Other commenters support the requirement of a written agreement.⁴⁸ One of these commenters believes such a requirement represents a way of discouraging the hiring of consultants solely for their personal or political influence with issuers.⁴⁹ However, this commenter conditions its support on the Board limiting the definition of consultant.⁵⁰

Board Response

The requirement of a written agreement embodied in proposed rule G-38 is similar to the April 1995 Draft Rule, and requires dealers who use consultants to evidence the consulting arrangement in writing (referred to as a "Consultant Agreement"). At a minimum, the writing must include the name, company, role and compensation arrangement of each consultant used by the dealer. Such written agreements must be entered into before the consultant engages in any direct or indirect communication with an issuer on the dealer's behalf. Although certain commenters were opposed to the requirement of a written agreement, the Board believes that this requirement is necessary to ensure that dealers are aware of arrangements that their branch offices or local personnel may have with consultants. The requirement also will assist dealers in developing mechanisms to monitor such arrangements, and will assist enforcement agencies to inspect for compliance with rule G-38. With regard to commenters' concern over the timing of this requirement (*i.e.*, that a written agreement must be entered into before the consultant provides any services on behalf of the dealer), the Board believes that by limiting the scope of the definition of consultant (as discussed above) and by revising the timing of the agreement (*i.e.*, before any communication by the consultant with an issuer on the dealer's behalf), it has ameliorated many, if not all, of these concerns.

Disclosure of Consulting Arrangements to Issuers

The April 1995 Draft Rule would have required dealers to disclose to issuers in writing all consultants with which they have entered into a Consultant Agreement in connection with an effort to obtain or retain municipal securities business with that issuer, along with the basic terms of the Consultant Agreement. The April 1995 Draft Rule required dealers to make such disclosures when they become involved in the issuer's process for selecting a dealer for municipal securities business, whether or not the issuer requests such information in a Request for Proposal.

Most commenters agree that disclosure to issuers of consulting arrangements is appropriate. However, one of these commenters believes that the timing of the disclosure requires clarification.51 This commenter notes that financing ideas frequently are discussed informally prior to the beginning of "the issuer's selection process," and that it would be 'imprudent to stifle'' such discussion.52 Similarly, another commenter supports disclosure to issuers, but is concerned that the timing of such disclosures "is too vague." ⁵³ This commenter believes that "it is sufficient to require that the disclosure be made at least prior to a dealer's acceptance of business from an issuer, on the theory that at that time the issuer is still in a position to rescind the award of business if the disclosed facts are sufficiently unpalatable." 54 The commenter also believes that "[l]imiting the disclosure obligation to consultants with whom the dealer has already entered into an agreement * * * would seem to create unnecessary timing issues as well as unnecessary opportunities for manipulation." 55 Accordingly, the commenter proposes extending the disclosure requirement to all consultants used by the dealer in connection with the relevant issuer or the relevant securities offering, regardless of the status of the written agreement between them.

One of the commenters believes that the disclosure of consultant relationships should only be made upon the request of the issuer, and notes that issuers can include a request for such information in their Request for Proposal and that if the issuer wants additional information, it can simply ask the dealer for further details.⁵⁶ The commenter also believes that "a specific description of a consultant's role is difficult to set forth at the onset of a relationship" and therefore disclosure of a consultant relationship should include only a general description of the role to be performed by the consultant.⁵⁷ Furthermore, the commenter believes that certain information, such as the details of the compensation arrangement, should remain confidential.

Another commenter believes that disclosure to the public is of greater importance than disclosure to issuers; "[i]ssuers are aware of the activities of consultants; the public often is not. The most powerful tool for preserving the integrity of the market is the public disclosure by the MSRB of the consulting relationships reported to it." 58 However, the commenter believes that consultants hired on the dealer's initiative should be disclosed to an issuer and the Board "only when (i) the issuer is engaged in a formal process of either reviewing its underwriting relationships or placing a specific piece of debt and (ii) the dealer is actually selected for the program or the specific underwriting." ⁵⁹ The commenter states that "this two-part test will result in meaningful information regarding the actual involvement of consultants in completed municipal finance transactions being made available." $^{\rm 60}$ Another commenter also is concerned about disclosure reaching the public domain, and states that any disclosure to issuers should be made to their governing bodies "for inclusion in the publicly available records thereof" otherwise the goal of public disclosure of consultant relationship can easily be frustrated.61

Board Response

In response to commenters' concerns, particularly over timing, the Board has modified the proposed rule's requirement concerning disclosure of consulting arrangements to issuers. Proposed rule G-38 now requires each dealer to disclose to an issuer with which it is engaging or seeking to engage in municipal securities business, in writing, information on consulting arrangements relating to such issuer. The written disclosure must include, at a minimum, the name, company, role and compensation arrangement with the consultant or consultants. Dealers are required to make such written disclosures no later than the issuer's selection of any dealer in connection with the municipal securities business sought, regardless of whether the dealer making the disclosure ultimately is the one to obtain or retain that business.

⁶⁰ Id.

⁴⁸ Artemis; Morgan Stanley.

⁴⁹ Morgan Stanley.

⁵⁰ In its Request for Comments, the Board asked whether it should require that all written agreements with consultants be approved by the head of the dealer's municipal finance group and the general counsel's office. Morgan Stanley supports such a requirement, while Chemical "believes it is not beneficial or necessary. . . ." Artemis supports a requirement that the agreement be approved by the head of the municipal finance group.

⁵¹PSA. Artemis shares this view.

⁵² PSA.

⁵³ Morgan Stanley.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Chemical Securities.

⁵⁷ Id.

⁵⁸ JP Morgan.

⁵⁹ Id.

⁶¹ Willkie Farr.