SIFMA
Securities Industry and Financial Markets Association

September 30, 2010

Leslie Carey, Associate General Counsel
Ronald W. Smith, Senior Legal Associate
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, Virginia 22314

Re: MSRB Notice 2010-27, Request for Comment on Rule G-23 on the Underwriting Activities of Financial Advisors

Dear Ms. Carey and Mr. Smith:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to provide the Municipal Securities Rulemaking Board (the "MSRB") with comments relating to Notice 2010-27, Request for Comment on Rule G-23 on the Underwriting Activities of Financial Advisors (the "Notice").

SIFMA continues to believe that Rule G-23 represents a comprehensive and balanced approach to potential conflicts of interest, which has a long and successful history of application in the marketplace. While we support the MSRB's review of its rules to ensure that the concerns of the marketplace are appropriately addressed, we do not see a need for the proposed changes in Rule G-23 at this time, particularly with the advent of the newly mandated

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[1] SIFMA brings together the shared interests of more than 600 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington, D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

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fiduciary standard for municipal advisors.[2] Moreover, the proposed changes to Rule G-23 would have adverse effects on issuers and would have the potential to disrupt certain areas of the market for municipal securities.

I. The Proposed Changes to Rule G-23 are Unnecessary and Would Be Detrimental to Issuers in the Municipal Securities Market

In adopting Rule G-23, the MSRB recognized the importance of maintaining issuer choice and flexibility.[3] The current Rule allows a dealer who has acted as financial advisor on an issue to seek, after thorough disclosures to the issuer and with the issuer's consent, to act as underwriter for such issue. The current Rule appropriately addresses the potential conflict of interest in this circumstance by allowing the issuer to make an informed decision.

The proposed changes to Rule G-23 (the "Proposed Rule") would completely proscribe this practice and remove the issuer's choice entirely. The Proposed Rule would limit issuer flexibility and could lead to market disruption for certain issuers. It would disproportionately affect small issuers and small issues, where there are frequently a limited number of potential underwriters. By eliminating a potential underwriter from the playing field, the Proposed Rule would decrease competition and likely increase costs for smaller issuers and issues. In addition, the Proposed Rule could result in market disruption through failed bids on offerings by small or infrequent issuers.

The MSRB has a long history of regular and thoughtful review of the matters addressed by the Proposed Rule. Since its adoption, the MSRB has consistently found that the purpose and intent of the Rule can be accomplished without restricting issuer flexibility. When Rule G-23 was revisited in the late 1990s in the context of a financial advisor serving as remarketing agent, the amendments addressed the issue of potential conflicts appropriately and effectively by requiring disclosures to issuers and their consent, rather than seeking to limit issuer choice.[4] Most recently, the MSRB requested comments on the Rule to ensure that potential conflicts were appropriately addressed, and again, the MSRB determined that the regulatory scheme was effective in accomplishing its intended purposes.[5]

It is relatively rare that the provisions of G-23(d) are relied upon by dealers. In these cases, however, if dealers were forced to choose between advising issuers and underwriting issues, issuers would be left with fewer options. In the case of less marketable issues, this could

[2] Dodd-Frank Wall Street Reform and Consumer Protection Act §975 (2010).
[3] MSRB Notice 1977-12.
[4] MSRB Notice 1997-16.
[5] MSRB Notice 2005-57.

represent a serious hardship—resulting in a lack of viable funding sources and/or increased cost of funds. For example, of competitive transactions under $10 million, almost 42% came to market with three or fewer bidders. For competitive transactions between $10 and 30 million, that figure drops to 28%, and for transactions over $30 million, only 12% had three or fewer bidders. [6] Clearly, regulation that leads to fewer bidders would have a significant adverse effect on smaller issues and issuers, particularly in times of economic stress.

We are also unaware of any history of abuse that the Proposed Rule is designed to prevent. In light of this and the Rule's relatively rare use, would not the harm caused by the Proposed Rule be far worse than any actual benefits? This appears to be a case where the cure may be worse than the disease. With the new fiduciary standard for municipal advisors, issuers and enforcement divisions of regulators have a new and powerful tool to combat abuse by municipal advisors. The additional prohibitions of the Proposed Rule are simply unnecessary and not worth the risk of adverse market consequences.

II. Responses to the Enumerated 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?*

   We do not believe there is any demonstrated need for a "cooling off" period following the provision of underwriting services, as there are no potentially cognizable conflicts once the underwriter's role has ended. To impose a "cooling off" period would serve only to reduce issuer choice and decrease competition, which can lead to increased costs for issuers.

   We note that the proposed changes to Rule G-23(e) would preclude a dealer from acting as remarketing agent for one year after the termination of the advisory relationship. Although we disagree with the proposed changes generally, we suggest that the one year period is longer than necessary. As stated above, we believe that the restrictions should be as narrowly tailored as possible so as to prevent unnecessary disruption in the marketplace. Thus, if the general prohibition is adopted we suggest that the time period in Rule G-23(e) be reduced to three months.

[6] Ipreo data for all competitive bond deals for 2000-August 2010 excluding certain note deals during the 2000-2005 period and certain deals for which no advance notice of sale was printed in a national publication. Over this period, there were at least 2,637 competitive issues in which only one bidder participated, and there were at least 13,024 competitive issues in which only two to three bidders participated.

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 advisors to the issuer, should there be an exception from 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?*

We urge the MSRB to exempt competitively offered transactions altogether from the Proposed Rule. The potential for abuse in the competitive context is dramatically different and the historical basis for this distinction remains relevant. 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. Conflict of interest issues simply do not arise in this context. Although some have suggested that a dealer serving as advisor on a competitive transaction has an unfair advantage over other potential bidders on the transaction because the dealer-advisor would be able to recommend to the issuer a deal structure that would give the dealer-advisor benefits over competing bidders, the new federal fiduciary standard for municipal advisors mandates that all advisors, including dealers serving as advisors, put the interests of issuers first in rendering advice. Recommending a financing structure because it may advantage the dealer-advisor would be in violation of the fiduciary duty of such dealer-advisor.

In the last few years, we have witnessed the dramatic effect failed bids can have on the marketplace. By retaining the competitive transactions exception to the general prohibition of the Proposed Rule, we can avoid exacerbating the risk of failed bids that might otherwise occur. SIFMA believes that it would be ill-advised to do otherwise, as the Rule is sufficient to safeguard issuers, particularly in light of the new municipal advisor fiduciary standard.

We concur that additional prior notice of competitively bid transactions could be helpful in encouraging bid participation, and suggest that five business days would be sufficient for these purposes. Again, our position is that competitively offered transactions should be exempted altogether from the Proposed Rule.

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?*

Small and infrequent issuers would be disproportionately adversely affected by the Proposed Rule. These issuers face marketing challenges under the very best of circumstances. The Proposed Rule would cause such issuers to face reduced choice and competition as well as the inevitably higher cost of funds that would result. In times of credit uncertainty and market upheaval, these additional effects could prove devastating for such issuers.

In the event the Proposed Rule is adopted, we propose in the alternative that small offerings under $10 million in aggregate principal amount be exempt from the prohibitions of Rule G-23(d). Such offerings represented only 2.5% of all new issue volume (based on the total dollar amount) for the last ten years.[7] Given the adverse effect on smaller issues and issuers described above, we believe such an exemption would help ensure that such issues would not be subject to reduced market access and higher borrowing costs.

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?*

We believe that the participation of dealers and advisors should be viewed on an issue by issue basis. The differences between issues of the same issuer can be vast and are appropriately considered separately. Moreover, very large issuers frequently have a number of transactions that are pursued separately by different departments or divisions, each of whom may seek advice from dealers who may otherwise be underwriter participants on an unrelated issue. Barring dealers from participating in different capacities on different issues would clearly limit the available options for these issuers. By limiting the number of syndicate participants, such a restriction could adversely affect issuers' ability to efficiently market their securities. Accordingly, we do not believe that such a restriction would be useful or appropriate.

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[7] *Id*.

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 new issue transaction as an underwriter? Is there ever a time when a 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?*

   We believe that a financial advisor should not conduct an auction in a competitively bid transaction and participate as a bidding underwriter on the same issue, and would support this specific prohibition. In the event a financial advisor resigns to participate in a bid, however, issuers have a number of alternatives by which they can manage the auction process. It is not uncommon for the bid process to be handled internally by certain issuers, and it is common for issuers to utilize third party electronic platforms for the bidding process. In addition, issuers could utilize the services of another financial advisor if they so choose.

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?*

   The exception in Proposed Rule G-23(d)(iii) is already quite narrowly drawn and should not be further limited as suggested above. As proposed, this paragraph is important in that it applies the distinction that issues should be viewed separately, and not lumped in with all of the issues of a particular issuer. We believe that the exception found in the second sentence of such paragraph will help ensure an orderly secondary market for municipal securities and that the proviso thereto is more than sufficient to ensure compliance with the spirit of the Rule.

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?*

   Please see our response to Question 5 above.

In addition, we note two other areas of concern in connection with the Proposed Rule: First, we believe that to the extent the Proposed Rule is adopted, there should be a specific exemption for corporate (not for profit and for profit) conduit borrowers. These corporate borrowers expect to be treated in the same manner as they are treated in the corporate advisory and underwriting context, where there exist no corresponding limitations with respect to advisors and underwriters. Moreover, the same paternalistic concerns regarding certain municipal issuers are not applicable or appropriate in this context. Accordingly, we suggest that all corporate conduit borrowers be exempt from the application of the Proposed Rule.

Second, to the extent the Proposed Rule is adopted, we suggest that the MSRB continue to apply current Rule G-23 to those financial advisory relationships that are in place at the time the Proposed Rule is adopted. In essence, this would allow for the application of the Proposed Rule to be phased in over time.

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We wish to thank the MSRB and its staff for their work in developing the Proposed Rule and for this opportunity to comment on it. We would be pleased to discuss any of these comments in greater detail, or to provide any other assistance that would help facilitate your review of the Proposed Rule. If you have any questions, please do not hesitate to contact the undersigned at (212) 313-1130, or via email at lnorwood@sifma.org.

Very truly yours,

Leslie M. Norwood

cc: ***Securities Industry and Financial Markets Association***
Municipal Executive Committee
Municipal Legal Advisory Committee
Municipal Syndicate & Trading Committee
Regional Dealers Fixed Income Committee