companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EST on February 24, 2011, through 11:59 p.m. EST on March 9, 2011.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2011–4496 Filed 2–24–11; 4:15 pm]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63946; File No. SR–MSRB–2011–03]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Amendments to Rule G–23, on Activities of Financial Advisors

February 22, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("the Act" or "the "Exchange Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 9, 2011, the Municipal Securities Rulemaking Board ("Board" or "MSRB") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The MSRB is filing with the SEC a proposed rule change consisting of (i) proposed amendments to Rule G–23 (activities of financial advisors) and (ii) a proposed interpretation of Rule G–23 (the "proposed interpretive notice"). The MSRB requests that the proposed rule change be made effective for new issues for which the Time of Formal Award (as defined in Rule G–34(a)(ii)(C)(1)(a)) occurs more than six (6) months after SEC approval to allow issuers of municipal securities time to finalize any outstanding transactions that might be affected by the proposed rule change.

The text of the proposed rule change is available on the MSRB's Web site at *http://www.msrb.org/Rules-and-Interpretations/SEC-Filings/2011-Filings.aspx,* at the MSRB's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the MSRB included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

(a) Currently Rule G–23, on activities of financial advisors, sets forth the circumstances under which a broker, dealer, or municipal securities dealer ("dealer") acting as a financial advisor to an issuer with respect to a new issue or issues of municipal securities ("dealer financial advisor") may acquire all or any portion of such issue, directly or indirectly, from the issuer as a principal, or may act as agent for the issuer in arranging the placement of such issue, either alone or as a participant in a syndicate or other similar account formed for that purpose. For negotiated transactions, Rule G–23(d)(i) requires that: (i) The dealer terminate the financial advisory relationship with regard to the issue and at or after such termination the issuer expressly consent in writing to such acquisition or participation; (ii) at or before such termination, the dealer disclose in writing to the issuer that there may be a conflict of interest in changing from the capacity of financial advisor to that of purchaser of or placement agent for the securities and the issuer expressly acknowledges in writing to the dealer receipt of such disclosure; and (iii) the dealer disclose in writing to the issuer at or before such termination the source and anticipated amount of all remuneration to the dealer with respect to such issue and the issuer expressly acknowledge in writing to the dealer receipt of such disclosure. With respect to issues sold by competitive bid, Rule G–23(d)(ii) provides that a financial advisor must obtain the issuer's written consent prior to making a bid for the issue.

The limitations of Rule G–23(d) also apply to affiliates of the dealer financial advisor; however, they do not apply to purchases by dealer financial advisors of securities from an underwriter, either for the account of the dealer financial advisor or for the account of customers of the dealer financial advisor, except to the extent that such purchases are made to contravene the purpose and intent of the rule.

In addition, Rule G–23(e) provides that a dealer that has a financial advisory relationship with respect to a new issue of municipal securities may not act as agent for the issuer in remarketing such issue unless the dealer has disclosed in writing to the issuer: (i) That there may be a conflict of interest in acting as both financial advisor and remarketing agent for the securities; and (ii) the source and basis of the remuneration the dealer could earn as remarketing agent on such issue. The dealer must receive from the issuer its express acknowledgement, in writing, of its receipt of such disclosure and its consent to the financial advisor acting in both capacities along with the source and basis of remuneration.

The proposed amendments would, subject to the exceptions described below, (i) prohibit a dealer financial advisor with respect to the issuance of municipal securities from acquiring all or any portion of such issue directly or indirectly, from the issuer as principal, or acting as agent for the issuer in arranging the placement of such issue, either alone or as a participant in a syndicate or other similar account formed for that purpose; (ii) apply the same prohibition to any dealer controlling, controlled by, or under common control with the dealer financial advisor; and (iii) prohibit a dealer financial advisor from acting as the remarketing agent for such issue.

The proposed amendments would not prohibit: (i) A dealer financial advisor from placing an issuer's entire issue with another governmental entity, such as a bond bank, as part of a plan of financing by such entity for or on behalf of the dealer financial advisor's issuer client;[3] (ii) a dealer financial advisor from serving as successor remarketing agent to an issuer for the same issue with respect to which it provided financial advisory services if the financial advisory relationship with the issuer had been terminated for at least

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The exception would only apply if the dealer financial advisor did not receive compensation for the placement of such issue and the dealer financial advisor was not compensated as an underwriter in connection with any related transaction undertaken by the governmental entity with which such issue is placed.

one (1) year; or (iii) a dealer financial advisor from purchasing such securities from an underwriter, either for its own trading account or for the account of its customers, except to the extent that such purchase was made to contravene the purpose and intent of the rule.

The proposed amendments would change references in Rule G–23 to "a new issue or issues of municipal securities" to "the issuance of municipal securities" to conform the language of the rule to the language used in Section 15B of the Act, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). This change in language is not intended to change the meaning or operation of Rule G–23.

The proposed amendments would also amend Rule G–23(b) to remove the requirement that financial advisory services be provided for compensation. This change is also proposed to conform the rule to the provisions of Section 15B of the Act as amended by Dodd-Frank, which does not require that financial advisors receive compensation in order to be considered "municipal advisors."

The proposed interpretive notice would provide guidance on when a dealer that provides advice to an issuer would be considered to be "acting as an underwriter" for purposes of Rule G–23(b), rather than a financial advisor. Under the proposed guidance, 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 would 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 and the dealer clearly identifies itself as an underwriter from the earliest stages of its relationship with the issuer with respect to that 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) could cause the dealer to be considered a financial advisor with respect to such issue and such dealer would be precluded from underwriting that issue by Rule G–23(d).

The proposed rule change resulted from a concern that a dealer financial advisor's ability to underwrite the same issue of municipal securities, on which it acted as financial advisor, presented a conflict that is too significant for the existing disclosure and consent provisions of Rule G–23 to cure. Even in the case of a competitive underwriting, the perception on the part of issuers and investors that such a conflict might exist was sufficient to cause concern that permitting such role switching was not consistent with "a free and open market in municipal securities," which the Board is mandated to perfect.

The imposition by Dodd-Frank of a fiduciary duty upon municipal advisors,[4] which includes financial advisors, made the existence of such a conflict a greater concern.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2) of the Act, which provides that:

> The Board shall propose and adopt rules to effect the purposes of this title with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers and advice provided to or on behalf of municipal entities or obligated persons by brokers, dealers, municipal securities dealers, and municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors.

Section 15B(b)(2)(C) of the Act, provides that the rules of the MSRB shall:

> Be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.

The proposed rule change is consistent with Section 15B(b)(2) of the Act because it would prevent conflicts of interest, whether actual or perceived, caused by a dealer financial advisor serving as underwriter or placement agent for an issue of municipal securities for which it provided financial advisory services.

[4] Dodd-Frank amended Section 15B(c)(1) of the Act to provide that:

A municipal advisor and any person associated with such municipal advisor shall be deemed to have a fiduciary duty to any municipal entity for whom such municipal advisor acts as a municipal advisor, and no municipal advisor may engage in any act, practice, or course of business which is not consistent with a municipal advisor's fiduciary duty or that is in contravention of any rule of the Board.

Accordingly, the proposed rule change would help protect municipal entities and help to perfect the mechanism of a free and open market in municipal securities to the benefit of investors, municipal entities, and the public interest.

Section 15B(b)(2)(L)(iv) of the Act requires that rules adopted by the Board:

> Not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud.

The proposed rule change would principally affect dealer financial advisors that are not small municipal advisors. Furthermore, it is likely that those dealer financial advisors that are small municipal advisors primarily serve as financial advisors to issuers of municipal securities that do not access the capital markets frequently and, when they do so, issue securities in small principal amounts. Those issuers may be less likely than larger, more frequent issuers to understand the conflict presented when their financial advisors also underwrite their securities. Accordingly, while the proposed rule change might burden some small municipal advisors, any such burden is outweighed by the need to protect their issuer clients.

B. Self-Regulatory Organization's Statement on Burden on Competition

The MSRB does not believe that the proposed rule change would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change would not burden competition among dealer financial advisors since it would apply equally to all such dealer financial advisors. In some cases the proposed rule change could reduce the number of dealers competing to underwrite an issuer's issue of municipal securities, if the issuer has employed a dealer financial advisor that is prohibited by the proposed rule change from seeking to underwrite such issuance. It could also reduce the number of dealers competing to serve as financial advisor for an issuer's issuance of municipal securities, if such dealers wished to act as underwriter or placement agent for such issue. Nevertheless, the MSRB does not believe that any such burden on competition is greater than is necessary or appropriate in furtherance of the purposes of the Exchange Act, because such burden is outweighed by the need to protect issuers as described above.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

On August 17, 2010, the MSRB requested comment on the portion of the proposed rule change consisting of amendments to Rule G–23.[5] A copy of the Notice can be viewed at *http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2010/2010-27.aspx?n=1.* The MSRB received 73 comment letters. An index to the comment letters received in response to the Notice can be viewed at *http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2010/2010-27.aspx?n=1,* and copies of the comment letters received in response to the Notice can also be accessed through that Web site. In addition, these documents, submitted with MSRB's filing as Exhibits 2a, 2b, and 2c, respectively, can be viewed at the Commission's Web site at: *http://www.sec.gov/rules/sro/msrb.shtml,* under the heading SR–MSRB–2011–03. A discussion of the comments and the MSRB's responses follows.

In its request for comment, the MSRB posed the following questions:

1. Should a dealer be precluded for a specific timeframe from entering into a financial advisory relationship with an issuer after serving as an underwriter on one of the issuer's prior offerings of securities?

2. If the MSRB were to amend Rule G–23 to prohibit dealers from serving as underwriter on transactions for which they have served as financial advisor to the issuer, should there be an exception for competitively bid transactions? Would it matter if the notice of sale was made available 5–7 business days before a competitively bid transaction to allow additional time for other competing firms to conduct due diligence? Should a financial advisor be allowed to bid in a competitively bid transaction in which a failed bid had occurred? How would the situation be handled in which there is a failed bid and the financial advisor cannot step in to buy the bonds because of the prohibition? Is this a common occurrence?

3. Are there small and/or infrequent issuers that will be negatively affected by the proposed prohibition? What are the alternatives and costs for such issuers should the MSRB adopt the proposed draft rule amendment?

4. Is it appropriate for a dealer to serve as financial advisor to an issuer at the same time that it serves as underwriter on a separate issue for the same issuer?

5. As it relates to current practices, are there instances in competitively bid transactions in which a financial advisor should resign in order to "officially" bid on a competitive issuance transaction as an underwriter? Is there ever a time when the financial advisor does not conduct the bid process for the issuer, such as the use of electronic bidding platforms where the process of collecting bids is done by a third party on behalf of the issuer? Is it an uncommon practice for the bid process to be handled internally by the issuer?

6. In the context of a primary offering, should the exception found in Rule G–23(d)(iii) be limited to situations in which a financial advisor purchases bonds from underwriters who won a competitive bid for the bonds in which multiple bids were received?

7. In competitively bid transactions, are there situations where the issuer may hire a financial advisor to serve on a specific issue and then, at some point, hire a second financial advisor to oversee the competitive bid process in order to allow the original financial advisor to bid on the issue?

Discussion of Comment Letters

The comments are summarized by topic as follows:

Conflicts of Interest

A trade association for non-dealer financial advisors stated that there is an unacceptable and/or inherent conflict of interest when a dealer financial advisor for an issue becomes an underwriter for the same issue.[6] An association for finance officers of State and local governments noted that it has encouraged the MSRB to adopt changes to the rule to prohibit such role switching for many years because of the conflicts of interest and as a caution to issuers.[7] An issuer stated that hiring non-dealer financial advisors provides "greater assurance of conflict-free advice."[8] A non-dealer financial advisory service to small and medium sized local governments and school districts stated, "[T]he roles and objectives of issuers and underwriters are so clearly diametrically opposed that the conflict of interest in an underwriter acting as financial advisor to an issuer can never be overcome."[9] Another non-dealer financial advisory firm noted that the possibility of conflicts of interest are real and, in fact, frequently arise when firms are allowed to serve as both financial advisor and underwriter on a transaction.[10]

The GFOA Letter described GFOA's Best Practices[11] as the basis for its response and noted that issuers should be aware of and avoid the conflicts of interest that arise when a financial advisor resigns to become the underwriter on a transaction. The GFOA Best Practices provide that "issuers must keep in mind that the roles of the underwriter and the financial advisor are separate, adversarial roles and cannot be provided by the same party." One issuer noted that allowing a dealer financial advisor to underwrite a negotiated issue stands in direct conflict with the GFOA Best Practices and two issuers provided form letters that expressed their support of the GFOA Best Practices.[12]

One issuer provided an example of a dealer financial advisor requesting that the city sign a revised agreement permitting the dealer to temporarily terminate its financial advisory relationship so that it could provide underwriting services. The revised agreement provided that, "It is necessary to point out that such an action could,

[5] *See* MSRB Notice 2010–27 (August 17, 2010) ("Notice"). The changes proposed to be made to Rule G–23 that are designed to conform the language of the rule to the language used in Section 15B of the Act, as described above, were not the subject of prior public comment. In addition, the portion of the proposed rule change that consists of the proposed interpretive notice was not the subject of prior public comment.

[6] *See* National Association of Independent Public Finance Advisors, Letter from Steven F. Apfelbacher, President dated September 30, 2010 ("NAIPFA Letter"); *see also* Ehlers & Associates, Letter from Michael C. Harrigan, Chairman/Senior Financial Advisor dated September 30, 2010 ("Ehlers Letter"); Independent Bond & Investment Consultants LLC, Letter from William N. Lindsay, Director and Mark N. Chapman, Director dated September 30, 2010 ("IBIC Letter"); Munistat Services, Inc., Letter from Robert F. Sikora, President dated September 30, 2010 ("Munistat Letter"); Portland, Oregon, Office of Management and Finance, Letter from Eric H. Johansen, Treasurer dated September 29, 2010 ("Portland Letter"); Specialized Public Finance Inc., Letter from Garry R. Kimball, President dated September 30, 2010 ("Specialized Public Finance Letter"); and Springsted Incorporated, Letter from Kathleen A. Aho, President dated September 29, 2010 ("Springsted Letter").

[7] *See* Government Finance Officers Association, Letter from Susan Gaffney, Director Federal Liaison Center dated September 30, 2010 ("GFOA Letter").

[8] *See* Portland, *supra* note 6.

[9] *See* Munistat Letter, *supra* note 6.

[10] *See* Lewis Young Robertson & Burningham, Inc., Letter from Scott J. Robertson, Principal dated September 22, 2010 ("Lewis Young Letter").

[11] *See* GFOA Best Practice—Selecting and Managing the Method of Sale of State and Local Government Bonds (1994 and 2007) (DEBT); GFOA Best Practice—Selecting Financial Advisors (2008) (DEBT); and GFOA Best Practice—Selecting Underwriters for Negotiated Bond Sales (2008) (DEBT) ("GFOA Best Practices").

[12] *See* Copperas Cove, Texas, Letter from Andrea Gardner, City Manager dated September 29, 2010 ("Copperas Cove Letter"); Georgetown, Texas, Letter from Micki Rundell, Chief Financial Officer dated September 8, 2010 ("Georgetown, Texas Letter"); and Portland Letter, *supra* note 6.

under certain circumstances, create a conflict of interest." [13] The issuer stated that, as an infrequent issuer, it did not understand the extent of the conflict inherent in such role switching or the availability of other options to market its bonds. The issuer further noted that the proposed amendments would assure that issuers receive unbiased advice regarding the structure of their issues and the approach to marketing their bonds. One non-dealer financial advisory firm noted, "Most issuers from our markets would be unable to provide comments because they are not clear on the difference" between non-dealer and dealer financial advisors.[14] Another advisory firm stated that the practice of role switching "deprives an issuer of the unbiased, independent advice it sought when originally retaining a financial advisor." [15]

Commenters against all or portions of the proposed amendments suggested there cannot be a one size fits all approach in the municipal market [16] and stated that they are unaware of any evidence or history of abuse that the proposed rule is designed to prevent.[17] One commenter stated, "We do not see abuses or issues in the marketplace related to Rule G–23 and, if abuses or specific concerns exist, would like to see them highlighted so that we can better understand the rationale behind the Securities and Exchange Commission's request for the MSRB to consider changes to this rule." [18] The commenter further argued that there is existing regulation under Rule G–17 that would apply to any situation in which a dealer is not acting in a fair and appropriate manner and that Rule G–23 is "an appropriately drafted rule that is serving the function that it was intended to serve."

A trade association for securities firms and banks stated, "Rule G–23 represents a comprehensive and balanced approach to potential conflicts of interest." [19] Another commenter noted "municipal clients clearly understand the potential conflict of interest that may exist when a financial advisor serves as underwriter" and that such clients are generally aware of GFOA Best Practices "which advise them of the inherent conflict of interest in allowing a financial advisor to resign in order to serve as underwriter." [20] Another commenter argued, "To suggest that an issuer is incapable of understanding an arrangement it is entering into is always a dangerous concept. Freedom of choice is an essential element in the healthy functioning of the financial markets to maximize credit availability." [21] A bank commenter stated, "In terms of negotiated financings, Rule G–23 should remain unchanged since the Rule currently in force does prevent conflicts of interest." [22] An issuer stated, "We fully comprehend the duties owed to us by a dealer financial advisor." [23] The trade association argued that the provisions that allow a dealer financial advisor to serve as underwriter on the same transaction are rarely relied upon by dealers.[24]

MSRB Response. The MSRB shares the concern of those commenters who stated that Rule G–23 permits inherent conflicts of interest, which are not cured by the disclosure and waiver provisions of the rule. While underwriters have a duty of fair dealing to issuers under Rule G–17,[25] they also have a duty to investors, whose interests are generally adverse to those of issuers. A financial advisor's sole duty is to its issuer client. The MSRB believes the proposed amendments will protect municipal entities, as the MSRB is mandated to do by Dodd-Frank, by preventing the perceived and actual conflicts of interest that arise under the existing rule.

Fiduciary Duty Concerns

Commenters in favor of the proposed amendments to Rule G–23 noted that certain sections of Rule G–23 should be eliminated or revised to ensure compliance with the provisions of Dodd-Frank.[26] One commenter [27] noted that Dodd-Frank "clearly and concisely defines the type of advice that a Municipal Advisor provides, and it does so for the purpose of delineating who owes a fiduciary duty to the issuer of municipal debt. In so doing, the Act provides an exception for brokers, dealers or municipal securities dealers serving as underwriters." [28] Another commenter argued that any rulemaking should make a clear distinction between a financial advisor and an underwriter.[29] One commenter stated that the definition of "underwriter" in Section 2(a)(11) of the Securities Act of 1933 "does not contemplate at all that underwriters will provide 'advice' to issuers." [30] Another commenter stated, "As presently written, Rule G–23 allows underwriters to provide substantially the same 'advice' as a financial advisor which is not consistent" with Dodd-Frank.[31]

The same commenter suggested that advice concerning structure, timing, terms and other similar matters that dealers are currently permitted to provide pursuant to Rule G–23 is now a function reserved for municipal advisors under Dodd-Frank. Another commenter noted, "the concept of

[13] *See* Osage Beach, Missouri, Letter from Karri Bell, City Treasurer dated August 26, 2010 ("Osage Beach Letter").

[14] *See* Ehlers Letter, *supra* note 6.

[15] *See* Columbia Capital Management, LLC, Letter from Dennis Lloyd, President dated September 29, 2010 ("Columbia Capital Letter").

[16] *See* George K. Baum & Company, Letter from Robert K. Dalton, Vice Chairman dated September 29, 2010 ("Baum Letter"); Bond Dealers of America, Letter from Mike Nicholas, Chief Executive Officer dated September 30, 2010 ("BDA Letter"); D.A. Davidson & Co., Letter from William A. Johnstone, President and Chief Executive Officer dated September 29, 2010 ("D.A. Davidson Letter"); and J.J.B. Hilliard, W.L. Lyons, LLC, Letter from Ronald J. Dieckman, Director Public Finance and Municipal Bonds dated September 30, 2010 ("Hilliard Letter").

[17] *See* Robert W. Baird & Co. Incorporated, Letter from Charles M. Weber, Associate General Counsel dated September 29, 2010 ("Baird Letter"); Piper Jaffray & Co., Letter from Frank Fairman, Managing Director, Head of Public Finance Services, and Rebecca Lawrence, Assistant General Counsel, Principal dated September 29, 2010 ("Piper Letter"); RBC Capital Markets Corporation, Letter from Christopher Hamel, Head, Municipal Finance dated September 30, 2010 ("RBC Letter"); and Securities Industry and Financial Markets Association, Letter from Leslie M. Norwood dated September 30, 2010 ("SIFMA Letter").

[18] *See* Piper Letter, *supra* note 17.

[19] *See* SIFMA Letter, *supra* note 17; *see also* BDA Letter, *supra* note 16; BMO Capital Markets GKST Inc., Letter from Robert J. Stracks, Counsel dated September 30, 2010 ("BMO Letter"); Eastern Bank Capital Markets, Letter from James N. Fox, Senior Vice President and Managing Director dated September 29, 2010 ("Eastern Bank Letter"); Fulbright & Jaworski L.L.P., Letter from Fredric A. Weber dated September 30, 2010 ("Fulbright Letter"); and RBC Letter, *supra* note 17.

[20] *See* Baird Letter, *supra* note 17.

[21] *See* BMO Letter, *supra* note 19.

[22] *See* Eastern Bank Letter, *supra* note 19.

[23] *See* Denver, Colorado, Department of Finance, Letter from R.O. Gibson, Director of Financial Management dated September 29, 2010 ("Denver Letter").

[24] *See* SIFMA Letter, *supra* note 17.

[25] *See* Reminder Notice on Fair Practice Duties to Issuers of Municipal Securities, MSRB Notice 2009–54 (Sept. 29, 2009), *reprinted in* MSRB Rule Book.

[26] *See* Fieldman, Rolapp & Associates, Letter from Thomas M. DeMars, Managing Principal dated September 30, 2010 ("Fieldman Letter"); Fiscal Advisors & Marketing, Inc., Letter from John C. Shehadi, Chairman, *et al.* dated September 30, 2010 ("Fiscal Advisors Letter"); Munistat Letter, *supra* note 6; NAIPFA Letter, *supra* note 6; and Public FA, Inc., Letter from Philip C. Dotts, President dated September 30, 2010 ("Public FA Letter").

[27] *See* WM Financial Strategies, Letter from Nathan R. Howard, Municipal Advisor dated September 28, 2010 ("WM Financial Strategies/Mr. Howard Letter").

[28] Section 15B(e)(4)(A) of the Exchange Act defines the term "municipal advisor" to include, among other things, a person that provides advice to or on behalf of a municipal entity with respect to the issuance of municipal securities, including advice with respect to the structure, timing, terms and other similar matters concerning such issues. Section 15(B)(e)(4)(C) provides that the term does not include a dealer serving as an underwriter as defined in Section 2(a)(11) of the Securities Act of 1933.

[29] *See* WM Financial Strategies, Letter from Joy A. Howard, Principal dated September 28, 2010 ("WM Financial Strategies/Ms. Howard Letter").

[30] *See* Fieldman Letter, *supra* note 26.

[31] *See* Public FA Letter, *supra* note 26.

"advice," both legally and practically, suggests a party that has no business interest in the transaction that might be contrary to that of the issuer."[32] One financial advisory firm noted that any amendments to Rule G–23 should reflect that dealers providing such advice "must be fiduciaries and therefore cannot buy the bonds."[33] One commenter noted, "At the very moment firms seek to resign as advisers, they remain issuers' fiduciaries until finalization of resignations."[34] A financial advisory firm noted that financial advisors to issuers of governmental debt are fiduciaries that must render advice and must act only in the best interests of the issuers and another firm stated, "We have observed over many years that some broker/dealers performing underwriting services engage themselves to issuers who (mistakenly) consider the underwriter to be their "financial advisor" (*i.e.,* a fiduciary working for them)."[35]

One commenter noted that the rule should reiterate that "the underwriter does not hold a fiduciary responsibility to the issuer."[36] Another commenter stated that the Board could consider modifying the existing language of Rule G–23(b) to affirm that advice is now a function reserved for financial advisors and that providing such advice on a particular transaction places the underwriter in the role of financial advisor thus precluding it from acting as underwriter on such transaction.[37] Finally, another commenter noted, "If the advisers were performing their jobs properly, and not violating their fiduciary duty so severely, they would be actively contacting potential underwriters, not attempting to grab for themselves the underwriting positions in which the advisers become issuers' adversaries."[38]

Some commenters did not see a need for the proposed changes in Rule G–23 at this time, particularly with the advent of the newly mandated fiduciary standard for municipal advisors.[39] One commenter stated that this fiduciary standard of care will "help ensure that municipal clients receive reasonable, unbiased advice from their financial advisors and eliminate the concern that financial advisors are tainted by the prospect of underwriting new issues."[40] Another commenter stated, "As to a federal fiduciary standard, every adviser has had to deal with a fiduciary obligation under state or common law long before now (and even before the SEC was created)."[41]

MSRB Response. The MSRB is concerned that the role switching currently permitted under Rule G–23 is inconsistent with a dealer financial advisor's fiduciary duty to its issuer client. This inherent conflict is too significant for disclosure and consent to cure. Some commenters[42] suggested that the proposed amendments to Rule G–23 do not go far enough, because they do not address the exception from the definition of "financial advisory relationship" in Rule G–23(b) for dealers "acting as underwriters." The MSRB believes that the proposed interpretive guidance strikes a balance between these competing concerns by providing that a dealer may not avail itself of the underwriter exception unless it maintains an arm's-length relationship with the issuer.

Issue-by-Issue Application of the Proposed Rule

One commenter expressed support for a "cooling off" period during which a dealer would not be permitted to serve as underwriter for any transaction of an issuer following the termination of the dealer's financial advisory relationship with such issuer.[43] A trade association stated, "Under Rule G–37 and the proposed changes to Rule A–3, the MSRB has established a precedent for imposing two-year bans" and believes that a financial advisor "will remain independent if precluded from serving as an underwriter for a term of two years from the expiration or termination of the financial advisory relationship."[44] Another commenter agreed with a two year ban[45] if such a time frame would be part of the proposed amendments and also noted the two-year precedent of other MSRB rules. Some commenters supported a cooling off period of at least one year and some suggested that clarification be provided to ensure that any issue covered by a financial advisory agreement be subject to the prohibition.[46] Other commenters expressed concern that if clarification is not provided, some dealers may read the proposed rule change as simply eliminating the requirement for a disclosure of conflict letter, so long as they have not yet begun work on a particular issue, and would simply resign as to one issue and underwrite another issue.[47]

Some commenters also expressed concerns regarding situations in which a dealer serves as financial advisor to an issuer while it serves as underwriter on a separate issue for the same issuer. These commenters suggested that the best interests of issuers are not protected even if the services are provided on separate transactions.[48]

However, other commenters noted that there are issuers with multiple and/or separate and distinct debt financing programs that are funded from different revenue sources and that the proposed amendments would unnecessarily restrict the pool of available dealer financial advisors available to such issuers on various transactions.[49] One of these commenters noted that any proposed prohibition that is broader than issue-by-issue "goes beyond what is necessary to ensure fair competition and would unnecessarily constrain the advice and services available to issuers."[50] Another noted that a broad amendment to Rule G–23 would result in unintended consequences that could be very unfair to dealers that engage in both financial advisory services and bond

[32] *See* Fieldman Letter, *supra* note 26.

[33] *See* Lewis Young Letter, *supra* note 10.

[34] *See* American Governmental Financial Services of Sacramento, E-mail from Robert Doty, President dated September 30, 2010 ("AGFS E-mail").

[35] *See* Ehlers Letter, *supra* note 6 and Lewis Young Letter, *supra* note 10.

[36] *See* GFOA Letter, *supra* note 7.

[37] *See* Munistat Letter, *supra* note 6.

[38] *See* AGFS E-mail, *supra* note 34.

[39] *See* Hilliard Letter, *supra* note 16; RBC Letter, *supra* note 17; and SIFMA Letter, *supra* note 17.

[40] *See* Baird Letter, *supra* note 17.

[41] *See* BMO Letter, *supra* note 19.

[42] *See* NAIPFA Letter, *supra* note 6; Public FA Letter, *supra* note 26; WM Financial Strategies/Ms. Howard Letter, *supra* note 29; and WM Financial Strategies/Mr. Howard Letter, *supra* note 29.

[43] *See* IBIC Letter, *supra* note 6.

[44] *See* NAIPFA Letter, *supra* note 6.

[45] *See* Copperas Cove Letter, *supra* note 12; *see also* Estrada Hinojosa & Company, Inc., Letter from Robert A. Estrada, Chairman and Chief Compliance Officer dated September 30, 2010 ("Estrada Letter"); Ehlers Letter, *supra* note 6; Fiscal Advisors Letter, *supra* note 26; Georgetown, Texas, *supra* note 12; Munistat Letter, *supra* note 6; Public FA Letter, *supra* note 26; Tamalpais Advisors, Inc., Letter from Jean Marie Buckley, President dated September 28, 2010 ("Tamalpais Letter"); Specialized Public Finance Letter, *supra* note 6; Springsted Letter, *supra* note 6; and WM Financial Strategies/Ms. Howard Letter, *supra* note 29.

[46] *See* Lewis Young, *supra* note 10.

[47] *See* Columbia Capital Letter, *supra* note 15; Lewis Young Letter, *supra* note 10; and Public Financial Management, Inc., Letter from F. John White, Chief Executive Officer dated September 29, 2010 ("PFM Letter").

[48] *See* NAIPFA Letter, *supra* note 6; Columbia Capital Letter, *supra* note 15; and Lewis Young Letter, *supra* note 10.

[49] *See* BDA Letter, *supra* note 16; Denver Letter, *supra* note 23; Eastern Bank Letter, *supra* note 19; Hilliard Letter, *supra* note 16; Lynn, Robert O.L., E-mail from Robert O.L. Lynn, Financial Services Consultant dated September 29, 2010 ("Lynn E-mail"); RBC Letter, *supra* note 17; Ross, Sinclaire & Associates, Letter from Murray Sinclaire, Jr., President/CEO dated September 28, 2010 ("RSA Letter"); SIFMA Letter, *supra* note 17; and Stone & Youngberg, Letter from Stone & Youngberg dated September 28, 2010 ("Stone & Youngberg Letter").

[50] *See* BDA Letter, *supra* note 16.

underwriting.[51] One commenter expressed support for proposed amendments that would "allow a regulated firm to continue to engage in non-transaction specific consulting" in order to "allow an issuer to have certainty in the relationship that they have with a firm for each specific debt transaction." [52] The same commenter noted that the "current practice of allowing a financial advisor to retain their role while involved with a private placement, which the financial advisory firm or a related bank portfolio purchases, should be eliminated."

Some commenters argued that any proposed cooling off period would be an arbitrary one, would reduce issuer choice and would decrease competition among financial advisors.[53] One of the commenters against such a period suggested that there is no reason that an issuer should be precluded from working with a dealer financial advisor for a specific timeframe because the dealer has previously underwritten a prior offering for that issuer. Another argued that no cooling off period is needed following the provision of underwriting services as there are no "potentially cognizable conflicts once the underwriter's role has ended." [54] One commenter also noted that in certain areas of the country there has been an "unfortunate movement by non-registered advisors to exclude broker-dealers/underwriters from responding to issuers' request for proposals to serve as financial advisor" and suggested that this "looks and smells like restrictive competition (anti-trust)." [55]

It was also noted that the proposed amendments to the rule would prohibit a dealer that provided financial advisory services to an issuer from providing successor remarketing agent services to the same issuer for a one year term following the termination of its financial advisory relationship. The commenter suggested "the restrictions should be as narrowly tailored as possible so as to prevent unnecessary disruption in the marketplace" and suggested a cooling off period of only three months.[56]

MSRB Response. Upon review of the comment letters, the MSRB has determined not to impose a cooling off period between the time a dealer completes a financial advisory engagement with an issuer and the time the dealer may serve as underwriter for a different issue by the same issuer. Instead, the MSRB has determined to continue to apply Rule G–23 on an issue-by-issue basis. The proposed amendments would not prohibit a dealer financial advisor from providing financial advisory services on one issue and then serving as underwriter on another issue, even if the two issues were in the market concurrently.

Nevertheless, the MSRB does consider it to be appropriate to impose a cooling off period of one year during which a dealer financial advisor could not serve as remarketing agent for the same issue of municipal securities. The MSRB believes the one year term is a significant timeframe that would more adequately address any potential or actual conflicts of interest than the three month time frame suggested by one commenter.

Small and/or Infrequent Issuers

Commenters that supported the proposed amendments to Rule G–23 generally did not support an exception to the proposed amendments for small and/or infrequent issuers.[57] One commenter asked what would constitute a small or infrequent issuer and noted that small and infrequent issuers would be the primary beneficiaries of a revised rule because they are less knowledgeable about the capital markets and consequently, are the least likely issuers to understand the conflicts of interest that arise when a dealer financial advisor switches to serve as underwriter.[58] Another noted, "We are not aware of any study proving that "small" or "infrequent" issuers have difficulty marketing their issues." [59] Others stated that small and infrequent issuers would benefit from the prohibition because they lack the market expertise necessary to defend their own interests.[60] Another commenter stated that small and infrequent issuers are the most likely to be manipulated by dealer financial advisors because such issuers lack the sophistication to know if the terms of the underwriting engagement are reasonable.[61]

A trade association stated that "if an FA is properly structuring the deal, and if the deal is rated and advertised appropriately, there should not be an adverse affect on the issuer." [62] Another commenter noted, "In our experience, the smaller, infrequent issuers have ample access to the market if the credit is sound." [63] Other commenters noted that "there are always reasonable alternatives for issuers to market their bonds," which include the use of non-dealer financial advisors and private placements with local banks and that, "Many times the smallest of issuers use governmental lenders anyway, and you have already provided for this needed exemption." [64]

Other commenters that supported the proposed amendments to Rule G–23 also noted that a fundamentally sound principle such as the proposed amendments to Rule G–23 should not be disregarded for small or infrequent issuers, as the rule as revised will provide protection against a broker's concealed self-interest and that "a prohibition would create a competitive environment" for all financial advisory firms, which would ultimately benefit issuers." [65] Finally, another commented that, if the MSRB continues to be concerned about the impact of a prohibition on role switching on smaller and infrequent issuers, it should "study the overall costs that smaller issuers incur when the financial advisor resigns to become the underwriter, versus other methods of sale." [66]

Commenters that opposed the proposed amendments to Rule G–23 generally noted concerns about the effect of the proposed amendments on smaller and/or infrequent issuers. One noted that any changes that further limit issuer choice will "in our opinion, result in adverse market consequences for

[51] Specifically, the Estrada Letter, *supra* note 45, provided examples to support a recommendation that the MSRB not prohibit dealers from providing financial advisory and/or underwriting services, at the same time, to more than one debt issuing entities of a single issuer (*e.g.,* a dealer firm should be able to provide financial advisory services to a city owned and operated water and sewer company while providing underwriting services to the same city owned and operated electric and gas utility company). The Estrada Letter also argued that such role switching should not be prohibited on various bond issuances that have more than one series, "The MSRB should not prohibit a broker/dealer who serves as financial advisor on Series 2010A from competing to serve as underwriter for B, C or D."

[52] *See* Baum Letter, *supra* note 16.

[53] *See* Denver Letter, *supra* note 23; Piper Letter, *supra* note 17; RSA Letter, *supra* note 49; and SIFMA Letter, *supra* note 17.

[54] *See* Piper Letter, *supra* note 17 and SIFMA Letter, *supra* note 17.

[55] *See* FirstSouthwest, Letter from Hill A. Feinberg, Chairman and CEO dated September 29, 2010 ("FirstSouthwest/Mr. Feinberg 2 Letter").

[56] *See* SIFMA Letter, *supra* note 17.

[57] *See* Fieldman Letter, *supra* note 26; GFOA Letter, *supra* note 7; IBIC Letter, *supra* note 6; Lewis Young Letter, *supra* note 10; PFM Letter, *supra* note 47; and Public FA Letter, *supra* note 26.

[58] *See* WM Financial Strategies Letter/Ms. Howard, *supra* note 29.

[59] *See* NAIPFA Letter, *supra* note 6.

[60] *See* Fiscal Advisors Letter, *supra* note 26 and Munistat Letter, *supra* note 6.

[61] *See* Columbia Capital Letter, *supra* note 15.

[62] *See* GFOA Letter, *supra* note 7.

[63] *See* Specialized Public Finance Letter, *supra* note 6.

[64] *See* Columbia Capital Letter, *supra* note 15; Lewis Young Letter, *supra* note 10; NAIPFA Letter, *supra* note 6; Public FA Letter, *supra* note 26; and Springsted Letter, *supra* note 6.

[65] *See* IBIC Letter, *supra* note 6.

[66] *See* GFOA Letter, *supra* note 7; IBIC Letter, *supra* note 6; and PFM Letter, *supra* note 47.

many issuers." [67] Another stated, "Small issuers, issuing difficult to place securities need all the options they can get." [68] Another commenter stated, "Very often, only the local dealer is interested in marketing the securities of these municipal issuers and these transactions are usually too small to attract bids from larger firms" and argued that any revisions to the rule should retain the ability of dealer financial advisors to conduct direct placements on behalf of smaller issuers.[69] Another noted that small and infrequent borrowers in the municipal bond market face difficulties getting bids for their bonds even when deal flow is low.[70]

Other commenters against the proposed amendments to Rule G–23 raised specific State law requirements and said that certain special districts would be negatively affected by the proposed amendments.[71] Specifically, some commenters noted that municipal utility districts ("MUDs") in Texas sell their bonds "non-rated" and said that the proposed amendments would increase interest rates and property taxes.[72] One commenter also argued, "Eliminating financial advisers from bidding on their own districts would force our firm to seek a legislative remedy and allow our districts to sell bonds by negotiated sale and therefore all but eliminating competitive sales in the future." [73]

Some of the commenters against the proposed amendments also suggested exemptions for issuances below a certain threshold if the proposed amendments that would prohibit dealer financial advisors from serving as underwriters on transactions on which they provided financial advisory services were adopted.[74] The proposed threshold exemptions ranged from $5 million to $30 million or less. One trade association provided statistics to indicate that "only 2.5% of all new issue volume (based on the total dollar amount) for the last ten years" exceeded $10,000,000, which suggest that there should be an exception for smaller issuances as they are a small part of the market.[75]

MSRB Response. The MSRB believes that the potential negative impact on fees and market accessibility for small and/or infrequent issuers would be minimal compared to the protections that will be afforded to such issuers. The MSRB is persuaded by the arguments that small and/or infrequent issuers are, in many cases, unable to appreciate the nature of the conflict they are being asked to waive by the very dealer financial advisor that will benefit from the waiver.[76] The MSRB does not believe that exceptions should be provided for smaller offerings as suggested by several commenters.

Competitive Bid Offerings and Failed Bids

Some commenters did not support exceptions to the prohibition that would allow a dealer financial advisor to bid on a competitive transaction for which they have provided financial advisory services. One of these commenters noted "a financial advisor may also control or influence the credit enhancement and ratings process. Whether to apply for insurance and/or a rating, which ratings service to use and structural considerations like reserve or coverage requirements can all impact the outcome of a competitive sale." [77] Another argued that if a financial advisor were permitted to bid for a competitive transaction, it might not aggressively work to secure the largest number of bids possible because of an incentive to reduce competition.[78] One commenter noted that any time a financial advisor provides the winning bid on a competitive sale transaction the potential for an appearance of impropriety exists.[79]

Commenters also suggested that, even if a notice of the sale were made available an ample time before the competitive bid, the notice would not change the inherent conflict of interest that exists when a dealer is allowed to participate in such a transaction. One of these commenters stated that the notice of sale is already published at least five business days before a competitive sale, so providing such an exception would not provide meaningful relief or mitigate any conflicts of interest.[80] Another commenter suggested that allowing an exception for competitively bid issues for which the notice of the sale was provided five to seven business days in advance of the bid deadline to allow time for due diligence "will invite game playing." [81]

Other commenters noted that failed bids are not a common occurrence and there should be no exceptions for such occurrences.[82] One noted that most failed bids are due to "severe market disruptions, transactions not suited to competitive bid or poorly designed bidding rules." In the event of a failed

[67] *See* D.A. Davidson Letter, *supra* note 16.

[68] *See* Zions First National Bank, Letter from W. David Hemingway, Executive Vice President dated September 30, 2010 ("Zions Letter").

[69] *See* BDA Letter, *supra* note 16.

[70] *See* BDA Letter, *supra* note 16; D.A. Davidson Letter, *supra* note 16; Hilliard Letter, *supra* note 16; and Zions Letter, *supra* note 78.

[71] *See* Alabama Department of Education, Letter from Warren Craig Pouncey, Deputy State Superintendent of Education, Administrative and Financial Services dated September 29, 2010 ("Alabama Letter"); Allen Boone Humphries Robinson LLP, Letter from Joe B. Allen, Managing Partner dated September 29, 2010 ("Allen Letter"); Corinthian Communities, Letter from Harry Masterson, Principal dated September 30, 2010 ("Corinthian Letter"); Crews & Associates, Inc., Letter from Jim Jones, President dated September 28, 2010 ("Crews Letter"); FirstSouthwest, Letter from Terrell Palmer, Senior Vice President dated September 29, 2010 ("FirstSouthwest/Mr. Palmer Letter"); Fulbright Letter, *supra* note 19; GGP–Bridgeland, LP, Letter from Peter C. Houghton, Vice President dated September 29, 2010 ("GGP–Bridgeland Letter"); Mischer Investments, Letter from Mark A. Kilkenny, Senior Vice President dated September 29, 2010 ("Mischer Letter"); Newland Real Estate Group, LLC, Letter from Walter F. Nelson, President dated September 30, 2010 ("Newland Letter"); New Quest Properties, Letter from Steven D. Alvis, Managing Partner dated September 29, 2010 ("NewQuest Letter"); Schwartz, Page & Harding, L.L.P., Letter from Joseph M. Schwartz, Managing Partner dated September 29, 2010 ("Schwartz Letter"); Signorelli Company, Letter from Daniel K. Signorelli, President ("Signorelli Letter"); Wolff Companies, Letter from David W. Hightower, Executive Vice President and Chief Development Officer dated September 30, 2010 ("Wolff Letter"); and Young & Brooks, Letter from Mark W. Brooks dated September 29, 2010 ("Young & Brooks Letter").

[72] *See also* FirstSouthwest/Mr. Palmer Letter, *supra* note 71; FirstSouthwest, Letter from Julie Peak, Managing Director, dated September 27, 2010 ("FirstSouthwest/Ms. Peak Letter"); Municipal Information Services, Letter from Ronald L. Welch dated September 30, 2010 ("MIS Letter"); and Young and Brooks Letter, *supra* 70.

[73] *See* FirstSouthwest/Mr. Palmer Letter, *supra* note 71.

[74] *See* Baum Letter, *supra* note 16 ($30,000,000); D.A. Davidson Letter, *supra* note 16 ($30,000,000); FirstSouthwest, Letter from Hill A. Feinberg, Chairman and CEO dated September 23, 2010 ("FirstSouthwest/Mr. Feinberg Letter") (competitively bid issues not exceeding $5,000,000); Lantana (Texas) District Offices, Denton County Fresh Water Supply Districts 6 & 7, Letter from Kevin Mercer, General Manager dated September 28, 2010 ("Lantana Letter") (competitively bid issues not exceeding $10,000,000); NewQuest Letter, *supra* note 71 (competitively bid issues not exceeding $10,000,000); RBC Letter, *supra* note 17 ($20,000,000); and Signorelli Letter, *supra* note 71 (competitively bid issues not exceeding $10 million).

[75] *See* SIFMA Letter, *supra* note 17.

[76] *See* Copperas Cove Letter, *supra* note 12; Fieldman Letter, *supra* note 26; Georgetown, Texas Letter, *supra* note 12; and Portland Letter, *supra* note 6.

[77] *See* Specialized Public Finance Letter, *supra* note 6.

[78] *See* WM Financial Strategies/Ms. Howard Letter, *supra* note 29.

[79] *See* Columbia Capital Letter, *supra* note 15; Specialized Public Finance Letter, *supra* note 6; and WM Financial Strategies/Ms. Howard Letter, *supra* note 29; *see also* Fieldman Letter, *supra* note 26; Fiscal Advisors Letter, *supra* note 26; Munistat Letter, *supra* note 6; Public FA Letter, *supra* note 26.

[80] *See* Columbia Capital Letter, *supra* note 15; IBIC Letter, *supra* note 6; Fiscal Advisors Letter, *supra* note 26; Specialized Public Finance Letter, *supra* note 6; and Tamalpais Letter, *supra* note 45.

[81] *See* Springsted Letter, *supra* note 6.

[82] *See* Columbia Capital Letter, *supra* note 15; IBIC Letter, *supra* note 6; Lewis Young Letter, *supra* note 10; and WM Financial Strategies/Ms. Howard, *supra* note 30.

bid, another commenter stated, "there is almost always means of getting the securities sold without the advisor stepping in as a buyer." They also argued that in the case of private placements there is much more potential for abuse and a flat prohibition would be helpful. However, one commenter provided an example of a transaction that had not been completed as of the date of her letter and noted that the firm "was unsuccessful in underwriting the securities and then switched to serving as financial advisor for a competitive sale." [83]

A trade association for non-dealer financial advisors noted that "if a bid fails it is most likely because the broker-dealer financial advisor failed to properly advertise, circulate documents and/or perform other activities to obtain the largest number of bids possible. If a financial advisor has performed their role properly and yet there are no bidders, it is likely that the credit of the issuer's debt obligation should not be publicly sold." [84] In addition, the organization argued that in the event of the remote possibility under which competitive bidding is required by local/State law and the possibility of only one interested underwriter, the issuer would be better served by employing a non-dealer municipal advisor to arrange the competitive sale rather than relying on the potential "sole bidder" to serve as both financial advisor and sole bidder. It also argued that the non-dealer municipal advisor may recommend that the bid be rejected which could provide other legal options for the debt placement and that "sole bidders" have the opportunity to charge higher fees and impose higher yields.

However, commenters against the proposed amendments stated that they are unaware of: (i) Many circumstances under which a dealer financial advisor would be justified in resigning in order to bid on a competitive issuance transaction as underwriter; (ii) situations under which the financial advisor is not involved in the bidding process; or (iii) situations under which the issuer handles the bid process.[85] One commenter noted that issuers do not usually have the knowledge to properly handle the bid process internally. Another stated that allowing a financial advisor to resign to bid on a competitive transaction is "another illustration of allowing a loophole for the dealer that introduces a conflict of interest." One commenter argued, "The electronic bidding platforms are nothing more than vehicles to collect the bids" and that "it is an uncommon practice for the bid process to be handled internally by the issuer." Commenters also agreed that, in competitively bid transactions, the issuer should not have to hire a financial advisor to oversee the bid process in order to allow the original advisor to bid on the transaction. Finally, one of the commenters argued, "If the FA maintains its role throughout the transaction, there would be no need for a second FA." [86]

Some commenters stated that the proposed amendments to Rule G–23 are unnecessary because the competitive bid process is appropriate, fair and equal for all parties.[87] One commenter noted, "awards of deals in the competitive market are based solely on price and have nothing to do with any previous or existing relationships among issuers, advisors and dealers." [88] Another stated, "The bidding process for competitive sales encourages competition among the underwriters and introduces an arms' length basis for establishing the terms of the issue and the underwriting." [89] One bank argued that "at least direct purchases by financial advisors for their own portfolios should be allowed in competitively bid transactions where the issuer acknowledges the potential conflicts in writing and gives the financial advisor permission to submit a bid." [90]

Eleven commenters [91] in Kentucky and South Carolina submitted form letters opposing any changes to the rule. Some of these commenters noted that, for certain competitive bid issuances, a dealer financial advisor provided the only winning bid. "No other underwriting firm had bid to purchase these bonds and the Sale would have been unsuccessful" without the dealer financial advisor's participation. Other commenters noted that for certain of their competitive bid transactions, the winning bid provided by the dealer financial advisor was at a cost significantly lower than the next closest bid.

Some commenters stated that the negative impact of a failed bid in a competitive bid transaction can be prevented by allowing the financial advisor to bid on the transaction.[92] One commenter cited the "dramatic effect failed bids" had on the marketplace in the last few years and suggested that an exception to the prohibition for competitive bid transactions would avoid, "exacerbating the risk of failed bids that might otherwise occur." And further suggested that a financial advisor "* * * should not conduct an auction in a competitively bid transaction and participate as a bidding underwriter on the same issue." [93] One commenter stated that it has not had a failed bid transaction [94] and others stated that they have seen transactions in which no bid was placed or the dealer provided the only bid.[95] Another commenter argued that when a failed bid occurs "it is either a function of very unusual and difficult market conditions or an issue that likely should have been sold on a negotiated basis to begin with (perhaps the issue was required to be sold competitively as required by state law)." While another stated, "When we are hired as municipal advisor we pledge to the issuer that, if permitted, we will submit a bid for their bonds,"

[83] *See* WM Financial Strategies/Ms. Howard Letter, *supra* note 29.

[84] *See* NAIPFA Letter, *supra* note 6.

[85] *See* Columbia Capital Letter, *supra* note 15; IBIC Letter, *supra* note 6; Munistat Letter, *supra* note 6; Springsted Letter, *supra* note 6; and Tamalpais Letter, *supra* note 45.

[86] *See* Fiscal Advisors Letter, *supra* note 26; IBIC Letter, *supra* note 6; Lewis Young Letter, *supra* note 10; Munistat Letter, *supra* note 6; Public FA Letter, *supra* note 26; Springsted Letter, *supra* note 6; and Tamalpais Letter, *supra* note 45.

[87] *See* D.A. Davidson Letter, *supra* note 16; Eastern Bank Letter, *supra* note 19; and Hilliard Letter, *supra* note 16.

[88] *See* SIFMA Letter, *supra* note 17.

[89] *See* BDA Letter, *supra* note 16.

[90] *See* Zions Letter, *supra* note 78.

[91] *See* Barren County (Kentucky) Schools, Letter from Dr. Jerry Ralston, Superintendent dated September 15, 2010 ("Barren County Letter"); Boyd County (Kentucky) Public Schools, Letter from Donald Fleu, Finance Director/Treasurer dated September 15, 2010 ("Boyd County Letter"); Crittenden County (Kentucky) Schools, Letter from Brent Highfil, Finance Director dated September 15, 2010 ("Crittenden County Letter"); Dayton (Kentucky) Independent Schools, Letter from Gary Rye, Superintendent dated September 14, 2010 ("Dayton, Kentucky Letter"); East Bernstadt (Kentucky) Independent School, Letter from Homer Radford, Superintendent dated September 15, 2010 ("East Bernstadt Letter"); Elliott County (Kentucky) Board of Education, Letter from John Williams, Superintendent dated September 15, 2010 ("Elliott County Letter"); Greenup County (Kentucky) Schools, Letter from Scott P. Burchett, Finance Director/Treasurer dated September 17, 2010 ("Greenup County Letter"); Kenton County (Kentucky) Board of Education, Letter from Kelley Gamble, Finance Director dated September 15, 2010 ("Kenton County Letter"); Kentucky Interlocal School Transportation Association, Letter from Jack Moreland, President dated September 27, 2010 ("KISTA Letter"); Pike County (Kentucky) Schools, Letter from Nancy Ratliff, Finance Director dated September 15, 2010 ("Pike County Letter"); and South Carolina Association of Governmental Organizations, Letter from Brantley D. Thomas III, Chairman of the Board of Directors dated September 15, 2010 ("SCAGO Letter"). The letters were an exhibit to the RSA Letter, *supra* note 49.

[92] *See* BDA Letter, *supra* note 16 and Eastern Bank Letter, *supra* note 19.

[93] *See* SIFMA Letter, *supra* note 17.

[94] *See* RSA Letter, *supra* note 49.

[95] *See* DeWaay Financial Network, Letter from Mark Detter, Vice President dated September 24, 2010 ("DeWaay Letter") and Stone & Youngberg Letter, *supra* note 49 (on a non-rated transaction in a state where competitive bidding is compulsory).

which guarantees that a failed bid will not occur.[96]

Some commenters noted that existing market practice makes a notice of the competitive bid available five to seven days prior to the sale and that such notice would be a good rule of practice to allow bidders to review information, meet any internal processes and conduct any due diligence that they require.[97] One commenter also noted that five days advance notice is adequate and is "about the time of forward focus for underwriters. Anything longer will not be beneficial." [98] Other commenters stated that a five to ten day notice requirement would be helpful with competitive bid transactions.[99]

Commenters did not recognize situations in which the financial advisor would have to resign in order to submit a bid to underwrite a competitive bid transaction, especially because of the wide use of the electronic bidding process.[100] One of the commenters noted, "Nearly all competitive sales in our markets utilize a third party electronic platform to receive the bids," which precludes a financial advisor from manipulating the results and provides assistance with eliminating concerns regarding such practice. Another stated, "As financial advisor we facilitate the setting up of the bid process but the access" is handled by the issuer. One of the commenters requested that the MSRB consider modifications to the proposed amendments that would allow a financial advisory firm to bid on a competitive bond issuance through an "* * * independent electronic bidding system (*e.g.,* PARITY) in which the financial advisory firm does not have access to bid information." [101]

One commenter stated, "there are some situations where a financial advisor does not conduct the bid process for an issuer, but this is typically in the case of very large and very sophisticated issuers. In most cases issuers are ill-equipped to manage the bidding process, and would be negatively impacted if they attempted to do so." [102] Another commenter stated, in general, as financial advisor they do not conduct the bid process but they would assist the issuer in evaluating bids that issuers receive in a sealed bid process and suggested that it would be good practice to require that any dealer financial advisor that is bidding on a competitive sale for an issuer be required to submit its bid electronically through a third party independent platform.[103] Another noted, "Electronic bidding platforms are a viable option if those services are readily available to an issuer at a cost that is not prohibitive." [104]

Finally, other commenters argued that any proposed changes to Rule G–23 should apply to negotiated sales only and not to competitive sales and that the financial advisor should not be permitted to serve as underwriter on a negotiated transaction unless "the issuer is afforded the opportunity to hire an independent financial advisor to monitor the FA's structuring and the underwriter's pricing of the negotiated issue." Another argued that they could cite many examples in which the flexibility of a negotiated refunding has allowed issuers to generate savings that would have been missed or reduced by selling at competitive sale.[105]

MSRB Response. The MSRB does not believe that the use of electronic bidding platforms mitigates the conflict of interest posed by a dealer financial advisor's switching to an underwriter role, in part, because such platforms are not necessarily available to all issuers. Further, the MSRB does not believe that requiring additional advance notice of a competitive sale would provide adequate protections against conflicts of interest. As stated by a non-dealer financial advisor, "a financial advisor may also control or influence the credit enhancement and ratings process. Whether to apply for insurance and/or a rating, which ratings service to use and structural considerations like reserve or coverage requirements can all impact the outcome of a competitive sale." [106] The MSRB believes that involvement in this process provides a dealer financial advisor with information that can provide an unfair advantage when such dealer participates in a competitive bid transaction.

Effective Date/Transitional Rule

Some commenters noted that immediate implementation of the proposed amendments to prohibit a dealer financial advisor from serving as underwriter on an issue would cause disorder in the market because of existing contractual relationships. Commenters suggested various transitional time frames to allow market participants adequate time to comply with any changes.[107] One commenter suggested that "the MSRB delay its effective date or continue to apply current Rule G–23 to those financial advisory relationships that are in place at the time the modified Rule is enacted." [108] Another requested that "the MSRB include a transitional rule and time period to allow issuers, dealers and financial advisors time to review their current engagements and business practices and to take action to conform to, and comply with, any new rules." [109]

MSRB Response. The MSRB has requested that the proposed rule change be made effective for new issues for which the Time of Formal Award (as defined in Rule G–34(a)(ii)(C)(1)(a)) occurs more than six months after SEC approval to allow issuers of municipal securities time to finalize any outstanding transactions that might be affected by the proposed rule change.

Miscellaneous

Conduit Issues. One dealer financial advisor provided an example of services that it provides to its hospital clients. The commenter noted that such clients often pursue multiple Federal credit enhancement programs and must engage a financial advisor to assist and support them as they proceed through certain Federal processes. If at some point during the process, a client determines to pursue one Federal program over another, this commenter states that "the dealer engaged as financial advisor would be unable to serve as the client's underwriter." The commenter also suggests this is detrimental to the client because of "unnecessary project delays" and may lead the client to "select an underwriter inexperienced in structuring and issuing" certain types of financing structures.[110]

Another commenter requested a specific exemption for "corporate (not

[96] *See* Piper Letter, *supra* note 17 and Hilliard Letter, *supra* note 16.

[97] *See* D.A. Davidson Letter, *supra* note 16; Eastern Bank Letter, *supra* note 19; Piper Letter, *supra* note 17; and Stone & Youngberg Letter, *supra* note 49.

[98] *See* Hilliard Letter, *supra* note 16.

[99] *See* BDA Letter, *supra* note 16; Hilliard Letter, *supra* note 16; Piper Letter, *supra* note 17; SIFMA Letter, *supra* note 17; Smith, Murdaugh, Little & Bonham, L.L.P., Letter from W. James Murdaugh, Jr. dated September 29, 2010 ("Smith Letter"); Young & Brooks Letter, *supra* note 71; and Zions Letter, *supra* note 78.

[100] *See* D.A. Davidson Letter, *supra* note 16; Eastern Bank Letter, *supra* note 19; Hilliard Letter, *supra* note 16; Piper Letter, *supra* note 17; Stone & Youngberg Letter, *supra* note 49 and Zions Letter, *supra* note 78.

[101] *See* Allen Letter, *supra* note 71.

[102] *See* RSA Letter, *supra* note 49.

[103] *See* Piper Letter, *supra* note 17.

[104] *See* DeWaay Letter, *supra* note 105.

[105] *See* BDA Letter, *supra* note 16; MIS Letter, *supra* note 72; and Piper Letter, *supra* note 17.

[106] *See* Specialized Public Finance Letter, *supra* note 6.

[107] *See* BDA Letter, *supra* note 16; Baum Letter, *supra* note 16; and SIFMA Letter, *supra* note 17.

[108] *See* RBC Letter, *supra* note 17.

[109] *See* BDA Letter, *supra* note 16.

[110] *See* Red Capital Markets, LLC, Letter from Kevin J. Mainelli, Managing Director dated September 30, 2010 ("Red Capital Letter").

for profit and for profit) conduit borrowers" because of their expectation, "to be treated in the same manner as they are treated in the corporate advisory and underwriting context." [111]

MSRB Response. Rule G–23 does not preclude a dealer from serving as financial advisor to a conduit borrower on an issuance of municipal securities and the proposed amendments would not prohibit the dealer from providing underwriting services for such issue of the conduit issuer so long as it has not also become the financial advisor to the conduit issuer.

Principal Transactions by Financial Advisors. One commenter noted that an important issue to be considered is that financial advisors "should not be allowed to serve as a principal in any municipal transaction which includes a swap counter party, GIC provider or the reinvestment of proceeds." [112]

MSRB Response. The MSRB will take this comment under advisement when it considers the fiduciary duty of municipal advisors, as mandated by Dodd-Frank.

Bank Loans. One commenter noted that any amendments to the rule should prohibit the activities of financial advisors, dealer banks and affiliated bank portfolios from doing indirectly what they are prohibited from doing directly. Another noted that the MSRB should not adopt any amendments that will prevent a national bank that provides financial advisory services to municipalities from purchasing municipal securities from its municipal clients.[113]

MSRB Response. The MSRB notes that a bank's purchase of an issuer client's municipal securities is covered by Rule G–23. However, the proposed amendments would not preclude true loans that are not municipal securities under the Act made by banks to municipal issuers.

Competitiveness. One commenter argued, "It has been difficult for a broker dealer to compete when a non regulated competitor is able to buy business rather than earn it. But now proposed amendments to G–23 seem to be a trade off, further placing broker dealers in a non competitive situation." Another stated that the proposed amendments are anti-competitive and potentially harmful to municipalities on their new issues. Finally, another argued, "To adopt a rule change that narrows the free choice of state and local governments, even if with the intent to protect their interest, would appear to be inconsistent with fundamental principles of federalism." [114]

MSRB Response. Rule G–23 was adopted as part of the MSRB's "fair practice" rules [115] with the intent to establish standards of ethical conduct for dealer financial advisors. The Board has long noted that a dealer financial advisor acts in a "fiduciary capacity" as agent for a governmental unit. The role and interests of the dealer financial advisor are "significantly different" from the role and interests of a dealer acting as an underwriter for the same governmental unit. Often, when a dealer financial advisor switches roles to underwrite a transaction, the issuer does not fully understand the implications of the ending of the financial advisory relationship with the issuer (which ends the dealer's fiduciary obligation to the issuer) and the arm's length relationship that is necessary due to the dealer financial advisor's becoming the underwriter on the transaction. Further, under Dodd-Frank, the Board will be considering the adoption of fair practice rules applicable to non-dealer financial advisors and other municipal advisors, thereby promoting a more equalized regulatory burden on both dealers and municipal advisors. On balance, dealer financial advisors will not be placed at a competitive disadvantage with non-dealer financial advisors as a result of the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–MSRB–2011–03 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–MSRB–2011–03. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the MSRB's offices. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MSRB–2011–03 and should be submitted on or before March 21, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[116]

Cathy H. Ahn,

Deputy Secretary.

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[111] *See* SIFMA Letter, *supra* note 17; *see also* BMO Letter, *supra* note 19.

[112] *See* FirstSouthwest/Mr. Feinberg Letter, *supra* note 74.

[113] *See* Baum Letter, *supra* note 16 and Zions Letter, *supra* note 78.

[114] *See* Baird Letter, *supra* note 17; Fulbright Letter, *supra* note 19; and Hilliard Letter, *supra* note 16.

[115] *See* Exchange Act Rel. No. 13987 (September 22, 1977).

[116] 17 CFR 200.30–3(a)(12).