

3. Related to this is the Rule G-20 gift ban. This rule would be expanded from just underwriters to financial advisors and prohibits gifts and gratuities of more than \$100 annually “in relation to” advisor activities. However, there are exceptions for “occasional” gifts, such as meals and tickets to entertainment. The national advisor group is seeking to get this tightened up to have strict limits of no single gift worth more than \$100 and an annual cap of \$250, which is the same limit on certain campaign contributions. The debate revolves around the term “occasional” for gifts and whether anyone actually enforces a strict interpretation. Additional areas of discussion include contributions and gifts by family members and gifts to charities that were solicited by municipal officials.
4. Fees. As anything dealing with money, this is one of the most contentious. The proposed rule and commentary about fair dealing calls for disclosure of advisory fees, although underwriting fees are not required to be disclosed, except in certain areas. As a firm which works under written contracts with clients, this seems odd but apparently many issuers do not get information from their service providers. Additionally some proposals suggest that fees should be on a hourly basis – which is extremely unusual for bond issues. Just as underwriters, bond counsel, and many municipal attorneys charge on a transaction size basis, most financial advisors do as well.

At a minimum, it appears that a form will need to be signed by the issuer in each transaction acknowledging that they have to pay for advisory services and that they understand the contingent nature of fees; it is fairly common that if an issue fails to proceed, most parties do not get paid.

All of this is related to the concept of conflict of interest. The idea is that unscrupulous advisors are convincing issuers to sell unneeded and unwanted bonds. This is certainly not our experience, as we are seldom asked if a project should occur, just about the best financing options.

Regulation. Smegulation G-23. Bingo!

As noted in the prior article, the MSRB has been assigned the task of regulating the financial markets. It has initiated steps to now regulate municipal advisors, initially as firms but eventually with certification of individuals. Firms like Speer Financial, Inc., as a member of the National Association of Independent Public Financial Advisors (NAIPFA) have had our professional staff tested and certified by NAIPFA for almost 20 years.

On February 9, 2011, the MSRB filed a proposed amendment to Rule G-23 addressing concerns of real or perceived conflicts of interest. Effective November 27, 2011, this will now disallow a broker dealer from serving in both advisor and underwriter roles in the same transaction. The municipal advisor has a fiduciary responsibility (trust and confidence) to the issuer while the underwriter has some common interests (buying what you want to sell) but also some competing objectives (pricing and terms attractive to its purchasing clients). This amendment was adopted by the Securities and Exchange Commission (SEC) on May 31st.

By disallowing the same firm the ability to serve the issuer in two adversarial roles (advisor and underwriter), the MSRB is clearly seeking to protect issuers from costly mistakes in structuring and pricing that may benefit investors to the detriment of the issuer that does not know what they do not know. Municipal advisors have an obligation to put their clients (issuers) interest ahead of their own. Broker-dealers serving solely as underwriters are exempt from Rule G-23 as they make no claims of meeting the fiduciary standard and putting issuer interests ahead of their own. Broker-dealers must disclose that their relationship to the issuer is an arm’s-length relationship and that its interests differ from those of the issuer. Previously, a dealer acting as a financial advisor could act as a marketing agent with written disclosure of the conflict of interest along with their compensation coupled with the issuer’s written acknowledgment and consent.