INVESTMENT COMPANY INSTITUTE

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December 1, 2015

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

Re: File No. SR-MSRB-2015-03
Rule G-42, Duties of Municipal Advisors

Dear Mr. Fields:

The Investment Company Institute[1] is writing in response to the Securities and Exchange Commission's request for comments on proposed Municipal Securities Rulemaking Board ("MSRB") Rule G-42.[2] This rule would establish standards of conduct for municipal advisors. This is the third

[1] The Investment Company Institute (ICI) is a leading, global association of regulated funds, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's U.S. fund members manage total assets of $17.1 trillion and serve more than 90 million U.S. shareholders.

[2] *See Notice of Filing Amendment No. 2 to Proposed Rule Change Consisting of Proposed New Rule G-42, on Duties of Non-Solicitor Municipal Advisors, and Proposed Amendments to Rule G-8, on Books and Records to be Made by Brokers, Dealers, Municipal Securities Dealers, and Municipal Advisors,* SEC Release No. 34-76420 (November 10, 2015)("MSRB Amendment 2"). Consistent with the scope of the proposed rule, as used in this letter the term "municipal advisor" or "advisor" refers to a "non-solicitor municipal advisor."

time the Commission has sought comment on this proposal[3] and the third time we have commented on it.[4]

Since the MSRB first proposed the rule, we have consistently supported its adoption. However, we also have expressed consistently our dismay with one key aspect of it – the provision in Rule G-42(d) that affirmatively requires a municipal advisor to investigate the veracity of information provided to it by its municipal advisory clients.[5] ICI's September Letter again expressed our opposition to this requirement noting that:

- It is not reasonable for the MSRB to require such investigation unless it believes that, in the normal course of business, municipal advisory clients routinely provide materially inaccurate or incomplete information to their municipal advisors;
- This requirement is impractical and inconsistent with the suitability obligations imposed on other financial professionals;
- The requirement presumes that a municipal advisor will have access to the information it needs to assess the veracity and completeness of information provided by the client;
- It is inconsistent with the rule's overarching principle "that the [municipal] client should be empowered to determine the scope of services and control the engagement with the municipal advisor"; and
- It imposes absurd liability on the municipal advisor because, under the proposed rule, it is the advisor's obligation to determine the false nature of any information provided by a municipal

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[3] For the two previous SEC releases, *see Notice of Filing of a Proposed Rule Change Consisting of Proposed New Rule G-42, on Duties of Non-Solicitor Municipal Advisors, and Proposed Amendments to Rule G-8, on Books and Records To Be Made by Brokers, Dealers, and Municipal Securities Dealers, and Municipal Advisors,* SEC Release No. 34-74860 (May 4, 2015) and *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 Amendments to Rule G-8, on Books and Records to be Made by Brokers, Dealers, Municipal Securities Dealers, and Municipal Advisors,* SEC Release No. 34-75628, File No. SR-MSRB-2015-03 (August 6, 2015) ("SEC August Release").

[4] *See* Letters from the undersigned to Mr. Brent J. Fields, Secretary, SEC, dated September 11, 2015 ("ICI's September Letter and May 29, 2015 ("ICI's May Letter") commenting on File No. SR-MSRB-03. As discussed in detail in ICI's September and May Letters, the Institute expressed concern with the impact the proposed rule will have on our members that are municipal advisors as a result of the advisory services they have long provided, and continue to provide, to the states on their 529 college savings plans. These letters have noted that our members that are registered under the Investment Advisers Act of 1940 and render advice to municipal entities other than 529 college savings plans are not required to register as municipal advisors and therefore will not be subject to the rule.

[5] The amendments the MSRB has filed with the SEC to date on this proposal do not address our concerns. *See Notice of Filing of Amendment No. 1 to Proposed Rule Change Consisting of Proposed New Rule G-42, on Duties of Non-Solicitor Municipal Advisors, and Proposed Amendments to Rule G-8, on Books and Records to be Made by Brokers, Dealers, Municipal Securities Dealers, and Municipal Advisors,* SEC Release No. 34-75737 (August 19, 2015).

client and, if it does not, it is the *advisor* who has violated the rule by basing a recommendation on the inaccurate information and by failing to discern its accuracy.[6]

The ICI's September Letter also noted that the comments the Commission had received from other commenters expressed similar concerns with this requirement.[7] Notwithstanding this, the MSRB's Amendment 2 fails to address – or even mention – this section of the rule or this issue. Instead, this amendment is limited to revising paragraph .14 of the rule's Supplementary Material to address the rule's prohibition on principal transactions – an issue of no consequence to municipal advisors rendering advice to states' 529 plans. According to the MSRB's cover letter to the Commission accompanying the amendment, MSRB Amendment 2 is "a second partial amendment to SR-MSRB-2015-03."[8] The MSRB's letter also states that "The MSRB will address issues raised in the comment letters received in response to the OIP or Amendment No. 1 that are not addressed through Amendment No. 2 concurrently with its response to comment letters received, if any, in response to Amendment No. 2."[9]

Accordingly, while the substance of MSRB Amendment No. 2 will not impact our members, we are filing this comment letter to reiterate and preserve for consideration the concerns previously raised in the ICI's May and September Letters and our recommendation that the MSRB reconsider requiring municipal advisors, alone among all financial professionals,[10] to verify the veracity and completeness of information provided to them by their clients. Should this requirement remain in the rule, we again strongly urge that the Commission require the MSRB to explain why such investigation is warranted or necessary in the public interest and why the MSRB is imposing it. As noted in ICI's September Letter, to date, the MSRB has failed to provide *any* explanation of why this unprecedented requirement is necessary or appropriate. In the absence of such explanation, it is difficult to discern why only those financial professionals who render advice to a government entity have a regulatory

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[6] Institute's September Letter at pp. 4-5. The Institute's letter noted that this "seems patently unfair." It also noted that, while we concur with the MSRB empowering the municipal client, such empowerment "comes with responsibility and, in our view, this responsibility includes the client dealing fairly and honestly with the municipal advisor and the advisor, in turn, being able to rely on the information provided to it by the client." Institute's September Letter at p. 5.

[7] SEC August Release at pp. 23-24. Other rule requirements did not result in a similar number of negative comments.

[8] *See* Letter from Michael L. Post, General Counsel – Regulatory Affairs, to Secretary, Securities and Exchange Commission, dated November 9, 2015 at p. 1.

[9] *Id.* at p. 2.

[10] As noted by commenters in previous comment letters on the MSRB's proposal, "this requirement is inconsistent with 'standards applicable to broker-dealers and investment advisers' because neither 'are required to challenge the statements of their clients.'" SEC August Release at p. 8. While the SEC August Release quotes SIFMA's comment letter, the ICI's Letter expressed a similar concern. *See* ICI's September Letter at p. 4.

obligation to investigate the information their clients provide. We also recommend that the Commission require the MSRB to determine the economic impact of this requirement rather than merely asserting – without any substantiation or proof – that it "will likely not result in an unreasonable and unnecessary burden for municipal advisors or their clients."[11] As discussed in more detail in ICI's September Letter, we question the basis for and validity of this assertion, particularly in the context of advice rendered in connection with 529 college savings plans.

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The Institute appreciates the opportunity to provide these comments to the Commission on proposed Rule G-42. If you have any questions about our comments or would like additional information concerning any of them, please do not hesitate to contact the undersigned by phone at [redacted].

Regards,

/s/

Tamara K. Salmon
Associate General Counsel

[11] *See* Letter from Michael L. Post, General Counsel – Regulatory Affairs, to Secretary, Securities and Exchange Commission, dated August 12, 2015 at p. 9.