Sarah A. Miller
General Counsel

December 17, 2004

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

Re: Revised Draft Amendments to Rule G-38
Solicitation of Municipal Securities Business

Dear Mr. Lanza:

The ABA Securities Association ("ABASA")[1] is responding to the request of the Municipal Securities Rulemaking Board ("MSRB") for comments on revised draft amendments to MSRB Rule G-38—requirements for independent solicitors.

The revised draft amendments represent a further step by the MSRB in response to its concerns that the significant increases in both the amount of compensation being paid to and the amount of political contributions given by these consultants could potentially present challenges to maintaining the integrity of the municipal securities market. Specifically the MSRB believes that (1) the current disclosure scheme may not be sufficient to ensure fair dealing by consultants and (2) that these activities may involve indirect violations of MSRB Rule G-37.

Previously on April 5, 2004, the MSRB published a notice requesting comments on draft amendments replacing the existing language of Rule G-38 relating to consultants with a provision limiting paid solicitations of municipal securities business on behalf of a dealer solely to persons associated with the dealer. 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.

The revised draft amendments to Rule G-38 would, among other things:

[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.

- Define solicitation as a direct or indirect communication with an issuer for the purpose of obtaining or retaining municipal securities business;

- Prohibit a dealer from making payments for solicitation of municipal securities business to any person who is not an associated person of the dealer;

- Require any paid solicitor to be subject to the MSRB's rules on fair dealing, gifts and gratuities, supervision and political contributions with respect to his or her solicitation activities on behalf of the dealer;

- Require a dealer to enter into a written solicitation agreement with an independent solicitor including, among other things:

    - Name, business address, role (including state or geographic area in which the independent solicitor is working for the dealer) and compensation arrangement; and

    - A requirement that the independent solicitor provide to the dealer a list of all contributions to issuer officials and payments to state or local political parties made by the independent solicitor, any solicitor personnel and any political action committee ("PAC") controlled by the independent solicitor or solicitor personnel.

Although ABASA supports the goals of the proposal, as discussed more fully below, the proposal would significantly add to the regulatory burden and disrupt established compensation and incentive programs for banks and bank holding companies affiliated with municipal securities dealers—all without any measurable progress toward the MSRB's goals. Moreover, the MSRB's determination that communications with conduit borrowers constitutes solicitation reflects a misunderstanding of the marketplace.

Discussion

1. "Independent Solicitor as Individual or Entity

The revised proposal incorporates the definition of "solicitation" of the original draft amendments—any direct or indirect communication with an issuer for the purpose of obtaining or retaining municipal securities business—and, for the first time, addresses "independent solicitors" as individuals or entities. The proposal appears to require that if employees of a bank solicit municipal securities business on behalf of their affiliated dealer, the bank itself would be required to enter into a solicitation agreement with the dealer. Such a reading would have significant negative implications for banking organizations.

We understand from conversations with MSRB staff that this language in the proposal was intended to clarify that dealers have the *option* of entering into agreements with either individuals or companies. Accordingly, ABASA requests clarification in any final proposal that a dealer may contract for solicitation activities with individuals employed by a bank without implicating the bank itself as an independent solicitor.

2. "Inform and Refer" Concept

The revised proposal provides further guidance on the activities that constitute "solicitation" for purposes of Rules G-37 and G-38. Under the proposal, an employee of an affiliate of a dealer could engage in limited communications with issuers affirming the dealer's public finance

capabilities and arranging the dealer to contact the issuer without that activity rising to the level of "solicitation." This concept would formalize the guidance that banking organizations have given to their employees since the Securities and Exchange Commission's ("Commission") agreement with Fifth Third Securities in 2002.

In that case, the Commission determined that individuals under common control with municipal securities dealers are associated persons of the dealer with the result that bank personnel engaged in soliciting on behalf of affiliated dealers could no longer qualify as consultants under Rule G-38. Therefore, bank employees that made political contributions to issuer officials had to avoid "soliciting" those officials so they did not trigger the two-year ban on business under Rule G-37.

ABASA appreciates the clarification of the "inform and refer" concept. As the MSRB is well aware, bank organizations engage in a wide array of financial activities that involve contacts with issuers of municipal securities. These include deposits of public funds, cash management, payroll processing, accounts receivable processing and lending, to name but a few. Thus, bankers often find themselves in circumstances with issuer officials in which public finance issues are raised. Walking a fine line to avoid soliciting has been of particular concern in smaller banking organizations because the top officers of a bank are integrally involved in the affairs of their community, both business and political.

If the guidance were limited to excluding from solicitation such "inform and refer" activities, ABASA would not object. However, the proposal goes on to state that "[I]f an associated person receives compensation such as a finder's fee or referral fee for [referring business to the dealer] . . . the associated person generally would be viewed as having solicited the business." Under MSRB interpretations, "compensation" or "payment" is defined as anything of value and thus would include referral fees or credits in a company's bonus plan. This extension of the "inform and refer" concept would significantly disrupt long-established bank incentive programs and, importantly, would not alleviate the MSRB's concerns about large payments to consultants.

Because of their fragmented structure, banking organizations rely on cross-selling by all of their employees to grow the organizations' business and maintain the profitability of the banks and their affiliates. Indeed, the Gramm-Leach-Bliley Act ("GLBA") was enacted in 1999 to promote integrated financial services—one-stop shopping—in a single organization through functional regulation of bank affiliates. To incent such cross-selling, banking organizations have established elaborate and varied referral and bonus programs.

For referrals of securities business, bank employees may receive payments, which may be in the form of cash or credits, for referring business to affiliates. Because dealers may not make payments to unregistered individuals, such payments generally flow to the bank from the dealer. The bank, in turn, credits the individual employee, typically in the form of a cash referral fee or as a component of a bonus plan.[2] In the case of a bonus plan, there is very little nexus between a yearly bonus and any given securities referral. Bonus plans typically involve numerous components that may cover the range of businesses in which the bank participates. Moreover, the determination of any particular bonus is very subjective because management retains discretion as to how to allocate the funds from the organization's bonus pool.

[2] Because each organization's incentive plan is unique, no one simple formula exists. A plan may encompass a branch, a department, a line-of-business, a region or entire entity. Further, it is not uncommon to find a variety of performance objectives one of which could be expressed in terms of asset gathering, i.e., new business brought into the unit or referred to other units or affiliates, at a single institution.

If the MSRB retains this element of the proposal—payment for "inform and refer" situations results in solicitation—banking organizations would be required to designate as independent solicitors *hundreds* of employees involved to any degree in public finance to avoid violating Rule G-38 as proposed. The types of employees that would be covered by this provision include relationship managers, personal trustees, corporate trustees, custodians and more. Estimates at individual banks run from 100 employees to 350 employees. This would be an enormous reporting and recordkeeping burden on banking organizations because of the wide range of cross-selling opportunities throughout the organization as a whole that are tied to incentive plans. Most importantly, however, over-designating such bank personnel as independent solicitors would do *nothing* to alleviate the MSRB's concerns because these referral fees or credits are quite small in comparison to the consultant fees cited by the Board in the both the original and revised amendments.

These same securities-related referral fees are currently the subject of a Commission rulemaking under Title II of GLBA. If the MSRB believes that it must retain the provision in the revised proposal that receiving referral fees for "inform and refer" situations constitutes solicitation, ABASA strongly urges the MSRB to exempt from that provision any referral fees permitted under GLBA. In this way, banking organizations would not be burdened with the costs involved in over-designating bank employees, and the MSRB (and issuers) would not be inundated with essentially meaningless disclosures.

3. Communications with Conduit Borrowers

In its earlier proposal, the MSRB sought comment on whether a communication with a conduit borrower to hire a dealer as an underwriter for a private activity bond issue should be considered an indirect communication with the issuer. In the revised amendments, the MSRB has rejected the notion that the issuer may *not* actually determine the underwriter, and has offered the industry an unworkable compromise. ABASA strongly disagrees both with this position and with the compromise.

First, ABASA believes the agency has misconstrued the process of putting together a tax-exempt project. In its response to the MSRB's earlier proposal, ABASA presented a typical scenario (incorporated herein by reference) in which the conduit borrower, the banker and the banker's affiliated municipal finance professional ("MFP") after determining that a project involving tax-exempt bonds is feasible, presents the complete package (including the underwriter) to the selected conduit issuer.[3] The issuer either accepts or rejects the complete package. Generally, the issuer's principal role is to determine whether the project meets the public purpose of the issuer. Typically, the issuer expresses no opinion on the transaction participants.

Yet, in the revised draft amendments, the MSRB states that "[I]n virtually all cases, the conduit issuer will maintain ultimate power to control which dealer underwrites a conduit issue since the conduit issuer has discretion to withhold its agreement to issue the securities through any particular dealer." ABASA believes that in the scenario described, if the underwriter were to be rejected, at best, the entire project would likely have to be renegotiated; at worst**,** the project would not go forward.

[3] It is only once the feasibility of using tax-exempt bonds has been determined that 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.)

Second, the MSRB states that "some conduit issuers may set minimum standards that dealers must meet to qualify to underwrite a conduit issue, and other conduit issuers may have a slate of dealers selected by the conduit issuer from which the conduit borrower chooses the underwriter for its issue." ABASA believes that when an issuer establishes standards or compiles a slate of underwriters, it is merely selecting a subset of the universe of underwriters. We strongly believe that such subsets are not in any way the equivalent of an issuer influencing the conduit borrower to choose a particular underwriter because of political contributions made on behalf of the underwriter.

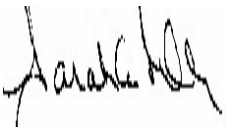
Finally, the MSRB has asserted that a communication with a conduit borrower would not be deemed to be solicitation if: (1) the conduit issuer historically defers to the obligor's selection of underwriters; and (2) the conduit issuer has not, in fact, influenced the conduit borrower's selection of the underwriter. This is a compromise in name only because a dealer would never be able to make such showings. Should the Board determine to go forward on this point, it should give clear guidance on how many deals does it take and what factors must be present to demonstrate that an issuer "historically" defers to the conduit borrower. What proof would demonstrate that there could be no reasonable "nexus" between political contributions and a selection?

Conclusion

In conclusion, while ABASA supports the goal of maintaining the integrity of the municipal securities market, the proposal fails to achieve that goal. It would impose a significant regulatory burden on banks affiliated with municipal securities dealers and disrupt long-established incentive and bonus programs without addressing the MSRB's concerns about the potential distortion of the market as a result of high fees being paid to consultants. Moreover, the MSRB's determination that discussions with conduit borrowers constitute "solicitation" does not reflect current market practices and the compromise offered by the agency is unworkable.

ABASA would be happy to discuss these issues with MSRB staff. In the meantime, if you have any questions, please contact Cris Naser at 202-663-5332.

Sincerely,



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