BAIRD

March 18, 2011

VIA E-MAIL (rule-comments@sec.gov)

Elizabeth M. Murphy, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re. File Number SR-MSRB-2011-03

Dear Ms. Murphy:

On behalf of Robert W. Baird & Co. Incorporated (Baird), I submit this letter commenting on proposed changes to MRSB Rule G-23. Founded in 1919, Baird is a registered broker-dealer, municipal securities dealer and municipal advisor, with significant experience in the municipal securities business. Baird serves as financial advisor to various municipal clients, both small and large, including school districts, charter schools, villages, towns, cities, counties and states and their agencies or authorities. Baird also serves as underwriter for new issues of tax-exempt and taxable municipal securities sold on a negotiated basis and at competitive bid, including general obligation and revenue bonds, bond and tax anticipation notes, advance refunding bonds, conduit bonds, private activity bonds, insured bonds and variable rate demand obligations.

The MSRB proposes to amend Rule G-23 so as to prohibit a financial advisor with respect to the issuance of municipal securities from, among other things, serving as underwriter or placement agent for that issuance. The MSRB believes that the proposed amendments to Rule G-23 are consistent with Section 15B(b)(2) of the Securities Exchange Act of 1934 in that the amendments "would protect municipal entities and help to perfect the mechanism of a free and open market in municipal securities." However, the SEC should not adopt the amendments to Rule G-23 because the amendments (i) are unnecessary in light of the imposition of a fiduciary duty standard on municipal advisors, (ii) would eliminate options currently available to municipal issuers and thus reduce competition, and (iii) go far beyond what is appropriate to protect municipal entities.

The MSRB is proposing dramatic changes to a rule that has worked effectively for years without providing any substantial evidence to support the need for change. The proposals seem to be based merely on the MSRB's perception that municipal issuers are too unsophisticated to understand the conflict of interest that may exist when a financial advisor also serves as an underwriter or placement agent and to make informed decisions in light of the conflict, notwithstanding the fact that municipal issuers typically have persons experienced in financial and accounting matters on their payrolls, boards of trustees or other elected officials who are required to approve the hiring of financial advisors and underwriters, and legal counsel advising them.

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The proposed amendments to Rule G-23 are not needed because financial advisors to municipal entities, covered by the definition of "municipal advisor," are now required, pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, to be registered and subject to fiduciary duties to their municipal clients. The details of these duties are currently being developed by MSRB, with draft rules and interpretations out for comment. Fiduciary duties include a duty of care and a duty of loyalty. The duty of loyalty requires a fiduciary to deal honestly and in good faith with the client and to act solely in the client's best interests without regard to the financial and other interests of the fiduciary. In particular, the duty of loyalty requires a fiduciary either to disclose a material conflict and obtain the client's consent, or to avoid the conflict. This principle has been the basis for Rule G-23 for years, and the disclosure and consent requirement is entirely consistent with a firm's fiduciary duties. These duties and the potential liability and regulatory sanctions that may result from a breach of these duties are sufficient to govern a financial advisor's conduct, and should provide the necessary protection for municipal entities. Financial advisors will clearly need to provide unbiased advice and behave appropriately in their dealings with municipal entities in order to avoid the risk of a legal claim for breach of fiduciary duty.

In evaluating the proposed changes to Rule G-23, the SEC should consider how conflicts of interest are addressed for registered investment advisors who are also subject to fiduciary duties. Despite the fact that investment advisors serve clients who generally are far less sophisticated than municipal entities, investment advisors are permitted to engage in principal transactions with their clients so long as they comply with disclosure and consent requirements. Principal transactions involving investment advisors present conflicts of interest that are similar to those which may arise with financial advisors' serving as underwriters or placement or remarketing agents. A consistent regulatory approach in this context would be appropriate.

In the interest of offering protection, the proposed changes to Rule G-23 only serve to eliminate options for municipal entities. The MSRB claims that its proposed changes to Rule G-23 are necessary to perfect the mechanism of a free and open market in municipal securities, yet by its own admission the proposed changes will reduce competition. The MSRB seeks to justify this undeniable inconsistency merely by asserting that the burden on competition is outweighed by the need to protect issuers. The MSRB does not bother to analyze the effect of the proposed rule change on competition, nor does it consider alternatives that would be less harmful to competition. The MSRB also does not present any proof that municipal clients have been harmed by the current situation. If the rule changes are adopted, there is no doubt that fewer firms will be offering financial advisory services and fewer firms will compete to underwrite, place or remarket municipal securities. Municipal clients will have fewer choices. These anti-competitive effects may increase the costs of financial advisory services sought by municipal clients and their costs of issuance. Adoption of the rule changes may also cause municipal entities not to retain a financial advisor for a proposed issuance and instead engage an underwriter and request it to provide ancillary financial advisory services as part of the underwriting engagement. Thus, while the rule changes will clearly benefit independent financial advisors, they are likely to harm municipal entities.

The proposed changes to Rule G-23 greatly exceed what may be necessary to protect municipal entities. The proposal is based on the premise that municipal entities are incapable of understanding the conflict of interest that may exist when a financial advisor also serves as underwriter. This premise is false given that municipal entities generally have treasurers and/or other professionals on their payroll, as well as elected officials who are advised by legal counsel. Municipal entities also have

the benefit of receiving information and guidance from various state and local governmental associations (such as the GFOA's Best Practices) and marketing materials from independent financial advisors consistently reminding them of the conflict. If some municipal entities do not understand the conflict, it is not because they can't understand it. Rather, their lack of understanding may be caused by inadequate or unclear disclosure on the part of the financial advisors. Accordingly, a reasonable alternative to the proposed changes to Rule G-23 would be to require better, more robust written disclosure about the conflict and what ending the financial advisory relationship means, and to require the written consent of an authorized municipal official. Similarly, disclosure about a financial advisor's fiduciary duties and the potential conflict of interest if the financial advisor were to serve as underwriter that is made at the beginning of the financial advisory relationship, such as when the financial advisory services agreement is presented to the municipality, may be helpful as well.

Another aspect of the proposed rule change that is hard to comprehend is its application to competitively bid offerings. The expressed justification is that financial advisors, knowing that they may be bidding on the offering, may structure the offering and obtain information so as to give them an advantage. Another, "darker" justification implies that financial advisors may not be trustworthy in their handling of the bidding process. Without any indication of manipulative conduct occurring in the competitive marketplace, these concerns are theoretical at best and considerably outweighed by the benefits to a municipal issuer of receiving an additional bid and avoiding the risk of a failed bid. Moreover, financial advisors, with clear fiduciary duties and registration requirements, will stay clear of any perception that they structured an offering or influenced the bidding process to their unfair advantage.

Baird agrees with the need to protect municipal entities and foster free and open markets in municipal securities, but the proposed changes to Rule G-23 are obviated by the imposition of a clear fiduciary standard and registration requirement applicable to municipal advisors which will ensure that they act in the best interests of municipal clients. The proposed changes also go much further than is appropriate in light of their competitive impact and the availability of more reasonable alternatives.

Baird appreciates the opportunity to comment on this matter.

Very truly yours,

ROBERT W. BAIRD & CO. INCORPORATED

Keith Kolb
Managing Director
Director of Baird Public Finance