BDA Bond Dealers of America

21 Dupont Circle, NW • Suite 750
Washington, DC 20036
202.204.7900
www.bdamerica.org

September 11, 2015

Submitted Electronically

Secretary
United States Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

RE: File Number SR-MSRB-2015-03

Dear Secretary:

On behalf of the Bond Dealers of America ("BDA"), I am pleased to submit this letter in response to the request by the Securities and Exchange Commission (SEC) for comments concerning whether it should approve or disapprove the Municipal Securities Rulemaking Board's (MSRB) proposed Rule G-42 (the "Proposed Rule"). ***For the reasons we discuss below, we urge the Commission to disapprove the Proposed Rule so that the MSRB can bring the Proposed Rule into alignment with Section 15B(b)(2)(L)(i) of the Exchange Act.***

BDA would first like to thank both the MSRB and the SEC for their consideration of all industry comment letters submitted on this very important regulation. It is clear that a lot of time and effort has been invested to ensure the core goals of the municipal advisor regulatory regime are met. Many market participants have also invested substantial thought and effort into the issues raised by the Proposed Rule to ensure that the Proposed Rule protects municipal entities and obligated persons in a manner that is consistent with the intention of Section 15B of the Exchange Act. We appreciate the difficulty in applying a fiduciary duty, for the first time, to a new set of municipal market participants and believe regulators have attempted, in earnest, to strike the appropriate balance between effective protection and potential unintended consequences. It is in that vein that we provide our comments today.

In previous letters and meetings with both the MSRB and SEC, BDA has raised substantive policy issues related to multiple provisions of the Proposed Rule. Though we believe that many of our concerns were considered, the MSRB was unwilling to provide a rationale for dismissing certain concerns in their follow up comments pertaining to some key issues the BDA and others raised. We remain most concerned with the Proposed Rule's absolute ban of related principal transactions and urge the Commission to disapprove the Proposed Rule so that the MSRB can redesign a more reasonable conflicts of interest regime.

In establishing the conflicts of interest regime set forth in the Proposed Rule, the MSRB was directed to create a rule consistent with Section 15B(b)(2)(L)(i) of the Exchange Act, which directs the MSRB to "prescribe means reasonably designed to prevent acts, practices, and courses of business as are not consistent with a municipal advisor's fiduciary duty." It is the opinion of the BDA that the MSRB has not met the requirements of this directive with regard to the outright ban of certain related principal transactions. The proposal that certain principal transactions be banned is out of step with how the duty of loyalty is managed with other fiduciaries—such as directors and officers, investment advisers, and attorneys. With other fiduciaries, the identification of a conflict of interest does not give rise to an outright ban but instead is managed through a disclosure and consent process.[1]

For example, the conflict management process for investment advisers is typical of the process for other fiduciaries. With investment advisers, under Section 206(3) of the Investment Advisers Act of 1940, an investment adviser – a fiduciary – is prohibited from executing principal transactions with a client, "*without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction."* This requirement is applicable on a trade-by-trade basis, which allows the client to assess the nature of the conflict associated with each transaction. Advisers Act Rule 206(3)-3T, applicable to principal transactions executed by dual registrants, requires a five-step framework of (1) disclosure of conflicts associated with principal trades, (2) the provision of written, revocable consent from the client authorizing the transaction, (3) pre-trade consent, (4) post-trade confirmation statement disclosure, and (5) an annual report of principal transactions executed on the clients behalf.

Further, the SEC in its 2011 Study on Investment Advisers and Broker-Dealers, when addressing what a fiduciary duty would require in the context of principal transactions in the fixed income market, stated that, "under the uniform fiduciary standard, a broker-dealer should be required, at a minimum, to disclose its conflicts of interest related to principal transactions, including its capacity as principal, but it would not necessarily be required to follow the specific notice and consent procedures of Advisers Act Section 206(3). Of course, when engaging in principal transactions, broker-dealers would remain subject to obligations relating to suitability, best execution, and fair and reasonable pricing and compensation."[2] It is clear from the Study that the SEC staff was not recommending a ban on principal transactions by brokers in the fixed income market. BDA therefore believes that a conflicts of interest regime that manages a principal transaction as a conflict, involves and engages the client, and that would require a municipal advisor to obtain appropriate consent before executing a principal transaction with a client should be used as a framework for the Proposed Rule. Fiduciary duties do not outright ban conflicts; they require them to be appropriately managed.

Under the Proposed Rule, a municipal entity is neither provided the opportunity of opining on potential conflicts of interest nor of participating in the conflict

[1] This process varies depending on the kind of relationship the fiduciary bears to the client.

[2] Securities and Exchange Commission Staff Study on Investment Advisors and Broker-Dealers, pg. 120.

management process. Because of this, BDA believes the conflicts regime is not in the best interest of municipal entities. It is important to remember that it is frequently the clients themselves who seek out the very products or services that would be prohibited by the principal transaction ban. This may be due to a variety of reasons such as established and trusted client relationships with firms, the ease and convenience of obtaining those products or services, the possibility that the firm is the only firm capable or willing to offer the service or lastly, and more importantly, because the firm offers those services on better economic terms for the client. It is the position of the BDA that the Proposed Rule should empower municipal entities by involving them in the conflict management process rather than disempowering them with outright bans. Similar to other beneficiaries of fiduciary duties, the Proposed Rule should afford municipal entities the right to carefully consider any principal transaction that they may enter into with their municipal advisor and provide informed, written consent.

Finally, with respect to the practical application of the documentation requirements of the proposed rule, the BDA has an additional concern for the MSRB to consider. Our specific concern is with how the proposed rule might allow for a discrepancy between information the examiner desires and that which the firm can provide.

The BDA believes that it is not fully appreciated by the MSRB just how important it is to be clear in the Proposed Rule language and state exactly what is expected of firms in the way of documentation. For example, a firm may be asked by an examiner to demonstrate a certain component of their work that may have taken the firm itself years to accomplish and compile. If a firm is not able to find a particular item for the examiner, the firm risks being accused of not being in compliance with the rule. As a result, it is almost impossible to prove to the examiner a single item of fact that may be buried under years of work. The reality is that deals get done sometimes over many years. Over the years, that examiner was not part of ongoing discussion and information sharing among deal participants. To then have an examiner come in after the fact and challenge the firm's system is difficult to overcome as a dealer, no matter how robust that firm's documentation process has been. Unless you've gone through an exam, as dealers have, it is hard to understand the volumes of record keeping options you have to consider for documentation purposes. Despite the belief that requirements in the rule may seem reasonable, the fact remains that it just takes one element of omission to find a firm at fault. BDA would therefore suggest that the MSRB consider including some mitigating language in the proposed rule to take into account this longstanding reality.

As a result of the concerns outlined above, the BDA urges the Commission to disapprove the Proposed Rule so that the MSRB may design a more reasonable conflicts of interest regulatory regime that grants municipal entities a greater level of involvement and ability to assess and prudently manage conflicts.

Thank you for the opportunity to submit these comments on the Proposed Rule.

Sincerely,

Michael Nicholas

Chief Executive Officer