



**National Association of Independent  
Public Finance Advisors**

P.O. Box 304  
Montgomery, Illinois 60538.0304  
630.896.1292 • 209.633.6265 Fax  
[www.naipfa.com](http://www.naipfa.com)

March 12, 2013

Elizabeth M. Murphy, Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-1090

Re: SR-MSRB-2013-01

The National Association of Independent Public Finance Advisors ("NAIPFA") appreciates this opportunity to provide comments to the Securities and Exchange Commission ("SEC" or "Commission") in regard to SR-MSRB-2013-0 – Notice of Filing of a Proposed Rule Change Relating to Amendments to MSRB Rules G-37 and G-8 and Form G-37 (the "Notice").

Previously in connection with MSRB Notice 2012-43 ("Prior Notice"), NAIPFA stated that we do not believe that these proposed amendments go far enough in terms of their ability to curb the *quid pro quo* practices of Municipal Securities Rulemaking Board ("MSRB") registered individuals, underwriters and municipal advisors alike ("Registered Individuals"), by and through their contributions to bond ballot campaign committees ("BBCCs").

Since the release of the Prior Notice, NAIPFA member firms have reported a continuous rise in the amount of contributions and extent to which Registered Individuals are making BBCC contributions. NAIPFA understands that there is concern among members of the MSRB about the existence of a link between Registered Individuals who give contributions to BBCCs and the ultimate engagement of those individuals by municipal entities to provide municipal securities related services.<sup>1</sup> However, it is our further understanding that the MSRB's concerns are outweighed by the potential for First Amendment violations<sup>2</sup> in light of the recent Supreme Court's decision in *Citizens United v. FEC*<sup>3</sup>.

Conversely, and as discussed more fully herein, we believe that the MSRB's First Amendment concerns are unwarranted in light of the text of the above-referenced case. We therefore reaffirm our previous position that these revisions to Rule G-37 do not go far enough in correcting the actual or perceived *quid pro quo* which has and will continue to result from BBCC contributions as is evidenced by the near perfect correlation between those Registered Individuals who contribute to BBCCs and the ultimate awarding of municipal securities related business to those individuals.<sup>4</sup>

In this regard, please consider the following:

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<sup>1</sup> MSRB Press Release, "MSRB Holds Quarterly Meeting." (October 31, 2012).

<sup>2</sup> *Id.*

<sup>3</sup> *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876 (2010).

<sup>4</sup> *Infra* note 17, at 3.

## I. Citizens United Analysis

The factual background of *Citizens United* can be surmised simply enough: a company wishing to produce and distribute a movie opposing the election of a particular politician was viewed by the Federal Elections Commission as an impermissible corporate indirect expenditure in violation of a campaign finance law's restriction on such expenditures when they are made in connection with the speaker's support or opposition to a candidate or an election.<sup>5</sup>

As discussed more fully below, *Citizens United* stands for the basic principle that the Government cannot restrict speech based upon the contributor's identity if the speech being restricted is in the form of an indirect expenditure made in support or opposition of a candidate or election absent evidence indicating actual or perceived *quid pro quo* with respect to such expenditures.

In *Citizens United*, the campaign finance law at issue was “an outright ban, backed by criminal sanctions.”<sup>6</sup> The Court stated that the law acted “[a]s a restriction on the amount of money a person or group can spend on political communication during a campaign, [and] necessarily reduces the *quantity* of expression by restricting the *number* of issues discussed.”<sup>7</sup> The Court explained that if such restrictions were upheld, “the Government could repress speech by silencing certain voices at any of the various points in the speech” and the “purpose and effect [would be] to silence entities whose voices the Government deems to be suspect.”<sup>8</sup> However, appropriate restrictions on speech that further a compelling interest may be permissible,<sup>9</sup> such as a ban on corporate direct expenditures.<sup>10</sup>

The Court also set forth clear parameters under which certain indirect expenditure regulations are deemed *per se* permissible or impermissible, specifically, “[t]he Government may regulate corporate political speech through disclaimer and disclosure, but it may not suppress speech altogether.”<sup>11</sup> In so doing, the Court suggests that there is flexibility within these two extremes for the development of indirect expenditure restrictions that do not violate the First Amendment.

### A. Direct Contributions vs. Indirect Expenditures

In coming to its holding, the Court looked at the regulation of direct contributions versus indirect expenditures and determined that there exists a distinction between the two in terms of their treatment under the First Amendment where a class of people is singled out for regulation.<sup>12</sup> Specifically, the Court reaffirmed the notion that regulation of corporate direct contributions is permissible to prevent actual or perceived *quid pro quo*,<sup>13</sup> whereas a restriction on indirect

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<sup>5</sup> *Citizens United*, 130 S. Ct., at 2-3.

<sup>6</sup> *Id.*, at 20.

<sup>7</sup> *Id.*, at 22 (emphasis added).

<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> *See id.*, at 23.

<sup>10</sup> *Id.*, at 29.

<sup>11</sup> *Id.*, at 2 (emphasis added); *See also id.*, at 41.

<sup>12</sup> *See id.*, at 29 (internal citations and quotations omitted).

<sup>13</sup> *Id.*



expenditures would have to be accompanied by evidence of actual or perceived *quid pro quo*.<sup>14</sup>

The Court explained further that the distinguishing factor between direct contributions and indirect expenditures is whether the outlay is coordinated with a candidate.<sup>15</sup> If so, it is a direct contribution and subject to potential regulatory prohibition.<sup>16</sup>

## **B. Direct Contributions**

It should be noted that the situation we are faced with here is quite different from that which the Court addressed in *Citizens United*. In this instance, the BBCCs receiving political contributions are often influenced by elected officials. It is understood that elected officials who vote in favor of placing the particular measure on the ballot will often coordinate the activities of the correspondingly created BBCC through solicitation of committee members, and/or through the steering of BBCC activities and/or contributions thereto.

In addition, NAIPFA member firms have reported instances in which municipal officials, elected and otherwise, have solicited contributions during the course of the initial engagement/interview discussions.

Further, there is evidence of actual or perceived *quid pro quo* with respect to these contributions; virtually every instance in which Registered Individuals have given to successful bond ballot campaigns has resulted in those Registered Individuals receiving the municipal securities business.<sup>17</sup>

The MSRB has acknowledged this issue and has stated that, “The award of municipal securities underwriting business tied to dealer contributions to campaigns that secure voter approval for taxpayer-funded public projects can give rise to real or perceived conflicts or related concerns that can adversely affect the integrity of the municipal market.”<sup>18</sup> Further, the MSRB has stated that such contributions “rais[e] the perception of pay-to-play practices”, i.e., *quid pro quo*.<sup>19</sup> NAIPFA could not agree more.

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<sup>14</sup> See *id.*, at 40-41, and 45.

<sup>15</sup> *Id.*, at 44-45.

<sup>16</sup> See *id.*, at 41.

<sup>17</sup> Dan Weikel, *L.A. Times*, (anticipated March 2013) (on file with author) (analysis of 53 successful bond ballot campaigns found that 100.0% of the Registered Individuals who received business from the issuers were the Registered Individual who gave the largest contribution); David Olinger, “Colorado Bond companies’ role in school campaigns raises questions”, *The Denver Post* (May 13, 2012) (analysis of 15 successful bond ballot campaigns found that 100.0% of the Registered Individuals who received business from the issuers were the Registered Individual who gave the largest contribution); Will Evans, “Bond Firms’ Campaign Gifts Linked to Sales Pacts”, *San Francisco Chronicle*, (May 6, 2012) (analysis of 111 successful bond ballot campaigns found that 95.5% of the Registered Individuals who contributed received the business); Randall Jensen, “Brokers’ Gifts That Keep Giving”, *The Bond Buyer*, (January 13, 2012) (analysis of 41 successful bond ballot campaigns found that 97.6% of the Registered Individuals who contributed, received the business).

<sup>18</sup> MSRB Press Release, Oct 31, 2012.

<sup>19</sup> MSRB Notice 2012-43, “Request for Comment: Rule G-37 on Political Contributions and Prohibitions on Municipal Securities Business – Bond Ballot Campaign Committee Contributions,” (August 15, 2012).



The foregoing leads NAIPFA to conclude that contributions made to BBCCs may be deemed direct contributions. What is more, unlike those instances reviewed by the Court in *Citizens United*, the contributions here do in fact give rise to the appearance of actual or perceived *quid pro quo*.<sup>20</sup> For these reasons, these contributions must be banned in their entirety in order to prevent and curtail actual or perceived *quid pro quo* within the municipal securities market.<sup>21</sup>

### C. Indirect Expenditures

The Court, however, refused to extend the above rationale to indirect expenditures in *Citizens United* because the Government was unable to show that it had a substantial interest in restricting such speech.<sup>22</sup>

Yet, this was not because the Court believed that *quid pro quo* could not exist in the context of an indirect campaign contribution. Rather, it is simply because the Court has not yet been presented with a situation in which a regulation has been imposed as a result of evidence of actual or perceived *quid pro quo* with respect to indirect expenditures.<sup>23</sup>

The Court, citing *Buckley*<sup>24</sup>, noted that where there exists a perception of actual or potential *quid pro quo*, the Government may have a compelling interest in limiting such speech with respect to corporate direct contributions.<sup>25</sup> But *Citizens United* did not extend this conclusion to indirect expenditure limits<sup>26</sup> because in each of the situations reviewed, there was no claim that indirect expenditures had resulted in actual or perceived *quid pro quo*.<sup>27</sup>

The Court concluded that:

When [the Government] finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by the [Government] to seek to dispel either the appearance or the reality of these influences.<sup>28</sup>

The Government is therefore left with some space with which to develop regulations related to indirect expenditures so long as there is evidence of actual or perceived *quid pro quo*.<sup>29</sup>

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<sup>20</sup> See *supra* note 17, at 3.

<sup>21</sup> *Citizens United*, 130 S. Ct., at 41.

<sup>22</sup> *Id.*, at 22; See also *id.*, at 40-41.

<sup>23</sup> See *id.*, at 40-41.

<sup>24</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>25</sup> *Citizens United*, 130 S. Ct., at 29 (internal citations and quotations omitted).

<sup>26</sup> *Id.*, at 40.

<sup>27</sup> See *id.*, at 41.

<sup>28</sup> *Id.*, at 45.

<sup>29</sup> *Id.*, at 45.



Assuming that it is determined that BBCC contributions are indirect expenditures rather than direct contributions, *Citizens United* and the limitations it placed upon the Government in terms of regulating indirect contributions do not apply in this instance because here, unlike in *Citizens United*, there is evidence of *quid pro quo*.<sup>30</sup>

Further, the Court found that the law at issue “would not interfere with governmental functions” and the Court found “no basis for the proposition that, in the context of political speech, the Government may impose restrictions on *certain* disfavored speakers.”<sup>31</sup> This is not the situation here. In this instance, indirect contributions do interfere with government function by virtue of the *quid pro quo* which occurs as a result of BBCC contributions.<sup>32</sup>

It should be noted that these concerns extend well beyond NAIPFA’s membership. In 2009, the MSRB received a letter from the then three largest underwriters of negotiated transactions “arguing that the rule’s restrictions on contributions to such ballot campaigns should mirror the restrictions on broker-dealer contributions to issuer officials and should cover banks, municipal finance professional, and associated political action committees, as well as the broker-dealers.”<sup>33</sup> The authors went on to state that these regulations were necessary, “Out of an abundance of caution to the *perception* that making such a contribution could cause an underwriter to be selected.”<sup>34</sup> Although theirs was an argument for preventative implementation of a restriction, the data suggests that the need for preventative steps is no longer necessary as there is now evidence which gives rise to the appearance of actual or perceived *quid pro quo*,<sup>35</sup> thereby making these measures curative, not preventative, and able to be regulated.<sup>36</sup>

In *Citizens United*, the Court found that the Government failed to claim that the indirect expenditure restriction “corrupted the political process.”<sup>37</sup> Based upon the data<sup>38</sup> and the experiences of our members, it is our conclusion that there is *quid pro quo* within the municipal securities market with respect to BBCC contributions. Therefore, we find there to be a compelling reason to limit such expenditures, and recommend that the Commission and the MSRB take those steps necessary to place limitations on such expenditures in order to curtail these abusive practices.

## II. NAIPFA’s Recommendations

The disclosure requirements in the Notice are inadequate to curtail actual or perceived *quid pro quo* practices with respect to BBCC contributions. NAIPFA feels strongly that merely collecting additional data at this point is superfluous. Rather, the Commission and MSRB should take

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<sup>30</sup> *See supra*, at 3.

<sup>31</sup> *Citizens United*, 130 S. Ct., at 25.

<sup>32</sup> *See id.*, at 45 (“If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern.”)

<sup>33</sup> Ackerman, Andrew, “G-37 Change Weighed”, *The Bond Buyer*, (January 27, 2009) (discussion of letter received from Citi, JPMorgan, and Morgan Stanley).

<sup>34</sup> *Id.*

<sup>35</sup> *See supra* note 17, at 3.

<sup>36</sup> *Supra*, at 4.

<sup>37</sup> *Citizens United*, 130 S. Ct., at 41.

<sup>38</sup> *Supra* note 17, at 3.



additional steps beyond those disclosure requirements set forth in the Notice in order to address this issue.

NAIPFA believes that appropriate regulations can be developed to limit Registered Individuals' ability to give an unlimited amount of contributions to BBCCs, either by way of a direct contribution ban, or an indirect expenditure limit. NAIPFA's understanding of the realities which exist with respect to the control of BBCC by members of municipal entities leads us to conclude that contributions to BBCCs are, in fact, direct in nature and, because of the evidence of actual or perceived *quid pro quo*, such contributions should be prohibited in order to prevent *quid pro quo* from continuing to occur.

Alternatively, if BBCC contributions are determined to be indirect expenditures, we urge the Commission to merely place limits on such expenditures as a result of past and ongoing *quid pro quo*. To that end, NAIPFA suggests that contributions to BBCCs be limited to \$200 per election and be coupled with a ban on business in the event such contributions exceed this amount. This is consistent with current Rule G-37's *de minimus* allowable contributions to municipal elected officials. In addition, this restriction would further a compelling governmental interest in curtailing actual or perceived *quid pro quo* abuses that have and will continue to occur within the municipal securities market.

If, however, it is determined to undertake neither of the above-referenced recommendations, the proposed rule change should be further amended to require Registered Individuals making such contributions to contemporaneously or within a reasonable amount of time thereafter undertake the disclosure of such expenditures in the manner and as described within the Notice. The current proposal's quarterly disclosure regime is insufficient to curtail the perceived actual or perceived *quid pro quo*; in all likelihood an election will have concluded long before the disclosures are ever made, which will diminish whatever informative value such disclosures may have to the voting public. In this regard, the proposed amendment may not achieve the MSRB's contemplated purpose.

NAIPFA appreciates the opportunity to comment on this important issue. It is our hope that the Commission and the MSRB will consider the foregoing and aggressively act to curtail the actual or perceived *quid pro quo* associated with contributions to BBCCs that are made by individuals registered with the MSRB, including both broker-dealers and municipal advisors alike.

We remain available to address any questions the Commission or the MSRB may have relative to these comments.

Sincerely,



Jeanine Rodgers Caruso, CIPFA  
President, National Association of Independent Public Finance Advisors



cc: The Honorable Elisse B. Walter, Chairman  
The Honorable Luis A. Aguilar, Commissioner  
The Honorable Troy A. Paredes, Commissioner  
The Honorable Daniel M. Gallagher, Commissioner  
Liban Jama, Counsel to Commissioner Aguilar  
Lynnette Kelly, Executive Director, Municipal Securities Rulemaking Board

