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Ernesto A. Lanza
Senior Associate General Counsel
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA 22314

Re: Draft Amendment to MSRB Rule G-38

Dear Mr. Lanza:

The ABA Securities Association ("ABASA")¹ is responding to the request of the Municipal Securities Rulemaking Board ("MSRB") for comments on its draft amendment to Rule G-38. The proposed amendment would repeal existing Rule G-38 relating to consultants and replace it with a requirement that paid solicitations of municipal securities business on behalf of a dealer be undertaken only by associated persons of that dealer.

The MSRB has taken this action because the significant increases in both the amount of compensation being paid to and the amount of political contributions given by these consultants have raised concerns that (1) disclosure may not be sufficient to ensure fair dealing by consultants and (2) that these activities may involve indirect violations of MSRB Rule G-37. An associated person that solicits municipal securities business on behalf of a dealer would become a municipal finance professional and thereby be subject to the MSRB's rules on political contributions and fair practices with respect to municipal securities activities undertaken for the benefit of the dealer.²

¹ ABASA is a separately chartered trade association and nonprofit affiliate of the American Bankers Association ("ABA") whose mission is to represent the interests of banks underwriting and dealing in securities, proprietary mutual funds and derivatives before Congress, federal and state governments, and the courts. The views in this letter are also endorsed by the ABA. ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership -- which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks -- makes ABA the largest banking trade association in the country.

² As is currently the case, payment is not a precondition to the applicability of MSRB Rule

Repeal of Rule G-38 Consultants

Under the proposed amendment, Rule G-38 would be replaced in its entirety by a requirement that dealers provide compensation for soliciting municipal securities business *only* to associated persons of the broker-dealer. The proposal would define an “associated person” as “any partner, officer, director or branch manager of the broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with the broker or dealer or any employee of the broker or dealer. . .”³

Since the Securities and Exchange Commission’s settlement agreement with Fifth Third Securities, bank-affiliated dealers have treated employees of their affiliated banks as associated persons because they are under common control with the dealer (at least theoretically, if not in fact). As a result, bank employees that solicit municipal securities business on behalf of their affiliated dealer are already subject to Rule G-37, whether or not there is any compensation for the solicitation. Accordingly, ABASA supports an amendment that would treat all solicitors in the same manner.

Definition of “Solicitation”

Under the proposal, “solicitation” occurs when there is both (1) a direct or indirect communication with an issuer, and (2) that communication is for the purpose of obtaining municipal securities business for a dealer. The proposal notes that a direct or indirect communication with an issuer through a third party could also be considered a solicitation under draft new Rule G-38.⁴ Specifically, the proposal asks whether a communication with a conduit borrower to hire a dealer as an underwriter for a private activity bond issue where the issuer ultimately must approve the underwriter for the issue be considered an indirect communication with the issuer.

ABASA is concerned that under the proposal, all communications with conduit borrowers may be seen as indirect “solicitations” of issuers. Therefore, ABASA seeks clarification that in the context of a conduit issuance in which the issuer is brought into the discussions only after the feasibility of tax-exempt financing is determined and the election of an underwriter has

G-37. Rather, under the proposal, a dealer could not compensate any party other than an associated person for solicitations to issuer officials.

³ Section 3(a)(18) of the Securities Exchange Act of 1934 (12 U.S.C. § 78c(a)(18)).

⁴ The MSRB further notes that the definition of municipal finance professional in existing Rule G-37(g)(iv) is not dependent upon the person to whom a solicitation to obtain business is made.

already been made, there is no indirect communication with the issuer that is intended to obtain municipal securities business for a dealer.

The following scenario is typical of the genesis and issuance of an industrial development bond or an industrial revenue bond in the commercial banking industry. In this scenario, it is not the conduit issuer who determines who will be its underwriter. Rather, the conduit borrower/banker/affiliated MFP bring to the conduit issuer a project (complete with underwriter) that may be financed by tax-exempt bonds. The same scenario would apply if the bonds were taxable, but nonetheless were issued through a conduit borrower.

Scenario

A borrower seeks financing for a potential expansion project that will involve the acquisition of hard assets (property, plant, fixtures and equipment) to be treated as capital expenditures.

First, the borrower talks to its relationship manager at its bank (“banker”) to find out the most economical way to finance the project. After some discussion, the bank and the borrower decide that financing using tax-exempt bond proceeds may be the method of choice. At this point, neither party knows whether the project will qualify for tax-exempt financing or what entity will be chosen to be the issuer.

Second, the banker contacts an MFP at the bank’s affiliated broker-dealer who is an expert in tax-exempt finance. The MFP will review the project to determine if it qualifies for tax-exempt financing. Eligible borrowers and projects could include without limitation:

- Non-profit organizations – 501(c)(3);
- “Small manufacturing” as defined in the Internal Revenue Code (“IRC”);
- Qualified multi-family housing; and
- Solid waste (handling/processing solid waste or effluents).

Third, all three parties (borrower, banker, MFP) discuss the project and financing to assess, among other things:

- The project’s qualification under the IRC;
- The project’s timing and financing schedule;
- Whether the project may be financed with a tax-exempt bond; and
- The borrower’s ability to qualify for any credit enhancement that would be required to secure the bond.

At the end of this process, the parties determine whether or not tax-exempt financing is feasible. *At this point, no contact has been made with any issuer. Indeed, the issuer has not yet been selected.*

Five, if the project qualifies, the MFP, who knows the capabilities of various issuers in the area, will review them to determine which is best suited for the project. For example, the amount of the issuance may exceed the permissible amounts for certain issuers; or, the project may not be within the scope of some issuers' authority.

Six, after the MFP selects an appropriate issuer, the borrower applies to the conduit issuer for preliminary approval or "inducement." Most conduit issuers will review the project to determine whether it meets public policy guidelines.

* * * * *

It is clear from the above scenario that the conduit issuer has no discretion regarding the selection of the underwriter. These communications between the conduit borrower, the banker and the MFP cannot constitute indirect communications with an issuer because the issuer is not identified until the project (complete with underwriter) is already formed. In this respect, it is more analogous to the situation cited in the proposal where the underwriter or its personnel contact the issuer about an underwriting for which it has already been chosen.

ABASA believes that without clarification, the proposed definition of "solicitation" could call into question the above types of contacts between the conduit borrower, its banker and MFP that are intended to determine the type of financing best suited to the borrower's needs. These types of contacts are both typical of and important for this marketplace. Accordingly, ABASA urges the MSRB to craft an amendment to ensure that these time-honored ways of doing business are not construed as being solicitations that could ultimately trigger the ban on underwriting under MSRB Rule G-37.

For the same reasons, ABASA believes that parties other than the issuer (such as financial advisors, bond counsel, conduit borrowers or other governmental borrowers) should *not* be explicitly listed in the definition of "solicitation" as persons to whom communications are directed.

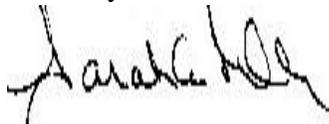
In a bank holding company, a banker may likely be an associated person of its affiliated broker-dealer, and such bankers have many occasions to discuss non-securities services performed for issuer representatives. ABASA believes such bankers should be free to inform issuers that affiliated broker-dealers have municipal securities capabilities and provide the relevant contact information without it being considered "solicitation."

Similarly, ABASA believes that in the scenario above, if the borrower was the issuer itself, the banker and that issuer should be able to discuss the pros and cons of different financing mechanisms without it being considered solicitation. However, once tax-exempt financing becomes the focus, the banker should be permitted to bring its MFP into the discussion and bow out without becoming a solicitor.

The banking industry's concern focuses largely on the ability of bankers to discuss financing options with clients without triggering MSRB Rule G-37; and, therefore, those bankers would likely have no other municipal securities responsibilities. Accordingly, ABASA strongly believes that the act of soliciting municipal securities business (without more) should *not* require qualification as a municipal securities representative.

ABASA representatives would be pleased to discuss any of these issues further. If you have any questions, please do not hesitate to contact Cris Naser at 202-663-5332 or cnaser@aba.com.

Sincerely,

A handwritten signature in black ink, appearing to read "Sarah Miller". The signature is fluid and cursive, with the first name "Sarah" being more prominent than the last name "Miller".

Sarah Miller