I submitting these comments regarding MSRB Rule G-23 and the Board's recent Interpretation of certain language in the Rule regarding disclosures, by underwriters providing "advice" to issuers, of the underwriters' adverse status in relation to the issuers. My comments should not be construed as criticism of the Board's actions, which I support.

Some of my comments take into the lengthy history of Rule G-23 in which the then-required issuer consents to resignations from underwriter financial advisory (FA) roles were obtained by some dealer firms by asking nonpolicy-making issuer personnel to sign significant resignation documents in the process of a fundamental change in status from a fiduciary FA to an adverse underwriter. Those issuer officials were misled by purported "disclosures" to the effect that a conflict "may" have existed as a result of the change in status, when the conflict was real, inevitable and serious. Lawyers representing issuers, often did not themselves know the difference, or did not care sufficiently about the resignations to advise their issuer-clients regarding the significance of the role changes. Many lawyers representing issuers, and who withheld that advice from their clients, also had active underwriter counseling businesses. Some lawyers would include the consents in stacks of closing documents as just another document to be signed by whichever issuer official happened to be available.

In other words, those "consents" often were buried, were obtained from nonpolicy-making issuer officials, and were preceded by ambiguous and misleading "disclosures" at best in the context of a void in legal advice to the issuers. The Board's amendments of Rule G-23 and the Interpretation go far to remedy those abuses.

I am sure there is no motivation to re-visit Rule G-23 at this point. For future monitoring purposes, however, and perhaps future interpretations, remaining risks I see under the Interpretation are that (1) the significant disclosures required by the Interpretation regarding an underwriter's adverse status may be buried, even though the disclosures are supposed to be "clear," and (2) the disclosures might not be made to issuer policy-makers. That might occur, for example, in 50-page proposals delivered to finance directors, with the "disclosures" located in a single sentence on page 37.

In a related area, I take strong issue with self-serving arguments that small issuers will not be able to market their securities in competitive bids as a result of the Rule G-23 changes prohibiting resignations by dealers to serve as underwriters. Although I am very concerned about protecting issuers, those arguments do not conform to reality. I often see small, obscure issuers receiving numerous proposals frequently in a market with stiff competition. That may or may not occur through what I call the "shadow market" of direct loans or private placements. Such arguments are the result of scare tactics used in communications to issuers by firms serving as FAs, while being more interested in underwriting than in advising the issuer-clients.

If there are insufficient numbers of bids for some small issuers with reasonable credits, the reason is that the issuers' FAs are not performing their fiduciary roles appropriately with adequate aggressiveness on behalf of their issuer-clients. Yet, laziness is not the only reason. Many of those FA firms are motivated to structure the issuers' financings for the FAs firms' own underwriting desks, thus discouraging potential competitors from submitting bids. That self-serving FA behavior, in combination with FA laziness, is why some naïve small issuers report that only their FAs would bid for their securities.

The necessary FA aggressiveness—inherent in the fiduciary duty of care—requires both structuring the securities to be attractive to other firms in the market and seeking out potential bidders (rather than merely publishing advertisements). It is easy for those poorly-performing FAs to mislead vulnerable unsophisticated officials of small issuers about the reasons for a low number of bids—another violation of the FAs' fiduciary duty.

My respectful suggestion to the Board is to consider a focus, in a future interpretation of the municipal advisors' fiduciary duty, on the responsibilities of FAs in competitive bids—dealers and nondealers—to structure issuers' securities in the issuers,' not the FAs,' best interests and to seek out competing bids aggressively in the issuers' best interests. That would require that the FAs contact both numerous regional dealers and others to seek bids; explain the securities adequately to potential bidders; and take into account the preferences of potential bidders regarding securities structures.

I continue to believe that the professional community in the municipal market—including dealers, municipal advisors and lawyers—must find better ways to serve issuers than is the case at present. If they do not do so, the public debt market will continue to shrink in terms of proportions of funding transactions, even if absolute volumes rise with increasing populations. With growing regulation and complexity, issuers often will continue to find it to be advantageous to turn to the "shadow market," which is less costly from a cost of issuance perspective and which involves simpler documentation, generally without OSs and, since some funding entities will provide their own documentation, often without the issuers employing bond counsel. Large numbers of issuers already follow that path.

For my part, I believe that, with appropriate due care, the "shadow market" can be superior to the public securities market, but often it is not. For example, the maturities are rarely longer than 20 years, and generally not more than 10 to 15 years. Often, transactions require with interest rate resets after 10 years or so. Those maturities do not work well for many projects requiring 30-year financing for financial feasibility. Further, interest rate rests far in the future, under unknown economic and market conditions, present issuers with severe risks that are unlikely to be pointed out to, and discussed with, many unknowing issuers accepting those terms and risks.

That leads to my third comment regarding Rule G-23. For years, the focus on Rule G-23 has been appropriately on how a small number of registered broker-dealers were taking advantage of issuers. Yet, the municipal securities market also has within it quite a few FA and lease marketing firms that function effectively as unregistered broker-dealers and as underwriters for issuers. Rule G-23's principles—which apply to "dealers," both registered and unregistered—already would appear to apply equally to those firms.

That occurs as a result of those FA and lease marketing firms offering securities—as opposed to direct loans that are not securities—to investors for issuer-clients as an inherent part of the FAs' and lease marketers' business models. Those nonregistered FA and lease marketing firms, which appear to be "dealers" within the scope of Rule G-23, commonly have direct conflicts of interest in those transactions through contingent success fees that are payable solely upon the closing of the sales. In other words, those FA firms have precisely the same conflicts of interest that have been at issue for decades regarding registered dealer firms.

In many of the shadow market's transactions, there are no restrictions regarding whether those providing funding to the issuers are doing so from investment or loan accounts. Sometimes FAs and lease marketers make no effort to offer "loans" for their issuer-clients, but simply offer for sale bonds, certificates of participation or other securities. Sometimes purported "loans" are arranged, but there are no denomination or other restrictions against future securitization or otherwise to prevent re-sale of the "loans" to investors in the public market. At times, nonregistered FAs and lease marketers will arrange private placements directly with investors.

Those FA firms also have, and depending upon the facts and circumstances, lease marketing firms may have, conflicts of interest that should be recognized and prohibited under Rule G-23 and that should be recognized in future interpretations of the FAs' and lease marketers fiduciary duty as municipal advisors. Dealers rightfully have complained about these often illegal activities that pervade the nonregistered FA and lease marketing communities. Those FAs and lease marketers that seek to comply with the rules, even though the rules are vague, have similar valid complaints. This is an area warranting future Board action.

Robert Doty
AGFS