September 10, 2015

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: **Release No. 34-75628; File No. SR-MSRB-2015-03; Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change Consisting of Proposed New Rule G-42, on Duties of Non-Solicitor Municipal Advisors, and Proposed Amendment to Rule G-8, on Books and Records to be Made by Brokers, Dealers, Municipal Securities Dealers, and Municipal Advisors ("Release")**

Dear Mr. Fields:

Zions First National Bank ("Zions") appreciates this opportunity to provide additional comments to the Securities and Exchange Commission ("SEC") pertaining to the Municipal Securities Rulemaking Board's ("MSRB's") Proposed Rule G-42 regarding enhanced standards of conduct and duties of municipal advisors when engaged in municipal advisory activities (the "Proposed Rule").

Zions also appreciates the MSRB's efforts to propose a basic conduct rule for municipal advisors and agrees with many of the provisions of the Proposed Rule. However, Zions continues to believe that the prohibition contained in the Proposed Rule against principal transactions between municipal entities and their municipal advisors is overly broad and inconsistent with federal securities and banking laws. Under the Proposed Rule, "[a] municipal advisor to a municipal entity client, and any affiliate of such municipal advisor, is prohibited from engaging in a principal transaction directly related to the same municipal securities transaction or municipal financial product as to which the municipal advisor is providing or has provided advice."[1]

I. Basis for Proceedings and MSRB Response

In its Release, the SEC provides notice of the three grounds upon which it is considering disapproval of Proposed Rule G-42. First, the SEC cites to Section 15B(b)(2) of the Securities Exchange Act of 1934 ("Exchange Act"), which requires that the MSRB propose and adopt rules to effect the purposes of the Act with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers and advice provided to or on behalf of municipal entities or obligated persons by brokers, dealers, municipal securities dealers, and municipal advisors with respect to municipal financial products, the issuance of municipal

[1] Proposed Rule G-42(e)(ii).

securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors.

Second, the SEC cites Section 15B(b)(2)(C) of the Exchange Act, which provides that MSRB rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.

The SEC cites as its final grounds for disapproval Section 15B(b)(2)(L)(i) of the Exchange Act, which requires the MSRB to adopt municipal advisor rules to prescribe means reasonably designed to prevent acts, practices, and courses of business as are not consistent with a municipal advisor's fiduciary duty to its clients.

On August 12, 2015, the MSRB sent a letter to the SEC in response to the comments received by the SEC on Proposed Rule G-42 ("Response"), including those submitted by Zions on May 29, 2015. In these comments, Zions focuses on the Release's grounds for disapproval and the MSRB Response; however, Zions incorporates by reference the comments provided in its May 29, 2015 comment letter. Although Zions appreciates the MSRB's willingness to continue to try to address concerns of market participants, it is Zions' position that the Proposed Rule's principal transaction ban is not consistent with Sections 15B(b)(2), 15B(b)(2)(C), and 15B(b)(2)(L)(i) of the Exchange Act.

II. Proposed Rule G-42 Is Inconsistent with Federal Securities Regulation.

The Proposed Rule is inconsistent with federal regulation of investment advisers. Investment advisers are fiduciaries to their advisory clients.[2] The U.S. Supreme Court has found that, as a fiduciary, an investment adviser "has an affirmative duty of utmost good faith and full and fair disclosure of all material facts, as well as an affirmative obligation to employ reasonable care to avoid misleading his clients."[3]

Investment advisors are permitted under the Investment Advisers Act of 1940 ("Advisers Act") to engage in principal transactions with clients, including municipal entity clients, if the adviser provides certain written disclosure regarding the conflict and obtains client consent.[4] The

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[2] Investment Advisers Act of 1940 § 206(1) and (2); *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963).

[3] *Capital Gains*, 375 U.S., supra note 2 at 191-192 (internal quotations and citations omitted).

[4] Investment Advisers Act of 1940 § 206(3).

benefits of permitting principal transactions within the confines of disclosure and consent requirements have been recognized by the SEC. [5]

In its Response to comments on the Proposed Rule's inconsistency with other regulatory schemes the MSRB states that:

> The MSRB previously considered such comments, analyzing the fiduciary duty of the municipal advisor in its relationship to a municipal entity client and the possibility for self-dealing and determined, after careful consideration of the views of commenters, that the proposed prohibition on principal transactions is sufficiently targeted and should not be amended to include exceptions based on disclosure and client consent. The MSRB does not find sufficient additional rationale offered in the most recent commentary to revise the provision in the manner suggested. The MSRB continues to believe that incorporating such exceptions to the prohibition on principal transactions would not sufficiently protect municipal entity clients from potential self-dealing-related abuses.[6]

The MSRB does not state in its Response how a municipal advisor's fiduciary duty might differ from that of an investment advisor's under federal securities law. It also does not provide reasoning for why disclosure and consent requirements offer insufficient protections to municipal entity clients. The MSRB's articulation of a municipal advisor's fiduciary duty under Proposed Rule G-42 is consistent with the U.S. Supreme Court's articulation of an investment advisor's fiduciary duty. As there is no basis to treat municipal advisors differently than investment advisors in terms of setting fiduciary duty standards, Zions believes the Proposed Rule is not reasonably designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest. The Proposed Rule also does not prescribe means reasonably designed to prevent acts, practices, and courses of business as are not consistent with a municipal advisor's fiduciary duty to its clients. Thus, it is Zions' position that municipal advisors should be permitted to engage in principal transactions with their municipal entity clients, provided that advice and consent requirements are met.

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[5] SEC Interpretation of Section 206(3) of the Investment Advisers Act of 1940, Release No. IA-1732 (July 20, 1998).

[6] MSRB Response at p. 12.

III. Proposed Rule G-42 Is Inconsistent with Federal Banking Regulation.

The Proposed Rule is also inconsistent with federal banking regulation of transactions with private companies and individuals. As an alternative to generally permitting principal transactions subject to disclosure and consent requirements, Zions believes bank loans should be excluded in their entirety from Proposed Rule G-42. The Proposed Rule G-42 contains provisions that would prohibit a municipal advisor from engaging in a principal transaction related to the same municipal securities transaction or municipal financial product, which includes a bank loan in an aggregate principal amount of $1,000,000 or more that is economically equivalent to the purchase of one or more municipal securities.[7]

Banks have been making loans to private companies and individuals for hundreds of years while simultaneously serving as fiduciaries in trust situations with the same customers. Why would individuals and private businesses be allowed to borrow money from the same banks that also serve as their fiduciaries, but municipal entities be restricted from doing the same?

The MSRB Response provides that:

> In response to Zions's comment that bank loans should be excluded, the MSRB notes that proposed paragraph .12 is limited substantially and would target only those loans that would be the same as, or directly related to, the municipal securities transaction or municipal financial product as to which the municipal advisor is providing or has provided advice and which would be considered "economically equivalent to the purchase of one or more municipal securities."[8]

It is Zions' position that banks, as highly-regulated entities, should be allowed to continue offering traditional banking services to municipal entities, including in a principal capacity. The MSRB stated that the Reves test may not be employed as "other similar financial product" was "drafted intentionally to include bank loans other than those that are a security."[9] Determining on a case-by-case basis whether a particular transaction is "economically equivalent to the

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[7] Proposed Rule, Supplementary Material Paragraph .11. Written evidences of indebtedness from municipal entities must have virtually the same structure and provisions as the related municipal securities in order to be legal, valid and binding under applicable state constitutional and statutory laws, and for interest thereon to be tax-exempt under Federal tax laws. Therefore, Zions believes the only clear way to distinguish between direct bank loans and municipal securities is to look at the intent of the acquirer at the time of acquisition. If the written evidence of municipal indebtedness is acquired with an intent of distribution, it should be deemed a security. If the written evidence of indebtedness is acquired directly by a bank for its own portfolio with no intent of distribution, it should be (and Zions believes it is) a bank loan. Such a test would conform to analogous tests under existing securities laws.

[8] MSRB Response at p. 19.

[9] MSRB Response at 18.

purchase of one or more municipal securities" is unnecessarily complex and costly for products that are already thoroughly regulated. Therefore, Zions does not believe the Proposed Rule is consistent with Sections 15B(b)(2), 15B(b)(2)(C), and 15B(b)(2)(L)(i) of the Exchange Act, and bank loans should be excluded in their entirety.

Zions would also like to reiterate its agreement with the comments of the American Bankers Association on the MSRB's Proposed Rule submitted May 29, 2015 regarding the bank loan restrictions.

IV. At Minimum, the Threshold for the Bank Loan Exception Should Be Increased.

At minimum, the threshold for the bank loan exception under the Proposed Rule should be increased. Banks often may be the sole source of certain types of financings for smaller municipal entities and smaller projects. Many of the direct loans Zions makes to smaller and more remote municipal entities for which Zions also serves as a financial advisor on unrelated issuances of municipal securities, qualify for Community Reinvestment Act ("CRA") credit from its banking regulators. Many of these borrowers and/or projects are so small that their access to the capital markets is quite limited, and direct loans may be the only source of efficient and economic solutions for their capital needs. As such, the dollar threshold for the bank loan exception under the Proposed Rule should be consistent with, and pegged to, the threshold for bank qualified obligations under Section 265(b)(3) of the Internal Revenue Code (as the same may be amended), which is currently $10,000,000, for the same reasons the bank qualification exemption was originally adopted by Congress.

The MSRB Response indicates that the MSRB is willing to consider soliciting information regarding whether the threshold of $1 million should be modified after the Proposed Rule is adopted and is in effect.[10] To be consistent with Sections 15B(b)(2), 15B(b)(2)(C), and 15B(b)(2)(L)(i) of the Exchange Act, Zions believes, at minimum, the Proposed Rule's threshold for the bank loan exception should be consistent with Section 265(b)(3) of the Internal Revenue Code prior to adoption.

V. Conclusion

Zions believes its position on the Proposed Rule is correct and would welcome an opportunity to discuss it further. We hope our comments will provide additional perspective on the appropriate level of municipal advisor regulation to ensure municipal entities are able to access the municipal market and obtain the best financing terms available to them.

We understand that other federal regulators may be interested in the outcome of the issues discussed herein and, therefore, have provided copies of this letter to the individuals listed below.

Thank you for your consideration. If you have any questions regarding this letter, please feel free to contact Gary Hansen at Zions First National Bank, One South Main, 17th Floor, Salt Lake City, Utah 84133, Telephone [redacted], E-mail: [redacted].

[10] MSRB Response at p. 19.

Very truly yours,

ZIONS FIRST NATIONAL BANK

By _____
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