American Bankers Association
Building Success. Together.

Cristeena Naser
Senior Counsel
Center for Securities, Trust and Investments
202-663-5332
cnaser@aba.com

BY ELECTRONIC MAIL

February 25, 2011

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street
Alexandria, VA 22134

Re: Request for Comment on Pay to Play Rule for Municipal Advisors
MSRB Notice 2011-04, January 14, 2011

Dear Mr. Smith:

The American Bankers Association (ABA)[1] appreciates this opportunity to comment on the Municipal Securities Rulemaking Board (MSRB) proposal to establish "pay to play" and related rules affecting municipal advisors. The proposal would create a new Rule G-42 that would apply to "municipal advisors" as defined by the Securities and Exchange Commission (Commission) in rulemaking[2] pursuant to Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (DFA).[3] Section 975 establishes a system of dual registration with the Commission and the MSRB that will require covered municipal advisors to comply with rules of business conduct, ongoing education requirements, and a fiduciary duty to their municipal entity clients.

Proposed Rule G-42 generally would prohibit a municipal advisor from "engaging in advisory business" or soliciting third-party business for compensation from a municipal entity for two years after making a non-*de minimis* political contribution to certain municipal officials. In addition, the proposal would prohibit municipal advisors and "municipal advisor professionals" from soliciting or coordinating contributions to municipal officials or state or local political parties if engaged or seeking to be engaged in municipal advisory business with the municipal entity. Lastly, the proposal would require municipal advisors to disclose quarterly to the MSRB certain contributions and related information.

ABA supports efforts to ensure that political contributions do not influence the awarding of municipal financial contracts. However, the rule as proposed would impose obligations that are inconsistent with those established by the Commission, thereby creating needless confusion and adding burdens that outweigh the rule's benefits.

---

[1] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its 2 million employees. ABA's extensive resources enhance the success of the nation's banks and strengthen America's economy and communities. Learn more at www.aba.com.

[2] The Commission's proposed rule seeks to establish a registration system for municipal advisors that may capture banks providing traditional banking products and services to state and local governmental bodies, including deposit taking, cash management, lending, credit facilities, employee benefit, trust, securities processing and agency services, advisory services, and capital market services. ABA strongly opposes this expansive approach to the registration of municipal advisors. *See* ABA Letter to Commission (Feb. 22, 2010), *available at* http://www.sec.gov/comments/s7-45-10/s74510.shtml.

[3] Pub. L.111-203 (2010).

MSRB and Commission Rules on Political Contributions

ABA and its members support the adoption of measured and targeted efforts to address the use of political contributions to influence the awarding of municipal financial contracts, whether for underwriting or advisory contracts. Nonetheless, it is imperative that the MSRB coordinate its existing Rule G-37 and proposed Rule G-42 with the Commission's registered investment advisor pay to play Rule 206(4)-5 to achieve a uniform system of regulations governing political contributions across all affected municipal market participants. Otherwise, the MSRB and Commission will force market participants to adopt unnecessarily complex and burdensome compliance systems to avoid the draconian penalties for even inadvertent violations of the pay to play rules.

Most critically, the MSRB should adopt in Rule G-42 the thresholds for permissible political contributions established by the Commission in Rule 206(4)-5 and amend the Rule G-37 thresholds accordingly. The political contribution thresholds for Rule G-37 have not been amended since the rule's adoption in 1994. The Commission, which has most recently reviewed the current economic and political environment in the context of its deliberations on its adviser rule, determined that increased thresholds were warranted to account for inflation since 1994. Accordingly, the Commission in its adviser rule increased to $350 per election the threshold for permissible contributions to officials for whom a covered associate may vote – an increase of $100 over the MSRB's current threshold of $250. Furthermore, the Commission, acknowledging that many individuals have a legitimate interest in contributing to other campaigns, expanded the scope of the *de minimis* exception to allow contributions to officials for whom the covered associate may not vote.[4]

Accordingly, ABA strongly urges the MSRB to amend the definition of *de minimis* contributions in proposed Rule G-42 to parallel the thresholds under the SEC rule: $350 to an official, per election, for whom the covered associate was entitled to vote at the time of the contribution and $150 to any other official, per election.[5] Furthermore, the comparable thresholds in G-37 should be similarly and promptly amended. We recognize that there may be costs to the MSRB attendant to the systems changes necessary to achieve a uniform result. However, any such costs would pale in comparison to the enormous – and wholly unnecessary – costs and burdens that would be imposed on municipal market participants as a result of the MSRB and the Commission imposing two different pay to play regimes that are intended to accomplish exactly the same result.

Moreover, imposing two overlapping but inconsistent sets of rules on the same conduct would be inconsistent with the spirit of President Obama's January 18, 2011, Executive Order, Improving Regulation and Regulatory Review.[6] As stated in that Order –

> Our regulatory system … must identify and use the best, most innovative and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand.

The MSRB's proposed Rule G-42 and existing Rule G-37, if unchanged, would result in needless burden and inconsistencies. This situation is precisely what the Executive Order was intended to prevent.

---

[4] 75 Federal Register 41018, 41035 (July 14, 2010).
[5] 17 CFR 275.206(4)-5 (b)(1).
[6] Available at: http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order.

Overly Broad Recordkeeping and Reporting

Under proposed G-42, the MSRB would require municipal advisors to report and keep records not only on business that they have obtained with municipalities but also on business that was sought but never obtained. Such a broad reporting and recordkeeping obligation would be difficult and expensive to manage and would yield little benefit in return. The Commission in its final rule limited recordkeeping requirements to business obtained, because of concerns that expanded recordkeeping would be "unnecessarily intrusive to employees and burdensome on advisers."[7] The MSRB should do the same.

Overly Broad Prohibition on Receiving Compensation

ABA believes the scope of the MSRB proposal's prohibition on contributions is overly broad, burdensome, and not flexible enough to allow for inadvertent violations. We believe that the prohibition should only apply to the municipal advisor and those employees of the municipal advisor that are actually engaged in the solicitation or provision of municipal advisory business. Narrowing the scope of "municipal advisor professional" would more effectively tailor the regulation to the issue and avoid unnecessary burdens.

The need to apply a narrow scope is all the more compelling given the severe consequence of the two-year ban on receiving compensation. Sometimes it is difficult to unwind a business relationship with a municipality, especially if there is an investment in a fund that has a lock-up period. Furthermore, if the municipal advisor has a fiduciary duty to the client, it may not be able to sever the relationship in a timely manner due to its fiduciary duties of loyalty and care. In those cases, the municipal advisor may feel compelled to provide its services without compensation for some time before being able to hand off the business to another advisor that is not banned from receiving compensation. Thus, we strongly urge the MSRB to amend the rule to prohibit only compensation for new services provided, as Rule G-37 allows.

Look-Back Provision

The MSRB proposal would trigger a prohibition on compensation if an employee had made a contribution within two years of becoming a municipal advisor. This restriction would require municipal advisor employers to rely on the accurate disclosures of new hires and may preclude an employer from hiring an otherwise qualified candidate because of his or her *legal* and *legitimate* political contributions. We strongly urge the MSRB to conform its rule to the Commission's Rule 206(4)-5 which only requires employers to "look back" six months for newly designated "covered associates."

Conclusion

ABA appreciates this opportunity to comment on the proposal. We strongly urge the MSRB to consider regulations that are consistent with what the Commission has done in Rule 206(4)-5. If you wish to discuss the comments in this letter, please contact the undersigned.

Sincerely,

Cristeena G. Naser

[7] 75 Federal Register 41018, 41050 (July 14, 2010).