

accountant retained to provide audit and attestation services; and a law firm retained to conduct a legal analysis on a particular transaction contemplated).²⁷

Professionals designated by an issuer to provide services to the dealer (e.g., underwriter's counsel).²⁸

Professional from whom a dealer seeks substantive or technical advice in connection with an issuer presentation with no intention of seeking their intercession with the issuer (e.g., engineers who perform technical reviews or feasibility studies; lawyers who review local regulations; and accountants who scrutinize financial reports).²⁹

Any individual retained as a consultant but treated by a dealer as a municipal finance professional (e.g., a limited partner or other retired employee of the dealer).³⁰

²⁷ A.G. Edwards; PSA. PSA does not believe that "persons or firms which offer other professional services commonly employed in a municipal securities transaction should be treated as consultants merely because a . . . dealer engages in conversations or discussions with such persons or firms about concepts or ideas which might be offered to an issuer to achieve or encourage a particular financing." PSA argues that the definition "is so broad as to interfere with traditional and appropriate methods of developing new business opportunities."

²⁸ Artemis; GFOA; Gilmore & Bell; JP Morgan; Morgan Stanley; and NABL. NABL believes that the rule "should make clear that providers of substantive professional advice and services are not 'consultants' . . . and that a law firm which is selected as counsel to the underwriter, even if 'designated' as such by the issuer, does not become a 'consultant' to the underwriter. . . ." The GFOA states that "there are many instances where issuers make designations using merit-based criteria and it would not be appropriate to assume that such 'designated' persons should be treated as if they were used by a dealer to obtain or retain business . . ." and that the April 1995 Draft Rule should distinguish between "merit-based and nonmerit-based designations." Broward County shares this position. Gilmore & Bell is "not comfortable with the entire concept of calling issuer-designated persons 'consultants' to the dealer. . . ." They believe that the "whole concept of a consultant under the Rule is someone who assists the dealer in obtaining or retaining municipal securities business. In no sense is an issuer-designated representative of the dealer a person who helped the dealer get the business; rather, that issuer-designated person or firm is imposed on the dealer as a condition to participating in the offering." Morgan Stanley does not believe that issuer-designated professionals should be defined as consultants. "Far from helping dealers to solicit or win business, issuer-designated professionals are all too often imposed on dealers * * *." Morgan Stanley supports the disclosure of such relationships, and suggests removing such persons from the scope of the definition and adding a disclosure requirement to a separate section of the draft rule. JP Morgan also supports the disclosure of such relationships "once an underwriting has been won, * * * but that in no way should these * * * professionals be deemed to be 'consultants' to the dealer." A.G. Edwards, on the other hand, believes that even those persons who may be engaged by the dealer as a "precondition" to obtaining an issuer's business (e.g., underwriter's counsel designated by the issuer), "are the type of 'consultants' to which the disclosure rule should apply."

²⁹ Morgan Stanley; PSA; and Smith Barney.

³⁰ Goldman Sachs. Presumably the dealer has deemed the person to be subject to rules G-37 and G-20, and is recording information on political

Lobbyists who are not acting to obtain or retain business (e.g., a lobbyist employed to keep the dealer apprised of legislation that could impact the dealer or its issuer clients).³¹

PSA recommends the following definition of consultant:

Any person, other than a municipal finance professional, who is employed by the broker, dealer or municipal securities dealer on an exclusive basis with respect to either an issuer or a particular transaction to obtain or retain municipal securities business, provided that such employment (A) includes any direct or indirect communication with the issuer by such person which is made on behalf of the broker, dealer or municipal securities dealer to obtain or retain such municipal securities business, and (B) is undertaken with the understanding of receiving compensation from such broker, dealer or municipal securities dealer.

Another commenter is concerned about the Board's definition of consultant because "any third party with whom a dealer discusses any issue which might bear on the firm's decision to seek business could qualify as a consultant. After all, since firms are in business to do business, they have little reason to talk to anyone unless it is to help get business."³² This commenter endorses PSA's definition of consultant, and believes that at least two factors are relevant to the creation of a consulting relationship: (1) The person will actively promote the underwriter—and only that underwriter—to an issuer; and (2) the person will be compensated in some way by the underwriter. Two other commenters also endorse PSA's proposed definition of consultant, and believe that it should be incorporated into rule G-37.³³ Another commenter, without criticizing the commenter's proposed definition, recommends a modified version thereof.³⁴ On the other hand, Morgan Stanley is critical of certain elements of PSA's definition.³⁵

contributions and gifts and gratuities, as required by those rules.

³¹ Seattle-Northwest.

³² Smith Barney.

³³ Chemical Securities; JP Morgan.

³⁴ Artemis recommends a version that would not include the elements of exclusivity or indirect communication with the issuer.

³⁵ Morgan Stanley opposes PSA's requirement for "exclusivity" which "is intended to disqualify a relationship under the definition if a putative consultant has also been retained to solicit the same business on behalf of another firm." Morgan Stanley does not understand "why exclusivity makes any difference. * * * [and is concerned that] the phrase could be read to disqualify a consultant who is soliciting business from more than one issuer and a consultant hired by two dealers to solicit the same piece of business on their joint behalf." Morgan Stanley also is concerned that PSA's proposal, which would limit the definition of consultant to persons hired "with respect to either an issuer or a particular transaction," will "inappropriately limit the number of consultants required to be disclosed * * * [for example,] by excluding

With respect to the definition proposed in the April 1995 Draft Rule, this commenter argues that that definition inappropriately applies to three groups of professionals: (1) Professionals designated by an issuer to provide services to the dealer; (2) professionals from whom a dealer seeks substantive or technical advice in connection with an issuer presentation with no intention of seeking their intercession with the issuer; and (3) "professionals who may in fact recommend a broker-dealer to an issuer—on the basis of substantive professional familiarity and respect and not on the expectation or promise of *quid pro quo* recompense." Morgan Stanley is concerned that the Board's definition could "cause disruptions in an industry currently undergoing contraction * * * [and] may lead larger firms, with other sources of revenue, finally to conclude that the burden of ensuring municipal market compliance outweighs the benefit of what, frankly, is currently a marginal business for many of them." Morgan Stanley believes the definition of consultant "should be restored to its common-sense meaning in the context of the municipal securities business. * * * [and] should reflect * * * the two essential elements of disclosable consulting relationships in the municipal securities business: compensation and the proposed intercession with an issuer by the consultant in exchange for such compensation."³⁶ The commenter notes that its proposed definition incorporates "not only direct but also indirect consultant use and issuer intercession and * * * [alludes] to the possibility of compensation from persons other than the dealer." Thus, Morgan Stanley recommends the following definition of consultant:

Any person or entity used, directly or indirectly, by a broker, dealer or municipal securities dealer to obtain or retain municipal securities business through direct or indirect intercession by such person or entity with the relevant municipal issuer on behalf of such broker, dealer or municipal securities dealer where such intercession is undertaken by such person or entity in exchange for, or with the understanding of receiving, payment (as defined in rule G-37) from such broker, dealer or municipal securities dealer or any other person.

consultants who are hired not with respect to particular issuers and transactions but according to other organizing principles: by type of transaction (e.g., student loan deals), by type of issuer, by geographic area * * *."

³⁶ Morgan Stanley further suggests defining "compensation" to mirror the definition of "payment" under rule G-37.