American Bankers Association

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Vice President
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[redacted]

BY ELECTRONIC MAIL

August 26, 2014

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: MSRB Proposed New Rule G-44
Supervisory and Compliance Obligations of Municipal Advisors
File Number SR-MSRB-2014-06

Dear Secretary Murphy:

The American Bankers Association (ABA)[1] appreciates this opportunity to comment on new Rule G-44 proposed by the Municipal Securities Rulemaking Board (MSRB). The proposed rule seeks to establish principles-based supervisory and compliance obligations for registered municipal advisors pursuant to Section 975 of the Dodd-Frank Wall Street and Consumer Protection Act (Dodd-Frank Act).[2] Our member banks[3] and their affiliates provide a broad range of products and services to municipal entities and obligated persons in various capacities, including as municipal advisors. Our comments in this letter express the concerns of our members who are (or will be) registered municipal advisors who provide services to municipalities and obligated persons in a fiduciary capacity.

As described by the MSRB, a core principle of proposed Rule G-44 is that "all municipal advisors must have a system to supervise their municipal advisory activities that is reasonably designed to achieve compliance with all applicable securities laws, including MSRB rules." Second, the proposal further requires the establishment, implementation, maintenance, and enforcement of written supervisory procedures reasonably designed to achieve compliance with applicable securities laws. Responsibility for supervision would reside with one or more "municipal advisor principals" whose experience, knowledge, and training must be commensurate with their supervisory responsibilities. Reviews of compliance and supervisory procedures would have to be completed at least annually. Third, municipal advisors would also be required to designate a Chief Compliance Officer who must have the competence to develop and test policies and procedures designed to comply with applicable law. The regulatory requirements set forth in the proposal are modelled generally on current regulatory regimes for broker-dealers and registered investment advisers.

[1] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $14 trillion banking industry and its 2 million employees. ABA's extensive resources enhance the success of the nation's banks and strengthen America's economy and communities. Learn more at www.aba.com.
[2] *Pub. L*. 111-203.
[3] In this letter, we use the term "bank" as defined in the Securities Exchange Act of 1934 (15 U.S.C. § 78c(6)).

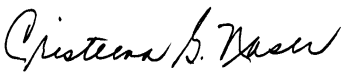
In our comment letter to the MSRB on Draft Rule G-44 (copy appended hereto), we asserted that the bank fiduciary regulatory regimes would satisfy the principles set forth in Draft Rule G-44. We noted that the fiduciary regulatory regime, like Draft Rule G-44, promotes compliance with applicable securities laws by requiring bank fiduciaries to develop and implement compliance and supervisory policies. Critically, such banks are subject to close banking agency supervision to examine for compliance with applicable federal and state laws and regulations.[4]

We are most appreciative of the fact that the MSRB in proposed Rule G-44(e) has provided an exemption from the rule for banks that certify that they are subject to *federal* supervisory and compliance obligations and books and records requirements that are substantially equivalent to the supervisory and compliance obligations of proposed Rule G-44 and the books and records requirements of Rule G-8(h)(iii).[5] Nonetheless, we believe that state fiduciary regulatory regimes may similarly satisfy the principles set forth in proposed Rule G-44. Because the regulations of the Office of the Comptroller of the Currency (OCC),[6] which we cited in our comment letter to the MSRB, are considered to be the "bible" for fiduciary compliance throughout the country, many individual state banking regulators have adopted fiduciary regulations which are substantially based on OCC's rules. In addition, state-chartered trust companies are typically subject to similar supervision to examine for compliance with applicable state laws.

Accordingly, we strongly believe that state-chartered trust companies should be afforded the opportunity to demonstrate to the MSRB the strength of their state fiduciary regulatory regimes and that they are substantially equivalent to the supervisory and compliance obligations of proposed Rule G-44 and the books and records requirements of Rule G-8(h)(iii). While such individual demonstrations may require the investment of MSRB resources, we believe that such treatment is consistent with good government, avoiding an unnecessary overlay of a securities-law based compliance regime onto a trust company compliance regime, which compliance costs will be ultimately be borne by municipal entities.

We appreciate your consideration of this request and, as always, are ready to answer your questions or provide additional information.

Sincerely,



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[4] We note that fiduciary laws are fundamentally in the purview of states through legislation and jurisprudence. OCC's regulations recognize this fact by requiring compliance with applicable law, such as state fiduciary law, terms of the document governing the account, and other applicable regulations.

[5] Subsection (e) provides that: A municipal advisor that is a bank or separately identifiable department or division of a bank as defined in Securities Exchange Act Rule 15Ba1-1(d)(4) shall, to the extent it engages in municipal advisory activities in the exercise of any fiduciary powers as defined in 12 C.F.R. Section 9.2(g) or substantially identical powers, be exempt from this rule and Rule G-8(h)(iii) if such municipal advisor certifies in writing annually that it is, with respect to such activities, subject to federal supervisory and compliance obligations and books and records requirements that are substantially equivalent to the supervisory and compliance obligations of this rule and the books and records requirements of Rule G-8(h)(iii).

[6] OCC's fiduciary regulations may be found at 12 C.F.R. Part 9.

BY ELECTRONIC MAIL

May 1, 2014

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street
Alexandria, VA 22314

Re: MSRB Notice 2014-04 – Draft MSRB Rule G-44
Supervisory and Compliance Obligations of Municipal Advisors

Dear Mr. Smith:

The American Bankers Association (ABA)[7] appreciates this opportunity to comment on Draft Rule G-44 proposed by the Municipal Securities Rulemaking Board (MSRB). The draft rule would seek to establish principles-based supervisory and compliance obligations for registered municipal advisors pursuant to Section 975 of the Dodd-Frank Wall Street and Consumer Protection Act (Dodd-Frank Act).[8] Our member banks[9] and their affiliates provide a broad range of products and services to municipal entities and obligated persons in various capacities, including as municipal advisors. Our comments in this letter express the concerns of our members who are (or will be) registered municipal advisors who provide services to municipalities and obligated persons in a fiduciary capacity.

As described by the MSRB, a core principle of the Draft Rule G-44 is that "all municipal advisors must have a system to supervise their municipal advisory activities that is reasonably designed to achieve compliance with all applicable securities laws, including MSRB rules." Second, the proposal further requires the establishment, implementation, maintenance, and enforcement of written supervisory procedures reasonably designed to achieve compliance with applicable securities laws. Responsibility for supervision would reside with one or more "municipal advisor principals" whose experience, knowledge, and training must be commensurate with their supervisory responsibilities. Reviews of compliance and supervisory procedures would have to be completed at least annually. Third, municipal advisors would also be required to designate a Chief Compliance Officer who must have the competence to develop and test policies and procedures designed to comply with applicable law.

As noted in draft Rule G-44, in developing its supervisory and compliance program, the MSRB has used as a baseline aspects of existing supervision and compliance regulation under other securities law regimes, including those for broker-dealers under rules of the MSRB and the Financial Industry Regulatory Authority (FINRA), and for investment advisers under the Investment Advisers Act of 1940.

[7] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $14 trillion banking industry and its 2 million employees. ABA's extensive resources enhance the success of the nation's banks and strengthen America's economy and communities. Learn more at www.aba.com.
[8] *Pub. L*. 111-203.
[9] In this letter, we use the term "bank" as defined in the Securities Exchange Act of 1934 (cite).

ABA believes that with respect to municipal advisory activities of bank trust departments and trust companies (hereinafter, "bank fiduciaries"),[10] the MSRB should also consider the fiduciary regulatory regimes of federal and state bank regulators as a baseline for compliance. The regulatory regime applicable to bank fiduciaries, like Draft Rule G-44, promotes compliance with applicable securities laws by requiring bank fiduciaries to develop and implement compliance and supervisory policies. Critically, such banks are subject to close banking agency supervision to ensure compliance with applicable federal and state laws and regulations.

ABA strongly believes the regulatory regime applicable to bank fiduciaries satisfies the principles underlying the MSRB's Draft Rule G-44 and that compliance with already applicable regulations (and guidance) should be deemed to constitute compliance with Rule G-44 for bank fiduciaries that are municipal advisors. Importantly, permitting the use of the robust bank fiduciary regulatory structure as an alternative to that laid out in Draft Rule G-44 would not only further the purpose of the draft rule, but it would avoid overlaying an unnecessary and costly securities-based compliance program onto a banking-law based compliance regime.

DISCUSSION

1. Bank fiduciaries are already subject to comprehensive supervision and regulation.

In Draft Rule G-44, the MSRB stated that "the legislative history of the Dodd-Frank Act indicates Congress was concerned with the previously unregulated activities of municipal advisors" [emphasis added] and thus, "It is reasonable to conclude that Congress, in subjecting municipal advisors to regulation in the Dodd-Frank Act, contemplated a regulatory regime comparable to the regulatory regimes for other entities and persons in the financial services industry, at least to the fundamental extent of requiring reasonable supervisory and compliance functions to be performed."[11] Municipal advisory activities of bank fiduciaries are not unregulated – far from it – they are subject to a time-tested and robust regulatory regime.

Bank fiduciaries are subject to extensive oversight by their primary federal regulator, and additionally for state-chartered institutions, by the bank or financial institution regulator in their state. For all fiduciary clients, including municipal entities, national banks must comply with the regulations of the Office of the Comptroller of the Currency (OCC) at 12 CFR Part 9, Fiduciary Activities of National Banks.[12] In addition to Part 9, OCC's regulation is supplemented with detailed manuals, handbooks, and examination procedures on specific topics, including: Asset Management; Asset Management Operations and Controls; Collective Investment Funds; Conflicts of Interest; Custody Services; Investment Management Services; and Personal Fiduciary Services. The OCC regulatory regime is broadly recognized as a model, and state regulations largely track OCC requirements.

[10] Bank trust departments and trust companies provide a range of investment management and advisory services to municipalities, municipal pension plans, or retirement systems that typically take the form of investments in collective investment vehicles or separately managed accounts. To the extent that such vehicles or accounts include the proceeds of an issuance of municipal bonds, the bank fiduciary must register as a municipal advisor.
[11] Draft Rule G-44 at 7.
[12] 12 CFR Part 9 is available at http://www.gpo.gov/fdsys/pkg/CFR-2014-title12-vol1/pdf/CFR-2014-title12-vol1-part9.pdf.

For a bank to exercise fiduciary powers, including the power to provide investment management services, the bank must apply to its federal or state regulator and obtain approval prior to offering any fiduciary services. The application generally is approved only if the regulator finds that the bank is operated in a satisfactory manner, the proposed activities comply with applicable law, and the bank employs qualified fiduciary management.

Once approved, the activities of bank fiduciaries are highly regulated. For example, 12 CFR § 9.5 requires national bank fiduciaries to adopt and follow written policies and procedures to maintain fiduciary activities in compliance with applicable law**.** Specifically, under § 9.5 the bank fiduciary's policies and procedures must address, where appropriate:

- Brokerage placement practices;
- Methods for ensuring that fiduciary officers and employees do not use material inside information in connection with any decision or recommendation to purchase or sell any security;
- Methods for preventing self-dealing and conflicts of interest;
- Selection and retention of legal counsel who is readily available to advise the bank and its fiduciary officers and employees on fiduciary matters; and
- Investment of funds held as fiduciary, including short-term investments and the treatment of fiduciary funds awaiting investment or distribution.

In addition, Part 9 requires bank fiduciaries to establish a supervisory environment that communicates a commitment to risk management and a sound internal control system. As stated in OCC's Asset Management Handbook:

> The board of directors and senior management must be committed to risk management for processes to be effective. Acknowledged acceptance and oversight of the risk management process by the board and senior management is important . . . Directors must recognize their responsibility to provide proper oversight of asset management activities, and the official records of the board should clearly reflect the proper discharge of that responsibility. . . The board must recognize and understand existing risks and risks that may arise from new business initiatives, including risks that originate in bank and nonbank subsidiaries and affiliates, such as investment advisory and brokerage companies. The board is ultimately responsible for any financial loss or reduction in shareholder value suffered by the bank. . . If, through their failure to exercise prudent oversight, losses accrue to account principals, beneficiaries, or the bank, directors can be held liable for such losses in an action for damages.[13]

OCC further tasks bank senior management with the responsibility of ensuring the development and implementation of an effective risk management system, including day-to-day risk assessment and implementation of appropriate risk controls and monitoring systems. As stated in OCC's Asset Management Operations and Controls Handbook:

> [T]he board and management are responsible for the oversight of Asset Management operations. This includes maintaining a strong control environment, effective policies and procedures, a robust audit process, and a sound vendor management program. The size and complexity of a bank's Asset Management activities affect a bank's specific organizational structure, internal processes, and choice of Asset Management accounting systems. The resulting systems and controls should accomplish the following:

[13] OCC Asset Management Handbook at 21.

- adequately safeguard assets;
- ensure the accuracy and reliability of accounting data;
- provide timely information for management and clients;
- maintain adequate levels of operating efficiency;
- ensure compliance with laws, rules, regulations, and bank policies; and
- accommodate new financial products/services and future growth.[14]

To ensure compliance with its regulations, OCC provides close and continuous oversight of national banks and is required to conduct a full-scope, on-site examination of every bank fiduciary at least once during each 12-month period.[15] Such examinations include reviewing written policies and procedures that address the supervision of bank fiduciary activities and the bank's management of collective funds.[16] State banking regulators provide a similar level of oversight.

It is clear from the above discussion that bank fiduciaries are already required to maintain supervisory and compliance programs and are subject to annual examinations to ensure compliance. Accordingly, ABA believes that the existing fiduciary regulatory structure achieves the goals of Draft Rule G-44 without the overlay of a costly and unneeded securities law-based framework.

2. The application of Draft Rule G-44's regulatory regime will impose unwarranted costs on bank fiduciaries with no additional benefit to municipal entities.

We do not disagree that registered municipal advisors should be subject to a regulatory regime providing accountability and protections for municipal entities. We further agree that the proposed securities law-based regulatory model achieves laudable goals and may be appropriate to impose upon municipal advisors that are currently unregulated. With respect to bank fiduciaries, however, we believe that there is already in place a time-tested regulatory regime which achieves the protections sought by the draft rule.

In its economic analysis, the MSRB stated that it "has sought to tailor the draft rule and draft amendments so as not to impose unnecessary or inappropriate costs and burdens on municipal advisors."[17] However, in its considerations, the MSRB has failed to consider the existing regulatory structure in which bank fiduciaries operate and the costs and burdens that would be entailed to overlay the proposed regulatory structure on the fiduciary regime. Moreover, ABA strongly believes that the imposition on such fiduciaries of a superfluous and costly regulatory regime will provide no additional protections for municipal entities who are bank fiduciary clients. Those clients already receive the highest level of protection both through the fiduciary duty applicable to banks and the fact of robust supervision and examination by their bank regulators. Rather than benefitting municipal entities, the costs of a duplicative regulatory regime will necessarily be borne by these entities.

The imposition of the regulatory regime envisioned in Draft Rule G-44 will necessarily require bank fiduciaries to undertake costly reviews to determine where there are duplicative or contradictory procedures between the two systems. Moreover, bank fiduciaries may find that there are new requirements and differences which will compel them to adopt both regimes side-by-side. For example, the proposed municipal advisory principal and associated person structure may have similarities to the organizational, communication, and compliance structures in place at banks, but banks will likely be

[14] OCC Asset Management Operations and Controls at 2, available at http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/am-operations-controls-rev8-18-11.pdf.
[15] 12 CFR § 4.6.
[16] OCC Internal Control Questionnaires and Verification Procedures, available at http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/_paginated/icq/default.htm, ("Evaluating a bank's system of internal controls is a fundamental step in the OCC's supervision process.")
[17] Draft Rule G-44 at 5.

required to adopt side-by-side structures to ensure they meet Draft Rule G-44's specific requirements. For example, for all clients bank fiduciaries will be required by their regulator to adhere to the bank fiduciary regulatory regime, including for municipal entity clients whose accounts do not include proceeds. However, for those municipal entity clients whose accounts do include proceeds, they would have to institute the additional, separate regulatory regime of Rule G-44. Indeed, we believe the role of "municipal advisor principal" to be inapposite when the activities at issue involve fiduciary asset management for municipalities by bank fiduciaries, such as discussions regarding a client's investment strategies rather than sales of securities. To ensure compliance with the proposed written supervisory procedures requirement, bank fiduciaries will need to adopt additional supervisory procedures, regardless of their overlap with existing procedures. Given the level of current regulation of bank fiduciaries, the overlap will be significant, and there will be added compliance costs with no substantive benefit. In addition, the maintenance and testing requirements under the proposal will impose ongoing costs.

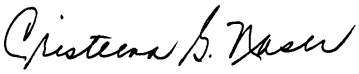
Finally, because of these costs bank fiduciaries will be at a significant competitive disadvantage with registered investment advisers (RIAs) who are exempt from municipal advisor registration altogether. It is not insignificant that banks were exempted from registration as RIAs because Congress believed that the bank regulatory regime was the equivalent of the intended RIA regulation.[18]

CONCLUSION

Draft Rule G-44 would impose regulatory requirements that overlap but are not coextensive with the robust regulatory regime with which bank fiduciaries must currently comply. We are concerned that applying the draft rule's requirements to bank fiduciaries would impose on bank fiduciaries a duplicative and conflicting regulatory regime with no observable benefit to fiduciary clients, who ultimately would bear the costs of such redundant regulation. In addition, bank fiduciaries would also be at a competitive disadvantage with RIAs who would not be subject to such duplicative regulation. Accordingly, because the bank regulatory regimes are similarly principles based and address the same issues encompassed in Draft Rule G-44, we strongly urge the MSRB to recognize that the bank fiduciary supervisory regime satisfies the principles underlying the MSRB's Draft Rule G-44 and that compliance with that regime constitutes compliance with Draft Rule G-44.

We would be happy to provide additional detailed information on the bank fiduciary regulatory regime.

Sincerely,



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[18] We note further that bank fiduciaries are subject to both federal regulations and state law requirements applicable to fiduciaries. Registered investment advisers are not subject to state fiduciary law. *See,* Regulation of Investment Advisers by the U.S. Securities and Exchange Commission, March 2013 at 23, footnote 129, available at http://www.sec.gov/about/offices/oia/oia_investman/rplaze-042012.pdf.