Several other commenters share Morgan Stanley's view that compensation is a relevant factor in determining the existence of a consulting relationship. For example, one of the commenters does not believe the draft rule should apply to ''persons who are merely engaged by a dealer *in connection with* municipal securities business * * * [but rather] should apply only to persons engaged by a dealer with the expectation of receiving compensation for seeking to obtain or retain municipal securities business.'' [37] Another commenter believes that ''a dealer may 'use' a person in a broad sense (and in a perfectly permissible sense) without that person being a consultant to the dealer in any common sense meaning of the word.'' [38] But if a dealer compensates a person for services in obtaining or retaining municipal securities business, ''then obviously such person is working for the dealer and a 'consulting' relationship exists. * * *'' [39] In this regard, the commenter argues that, at a minimum, the definition of consultant should include any person who is paid or compensated (rather than ''used'') by a dealer for the purpose of seeking to obtain or retain municipal securities business. Another commenter notes that such compensation ''can take various forms, such as payment of a finder's fee, a percentage of revenues or fees earned on the transaction, a fee for services in excess of the industry standard for such services, and political contributions.'' [40]

One of the commenters believes the definition should extend to private entities that construct or develop facilities from the proceeds of municipal financings, including nursing home and retirement center projects, housing issues, and land-based development financings.[41] This commenter believes that ''it is quite common for such private parties, after making large political contributions, to bring their own finance teams, including underwriters, onto the scene and to pressure issuers to use those teams. * * * [t]hus, the private parties can be viewed as acting on behalf of the underwriters. * * *''

Board Response

In response to the commenters' concerns over the definition of consultant in the April 1995 Draft Rule, the proposed rule now defines consultant as any person used by a dealer to obtain or retain municipal securities business through direct or indirect communication by such person with an issuer on the dealer's behalf where the communication is undertaken by such person in exchange for, or with the understanding of receiving, payment from the dealer or any other person. The definition specifically excludes ''municipal finance professionals,'' as that term is defined in rule G–37(g)(iv), because such individuals are covered by the requirements of rule G–37. The definition also excludes any person whose sole basis of compensation from the dealer is the actual provision of legal advice, accounting or engineering assistance in connection with the municipal securities business that the dealer is seeking to obtain or retain. The exclusion would apply, for example, to a lawyer retained to conduct a legal analysis on a particular transaction contemplated by the dealer, or to review local regulations; an accountant retained to conduct a tax analysis or to scrutinize financial reports; or an engineer retained to perform a technical review or feasibility study. The exemption is intended to ensure that professionals who are engaged by the dealer solely to perform substantive work in connection with municipal securities business are not brought within the definition of consultant as long as their compensation is in consideration of only those professional services actually provided in connection with such municipal securities business. However, any attorney or other professional used by the dealer as a ''finder'' for municipal securities business would be considered a consultant under the proposed rule.

Also, in response to certain commenters' concerns, the Board has eliminated ''issuer-designated'' professionals from the definition of consultant. The Board agrees with these commenters that persons who are engaged by a dealer at the request or direction of the issuer (*e.g.*, underwriter's counsel) are not, in fact, consultants because they do not assist the dealer in obtaining or retaining municipal securities business. However, the Board continues to believe that the subject of issuer involvement in the underwriting process merits review, and will address this subject, including the question of requiring disclosure of issuer-designated persons, at a future time.

Requirement of a Written Agreement

The April 1995 Draft Rule would have required dealers to have written agreements with their consultants before the consultants could provide any services on their behalf. The April 1995 Draft Rule would have provided that the ''Consultant Agreement'' must indicate the role to be performed by the consultant and the compensation arrangement. One of the commenters opposes the requirement of a written agreement, arguing that it could ''hinder the effective and timely rendering of legal services due to the proposed rule's prohibition of services until the execution of a contract. The prospect of depriving a client of substantive legal advice for any reason, and even for a modest timeframe, is by itself troubling.'' [42] Another commenter also opposes this requirement, arguing that whether or not a consultant and a dealer enter into a written agreement ''is a business decision best left to the interested parties.'' [43] One commenter, while not opposed to memorializing traditional consultant agreements, believes that the content of such agreements ''is best left to private negotiation between the parties, and not subject to any specific regulatory strictures.'' [44] Another commenter shares this view.[45]

A number of commenters are concerned about the timing of the requirement of a written agreement. One commenter ''strongly objects'' to the requirement that a written agreement be in place before using the services of professional service providers, such as lawyers, accountants, and printers, and believes that such a requirement ''will disrupt traditional and legitimate business relationships and impede the ability of dealers to respond to issuer's needs, particularly in the case of ad-hoc inquiries from issuers in response to which dealers routinely make use of professional providers such as lawyers or accountants.'' [46] Another commenter states that ''it would be a legal and logistical nightmare if every firm was required to enter into a contract with the entire universe of persons and entities who provide information to underwriters in the normal course of business. It would be much less burdensome—though still in our view an unnecessary intrusion into business relationships—to limit the requirement of a written agreement to those situations in which the firm is retaining a third party to promote the firm to an issuer for a fee or other compensation.'' [47]

[37] A.G. Edwards.
[38] Gilmore & Bell.
[39] *Id.*
[40] Artemis.
[41] American Government Financial Services.
[42] Goldman Sachs.
[43] PSA.
[44] A.G. Edwards.
[45] Chemical Securities.
[46] A.G. Edwards.
[47] Smith Barney.