



500 New Jersey Avenue NW  
6<sup>th</sup> Floor  
Washington DC 20001

September 30, 2010

**VIA ELECTRONIC MAIL**

Ms. Leslie Carey  
Associate General Counsel  
Municipal Securities Rulemaking Board  
1900 Duke Street Suite 600  
Alexandria, VA 22314

**RE: Municipal Securities Rulemaking Board Notice 2010-27: Request for  
Comment on Rule G-23 on the Underwriting Activities of Financial Advisors**

Dear Ms. Carey:

The Bond Dealers of America (the "BDA") is pleased to offer comments on the draft amendments in Municipal Securities Rulemaking Board Notice 2010-27, "Request for Comment on Rule G-23 on the Underwriting Activities of Financial Advisors" (the "Notice"). The BDA is the Washington, DC based organization that represents securities dealers and banks primarily active in the U.S. fixed income markets. The BDA's members include dealers that also are some of the nation's leading municipal financial advisors.

The proposed changes to Rule G-23 would prohibit any broker, dealer or municipal securities dealer (a "dealer") that acts as a financial advisor to an issuer in connection with a particular new issue of municipal securities from resigning as financial advisor and then underwriting the transaction. This prohibition would apply whether the securities are being sold on either a negotiated or a competitively bid basis and regardless of the size of the issuer. The justification offered for this broad prohibition is to eliminate any real or perceived conflict of interest that may result from this change in roles and to encourage competition among underwriters.

BDA acknowledges that it is prudent to periodically review existing regulatory structures to determine their effectiveness in the context of current market practices. The current Rule G-23 provides a structure that relies on the disclosure of potential conflicts of interest on the part of a financial adviser that may become an underwriter so that an

issuer has the information it needs to evaluate each situation and the nature of any conflict. BDA believes there are situations where this prohibition will actually work to the detriment of issuers. Further, a complete prohibition on the switching of these roles will serve to benefit that portion of the industry which does not possess the capacity to underwrite securities. In addition, the proposed amendments to Rule G-23 may not achieve the desired effect of fostering competition among underwriters. Contrary to what appears to be an underlying assumption of the proposed prohibition, independent financial advisory firms often develop close working relationships with certain underwriting firms or dealers. BDA urges the MSRB to examine this question and whether, if the goal of the proposed prohibition is to ensure fair competition among underwriters, the prohibition would, in those circumstances, achieve that goal.

If changes to Rule G-23 are necessary to better protect issuers from either real or perceived conflicts of interest, BDA believes these changes should be more limited in scope and focused on identified conflicts. Any changes should take into consideration the differing circumstances surrounding competitive and negotiated sales as well as the size of the issuers and how the issuers access the markets. In particular, BDA urges the MSRB to apply any changes to Rule G-23 to negotiated sales only and not to competitive sales.

#### *Competitive Sales*

The bidding process for competitive sales encourages competition among the underwriters and introduces an arms' length basis for establishing the terms of the issue and the underwriting. Rule G-23 in its current form sufficiently protects issuers from any conflict of interest with respect to competitive bid situations, and there is no need to extend restrictions to cover such transactions. If there is a concern that a financial advisors' switching of roles does not provide sufficient notice to other bidders to ensure that the bid process is fair, then BDA recommends that a financial advisor provide disclosure as under the current rule and resign prior to the notice of a sale being posted, and at least 5 business days prior to the sale, which is sufficient time for other interested dealers to conduct the diligence and research necessary to enable them to bid in the competitive sale.

#### *Effect on Small or Infrequent Issuers*

Small or infrequent issuers of municipal securities face unique challenges in the municipal markets. The prohibition in the proposed Rule G-23 would be particularly detrimental to small or infrequent issuers. Very often, only the local dealer is interested in marketing the securities of these municipal issuers and these transactions are usually too small to attract bids from larger firms. According to data provided to BDA by IPREO, between January 1, 2000 and August 27, 2010, 42 percent of competitive bond issuances of \$10 million or less and competitive note sales between \$1 million and \$10 million received 3 or fewer bids. Some competitive offers received only one bid. This compares to bond issuances of \$30 million or more, where only 12 percent received 3 or fewer bids. The competitive bond issuances of \$10 million or less and competitive note

sales between \$1 million and \$10 million were nearly 70 percent of the issuances during that period. If even fewer firms are able to bid as a result of the proposed amendments to Rule G-23, the cost of accessing the capital markets for these smaller issuers is likely to significantly increase or, in the worst case, these issuers may be prevented from accessing the markets at all.

Requiring an issuer to select one firm to serve as underwriter and a different firm to serve as a financial advisor for a particular issue of securities may also result in a delay in the sale of the bonds and expose the issuers to more market risk.

An additional benefit to smaller issuers under the current rules is the ability of firms which are able to perform both financial advisor and broker-dealer functions is the firms' ability to do direct placements on behalf of small issuers. That ability should be retained in any revised Rule G-23.

In addition, any portion of a revised rule which may be based on issue size or annual expected amount of issuance by an issuer should include an adjustment for inflation, so that the value of that aspect of the rule to smaller issuers is not eroded over time.

#### *Issue by Issue Basis*

The current Rule G-23 allows a dealer to serve as a financial advisor to an issuer at the same time it serves as underwriter on a separate issue for the same issuer. Any proposed prohibition should continue to be on an issue-by-issue basis. Many issuers have found that there are advantages to engaging a separate financial advisor for separate issuances. Additionally, because municipal issuers are responsible for financing the costs of numerous specialized projects, many issuers often have multiple issuances in various stages of planning or execution at any one time that may require knowledge of different industries or markets. Prohibiting a firm from underwriting any issue if it is acting as a financial advisor on any other issue is too broad, goes beyond what is necessary to ensure fair competition and would unnecessarily constrain the advice and services available to issuers. Similarly, imposing a specific time restriction on an issuer from engaging a financial advisor after it has served as underwriter (or vice versa) will infringe on these issuers' practice and create unnecessary obstacles to the timeframe for planning and executing transactions.

#### *Transitional rule*

Many of the proposed changes to Rule G-23 will affect the current practices and engagements of many issuers, financial advisors and dealers. Therefore, if the MSRB decides to adopt any change to Rule G-23, BDA requests that the MSRB include a transitional rule and time period to allow issuers, dealers and financial advisors time to review their current engagements and business practices and to take action to conform to, and comply with, any new rules.

*Summary*

BDA believes that Rule G-23 as currently structured, based on disclosure of potential conflicts, adequately protects the interests of all parties. Restricting the ability of a financial advisor to act as a dealer, especially in competitive deals, will only hurt issuers, particularly small issuers and issuers that infrequently access the market, by reducing the number of firms available to participate in new issues of municipal securities. If the MSRB determines that amendments to Rule G-23 are needed to further reduce the risk of real or perceived conflicts of interest, then such amendments should not take the form of the broad prohibition proposed in the Notice but should instead be narrowly written to prevent any identified conflicts.

Thank you for the opportunity to present our views on the Notice. Please do not hesitate to call if you have any questions.

Sincerely,



Mike Nicholas  
Chief Executive Officer