December 1, 2015

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

Re: File Number SR-MSRB-2015-03:

Notice of Filing of 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

Dear Mr. Fields:

The Securities Industry and Financial Markets Association ("**SIFMA**")[1] appreciates the opportunity to provide further comments to the Securities and Exchange Commission (the "**SEC**") in connection with Municipal Securities Rulemaking Board ("**MSRB**") Proposed Rule G-42 ("**Proposed Rule G-42**"), and in particular, in response to the MSRB's Amendment No. 2 thereto ("**Amendment No. 2**").[2]

SIFMA recognizes the important step that the MSRB has taken in Amendment No. 2 toward addressing a central flaw in Proposed Rule G-42. By proposing a limited exception (the "**Exception**") from Proposed Rule G-42's principal transaction ban to permit sales of certain fixed income securities on a principal basis to a municipal entity—subject to obtaining the customer's informed consent—the MSRB has acknowledged that it must move toward a more workable construct that will protect municipal entities while not unnecessarily increasing their costs. Nonetheless, Proposed Rule G-42, as amended,

[1] SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over $2.4 trillion for businesses and municipalities in the U.S., serving clients with over $16 trillion in assets and managing more than $62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] Exchange Act Release No. 34-76420 (Nov. 10, 2015).

continues to suffer from many of the defects previously noted by SIFMA,[3] virtually none of which (other than the one the Exception is aimed toward) have been addressed in Amendment No. 2. Moreover, the Exception is not appropriately tailored to be useful for municipal advisors, and includes numerous procedural and operational burdens that would neither advance the objective of safeguarding municipal entities nor ensure that municipal entities will continue to have robust access to brokerage and securities execution services that they require. Accordingly, for the reasons stated in the Prior SIFMA Letters, and those enumerated below, Proposed Rule G-42 does not meet the standards for MSRB rulemaking under the Securities Exchange Act of 1934 (the "**Exchange Act**"). Although SIFMA is eager to see the Rule G-42 rulemaking process completed, SIFMA urges the SEC to disapprove this version of Proposed Rule G-42.

Since the MSRB has not cured the numerous infirmities raised in the Prior SIFMA Letters, and particularly those advanced in SIFMA's comment letter on Amendment No. 1 to Proposed Rule G-42, SIFMA reiterates and reaffirms its previous objections, and will limit its additional comments herein to two issues: (1) why the Exception is an incomplete solution to the problem of applying Proposed Rule G-42 to brokerage and securities execution services, and (2) the defects in the Exception as proposed.

I. The Exception Only Addresses Half of the Problem for Securities Execution/Brokerage Services

As discussed in the Prior SIFMA Letters, the major impediments to applying Proposed Rule G-42 in the specific context of a dually-registered municipal advisor – broker-dealer providing securities execution/brokerage (which may include incidental advice) to a municipal entity are (i) the impracticality of complying with the relationship documentation and conflict disclosure requirements of Proposed Rule G-42(b) and (c), particularly on a transaction-by-transaction basis, and (ii) the application of the principal transaction ban to sales of fixed income securities. Amendment No. 2 attempts to address only the latter issue. Unless both are solved, brokerage firms that are municipal advisors will be effectively unable to provide the advice that municipal entity customers need and rely on, and municipal entities will need to take the costly and unnecessary step of having to engage separate investment advisers and brokers.

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[3] SIFMA commented in detail on the Proposed Rule G-42 as originally filed with the SEC, and on Amendment No. 1, as well as on prior drafts of the rule. *See* Letters from Leslie M. Norwood, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, SEC (May 28, 2015 and Sept. 11, 2015), *available at* http://www.sifma.org/issues/item.aspx?id=8589954935 and http://www.sifma.org/issues/item.aspx?id=8589956474 (the "**Prior SIFMA Letters**"); Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, SIFMA, to Ronald W. Smith, MSRB (Aug. 25, 2014), *available at* http://www.sifma.org/issues/item.aspx?id=8589950587; Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, SIFMA, to Ronald W. Smith, MSRB (Mar. 10, 2014), *available at* http://www.sifma.org/issues/item.aspx?id=8589947958.

SIFMA believes strongly that the MSRB must craft a solution that permits municipal advisors that are also broker-dealers (and their affiliates) to satisfy the conflict disclosure and documentation requirements by providing to municipal entities standardized disclosures on a one-time basis, or otherwise avoids transaction-by-transaction specific disclosure and documentation requirements.

II. Exception is Unnecessarily Burdensome and Narrow

SIFMA agrees with the MSRB's basic premise that informed consent by a municipal entity is an appropriate method to manage and cure conflicts associated with municipal advisors seeking to engage in principal transactions in securities with municipal entities where a fiduciary standard applies. SIFMA further agrees that Section 206(3) of the Investment Advisers Act ("**Advisers Act**") and Rule 206(3)-3T thereunder demonstrate that principal transactions are not necessarily inconsistent with a fiduciary duty, with appropriate disclosure and consent, and that the analogous Advisers Act provisions may serve as a starting point for developing exceptions from Proposed Rule G-42's principal transaction ban. However, SIFMA believes that the MSRB has unreasonably limited the scope of the Exception by importing into the Exception all of the procedural accoutrements of Section 206(3) and Rule 206(3)-3T, adopted in another context, with the result that the Exception, as proposed, would be unworkable in practice.

SIFMA's specific concerns pertaining to the Exception are the following:

A. The Proposed Conditions To Relying on Blanket Consent Alternative Render The Alternative Illusory

The Exception would provide municipal advisors with two alternative methods of providing disclosure and obtaining consent from a municipal entity to engage in principal transactions in permitted circumstances: (i) a transaction-by-transaction disclosure and consent procedure modeled on Section 206(3) of the Advisers Act, or (ii) a "blanket" prospective written consent procedure (the "**Blanket Consent Alternative**"), modeled on Rule 206(3)-3T under the Advisers Act. The Blanket Consent Alternative would require, among other things, that a municipal advisor obtain both prospective written consent as well as further, pre-execution, oral or written consent from the municipal entity customer on a transaction-by-transaction basis, send a written confirmation with particular disclosures and provide an additional written disclosure, at least annually, listing all transactions conducted in reliance on the Blanket Consent Alternative.

In SIFMA's view, the Blanket Consent Alternative's requirement to obtain additional transaction-by-transaction consent totally undermines the utility of obtaining advance written consent, and presents challenging issues of documentation and recordkeeping. There would be little benefit to municipal advisors or municipal entities in selecting this alternative, as transaction-by-transaction consent is still required (on a pre-execution basis), presenting unworkable challenges to the municipal advisor and municipal entities that may seek to execute ordinary course transactions several times per day or more. It is unclear that municipal entity clients would benefit from being required

to provide this repetitive consent—particularly where a particular purchase or sale raises no special or unique concerns.

In addition, the requirement to provide a list of principal transactions at least annually and the proposed special confirmation disclosure requirements are unwieldy and duplicative; moreover, both of these would require firms to implement costly operational changes. It is unclear that municipal entity clients would benefit from these disclosures, having previously provided (and not having revoked) their consent to principal transactions, and receiving the ordinary confirmation disclosure required under Exchange Act Rule 10b-10 that would disclose the capacity in which the broker-dealer acted. SIFMA believes that these same requirements have discouraged some brokers from relying upon Advisers Act Rule 206(3)-3T, and limited the ultimate utility of that Rule.[4]

B. Many Generally Applicable Proposed Conditions to the Exception are Unnecessary or Obscure

The requirement that a municipal advisor also be a broker-dealer registered with the SEC in order to rely on the Exception is unnecessary. The Exception should be available to municipal advisors (and, as discussed below, their affiliates) that are either registered or acting under an exemption from registration, such as banks.

Similarly, the policy rationale for the Exception's proposed requirement that "each account as to which the municipal advisor relies" be a "brokerage account" subject to SEC and SRO rules is unclear at best. While SIFMA acknowledges that this is an element of Advisers Act Rule 206(3)-3T, SIFMA observes that that rule was adopted to address a specific problem that arose out of the ruling in *Financial Planning Association v. SEC*[5] which held that certain fee-based brokerage accounts were advisory accounts subject to the Advisers Act.[6] That decision created a concern that, absent the adoption of a new rule, dually-registered investment advisers/broker-dealers carrying such accounts would be unable to continue to transact with such accounts on a principal basis in relation to certain securities that might not be available on an agency basis (or might be available on an agency basis only on less attractive terms). The requirement that the account be a "brokerage account" made sense in that context, since the whole subject matter being addressed was the permitted manner of transacting with particular types of brokerage accounts held at registered broker-dealers. However, other than the rote incorporation of

[4] We note that the staff of the SEC's Division of Investment Management, in stating its prior intention to recommend that the rule be allowed to sunset, stated its belief that "few firms" rely on Rule 206(3)-3T. *See* Letter from Andrew J. Donohue, Director, SEC Division of Investment Management, to Ira D. Hammerman, Esq., Senior Managing Director and General Counsel, SIFMA (Aug. 9, 2010), *available at* https://www.sec.gov/rules/final/2009/ia-2965a-sifma-letter.pdf.

[5] 482 F.3d 481 (D.C. Cir. 2007).

[6] *See* Temporary Rule Regarding Principal Trades with Certain Advisory Clients, Advisers Act Release No. 2653 (Sept. 24, 2007) (adopting Rule 206(3)-3T).

the conditions to Rule 206(3)-3T, it is unclear why the proposed Exception contains this condition, and it could in fact exclude legitimate account arrangements. For example, a municipal entity may have an execution-only delivery-versus-payment arrangement with a municipal advisor/broker-dealer seeking to rely on the Exception, but may hold its custodial "brokerage" account with another broker-dealer or a bank custodian. It is doubtful that the MSRB intended to exclude such arrangements from the Exception, and if so, the MSRB failed to explain why municipal entities would benefit from making the Exception unavailable in this circumstance.

C. The Exception Should Be Available to Affiliates of a Municipal Advisor

Although the principal transaction ban in Proposed Rule G-42 extends to affiliates of a municipal advisor, it is not clear that the Exception, as proposed, would also extend to such affiliates. Multi-service financial institutions organize themselves in various ways to achieve their corporate objectives, and there does not appear to be any reason to permit a municipal advisor that is also a registered broker-dealer to benefit from the Exception under situations in which it is subject to the principal transaction ban, but not to permit a registered broker-dealer affiliate of the municipal advisor (or an affiliate that is exempt from registration) that would be subject to the principal transaction ban from availing itself of the Exception and enabling municipal entity customers to maintain ongoing availability of securities transaction services.

D. Purchases and Sales of Money Market Instruments Should be Permissible Under the Exception

The Exception is available with respect to limited types of securities, including "corporate debt securit[ies]." That term, however, is proposed to be defined to exclude "money market instruments." As a result, the Exception would not be available to transactions in money market instruments. It is not clear to SIFMA that any policy benefit is served by excluding from the Exception transactions in, for example, commercial paper, certificates of deposit and other deposit instruments. There is no explanation given for this exclusion in the MSRB's filing accompanying Amendment No. 2, and SIFMA believes that there is no municipal entity protection reason to exclude them.[7]

[7] Indeed, it appears that the definition of "corporate debt security" in Amendment No. 2 was modeled on the definition of "TRACE-Eligible Security" under FINRA Rule 6710, which excludes "money market instruments" from that definition. However, FINRA's policy reasons for excluding money market instruments from TRACE reporting have no bearing on whether money market instruments should be eligible for the Exception. *See, e.g.,* Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Definition of "Money Market Instrument" in FINRA Rule 6710(o), SR-FINRA-2012-046, Exchange Act Release No. 68075 (discussing "FINRA's intention to exclude money market instruments generally from TRACE").

E. Transactions Involving Municipal Escrow Investments Should Not be Excluded From the Exception

As proposed, the Exception would not be available for principal transactions involving municipal escrow investments. The MSRB has indicated that it proposed to exclude municipal escrow investments from the Exception because it "believes that this is an area of heightened risk where, historically, significant abuses have occurred."

Although SIFMA agrees that there have been past abuses involving municipal escrow investments, the MSRB has not explained why these historical abuses should impact the availability of the Exception. These abuses occurred prior to the adoption of a comprehensive scheme of regulation of municipal advice under the Dodd-Frank Act and MSRB rules, which sought to address these abuses, among others. The availability of the Exception does not impact the fundamental duties imposed by the Dodd-Frank Act and MSRB rules—as the proposed Exception explicitly provides that the Exception does not relieve "a municipal advisor from acting in the best interest of its municipal entity clients, nor shall it relieve the municipal advisor from any obligation that may be imposed by other applicable provisions of the federal securities laws and state law."

Critically, excluding municipal escrow investments from the Exception would leave an important class of investments subject to the exact problem the MSRB explained it was trying to resolve in Amendment No. 2: that without the Exception, "the proposed ban would restrict the access of municipal entities to trusted financial advisors, limit their ability to obtain certain financial services and products, create undue burdens on competition, and impose unjustified costs for issuers." This remains as true for municipal escrow investments as other investments, and their exclusion from the Exception would cause municipal entities to incur unnecessary costs in hiring a separate investment adviser when the municipal entity may prefer to obtain such advice from their broker-dealer.

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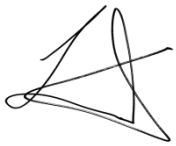
As discussed above, the MSRB has not cured or appropriately addressed the many material deficiencies identified in the Prior SIFMA Letters, which discuss in detail the reasons why these infirmities cause Proposed Rule G-42 to not satisfy the Exchange Act's statutory requirements. The Exception, as proposed, is also flawed in important ways. Accordingly, SIFMA respectfully urges that Proposed Rule G-42 be disapproved.

SIFMA appreciates your consideration of these views. Please do not hesitate to contact me at ([redacted], or our counsel, Lanny A. Schwartz of Davis Polk & Wardwell LLP, at [redacted] with any questions.

Sincerely yours,



Leslie M. Norwood
Managing Director and
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cc: ***SEC***

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