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January 10, 2006

Mr. Jonathan G. Katz  
Secretary  
Securities and Exchange Commission  
Station Place  
100 F Street, NE  
Washington, DC 20549-9303

RE: File Number SR-MSRB-2005-11: Comments to  
Proposed Interpretation of the Definition of Solicitation  
under MSRB Rules G-37 and G-38

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Dear Mr. Katz:

The Bond Market Association ("Association")<sup>1</sup> appreciates this opportunity to comment on the proposed interpretations, which the Municipal Securities Rulemaking Board ("MSRB") submitted to the Securities and Exchange Commission ("SEC") on December 7, 2005.<sup>2</sup> In particular, the proposal provides an interpretation regarding the definition of "solicitation" under MSRB Rules G-37 and G-38. This interpretation, however, conflicts with the MSRB's prior interpretations of this term. Thus, we request that those prior interpretations be formally withdrawn. Alternatively, the proposed interpretation should make clear that it overrules prior interpretations on this subject.

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<sup>1</sup> The Association is the trade association representing securities firms and banks that underwrite, trade and sell debt securities, both domestically and internationally. More information about the Association is available on its website at <http://www.bondmarkets.com>.

<sup>2</sup> 70 Fed. Reg. 75514 (December 20, 2005).



### **The Proposed Interpretation**

Rule G-38 prohibits a broker-dealer from paying any non-affiliated person (i.e., one who is neither an employee of the broker-dealer or its affiliate nor licensed with the broker-dealer) for soliciting municipal securities business. Rule G-37 requires that to the extent that an affiliated person solicits municipal securities business, he or she must be treated as a municipal finance professional, subject to the ban on making covered political contributions. For purposes of both Rules, the term "solicitation" is defined as "a direct or indirect communication . . . with an issuer for the purpose of obtaining or retaining municipal securities business."<sup>3</sup>

The MSRB states in the proposed interpretation that:

the central element in determining whether a communication is a solicitation is whether the communication occurs with the purpose of obtaining or retaining municipal securities business.<sup>4</sup>

The MSRB explains that this is a fact-specific inquiry by stating that one must look to whether the communication in question is made "under circumstances reasonably calculated to obtain or retain municipal securities business."<sup>5</sup> The MSRB further states that one must look at the specific facts and circumstances.<sup>6</sup> For the remainder of this letter, we will refer to this standard as the Fact-Specific Purpose Standard.

In the proposed interpretation, the MSRB goes on to apply the above Standard to certain specific factual scenarios. For example, the MSRB states that a person solely providing professional services to the broker-dealer would not be deemed to be soliciting municipal securities business.<sup>7</sup>

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<sup>3</sup> Rule G-38 (b)(i).

<sup>4</sup> 70 Fed. Reg. at 75515 (emphasis added).

<sup>5</sup> Id.

<sup>6</sup> MSRB Notice 2005-59 (December 7, 2005).

<sup>7</sup> 70 Fed. Reg. at 75517.



### **The Standard in the Proposed Interpretation Conflicts with Prior Interpretations**

The Fact-Specific Purpose Standard set forth in the proposed interpretation conflicts with the MSRB's prior interpretations in that the prior interpretations imposed a broad, rigid, and formalistic standard rather than one which looks to the specific purpose of a communication based on the totality of the circumstances. For example, in a 1999 Question & Answer ("Q&A"), the MSRB opined that if two broker-dealers (Dealer A and Dealer B) are jointly seeking underwriting assignments and Dealer A eventually gets selected, then Dealer B would be considered to have solicited municipal securities business for Dealer A, and thus become a Consultant to Dealer A, even if Dealer A is paying Dealer B merely for assisting in the structuring of the transaction.<sup>8</sup>

This 1999 Q&A is contrary to the proposed interpretation in that it did not turn on the specific facts which demonstrate the purpose of the communication (such as the nature of the communication or the specific type of assistance that Dealer B is providing), but rather imposed a categorical analysis putting at risk all joint ventures. In contrast, an earlier draft of the recent proposed interpretation, the MSRB expressly stated that bona-fide joint venturers would not be deemed to be soliciting municipal securities business under the Fact-Specific Purpose Standard.<sup>9</sup> Moreover, given that the standard at the time did not look to the specific circumstances and purpose of the communication, the 1999 Q&A was based on the presumption that the provision of only certain types of professional services (*i.e.*, legal, accounting or engineering services) was exempt from Rule G-38.<sup>10</sup> The proposed interpretation makes clear that the provision of professional services would not qualify as a solicitation -- even those services not listed in the 1999 Q&A.<sup>11</sup>

Please note that the 1999 Q&A is only one of many Q&As issued by the MSRB under Rules G-37 and G-38 which apply a categorical standard rather than the Fact-Specific Purpose Standard set forth in the proposed interpretation.

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<sup>8</sup> MSRB, Rule G-38 Q&A (March 4, 1999).

<sup>9</sup> MSRB, Notice 2005-34 (June 8, 2005).

<sup>10</sup> MSRB, Rule G-38 Q&A (March 4, 1999).

<sup>11</sup> 70 Fed. Reg. at Footnote 13.



**Prior Interpretations as to What Constitutes Solicitation Should Be Withdrawn Or the Proposed Interpretation Should Clearly State that it Overrides Prior Interpretations**

Having conflicting interpretations on the books creates confusion and disparate results. For instance, we understand that the 1999 Q&A was based on a question raised by a broker-dealer regarding the common practice of establishing joint ventures with local financial institutions in Puerto Rico. In particular, the Government Development Bank ("GDB"), which is the main entity responsible for issuing municipal bonds on behalf of Puerto Rico and its authorities, has a long-standing practice of encouraging U.S. broker-dealers to team up with a local Puerto Rico financial institution and to come in jointly when seeking to be selected as an underwriter.

This is because the U.S. broker-dealer has the capability to widely distribute the bonds on a national scale while the Puerto Rico firm has the local expertise on structuring issues (such as interest rates) unique to Puerto Rico as a U.S. territory rather than a state. Under the categorical approach taken in the 1999 Q&A, this would be problematic; whereas under the Fact-Specific Purpose Standard, this would apparently be permissible. Indeed, the proposed interpretation suggests that a firm providing such technical expertise could be viewed as providing permissible professional services.<sup>12</sup> Having such conflicting interpretations is especially troubling in light of the August Rule G-38 amendment, which now means that making a mistake on this point leads to a violation of the prohibition on non-affiliated persons soliciting municipal securities business as opposed to a mere disclosure requirement.

Moreover, the Fact-Specific Purpose Standard is much better than the categorical approach taken in prior interpretations. Creating broad and seemingly artificial categories as to what constitutes a solicitation (such as joint ventures) does not account for the wide variety of transactions and the resulting bona-fide arrangements among firms that are necessary to deal with those transactions. Consequently, the categorical approach unduly restricts, or at the very least casts doubt over, these bona-fide and necessary arrangements. In contrast, the Fact-Specific Purpose Standard allows one to fine tune the analysis to account for these variations while at the same time getting at the heart of the matter -- whether the outside person is being used for the purpose of obtaining municipal securities business.

For the above reasons, we request that prior interpretations under Rules G-37 and G-38 regarding what constitutes solicitation of municipal securities business

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<sup>12</sup> Id., at 75517.

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be formally withdrawn. Alternatively, the proposed interpretation should make clear that it overrides prior interpretations on this subject.

If you have any questions or comments regarding this letter, please contact the undersigned at (646)637-9230 or via e-mail at [lnorwood@bondmarkets.com](mailto:lnorwood@bondmarkets.com).

Sincerely,

A handwritten signature in black ink, appearing to read "Leslie M. Norwood", written over a horizontal line.

Leslie M. Norwood  
Vice President and  
Assistant General Counsel

Mr. Jonathan G. Katz

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cc: ***Securities and Exchange Commission***

The Honorable Christopher Cox, Chairman  
The Honorable Paul S. Atkins, Commissioner  
The Honorable Roel C. Campos, Commissioner  
The Honorable Cynthia A. Glassman, Commissioner  
The Honorable Annette L. Nazareth, Commissioner  
Giovanni P. Prezioso, General Counsel, Office of the General Counsel  
Robert L.D. Colby, Acting Director, Division of Market Regulation  
Martha Mahan Haines, Chief, Office of Municipal Securities

***NASD Regulation, Inc.***

Malcolm P. Northam, Director, Fixed Income Securities Group  
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***Municipal Securities Rulemaking Board***

Christopher A. Taylor, Executive Director  
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***The Bond Market Association***

Executive Committee, Municipal Securities Division  
Legal Advisory Committee, Municipal Securities Division  
Policy Committee, Municipal Securities Division  
Syndicate & Trading Committee, Municipal Securities Division  
Rule G-37 Working Group, Municipal Securities Division  
Consultants Task Force, Municipal Securities Division  
Regional Advisory Committee