



# WM Financial Strategies

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September 28, 2010

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

**Re: Request for Comments on Changes to Rule G-23**

Ladies and Gentlemen:

This letter is in response to the MSRB's request for comments on the proposed change to rule G-23 that will preclude a financial advisor from terminating its financial advisory relationship and subsequently serve as underwriter. I am limiting my comments to Section (b) of Rule G-23 and requesting the following changes be made thereto:

**Comment: Section (b) of Rule G-23 should be eliminated or revised to comply with the Dodd-Frank Wall Street Reform and Consumer Protection Act.**

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") clearly and concisely defines the type of advice that a Municipal Advisor provides, and it does so for the purpose of delineating who owes a fiduciary duty to the issuer of municipal debt. In so doing, the Act provides an exception for "brokers, dealers, or municipal securities dealers *servicing as underwriters*" as that term is defined in section 2(a)(11) of the Securities Act. Section 2(a)(11) of the Securities Act states, *inter alia*, that the term "underwriter" means:

Any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission.

Through the passage of the Act, Congress made the determination that individuals who give certain kinds of advice owe a fiduciary duty to municipal issuers.<sup>1</sup> Under the Act, individuals who are deemed to be Municipal Advisors must thereafter act in a manner consistent with their fiduciary duty regardless of whether that individual's relationship with the issuer is classified as either a "financial advisory relationship" or purely an underwriting relationship under current Rule G-23(b). Therefore, under the Act, an underwriter who acts beyond the scope of Section 2(a)(11) of the Securities Act by giving advice to an issuer with respect to matters such as the "structure, timing, terms, or other similar matters concerning such financial products or issues," becomes a Municipal Advisor and must comply with all aspects of the Act relating thereto regardless of the title that the relationship is given.<sup>2</sup>

Under Section (b) of Rule G-23 ("Section (b)") as it is currently written, a "financial advisory relationship" does **not** exist "when, in the course of acting as an underwriter, a broker, dealer or municipal

<sup>1</sup> See Securities Exchange Act Section 15B(c)(1) and (e)(4)(A).

<sup>2</sup> See Securities Exchange Act Section 15B(e)(4)(A) and (C).

securities dealer renders advice to an issuer, including advice with respect to the structure, timing, terms or other similar matters concerning a new issue of municipal securities.” This is clearly inconsistent with the Act. To that end, Section (b) must either be revised or eliminated in order to comply with the Act.

If the MSRB chooses to revise Section (b), the MSRB should consider taking a much different approach than is currently in place. Given the clear delineations in roles put in place by the Act with regard to Municipal Advisors and non-Municipal Advisors, the MSRB must take an approach similar to that put forth by the Securities and Exchange Commission in the case *SEC v. Howey Co.*<sup>3</sup> Put simply, the Court in *Howey* determined that although a particular “investment contract” was not specifically referred to as a “security,” it looked like a security and smelled like a security and had all of the “essential ingredients” of a security, and was therefore deemed to be a “security” within the meaning of the Securities Act of 1933 without regard to “the legal terminology in which [it was] clothed.” Similarly, any attempt by the MSRB to delineate the difference between a financial advisory relationship and an underwriting relationship merely in terms of titles or contractual relationships may be futile. At the same time, it may be duplicative for the MSRB to merely restate the advice that could be given by a Municipal Advisor as that which creates a financial advisory relationship. A more practical approach would be for the MSRB to utilize an approach similar to that taken by the SEC and the Supreme Court in *Howey*, and revise Section (b) to state as follows:

For purposes of this rule, a financial advisory relationship and fiduciary duty shall be deemed to exist where a person gives advice relating to municipal financial products or the issuance of municipal securities, including, but not limited to, advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues, or holds itself out to the issuer in such a manner as to create a financial advisory relationship. Notwithstanding the foregoing, a financial advisory relationship shall not be deemed to exist when a person acts as an underwriter (as the term is defined under Section 2(a)(11) of the Securities Act), or gives incidental information regarding the issuance of municipal securities that would otherwise not create a municipal advisory relationship.

## Conclusion

Section (b) as it is currently written is clearly inconsistent with the Act and must either be revised or eliminated. If the MSRB chooses to revise Section (b), it must do so with an eye towards delineating roles, not based on titles or contracts, but instead based on the type of advice given. Any other method of delineation will likely lead to inconsistencies with the Act.

I appreciate the opportunity to comment and would be happy to provide clarification to my comments.

Respectfully,



Nathan R. Howard, Esq  
Municipal Advisor  
WM Financial Strategies

cc: Ms. Mary L. Schapiro  
Ms. Martha M. Haines

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<sup>3</sup> *Securities and Exchange Commission v. Howey Co.*, 328 U.S. 293 (1946)