meaning of Section 975 of the Dodd-Frank [Act] * * *.
>
> In connection with the provision of [the broker's services], we understand and acknowledge that * * * the Services and related information are being provided solely at arms-length and [broker] is not providing the Services as a municipal advisor or fiduciary * * *".

Although the Board has assured the Commission that brokers' disclosures "would be adequate" to protect the interests of municipal entities, there is serious doubt that the waivers extracted from municipal entities are fair or enforceable under the Exchange Act, and, more importantly, the potential for abuse in an environment in which advice is claimed not to be "advice" will not go away without significant vigilance by the Commission.

Yours respectfully,

F. John White
Chief Executive Officer

FJW:plj
Enclosure

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Public Financial Management

February 25, 2011

Securities and Exchange Commission
100 F St NE
Washington, DC 20549
Attention: Elizabeth M. Murphy, Secretary
(202) 551-6000

Re: File No. SR-MSRB-2011-03

Dear Commissioners:

Public Financial Management, Inc. ("Public Financial") is a municipal advisor registered with the Commission and the Municipal Securities Rulemaking Board ("Board"). We are the largest financial advisor to state and local governments and authorities in the United States. Our sole business is providing advisory services to governments or their instrumentalities, either in connection with their financing activities or to respond to the operational and capital problems which threaten a government's viability. Public Financial is independent of all underwriters and brokers. We do not distribute securities or execute trades in any securities. We submit the following comments to urge the Commission to reject both a portion of the Board's revision of its Rule G-23 and a contemporaneous "Guidance" more fully described below, as contrary to the Dodd-Frank Act amendments to Section 15B of the Exchange Act.

The Board filed with the Commission on February 9, 2011 a Request for the Commission's approval of amendments to MSRB Rule G-23. (MSRB Notice 2011-10). Contemporaneously with the submission of the amendments to Rule G-23, the Board tendered to the Commission and published for the first time a Board statement titled "Guidance on the Prohibition of Underwriting Issues of Municipal Securities for Which a Financial Advisory Relationship Exists Under Rule G-23". We will refer to this statement as the "Guidance", but the substance of the statement has nothing to do with "prohibitions" that protect municipal issuers under amended Rule G-23, but rather is a misplaced guideline for underwriters to avoid the effect of Rule G-23.

Public Financial urges the Commission to reject the Guidance in its entirety and to reject that portion of Rule G-23 (described below) on which the

Guidance is premised. The Guidance, which the Board never exposed to the public until it was attached to the Rule G-23 amendments submitted to the Commission, offers to underwriters a license to attempt to avoid fiduciary duty to their clients for the advice which the Dodd-Frank Act and the Commission specifically recognize as a non-exempt municipal advisory activity. The fact that the Board surreptitiously has proposed the Guidance at the last hour is powerful evidence that despite superficial additions to the Board's membership, the underwriting community still holds the Board firmly by the neck.

The Commission already has made a compelling argument that independent financial advisors provide exceptional advantages to municipal issuers in negotiating with underwriters. The Commission refers to one study to the effect "that the use of municipal financial advisors is associated with better borrowing terms, lower reoffering yields and narrower underwriter gross spreads, particularly where the advisors are of a higher quality." The Commission further observes:

> "Municipal financial advisors that provide advice with respect to issuance of municipal securities and are continually active in the municipal securities market may help reduce the information asymmetry gap between municipal entities and underwriters * * * and other financial intermediaries."

(SEC Release 34-63576 at pp. 189-190, 76 Fed. Reg. 824, 874 (Jan. 6, 2011)).

For the major financial advisory firms, including Public Financial, significant competition for advisory business is presented by underwriters of municipal securities. It is not that the underwriters propose that they be engaged as financial advisors. They are rather too smart to do that. Instead, underwriters insist to prospective issuers, "You don't need a financial advisor. We're the experts in this business, and we can advise you on what form of debt obligation to sell, what you need to manage your credit, how much you can expect to pay for capital, and when you should go to market." And in many cases, the municipal issuer decides to forego the independent advice which potentially would conflict with the underwriter's convenience and profit.

The Board leaps to the cause of the underwriters in proposed Rule G-23(b) when it states that "a financial advisory relationship shall not be deemed

to exist when, in the course of acting as an underwriter, a broker * * * renders advice to an issuer, including advice with respect to the structure, timing, terms and other similar matters" concerning municipal securities. In the Guidance, the Board tells us what the "other similar matters" are. The Board assures that an underwriter providing advice on "* * * 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 * * * (emphasis added)." (MSRB Notice 2011-10, p. 5).

The fact that the Dodd-Frank Act recognizes an exemption to the "municipal advisor" definition for a "broker * * * serving as an underwriter (as defined in Section 2(a)(11) of the Securities Act of 1933" provides no support for the extraordinary license offered to underwriters by the Board. The integral definition of "underwriter" appropriated by the 111th Congress from the Securities Act states that an "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with the distribution of any security * * * (emphasis added)." Service as an underwriter cannot commence until the broker purchases the security from the issuer (or at least at the time the security is in existence in an agency distribution). "Service as an underwriter," as intended by Congress, and contrary to the Board, does not comprehend the variety of deal-shaping proposals made by brokers before and after bonds are put out for sale. The Commission knew that when it cited Section 2(a)(11) of the Securities Act as the condition for "serving as an underwriter" in proposed Rule 15Ba1-1(d).

But the Board winks at the Commission with a smile when it assures brokers in the Guidance that providing structure and substantive advice for the terms of a debt offering "including * * * other similar matters, such as the investment of bond proceeds, a municipal derivative, or other matters integrally related to the issue" will not result in the broker's "being viewed as a financial [municipal] advisor". Our hat is off to the person who can find investment of municipal bond proceeds (necessarily including guaranteed investment contracts) and the purchase of swaps and other municipal derivatives in Section 2(a)(11) of the Securities Act - - which the Dodd-Frank Act sets as the boundary of municipal underwriting. Those activities - - which were visible targets of the Congress in the design of regulation of "municipal advisors" - - and a host of other financial advisory services are not comprehended by the definition of "underwriter" in the '33 Act. If they were, the Commission could not have declared that the exemption of brokers from regulation as municipal advisors

> "does not apply when such persons are acting in a capacity other than as an underwriter on behalf of a municipal entity or obligated person. The Commission interprets the exclusion to apply solely to a broker * * * serving as an underwriter on behalf of a municipal entity * * *. * * * For example, a broker-dealer advising a municipal entity with respect to the investment of bond proceeds or the advisability of a municipal derivative, would be a municipal advisor with respect to those activities (emphasis added)." 76 Fed. Reg. at 832.

Either the Commission has it right, or the Board has it right, because those two widely differing truths cannot occupy the same place at the same time.

To be sure, the Board instructs its clients in the underwriting world that in order to travel the generous path that the Board has cut for it, the broker must "clearly identif[y] itself as an underwriter from the earliest stages of its relationship with the issuer * * *." That, of course, is no answer to the fact that the Board has repudiated the statute that it is charged faithfully to execute. But even here the Board is tardy in offering this admonition to brokers who wish to avoid being taxed with the fiduciary duty that the Dodd-Frank Act attaches to their giving pre-offering advice as to the character and terms of the bonds which the brokers then buy from the municipality. For several months now, many underwriters have presented intricate disclaimers of their providing financial advisor services to their municipal issuers and have demanded that the issuers waive any rights against the broker relating to fiduciary duty. It is clear that these attempted dilutions of the rights of issuers are not enforceable by reason of Section 29 of the Exchange Act. They surely are not barriers to the enforcement powers of the Commission, and the fact that a municipal issuer ultimately may be able to assert its rights against an underwriter is not a full answer to the duty of the Commission. For sixty years the Commission has asserted the position that it is a manipulative or deceptive device to engage in a practice which may result in a market participant believing that it has waived rights under the federal securities laws. (See Investment Advisers Act Release No. 58 (April 10, 1951)).

In conclusion, it is our submission to the Commission that:

1. The Guidance should be stricken in its entirety; and
2. The concluding sentence of Paragraph (b) of proposed Rule G-23 should be stricken.

Respectfully submitted,

PUBLIC FINANCIAL MANAGEMENT, INC.

By: _____
F. John White
Chief Executive Officer

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