

<sup>14</sup> The potential information barriers described in the guidance include: i) a prohibition on the dealer or MFP from recommending, nominating, appointing or approving the management of affiliated PACs; ii) a prohibition on sharing the affiliated PAC's meeting agenda, meeting schedule, or meeting minutes; iii) a prohibition on identification of prior affiliated PAC contributions, planned PAC contributions or anticipated PAC contributions; iv) a prohibition on directly providing or coordinating information about prior negotiated municipal securities businesses, solicited municipal securities business, and planned solicitations of municipal securities business; and v) other such information barriers as the firms deems appropriate to monitor conflicting interest and prevent abuses effectively.

<sup>15</sup> See Rule G-37 Interpretive Letter — Supervisory procedures relating to indirect contributions; conference accounts and 527 organizations (December 21, 2006).

### **Reminder Regarding the Application of Rule G-37 to Federal Election Campaigns of Issuer Officials**

September 28, 2011

In view of the commencement of fundraising efforts of candidates for various federal elected offices, the Municipal Securities Rulemaking Board ("MSRB") reminds brokers, dealers and municipal securities dealers ("dealers") of previous MSRB guidance on the application of its Rule G-37, on political contributions and prohibitions on municipal securities business, to contributions to certain state and local officials seeking election to federal office, including the offices of President and Vice President.

That guidance is summarized as follows:

In 1999, the MSRB published a notice on the application of Rule G-37, on political contributions and prohibitions on municipal securities business, to Presidential campaigns of issuer officials.<sup>1</sup> In general, the notice described a 1995 interpretive letter<sup>2</sup> in which the Board noted that Rule G-37 is applicable to contributions given to an official of an issuer<sup>3</sup> who seeks election to federal office, such as the Presidency. The Board also explained that the only exception to Rule G-37's absolute prohibition on business is for certain contributions made to issuer officials by municipal finance professionals. Specifically, contributions by such persons to an official of an issuer would not invoke application of the prohibition if the municipal finance professional is entitled to vote for such official, and provided that any contributions by such municipal finance professional do not exceed, in total, \$250 to each official, per election. In the example of an issuer official running for President, any municipal finance professional in the country can contribute the *de minimis* amount to the official's Presidential campaign without causing a ban on municipal securities business with that issuer. Finally, the Board noted that a Presidential candidate who has accepted public funding for the general election is prohibited under federal law from accepting any contributions to further his or her general election campaign. In these circumstances, federal law allows individuals to contribute to the candidate's compliance fund, which uses the contributions solely for legal and accounting services to ensure compliance with federal law and not for campaign activities. Thus, any municipal finance professional in the country can contribute

the *de minimis* amount to an issuer official's compliance fund without causing a ban on municipal securities business with that issuer. This would apply if the issuer official runs for President or Vice President.

The MSRB wishes to remind dealers that these concepts also apply to an issuer official who campaigns for any federal office. For example, any municipal finance professional residing in a state in which an issuer official is campaigning for a state-wide federal office may contribute the *de minimis* amount to the official's campaign without causing a ban on municipal securities business with that issuer. The MSRB does not opine whether any particular individual is or is not an issuer official.

The MSRB also wishes to remind dealers to be aware of the Rule G-37 issues involving indirect rule violations and contributions to non-dealer associated political action committees and payments to political parties, which issues have been the subjects of previous notices and interpretive Questions and Answers.<sup>4</sup>

<sup>1</sup> See Application of Rule G-37 to Presidential Campaigns of Issuer Officials reprinted in MSRB Rule Book (January 1, 2011) at 299-300. The notice is also available from the *MSRB Rules/Interpretive Notices* section of the MSRB's website at [www.msrb.org](http://www.msrb.org).

<sup>2</sup> See MSRB Interpretation of May 31, 1995, reprinted in *MSRB Rule Book* (January 1, 2011) at 309-311. The letter is also available from the *MSRB Rules/Interpretive Letters* section of the MSRB's website at [www.msrb.org](http://www.msrb.org).

<sup>3</sup> The term "official of an issuer" is defined in Rule G-37(g)(vi) as any person (including any election committee for such person) who was, at the time of the contribution, an incumbent, candidate or successful candidate: (A) for elective office of the issuer which office is directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer or municipal securities dealer for municipal securities business by the issuer; or (B) for any elective office of a state or of any political subdivision, which office has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer or municipal securities dealer for municipal securities business by an issuer.

<sup>4</sup> See Notice Concerning Indirect Rule Violations: Rules G-37 and G-38, reprinted in *MSRB Rule Book* (January 1, 2011) at 302-303; Rule G-37 Questions and Answers Nos. III.4 and III.5 regarding contributions to a non-dealer associated PAC and payments to a state or local political party, reprinted in *MSRB Rule Book* (January 1, 2011) at 290; and Rule G-37 Question and Answer No. III.7 regarding supervisory procedures relating to indirect contributions, reprinted in *MSRB Rule Book* (January 1, 2011) at 291. The notice and Questions and Answers are also available on the MSRB's website at [www.msrb.org](http://www.msrb.org).

See also:

**Rule D-12 Interpretation — Interpretation Relating to Sales of Municipal Fund Securities in the Primary Market**, January 18, 2001.

**Rule G-38 Interpretation — Interpretive Notice on the Definition of Solicitation Under Rules G-37 and G-38**, June 8, 2006

### **Interpretive Letters**

**Solicitation of contributions.** This is in response to your letter dated September 29, 1994 regarding rule G-37, on political contributions and prohibitions on municipal securities business. You review a situation regarding a municipal finance professional's participation in a fundraising event for a certain

state official. You seek guidance on two matters. First, you inquire whether the activities of the municipal finance professional in connection with this fundraiser constitute a violation of the solicitation prohibition in rule G-37(c). Second, you inquire that, if a violation of rule G-37(c) occurred, would such violation subject your firm to a two-year ban on municipal securities business with the state. The Board has reviewed your letter and authorized this response.

Rule G-37(b) prohibits dealers from engaging in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by: (i) the dealer; (ii) any municipal finance professional associated with such dealer; or (iii) any political action committee controlled by the dealer or municipal finance professional.<sup>1</sup> Rule G-37(c) provides that no dealer or any municipal finance professional shall solicit any person or political action committee to make any contribution, or shall coordinate any contributions, to an official of an issuer with which the dealer is engaging or is seeking to engage in municipal securities business.

With regard to your first inquiry, the Board is not the appropriate authority to determine whether in this instance the municipal finance professional's activities amounted to a solicitation of contributions in violation of rule G-37(c). While the Board has authority to adopt rules concerning transactions in municipal securities effected by brokers, dealers and municipal securities dealers, it has no enforcement authority over dealers; that authority is vested with the National Association of Securities Dealers, Inc. (NASD) for securities firms. Whether a particular activity should be characterized as a solicitation of a contribution and a violation of the rule is fact specific, and further inquiry and investigation may be appropriate prior to a determination of violation. The Board believes that it is more appropriate for the NASD to make such inquiries and determinations. Your letter has been forwarded to the NASD for its review.

The Board believes, however, that if a dealer's or a municipal finance professional's name appears on fundraising literature for an issuer official for which the dealer is engaging or seeking to engage in municipal securities business, there is a presumption that such activity is a solicitation by the named party.

With regard to your second inquiry, a violation of rule G-37(c) does not trigger a two-year ban on engaging in municipal securities business with an issuer. If the NASD finds a violation of rule G-37(c) has occurred, the NASD will determine the appropriate sanction.

Finally, rule G-27, on supervision, requires each dealer to adopt, maintain and enforce written supervisory procedures reasonably designed to ensure compliance with Board rules, including rule G-37. In view of the significant penalties associated with rule G-37, including a two-year ban on municipal securities business with an issuer in certain cases, effective compliance procedures are essential. We recognize that some dealers may focus their compliance procedures on the areas in

the rule concerning certain political contributions. Rule G-37 has other important provisions, however, such as the prohibition against certain solicitations and the recordkeeping and reporting requirements. Given the situation presented in your letter, your firm may wish to review its procedures to determine whether they are sufficient to ensure compliance with all provisions of rule G-37. *MSRB Interpretation of November 7, 1994.*

<sup>1</sup> The prohibition does not apply if the only contributions to officials of issuers are made by municipal finance professionals entitled to vote for such officials, and provided, such contributions, in total, are not in excess of \$250 by each such municipal finance professional to each official of such issuer, per election.

**Campaign for federal office.** This is in response to your letter dated May 5, 1995, concerning the application of the Board's rule G-37 to a campaign for President of the United States. You ask specifically about the application of rule G-37 to contributions to Governor [name deleted] presidential campaign. The Board reviewed your letter at its May 18-19, 1995 meeting and has authorized this response.

As you know, rule G-37, among other things, prohibits any broker, dealer or municipal securities dealer (dealer) from engaging in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by: (i) the dealer; (ii) any municipal finance professional associated with such dealer; or (iii) any political action committee controlled by the dealer or any municipal finance professional. The only exception to rule G-37's absolute prohibition on business is for certain contributions made to issuer officials by municipal finance professionals. Specifically, contributions by such persons to officials of issuers would not invoke application of the prohibition if the municipal finance professional is entitled to vote for such official, and provided that any contributions by such municipal finance professional do not exceed, in total, \$250 to each official, per election. Rule G-37(g)(i) defines the term "contribution" as any "gift, subscription, loan, advance, or deposit of money or anything of value made: (A) for the purpose of influencing any election for federal, state or local office..."

The Board previously has clarified that rule G-37 does not encompass all contributions to candidates for federal office. Rather, for federal office, the rule encompasses only those contributions to a current issuer official who is seeking election to federal office.<sup>1</sup>

You ask whether the Governor of [a state] is an "official of an issuer" for purposes of rule G-37. Rule G-37(g)(vi) defines the term "official of an issuer" as "any person (including any election committee for such person) who was the time of the contribution, an incumbent, candidate or successful candidate: (A) for elective office of the issuer which office is directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer or municipal securities dealer for municipal securities business by the issuer; or (B) for any elective office of a state or of any political subdivision, which office has authority to appoint any official(s) of

an issuer...” as defined above. The Board has not provided any exemptions from, or exception to, the definition “official of an issuer” as set forth in rule G-37.

The Board does not make determinations concerning whether a particular individual meets the definition of “official of an issuer.” The Board believes that because such determinations may involve particular issues of fact, such decisions must generally be the dealer’s responsibility. The Board has, however, provided guidance in this area by recommending that dealers review the scope of authority conferred upon the particular office (and not the individual) to determine whether the office is directly or indirectly responsible for, or can influence the outcome of, the hiring of a dealer for municipal securities business.<sup>2</sup> For example, a state may have certain issuing authorities whose boards of directors are appointed by the governor. In such circumstances, the Board previously has stated that it intended to include the governor as an official of the issuer.<sup>3</sup>

You ask whether rule G-37 applies to candidates for President of the United States. As noted above, the term “contribution” as defined in rule G-37(g)(i) includes payments “for the purpose of influencing any election for **federal**, state or local office.” [Emphasis added]. Thus, rule G-37 is applicable to contributions given to officials of issuers who seek election to federal office, such as the House of Representatives, the Senate or the Presidency.

You ask whether rule G-37 unfairly impinges upon Governor [name deleted] equal protection and freedom of speech and association rights in the context of the Presidential election since he is, at this time, the only candidate with respect to whom those covered by the rule face “disqualification” from municipal securities business for making contributions. You also state that rule G-37 violates the First Amendment rights of association or speech by limiting the ability of municipal finance professionals to contribute to Governor [name deleted] presidential campaign. In its order approving rule G-37, the Securities and Exchange Commission stated that:

any resulting hardship to candidates for federal office who are currently local officials is not a reason for eliminating these requirements. The MSRB cannot overlook potential conflicts of interest solely because there are candidates for the same federal office who do not face the same conflicts. In any event, the resulting burden to current local officials does not appear to be significant.<sup>4</sup>

The Board believes that rule G-37 is not the product of governmental action and is not subject to Constitutional review. However, as you may be aware, these issues currently are pending before the D.C. Court of Appeals.

You ask whether the creation of the District of Columbia Financial Responsibility and Management Assistance Authority means that the President of the United States is an “official of an issuer” and that all candidates for President now fall under rule G-37. Rule G-37(g)(vi) defines “official of an issuer” as “any person ... who was, at the time of the contribution, an

incumbent, candidate or successful candidate: (A) for *elective office of the issuer* which office is directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer or municipal securities dealer for municipal securities business by the issuer; or (B) for any elective office of a state or political subdivision, which office has authority to appoint any official(s) of an issuer.” [Emphasis added]. The President does not hold an elective office of an “issuer” of municipal securities. In addition, the President is not, and would not become, an issuer official by virtue of his authority to appoint members to the D.C. Financial Responsibility and Management Assistance Authority because the Presidency is not an elective office of a state or political subdivision.

You ask a number of questions concerning what activities are permissible by those individuals covered by the rule. You ask whether the \$250 *de minimis* contribution exception in rule G-37 applies to Presidential candidates. As noted previously, the only exception to rule G-37’s absolute prohibition on business is for certain contributions made to issuer officials by municipal finance professionals. Specifically, contributions by such persons to officials of issuers would not invoke application of the prohibition if the municipal finance professional is entitled to vote for such official, and provided that any contributions by such municipal finance professional do not exceed, in total, \$250 to each official, per election. The Board previously has stated that, if an issuer official is involved in a primary election prior to the general election, the municipal finance professional who is entitled to vote for such official may contribute up to \$250 for the primary election and \$250 for the general election to each such official.<sup>5</sup>

[Two paragraphs deleted.]<sup>6</sup>

You ask whether an individual covered by rule G-37 may raise money from others on behalf of Governor [name deleted]. Rule G-37(c) provides that no dealer or any municipal finance professional shall solicit any person or political action committee to make any contribution, or shall coordinate any contributions, to an official of an issuer with which the dealer is engaging or is seeking to engage in municipal securities business. A violation of rule G-37(c) does not trigger a two-year ban on engaging in municipal securities business with an issuer; however, if the appropriate enforcement agency finds that a violation of rule G-37(c) has occurred, the enforcement agency will determine the appropriate sanction.<sup>7</sup> You ask whether the *de minimis* exception applies to solicited and bundled contributions of \$250 and less. Solicitations of contributions are prohibited by the rule (for those covered); therefore, there is no *de minimis* exception.

You ask whether a covered individual may hold a party in his home for a Presidential candidate if contributions are raised at the party. The Board has stated that rule G-37 is not intended to restrict municipal finance professionals from engaging in personal volunteer work.<sup>8</sup> Personal expenses incurred by the municipal finance professional in the conduct of such volunteer work, which expenses are purely incidental to such work and unreimbursed by the dealer (*e.g.*, cab fares and personal

meals), would not constitute a contribution. However, the expenses incurred for hosting a party to solicit contributions would be viewed as a contribution.<sup>9</sup> The Board also has stated that if a dealer's or a municipal finance professional's name appears on fundraising literature for an issuer official for which the dealer is engaging or seeking to engage in municipal securities business then there is a presumption that such activity is a solicitation by the dealer or municipal finance professional in violation of section (c) of the rule.<sup>10</sup>

Finally, you ask whether spouses and eligible children of covered personnel may contribute to a Presidential candidate. The Board has stated that contributions to issuer officials by municipal finance professionals' spouses and household members are not covered by rule G-37 unless these contributions are directed by the municipal finance professional, which is prohibited by section (d) of the rule.<sup>11</sup> *MSRB interpretation of May 31, 1995.*

<sup>1</sup> See *MSRB Reports*, Vol. 14, No. 3 (June 1994) at 14.

<sup>2</sup> *Id.*

<sup>3</sup> See *MSRB Reports*, Vol. 14, No. 4 (August 1994) at 24.

<sup>4</sup> See Securities Exchange Act Release No. 33868 (April 7, 1994) at 41-42; 59 FR 17621.

<sup>5</sup> See *MSRB Reports*, Vol. 14, No. 3 (June 1994) at 13.

<sup>6</sup> An interpretation on determining whether a municipal finance professional is "entitled to vote" for an issuer official was withdrawn by the Board in January 1996. The Board has issued a revised interpretation of "entitled to vote" which states that a municipal finance professional is "entitled to vote" for an issuer official if the municipal finance professional's principal residence is in the locality in which the issuer official seeks election. In such instances, a municipal finance professional is able to make a *de minimis* contribution without resulting in a ban on municipal securities business. For example, if an issuer official is a governor running for reelection, anyone residing in that state may make a *de minimis* contribution to the official without causing a ban on municipal securities business with that issuer. In the example of an issuer official running for President, anyone in the country can contribute the *de minimis* amount to the official's Presidential campaign. The Securities and Exchange Commission approved this revision on February 16, 1996. See *MSRB Reports*, Vol. 16, No. 1 (January 1996) at 31-34.

<sup>7</sup> The enforcement agencies are: for securities firms, the National Association of Securities Dealers; and for bank dealers, the Federal Deposit Insurance Corporation, the Federal Reserve Board, or the Office of the Comptroller of the Currency.

<sup>8</sup> See *MSRB Reports*, Vol. 14, No. 3 (June 1994) at 15.

<sup>9</sup> *Id.*

<sup>10</sup> See *MSRB Reports*, Vol. 14, No. 5 (December 1994) at 17.

<sup>11</sup> See *MSRB Reports*, Vol. 14, No. 3 (June 1994) at 15.

**Solicitation of contributions.** This is in response to your letter in which you summarize your understanding of our telephone conversation relating to section (c) of rule G-37, on political contributions and prohibitions on municipal securities business. As I noted during our conversation, the Board's rules, including rule G-37, apply solely to brokers, dealers and municipal securities dealers ("dealers"). The Board's rulemaking authority, granted under Section 15B of the Securities Exchange Act of 1934, does not extend to issuers of municipal securities. Thus, rule G-37 does not impose

any obligations upon issuers or officials of issuers. Although the Board appreciates your interest in not placing dealers and their associated persons in a position to violate their obligations under the rule, it is ultimately the responsibility of such dealers and associated persons, in consultation with appropriate compliance personnel, to ensure compliance with Board rules.

As you know, rule G-37(c) provides that no dealer or municipal finance professional shall solicit any person or political action committee to make any contribution, or shall coordinate any contributions, to an official of an issuer with which the dealer is engaging or is seeking to engage in municipal securities business. The Board has previously stated that this provision would:

prohibit a dealer and any municipal finance professional from soliciting ... any other person or entity, to make contributions to an official of an issuer with which the dealer engages or is seeking to engage in municipal securities business or to coordinate (*i.e.*, bundle) contributions. ...  
[<sup>1</sup>] [M]unicipal finance professionals may volunteer their personal services in other ways to political campaigns.<sup>1</sup>

You had sought guidance regarding what activities would be covered by this provision of the rule. As you noted in your letter, I had indicated that the term "solicit" is not explicitly defined for purposes of section (c) of the rule. I had stated that whether a particular activity can be characterized as a solicitation of a contribution for purposes of section (c) is dependent upon the facts and circumstances surrounding such activity. I had noted, however, that the rule does not prohibit or restrict municipal finance professionals from engaging in personal volunteer work, unless such work constituted solicitation or bundling of contributions for an official of an issuer with which the municipal finance professional's dealer is engaging or seeking to engage in municipal securities business.<sup>2</sup> Municipal finance professionals are therefore free to, among other things, solicit votes or other assistance for such an issuer official so long as the solicitation does not constitute a solicitation or coordination of contributions for the official.<sup>3</sup>

Whether a municipal finance professional is permitted by section (c) of the rule to indicate to third parties that someone is a "great candidate" or to provide a list of third parties for the candidate to call would be dependent upon all the facts and circumstances surrounding such action. The facts and circumstances that may be relevant for this purpose may include, among any number of other factors, whether the municipal finance professional has made an explicit or implicit reference to campaign contributions in his or her conversations with third parties whom the candidate may contact and whether the candidate contacts such third parties seeking campaign contributions. However, the totality of the facts and circumstances surrounding any particular activity must be considered in determining whether such activity may constitute a solicitation of contributions for purposes of section (c) of the rule. Therefore, the Board cannot prescribe an exhaustive list of

precautions that would assure that no violation of this section would occur as a result of such activity. *MSRB interpretation of May 21, 1999.*

<sup>1</sup> *MSRB Reports*, Vol. 14, No. 3 (June 1994) at 5. See Securities Exchange Act Release No. 33868 (April 7, 1994), 59 FR 17621 (April 13, 1994). See also *Questions and Answers Concerning Political Contributions and Prohibitions on Municipal Securities Business: Rule G-37*, May 24, 1994, reprinted in *MSRB Rule Book*; *MSRB Interpretation of November 7, 1994*, reprinted in *MSRB Rule Book*; *MSRB Interpretation of May 31, 1995*, reprinted in *MSRB Rule Book*. Furthermore, the Board stated in its filing of the rule with the Securities and Exchange Commission that the rule's "anti-solicitation and anti-bundling proscriptions are intended to prohibit covered parties from: (i) soliciting others, including spouses and family members, to make contributions to issuer officials; and (ii) coordinating, or soliciting others to coordinate, contributions to issuer officials in order to influence the awarding of municipal securities business." SEC File No. SR-MSRB-94-2.

<sup>2</sup> See *Question and Answer No. 24*, May 24, 1994, reprinted in *MSRB Rule Book*; *Question and Answer No. 3*, August 18, 1994, reprinted in *MSRB Rule Book*. In addition, if the municipal finance professional used dealer resources or incurred expenses that could be considered contributions in the course of undertaking such volunteer work, the ban on municipal securities business under section (b) of the rule could be triggered.

<sup>3</sup> In upholding the constitutionality of rule G-37, the United States Court of Appeals for the District of Columbia Circuit observed that "municipal finance professionals are not in any way restricted from engaging in the vast majority of political activities, including making direct expenditures for the expression of their views, giving speeches, soliciting votes, writing books, or appearing at fundraising events." *Blount v. SEC*, 61 F.3d 938, 948 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 1351 (1996). However, the Board has stated that hosting or paying to attend a fundraising event may constitute a contribution subject to section (b) of the rule. See *Questions and Answers Nos. 24 and 29*, May 24, 1994, reprinted in *MSRB Rule Book*.

<sup>(1)</sup> [Sentence deleted to reflect current rule provisions.]

**Municipal finance professional: supervisor.** This is in response to your inquiry seeking guidance regarding the possible classification as a municipal finance professional under rule G-37 of a Taxable Department Head at your firm. You stated that the Taxable Department Head is the direct supervisor of a Branch Manager and this Branch Manager manages a sales representative who has solicited municipal securities business from an issuer. You state that it is clear that the Branch Manager and the sales representative are both municipal finance professionals. However, you further state that the Taxable Department Head has delegated all Public Finance/Municipal oversight responsibilities to the Public Finance Department Head for the Taxable Department Head's personnel. You ask whether, under these circumstances, the Taxable Department Head would be considered a municipal finance professional under rule G-37 as a result of his or her supervisory position.

The term "municipal finance professional" is defined in rule G-37(g)(iv). Clauses (C) and (D) of the definition set forth the basis for considering an associated person of a dealer to be a municipal finance professional as a result of his or her supervisory position. Clause (C) includes any associated person who is *both* (i) either a municipal securities principal or municipal securities sales principal and (ii) a supervisor of any associated person either primarily engaged in municipal securities representative activities or who solicits municipal

securities business (referred to herein as a "primary municipal securities supervisor"). Clause (D) includes any associated person who is a supervisor of a primary municipal securities supervisor up through and including (in the case of a non-bank dealer) the Chief Executive Officer or similarly situation official (referred to herein as a "secondary municipal securities supervisor").

Unlike in the case of a primary municipal securities supervisor, a secondary municipal securities supervisor is *not* required to be a municipal securities principal or municipal securities sales principal. The status of a secondary municipal securities supervisor as a municipal finance professional is not conditioned on the areas in which such supervisor has responsibility over a primary municipal securities supervisor, so long as such secondary municipal securities supervisor retains some degree of supervisory responsibility (whether or not relating to municipal securities activities) over the primary municipal securities supervisor. *MSRB interpretation of November 23, 1999.*

**Financial advisor to conduit borrower.** This is in response to your letter concerning rule G-37, on political contributions and prohibitions on municipal securities business. You state that your firm served as financial advisor to the underlying borrower, not the governmental issuer, for a certain issue of municipal securities. You ask whether you are required to report this financial advisory activity on Form G-37/G-38.

Rule G-37(g)(vii) defines the term "municipal securities business" to include "the provision of financial advisory or consultant services to or on behalf of an issuer with respect to a primary offering of municipal securities in which the dealer was chosen to provide such services on other than a competitive bid basis." If the financial advisory services your firm provided were to the underlying borrower and not "to or on behalf of an issuer,"<sup>1</sup> then your firm was not engaging in "municipal securities business" and these financial advisory services are not required to be reported on Form G-37/G-38. *MSRB interpretation of January 23, 1997.*

<sup>1</sup> Rule G-37(g)(ii) defines "issuer" as the governmental issuer specified in section 3(a)(29) of the Securities Exchange Act.

**Supervisory procedures relating to indirect contributions: conference accounts and 527 organizations.** This is in response to your request for confirmation that donations to segregated conference accounts of organizations such as the Democratic Governors Association (DGA) and Republican Governors Association (RGA) do not constitute contributions to an official of an issuer within the meaning of Rule G-37(b) without an intent to use the conference accounts as a device for contributing to the election activities of individual governors or other officials of issuers. You describe both organizations as independent, voluntary political organizations constituted under Section 527 of the Internal Revenue Code to raise money for political activities. You note that the organizations' activities have the primary purpose of influencing gubernatorial elections but also seek to conduct policy con-

ferences and work-shops to help their members and other interested parties to understand and participate in public policy questions that confront state governments. You state that all Democratic governors are members of the DGA and all Republican governors are members of the RGA.

You further note that each organization has a wide variety of accounts into which it receives funds from individuals, organizations and other entities, with some accounts used to provide financial support to gubernatorial candidates and other accounts (including conference accounts) used exclusively to fund policy conferences. You state that the conference accounts are segregated from accounts that provide financial support to gubernatorial candidates and that neither organization permits transfers of funds from their conference accounts to any of their other accounts, including their administrative accounts. You represent that both organizations follow a standard practice of honoring any request by a donor to place donated funds in a conference account and that they have further committed to provide, upon a donor's request, written confirmation prior to accepting a donation that the donated funds will be allocated to the conference account.

The MSRB cannot provide confirmation regarding the status under Rule G-37 of payments to any particular organization or account of such organization as such a determination requires an analysis of, among other things, the specific facts and circumstances of each individual payment, the written supervisory procedures of the broker, dealer or municipal securities dealer ("dealer"), and the efforts of the dealer to enforce such procedures. However, this letter reviews guidance previously provided by the MSRB that may assist you in undertaking such an analysis.

Under Rule G-37, on political contributions and prohibitions on municipal securities business, contributions to officials of an issuer by a dealer, a municipal finance professional ("MFP") of the dealer, or a political action committee ("PAC") controlled by the dealer or an MFP can result in the dealer being banned from municipal securities business with such issuer for a period of two years.<sup>1</sup> Section (d) of Rule G-37 provides, in part, that no dealer or MFP shall, directly or indirectly, through or by any other person or means, do any act which would result in a violation of the ban on municipal securities business.

The MSRB has previously provided guidance regarding the potential for payments made to political parties, PACs or others to constitute indirect contributions to issuer officials for purposes of Rule G-37(d). In guidance published in 1996, the MSRB stated that a dealer would violate Rule G-37 by doing municipal securities business with an issuer after providing money to any person or entity when the dealer knows that such money will be given to an official of an issuer who could not receive such a contribution directly from the dealer without triggering the rule's prohibition on municipal securities business. Further, depending on the specific facts and circumstances, a payment to a PAC or political party that is soliciting funds for the purpose of supporting a limited number of issuer

officials might result in the same prohibition on municipal securities business as would a contribution made directly to an issuer official.<sup>2</sup> In such circumstances, dealers should inquire of the PAC or political party how any funds received from the dealer would be used.<sup>3</sup>

In 2005, the MSRB published guidance on dealers' written supervisory procedures under Rule G-27, on supervision, relating to compliance with Rule G-37(d). The MSRB noted that each dealer must adopt, maintain and enforce written supervisory procedures reasonably designed to ensure that neither the dealer nor its MFPs are using payments to political parties and non-dealer controlled PACs to contribute indirectly to an official of an issuer.<sup>4</sup> Please note that the scope of Rule G-37(d) is not limited to the use of political parties and PACs as possible conduits for indirect contributions to issuer officials and, therefore, the need for such supervisory procedures would apply in connection with dealer and MFP payments to other types of political organizations as well, including but not limited to organizations constituted under Section 527 of the Internal Revenue Code.

The 2005 guidance on supervisory procedures included examples of certain provisions that dealers might include in their written supervisory procedures to ensure compliance with Rule G-37(d). The MSRB stated that such examples are not exclusive and are only suggestions, and that each dealer is required to evaluate its own circumstances and develop written supervisory procedures reasonably designed to ensure that the conduct of the municipal securities activities of the dealer and its associated persons are in compliance with Rule G-37(d).<sup>5</sup> Thus, a dealer need not include the specific supervisory procedures described in the 2005 guidance in order to meet its obligation under Rule G-27(c) so long as the dealer in fact has, and enforces, other written supervisory procedures reasonably designed to ensure that the conduct of the municipal securities activities of the dealer and its associated persons are in compliance with Rule G-37(d).

The MSRB also has stated that payments to "housekeeping," "conference" or "overhead" accounts of political parties are not safe harbors under Rule G-37 and that a dealer's written supervisory procedures designed to ensure compliance with Rule G-37(d) must take into account such payments. The MSRB noted that "preemptive" instructions accompanying payments to housekeeping accounts of political parties stating that such payments are not to be used for the benefit of one or a limited number of issuer officials are not considered sufficient to meet the dealer's obligations with regard to ensuring that the payment is not being made to circumvent the requirements of Rule G-37.<sup>6</sup> Although payments to housekeeping, conference or overhead accounts are not safe harbors and preemptive instructions are not by themselves sufficient to establish compliance with Rule G-37(d), procedures permitting payments to political parties and other political organizations only if made to these types of accounts and/or requiring preemptive instructions regarding the use of such payments may be elements in a supervisory program that, together with other

appropriate procedures, could adequately ensure compliance with Rule G-37(d), depending on the specific facts and circumstances. *MSRB Interpretation of December 21, 2006*.

<sup>1</sup> MFPs may make certain *de minimis* contributions to issuer officials without triggering the ban on business.

<sup>2</sup> See Rule G-37 Question and Answer No. III.4 (August 6, 1996), reprinted in *MSRB Rule Book*.

<sup>3</sup> See Rule G-37 Question and Answer No. III.5 (August 6, 1996), reprinted in *MSRB Rule Book*.

<sup>4</sup> See Rule G-37 Question and Answer No. III.7 (September 22, 2005) (“Q&A-III.7”), reprinted in *MSRB Rule Book*.

<sup>5</sup> See Q&A-III.7.

<sup>6</sup> See Rule G-37 Question and Answer No. III.8 (September 22, 2005), reprinted in *MSRB Rule Book*.

**Payments to non-political accounts of political organizations.** This is in response to your request for clarification that language relating to the “fungibility” of money included in Question and Answer No. III.8 dated September 22, 2005 (the “2005 Q&A”)<sup>1</sup> under Rule G-37, on political contributions and prohibitions on municipal securities business, was not intended to be construed to prohibit all contributions to political committees, political parties, political action committees (“PACs”) and other political entities or committees within the meaning of Section 527 of the Internal Revenue Code (collectively, “political organizations”) that might themselves make contributions to officials of issuers.

Rule G-37 does not prohibit contributions to political organizations or issuer officials. Rather, contributions to officials of an issuer by a broker, dealer or municipal securities dealer (“dealer”), a municipal finance professional (“MFP”) of the dealer, or a PAC controlled by the dealer or any of its MFPs can result in the dealer being banned from engaging in municipal securities business with such issuer for a period of two years under section (b) of the rule.<sup>2</sup> Further, if a dealer is currently engaged in, or seeking to become engaged in, municipal securities business with an issuer, then such dealer and its MFPs are prohibited from soliciting or coordinating contributions to officials of such issuer under section (c) of the rule. Section (d) of Rule G-37 provides, in part, that no dealer or MFP shall, directly or indirectly, through or by any other person or means, do any act which would result in a violation of section (b) or (c) of the rule.

The MSRB has previously provided guidance regarding the potential for payments made to political organizations or other third parties to constitute indirect contributions to issuer officials for purposes of Rule G-37(d). In guidance published in 1996, the MSRB stated that a dealer would violate Rule G-37 by doing municipal securities business with an issuer after providing money to any person or entity when the dealer knows that such money will be given to an official of an issuer who could not receive such a contribution directly from the dealer without triggering the rule’s prohibition on municipal securities business. Further, depending on the specific facts and circumstances, a payment to a political organization that is soliciting funds for the purpose of supporting a limited

number of issuer officials might result in the same prohibition on municipal securities business as would a contribution made directly to an issuer official.<sup>3</sup> In such circumstances, dealers should inquire of the political organization how any funds received from the dealer would be used.<sup>4</sup>

In 2005, the MSRB published guidance, as a companion to the 2005 Q&A (the “2005 Companion Guidance”), to the effect that each dealer must adopt, maintain and enforce written supervisory procedures under Rule G-27, on supervision, reasonably designed to ensure that neither the dealer nor its MFPs are using payments to political organizations to contribute indirectly to an official of an issuer.<sup>5</sup> This guidance also included examples of certain provisions that dealers might include in their written supervisory procedures to ensure compliance with Rule G-37(d). In a subsequent interpretive letter (the “2006 Interpretation”),<sup>6</sup> the MSRB stated that such examples are not exclusive and are only suggestions, and that each dealer is required to evaluate its own circumstances and develop written supervisory procedures reasonably designed to ensure that the conduct of the municipal securities activities of the dealer and its associated persons are in compliance with Rule G-37(d). Thus, a dealer need not include the specific supervisory procedures described in the guidance in order to meet its obligation under Rule G-27 so long as the dealer in fact has, and enforces, other written supervisory procedures reasonably designed to ensure that the conduct of the municipal securities activities of the dealer and its associated persons are in compliance with Rule G-37(d).

In the 2005 Q&A, the MSRB stated that payments to housekeeping, conference or overhead accounts of political organizations (referred to herein, together with any other similar accounts, as “nonpolitical accounts”) are not safe harbors under Rule G-37 and that a dealer must have adequate supervisory procedures reasonably designed to prevent a violation of Rule G-37(d) even when payments are being made to non-political accounts of political organizations. The MSRB noted that “preemptive” instructions accompanying payments to non-political accounts of political organizations stating that the payments are not to be used for the benefit of one or a limited number of issuer officials are not considered sufficient to meet the dealer’s obligations with regard to ensuring that such payments are not being made to circumvent the requirements of Rule G-37. Among other things, the MSRB stated that “because money is fungible, a payment made to a fund earmarked for non-issuer official elections might ‘free up’ other money to support the candidacy of specific issuer officials.” Thus, merely limiting contributions to such non-political accounts, or merely providing preemptive instructions regarding the use of funds, does not automatically avoid the possibility of an indirect contribution under Rule G-37(d). However, as the MSRB noted in the 2006 Interpretation, procedures permitting payments to political organizations only if made to non-political accounts and/or requiring preemptive instructions regarding the use of such payments may be elements in

a supervisory program that, together with other appropriate procedures, could adequately ensure compliance with Rule G-37(d), depending on the specific facts and circumstances.

The fungibility language used in the 2005 Q&A makes clear, and the 2006 Interpretation confirms, that a dealer may not satisfy its obligation to adopt and enforce written supervisory procedures to prevent violations of Rule G-37(d) merely by limiting payments to non-political accounts of political organizations since such payments may “free up” other money that would otherwise have been used to fund such political accounts to now be used to support the candidacy of specific issuer officials. Thus, the guidance provided in the 2005 Q&A, the 2005 Companion Guidance, and the 2006 Interpretation, as well as the MSRB’s prior guidance with respect to Rule G-37(d), is relevant for any payment to a political organization, whether such payment is provided without restriction as to its use (referred to herein as an “unrestricted payment”) or is made to a non-political account. The fungibility language in the 2005 Q&A serves to illustrate that, in many cases, it may be reasonably foreseeable that moneys provided to nonpolitical accounts could result in indirect contributions to issuer officials under Rule G-37(d) much in the same way as unrestricted payments. As a result, the types of procedures (including but not limited to any due diligence procedures) that would apply to unrestricted payments generally also should apply when payments are made to non-political accounts of political organizations.<sup>7</sup>

The fungibility language does not, however, cause all payments to political organizations that make contributions to issuer officials to trigger the ban on municipal securities business under Rule G-37. Rather, as described above, it places payments to non-political accounts on relatively equal footing with unrestricted payments to political organizations regarding the need for dealers to adopt and enforce written supervisory procedures reasonably designed to ensure that neither the dealer nor its MFPs are using payments to political organizations to contribute indirectly to an official of an issuer in circumvention of the rule’s ban on municipal securities business.<sup>8</sup> The procedures adopted by dealers with respect to Rule G-37(d) must be designed to address such possible circumvention, regardless of whether it is through unrestricted payments or through payments to non-political accounts. *MSRB Interpretation of September 25, 2007*

<sup>1</sup> See Rule G-37 Question and Answer No. III.8 (September 22, 2005), reprinted in *MSRB Rule Book*.

<sup>2</sup> Certain *de minimis* contributions made by MFPs to issuer officials do not trigger this ban on engaging in municipal securities business.

<sup>3</sup> See Rule G-37 Question and Answer No. III.4 (August 6, 1996), reprinted in *MSRB Rule Book*.

<sup>4</sup> See Rule G-37 Question and Answer No. III.5 (August 6, 1996), reprinted in *MSRB Rule Book*.

<sup>5</sup> See Rule G-37 Question and Answer No. III.7 (September 22, 2005), reprinted in *MSRB Rule Book*.

<sup>6</sup> See Rule G-37 Interpretive Letter — Supervisory procedures relating to indirect contributions: conference accounts and 527 organizations, reprinted in *MSRB Rule Book*.

<sup>7</sup> As noted above, the 2006 Interpretation observed that limiting payments solely to non-political accounts of political organizations may itself serve as one of the elements in a supervisory program that, together with other appropriate procedures, could adequately ensure compliance with Rule G-37(d), depending on the specific facts and circumstances.

<sup>8</sup> As you note in your letter, section (d) of Rule G-37 was adopted by the MSRB to prohibit dealers and their MFPs from using other persons or entities as conduits to circumvent Rule G-37’s prohibitions. See Exchange Act Release No. 33482 (January 14, 1994), 59 FR 3389 (January 21, 1994). See also Exchange Act Release No. 33868 (April 7, 1994), 59 FR 17621 (April 13, 1994).

**Rules G-37 and G-38 Interpretive Letter — Solicitation activity on behalf of affiliated company.** This is in response to your April 29, 2009 letter seeking guidance regarding Municipal Securities Rulemaking Board (“MSRB”) Rule G-38, on solicitation of municipal securities business, and MSRB Rule G-37, on political contributions and prohibitions on municipal securities business. Your letter relates to the formation of a joint venture broker-dealer (“JV B-D”) by two existing broker-dealers (the “legacy firms”). You state that JV B-D will not engage in municipal securities business<sup>1</sup> and that the employees of JV B-D will not retain their employment status with the legacy firms, but will be associated persons of both legacy firms.

Specifically, you request guidance on the following two issues: (i) whether the employees of the JV B-D may solicit municipal securities business, under Rule G-38, on behalf of the legacy firms; and (ii) whether an employee who solicits municipal securities business on behalf of one of the legacy firms will be considered a municipal finance professional (“MFP”)<sup>2</sup> solely of the legacy firm on whose behalf the MFP solicits municipal securities business under Rule G-37, rather than of both legacy firms. The Board has reviewed your letter and authorized this response.

**JV B-D Employee Solicitation of Municipal Securities Business on Behalf of Legacy Firms:** You ask whether employees of JV B-D, who are the prior employees of the legacy firms, may solicit municipal securities business on behalf of such firms under Rule G-38. Rule G-38(a) prohibits a broker, dealer or municipal securities dealer (“dealer”) from providing, directly or indirectly, payment to any person who *is not* an affiliated person<sup>3</sup> of the dealer for a solicitation of municipal securities business on behalf of such dealer.

You state that JV B-D will be controlled by the legacy firms and, as such, should be viewed as an affiliated company<sup>4</sup> of the legacy firms. Under Rule G-38, if JV B-D is controlled by the legacy firms, JV B-D and its employees should be viewed as affiliates of the legacy firms. Based on the control relationships you describe, Rule G 38 will not be violated if employees of JV B-D are paid by a legacy firm for a solicitation of municipal securities business on behalf of such legacy firms.