MSRB
Municipal Securities Rulemaking Board

Regulatory Notice

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Stakeholders
Municipal Advisors, Issuers, General Public

Notice Type
Request for Comment

Comment Deadline
April 28, 2014

Category
Fair Practice

Affected Rules
Rule G-8; Rule G-9

Request for Comment on Draft MSRB Rule G-44, on Supervisory and Compliance Obligations of Municipal Advisors

Overview

The Municipal Securities Rulemaking Board (MSRB) is seeking comment on draft MSRB Rule G-44 on supervisory and compliance obligations of municipal advisors when engaging in municipal advisory activities. The MSRB is also seeking comment on associated draft amendments to existing MSRB Rules G-8, on books and records, and G-9, on the preservation of records.

Comments should be submitted no later than April 28, 2014, and may be submitted in electronic or paper form. Comments may be submitted electronically by clicking here. Comments submitted in paper form should be sent to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board, 1900 Duke Street, Suite 600, Alexandria, Virginia 22314. All comments will be available for public inspection on the MSRB's website.[1]

Questions about this notice should be directed to Michael L. Post, Deputy General Counsel, or Darlene Brown, Assistant General Counsel, at 703-797-6600.

Background

The MSRB is currently developing a regulatory framework for municipal advisors. A significant aspect of that regulatory framework is draft Rule G-44 establishing supervisory and compliance obligations of municipal advisors when engaging in municipal advisory activities. Draft Rule G-44 embodies a primarily principles-based approach to supervision to, among other things,

[1] Comments are posted on the MSRB website without change. Personal identifying information such as name, address, telephone number, or email address will not be edited from submissions. Therefore, commenters should only submit information that they wish to make available publicly.

accommodate the diversity of the municipal advisor population, including small and single-person municipal advisors. Draft Rule G-44 is accompanied by draft amendments to Rules G-8 (on books and records) and G-9 (on preservation of records) requiring municipal advisors to make and keep books and records related to their supervisory and compliance obligations.

Summary of Draft Rule G-44 and Draft Amendments to Rules G-8 and G-9

As explained in detail below, draft Rule G-44 follows a widely accepted model in the securities industry of a reasonable supervisory system complemented by the designation of a chief compliance officer (CCO). The draft rule draws on aspects of existing supervision and compliance regulation under other regimes, including those for broker-dealers under rules of the MSRB and the Financial Industry Regulatory Authority (FINRA) and for investment advisors under the Investment Advisers Act of 1940 (Advisers Act).

In summary, draft Rule G-44 requires:

- A supervisory system reasonably designed to achieve compliance with applicable securities laws;
- Written supervisory procedures;
- The designation of one or more municipal advisor principals to be responsible for supervision;
- Compliance processes reasonably designed to achieve compliance with applicable securities laws;
- The designation of a chief compliance officer to administer those compliance processes; and
- At least annual reviews of compliance policies and supervisory procedures.

The draft amendments to Rules G-8 and G-9, in summary, require each municipal advisor to make and keep records of:

- Written supervisory procedures;
- Designations of persons as responsible for supervision;
- Written compliance policies;
- Designations of persons as CCO; and
- Reviews of compliance policies and supervisory procedures.

Request for Comment

Draft Rule G-44

Paragraph (a) of draft Rule G-44 contains the core principle 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. Subparagraph (a)(i) requires the establishment, implementation, maintenance and enforcement of written supervisory procedures reasonably designed to achieve compliance with applicable securities laws. Paragraph .01 of the Supplementary Material specifies several factors that municipal advisors' written supervisory procedures must take into consideration, including the advisor's size, organizational structure, nature and scope of activities, and number of offices. This guidance allows municipal advisors to tailor their supervisory procedures to, among other things, their size, particular business model and structure. Paragraph .02 of the Supplementary Material emphasizes the flexibility of the draft rule to accommodate small municipal advisor firms, even those with only one associated person. Draft Rule G-44(a)(i) also specifies requirements to promptly amend supervisory procedures and communicate them to the municipal advisor's relevant associated persons.

Draft Rule G-44(a)(ii) requires municipal advisors to designate one or more municipal advisor principals[2] to be responsible for the supervision required by the draft rule. Paragraph .03 of the Supplementary Material specifies the authority and specific qualifications required for municipal advisory principals designated as responsible for supervisory functions. They must have the authority to carry out the supervision for which they are responsible, including the authority to implement the municipal advisor's established written supervisory procedures and take any other action necessary to fulfill their responsibilities. They also must have sufficient knowledge, experience and training to understand and effectively discharge their supervisory responsibilities.

Paragraph (b) of draft Rule G-44 requires municipal advisors to implement processes to establish, maintain, review, test and modify written compliance policies and supervisory procedures. Draft Rule G-44(b) specifies that the reviews of the compliance policies and supervisory procedures must be conducted at least annually. Paragraph .04 of the Supplementary Material

[2] The MSRB intends to propose amendments to MSRB Rules G-2 and G-3 to create the "municipal advisor principal" classification, define the term and require qualification in accordance with the rules of the MSRB.

provides, however, that municipal advisors should consider the need, in order to comply with all of the other requirements of the draft rule, for more frequent reviews. Paragraph .04 of the Supplementary Material also provides guidance on what, at a minimum, municipal advisors should consider during their reviews of compliance policies and supervisory procedures. These considerations include any compliance matters that arose since the previous review, any changes in municipal advisory activities and any changes in applicable law.

Paragraph (c) of draft Rule G-44 requires municipal advisors to designate one individual as their CCO. Paragraph .05 of the Supplementary Material explains the role of a CCO and the importance of that role. Specifically, a CCO is a primary advisor to the municipal advisor on its overall compliance scheme and the policies and procedures that the municipal advisor adopts in order to comply with applicable law. To fulfill this role, a CCO should have competence in the process of (1) understanding activities that need to be the subject of compliance policies and supervisory procedures; (2) identifying the law applicable to those activities; (3) developing policies and procedures that are reasonably designed to achieve compliance with applicable law; and (4) testing compliance with the municipal advisor's policies and procedures. These qualifications of a CCO draw on those specified in FINRA's CCO requirement for its member firms.[3] Paragraph .05 further explains that the chief compliance officer can be a principal of the firm or a person external to the firm though in either case, the municipal advisor retains ultimate responsibility for its compliance obligations. This approach to the CCO function in the draft rule, which gives municipal advisors the option to outsource the CCO role, follows the precedent for investment advisers under the Advisers Act.[4]

Paragraph .06 of the Supplementary Material specifies that the CCO, and any compliance officers that report to the CCO, shall have responsibility for and perform the compliance functions required by the draft rule. Paragraph .07 of the Supplementary Material provides that a municipal advisor's CCO may hold any other position within the municipal advisor, including senior management positions, so long as the person can discharge the duties of chief compliance officer in light of all of the responsibilities of any other positions. This guidance is especially relevant to small municipal advisors, including sole proprietorships and other one-person entities. It makes clear

[3] *See* FINRA Rule 3130 Supplementary Material .05.

[4] *See* Section 202(25) of the Advisers Act and Rule 206(4)-7, 17 CFR § 275.206(4)-7.

that a single individual may, for example, serve under appropriate circumstances as CEO, supervisory principal and CCO. In addition, as discussed above, the CCO may be an external consultant.

Draft Amendments to Rules G-8 and G-9

Draft Rule G-44 is accompanied by related draft amendments to Rules G-8 (on books and records) and G-9 (on preservation of records). The draft amendments require each municipal advisor to make and keep records of written supervisory procedures and compliance policies, designations of persons as CCO and persons responsible for supervision, and reviews of the adequacy of written compliance policies and written supervisory procedures. The draft amendments require that records relating to designations of persons responsible for supervision and designations of persons as chief compliance officer be preserved for the period of designation of each person designated and for at least six years following any change in such designation. The six-year preservation requirement is consistent with the current provisions of Rule G-9 for records of similar designations by brokers, dealers and municipal securities dealers. The draft amendments to Rule G-9 require the other records related to municipal advisors' supervisory and compliance obligations to be preserved for five years, which is consistent with the preservation requirements of Rule 15Ba1-8 (Books and records to be made and maintained by municipal advisors)[5] under the Securities Exchange Act of 1934 (Exchange Act).[6]

Economic Analysis

The MSRB is sensitive to the costs imposed by its rules and has sought to tailor the draft rule and draft amendments so as not to impose unnecessary or inappropriate costs and burdens on municipal advisors. In accordance with this policy, the Board considered the following factors with respect to draft Rule G-44 and the draft amendments to Rules G-8 and G-9: 1) the need for the draft rule and how it will meet that need; 2) relevant baselines against which the likely economic impact of elements of the draft rule can be measured; 3) reasonable alternative regulatory approaches; and 4) the potential benefits and costs of the draft rule and the main alternative regulatory approaches. Each of these factors is discussed in detail below.

[5] 17 CFR § 240.15Ba1-8.

[6] Draft Rule G-8(h) includes reserved subparagraphs (i) and (ii), for books and records provisions that the MSRB has proposed in connection with draft Rule G-42, on duties of non-solicitor municipal advisors. *See* MSRB Notice 2014-01 (Jan. 9, 2014). The MSRB will make conforming changes to this proposal as appropriate depending on future actions by the MSRB and SEC related to draft Rule G-42.

1. The need for the draft rule and how it will meet that need.

The need for draft Rule G-44 arises from the MSRB's regulatory oversight of municipal advisors as provided under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).[7] The Dodd-Frank Act establishes a federal regulatory regime that requires municipal advisors to register with the Securities and Exchange Commission (SEC) and grants the MSRB certain regulatory authority over municipal advisors. The MSRB, in the exercise of that authority, is in the process of developing a regulatory framework for municipal advisors. Supervision and compliance functions play an important role in promoting and fostering compliance with all applicable securities laws by municipal advisors, including MSRB rules. Such functions are complementary to an enforcement program designed to deter violations of securities laws by imposing penalties after violations occur. Supervision and compliance functions, by contrast, are designed to prevent violations from occurring, while they also promote early detection and prompt remediation of violations when they do occur.

For similar reasons, the regulation of supervisory and compliance functions is well established within the financial services industry. The model of requiring written supervisory procedures complemented by the designation of a CCO to be responsible for compliance processes is a widely accepted regulatory model across the financial services industry. To achieve comparable levels of compliance with applicable securities laws as seen with other financial services professionals, there is a need for an MSRB rule governing municipal advisors' supervisory and compliance obligations.

2. Relevant baselines against which the likely economic impact of elements of the draft rule can be measured.

To evaluate the potential impact of the draft rule's requirements, a baseline, or baselines, must be established as a point of reference. The analysis proceeds by comparing the expected state with draft Rule G-44 in effect to the baseline state prior to the rule taking effect. The economic impact of the draft rule is measured as the difference between these two states.

One baseline that can be used to evaluate the impact of draft Rule G-44 is the Dodd-Frank Act itself which subjects municipal advisors to regulation by the MSRB. The Dodd-Frank Act mandates that MSRB rulemaking, at a minimum, prescribe means reasonably designed to prevent municipal

[7] Pub. Law No. 111-203, 124 Stat. 1376 (2010).

advisors from breaching their fiduciary duty to their clients. Draft Rule G-44, if adopted, would be put into effect after the adoption of draft Rule G-42, on the duties of non-solicitor municipal advisors, which provides guidance on avoiding breaches of a municipal advisor's fiduciary duty. A supervisory program and compliance program as required in draft Rule G-44 follows as a natural consequence of draft Rule G-42 as it prescribes a widely recognized means of preventing misconduct. As a more general matter, the legislative history of the Dodd-Frank Act indicates Congress was concerned with the previously unregulated activities of municipal advisors. 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.

For the subset of municipal advisors that are municipal securities dealers, the existing supervisory requirements of MSRB Rule G-27 serve as a baseline. For this subset of municipal advisors, the draft Rule G-44 supervisory requirements are no more stringent than the baseline Rule G-27 requirements.

For the subset of municipal advisors that are also FINRA-registered dealers of municipal securities, the FINRA supervision and compliance requirements also serve as a baseline. The relevant FINRA rules require, among other things, that each dealer have a reasonable supervisory system, comprehensive compliance processes, and a CCO.

An additional baseline applies to municipal advisors who are also registered as investment advisers and subject to the requirements of the Advisers Act. The Advisers Act gives the SEC authority to punish failures by investment advisers (IAs) to reasonably supervise. In addition, the SEC requires IAs to have written compliance policies and procedures and designate a CCO as responsible for the administration of those procedures.

3. Identifying and evaluating reasonable alternative regulatory approaches.

One alternative to adopting draft Rule G-44 would be for the MSRB not to engage in additional rulemaking and, thus, not establish minimum supervisory and compliance requirements for municipal advisors. In the absence of a minimum regulatory regime, municipal advisors would be relied on to determine the minimum elements of their supervisory and compliance programs, if any. To the extent that some municipal advisors might

implement programs that fail to meet the minimum elements specified in draft Rule G-44, or do not engage in this type of oversight, some benefits of the draft rule could be lost. Municipal advisors may have less robust procedures to prevent violations of applicable rules from occurring, a reduced ability to detect violations when they do occur, and a reduced ability to promptly remediate violations before the occurrence of more serious consequences.

Another alternative is for the MSRB to use a solely principles-based approach to its rulemaking on this subject. Under this approach, the regulatory objectives would be specified but individual firms would be free to select the means used to meet the objectives. Such an approach, however, would involve tradeoffs in terms of costs and benefits. A more principles-based approach would afford municipal advisors flexibility in determining the lowest-cost means to meet the regulatory objectives. But a more principles-based approach might require additional communication on the interpretation of regulatory objectives which could require additional MSRB rulemaking or interpretive action.

Another alternative would be to consider whether the supervisory requirements for municipal advisors should be included as part of the supervisory requirements for municipal securities broker-dealers under MSRB Rule G-27 instead of being organized in a separate rule. The significant differences in the activities of municipal advisors and the typical core activities of broker–dealers, however, support having a separate rule.

The MSRB invites public comment to suggest other potential regulatory alternatives.

4. **Assessing the benefits and costs, both quantitative and qualitative, of the draft rule and the main alternative regulatory approaches.**

The MSRB policy on economic analysis in rulemaking addresses consideration of the likely economic consequences of the draft rule, against the context of the economic baselines discussed above.

At the outset, the MSRB notes it is currently unable to quantify the economic effects of draft Rule G-44 and the amendments to Rules G-8 and G-9 because the information necessary to provide reasonable estimates is not available. The MSRB observes, as the SEC also observed in its Final Rule, that there is little publicly available information about the municipal advisory industry. In addition, estimating the costs for municipal advisory firms to comply with the draft rule is hampered by the fact that these costs depend on the business

activities and size of these municipal advisory firms, which can vary greatly. Given the limitations on the MSRB's ability to conduct a quantitative assessment of the costs and benefits associated with the draft rule, the MSRB has thus far considered these costs and benefits primarily in qualitative terms.

Benefits

A principal benefit of draft Rule G-44 is that it is expected to help promote compliance by municipal advisors with all applicable securities laws including, but not limited to, anti-fraud provisions of the Exchange Act, the conduct standards of Rule G-17, the statutory fiduciary duty for municipal advisors in dealing with municipal entity clients, and the standards of conduct and duties for municipal advisors under draft Rule G-42. Draft Rule G-44 is intended to prevent unlawful conduct and to help detect and promptly address unlawful conduct when it does occur.

The benefits of draft Rule G-44 are complementary to existing securities laws and MSRB rules in that the benefits of these standards as applicable to municipal advisors likely would not be fully realized without the supervisory and compliance requirements of draft Rule G-44. To this extent, draft Rule G-44 has potential benefits similar to those of these applicable securities laws, including the protection of investors, municipal entities, and obligated persons and the promotion of a fair and efficient municipal securities market.

Costs

The MSRB's analysis of the potential costs does not consider all of the costs associated with the draft rule, but instead focuses on the incremental costs attributable to its implementation that exceed costs associated with the baseline state. The costs associated with the baseline state are, in effect, subtracted from the costs associated with the draft rule to isolate the costs attributable to the incremental requirements of the draft rule.

The costs associated with the requirements of draft Rule G-44 would be most pronounced as the supervisory and compliance programs are implemented for the first time. These costs would be associated with such steps as identifying applicable laws, drafting supervisory procedures, drafting compliance policies, and developing programs to test compliance. These start-up costs may be significant for some market participants depending on the size and nature of their business. These costs may include seeking the advice of compliance and legal professionals. In addition, once the programs are implemented, municipal advisors would incur recurring costs of maintaining ongoing programs.

The costs associated with the draft rule may fall disproportionately on small municipal advisory firms, including sole proprietorships. To address this concern, the draft rule allows for small advisors, and advisors with other particular traits, to reasonably vary their supervisory procedures as appropriate. The draft rule also provides that the CCO may hold other positions in the firm and that the CCO function can be outsourced.

Any increase in municipal advisory fees charged to their clients attributable to the incremental costs of the draft rule compared with the baseline state may be, in the aggregate, minimal in that the cost per municipal advisory firm likely would be spread across the number of advisory engagements for each firm. It is possible, however, that for smaller municipal advisors with fewer clients, the incremental costs associated with the requirements of the draft rule may represent a greater percentage of annual revenues, and, thus, such advisors may be more likely to pass those costs along to their advisory clients.

The Dodd-Frank Act provides that MSRB rules may not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons provided that there is robust protection of investors against fraud. The MSRB is sensitive to the potential impact of the requirements contained in draft Rule G-44 on small municipal advisors. The MSRB understands that some small municipal advisors and solo practitioners, unlike larger municipal advisory firms, may not employ full-time compliance staff and that the cost of ensuring compliance with the requirements of the draft rule may be proportionally higher for these smaller firms. The MSRB, preliminarily, believes that the draft rule is consistent with the Dodd-Frank Act's provision with respect to burdens imposed on small municipal advisors. In order to minimize any significant burdens on small municipal advisors, however, the MSRB is particularly interested in receiving meaningful feedback regarding the potential economic impact of the draft rule and draft amendments on small municipal advisors. The MSRB will consider such feedback in light of the Dodd-Frank Act provision.

Effect on Competition, Efficiency and Capital Formation

Finally, it is possible that, as a result of the costs associated with the supervision and compliance requirements of the draft rule relative to the baseline, some municipal advisors may decide to exit the market, curtail their activities, or consolidate with other firms. For example, some municipal advisors may determine to consolidate with other municipal advisors in order to benefit from economies of scale (*e.g.*, by leveraging existing compliance resources of a larger firm) rather than to incur separately the costs

associated with the draft rule. It is also possible that some of the municipal advisors that may exit the market could be small municipal advisors doing so for financial reasons. Such exits from the market may lead to a reduced pool of municipal advisors. However, as the SEC recognized in its final rule on the permanent registration of municipal advisors, the market for municipal advisory services is likely to remain competitive despite the potential exit of some municipal advisors (including small entity municipal advisors), consolidation of municipal advisors, or lack of new entrants into the market.[8]

General Matters

In addition to any other subject which commenters may wish to address related to draft Rule G-44 and the draft amendments to Rules G-8 and G-9, the MSRB seeks public comment on the specific questions below. In particular, the MSRB requests public comment on the potential economic consequences which may result from the adoption of draft Rule G-44 and the draft amendments to Rules G-8 and G-9. The MSRB welcomes information regarding the potential to quantify likely benefits and costs. In addition, the MSRB requests comment to help identify the potential benefits and costs of the regulatory alternatives suggested by commenters. The MSRB also requests comment on any competitive or anticompetitive effects, as well as efficiency and capital formation effects, of the draft rule and draft amendments on any market participants. Commenters are encouraged to provide statistical, empirical, and other data from commenters that may support their views and/or support or refute the views or assumptions contained in this request for comment.

The MSRB specifically requests that commenters address the following questions:

1) Does draft Rule G-44 strike an appropriate balance between a principles-based and a prescriptive approach to supervision? If not, explain why and in what areas draft Rule G-44 should be more principles-based or prescriptive.

2) Is draft Rule G-44 appropriately accommodating for small and single person municipal advisors? If not, describe how the draft rule can be modified to be more appropriately accommodating.

3) Do commenters agree or disagree that municipal advisors should be able to outsource the CCO function pursuant to the draft rule and

[8] Exchange Act Release No. 70462, at p. 506 (Sept. 20, 2013), 78 FR 67467, at p. 67608 (Nov. 12, 2013.

that the CCO should not be required to be a principal or even an associated person of the municipal advisor?

4) Should draft Rule G-44 require municipal advisors to complete a periodic self-certification regarding the meeting of professional qualification standards by its associated persons and the municipal advisor's ability to comply, and history of complying, with all applicable regulatory requirements?

5) Do commenters agree or disagree that a need exists for the MSRB to articulate the supervision and compliance obligations of municipal advisors? Do commenters agree or disagree that the draft rule addresses that need?

6) Are the various baselines proposed to be used appropriate baselines? Are there other relevant baselines that the MSRB should consider?

7) To the extent that draft Rule G-44 and the draft amendments to Rules G-8 and G-9 impose costs on municipal advisors, will these costs be passed on to municipal entities or obligated persons in the form of higher fees?

8) What are the initial and ongoing costs associated with making and preserving the additional records required by the draft amendments to Rules G-8 and G-9?

9) Will draft Rule G-44 have benefits in terms of protecting municipal entities, obligated persons and investors?

10) Are there additional potential costs or benefits that the MSRB should consider? If so, please explain.

11) What alternatives to the form of draft Rule G-44 should the MSRB consider? How would the costs and benefits of such alternatives differ from those associated with the draft rule?

12) If draft Rule G-44 were adopted, what would be the likely effects on competition, efficiency and capital formation?

13) Would the requirements of draft Rule G-44 impose any burden on small municipal advisors that is not necessary or appropriate?

February 25, 2014

Text of Draft Rule and Amendments[9]

Rule G-44: Supervisory and Compliance Obligations of Municipal Advisors

(a) *Supervisory System*. Each municipal advisor shall establish, implement, and maintain a system to supervise the municipal advisory activities of the municipal advisor and its associated persons that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable Board rules ("applicable rules"). Final responsibility for proper supervision shall rest with the municipal advisor. A municipal advisor's supervisory system shall provide, at a minimum, for the following:

(i) *Written Supervisory Procedures*. The establishment, implementation, maintenance and enforcement of written supervisory procedures that are reasonably designed to ensure that the conduct of the municipal advisory activities of the municipal advisor and its associated persons are in compliance with applicable rules. The written supervisory procedures shall be promptly amended to reflect changes in applicable rules and as changes occur in the municipal advisor's supervisory system, and such procedures and amendments shall be promptly communicated to all associated persons to whom they are relevant based on their activities and responsibilities.

(ii) *Appropriate Principal*. The designation of one or more municipal advisory principals to be responsible for the supervision required by this rule.

(b) *Compliance Processes*. Each municipal advisor shall have in place and implement processes to establish, maintain, review, test and modify written compliance policies and written supervisory procedures reasonably designed to achieve compliance with applicable rules, and shall conduct, no less frequently than annually, a review of the compliance policies and supervisory procedures.

(c) *Chief Compliance Officer*. Each municipal advisor shall designate one individual to serve as its chief compliance officer.

(d) *Definitions*.

(i) "Municipal advisor," for purposes of this rule, shall mean a municipal advisor registered or required to be registered under section 15B of the Act and rules and regulations thereunder.

---Supplementary Material:

.01 Written Supervisory Procedures. A municipal advisor's written supervisory procedures shall take into consideration, among other things, the advisor's size; organizational structure; nature and scope of municipal advisory activities; number of offices; the disciplinary and legal history of its associated persons; the likelihood that associated persons may be engaged in relevant outside business activities; and any indicators of irregularities or misconduct (*i.e.*, "red flags").

[9] Underlining indicates new language; strikethrough denotes deletions.

.02 Small Municipal Advisors. A municipal advisor with few personnel, or even only one associated person, can have a sufficient supervisory system under this rule. The rule allows the designation of one person to be responsible for supervision, and allows the tailoring of written supervisory procedures based on, among other things, an advisor's size. In the case of a municipal advisor with a single associated person, the written supervisory procedures must address the manner in which, in the absence of separate supervisory personnel, such procedures are nevertheless reasonably designed to achieve compliance with applicable rules.

.03 Appropriate Principal. Designated supervisory principals must be vested with the authority to carry out the supervision for which they are responsible and have sufficient knowledge, experience and training to understand and effectively discharge their responsibilities. They also must have the authority to implement the established written supervisory procedures and take any other action necessary to fulfill their responsibilities. Even if not so designated, whether a person has responsibility for supervision under this rule depends on whether, under the facts and circumstances of a particular case, that person has the requisite degree of responsibility, ability or authority to affect the conduct of the employee whose behavior is at issue.

.04 Review of Compliance Policies and Supervisory Procedures. The reviews under paragraph (b) of this rule should, at a minimum, consider any compliance matters that arose since the previous review, any changes in the municipal advisory activities of the municipal advisor or its affiliates, and any changes in applicable rules that might suggest a need to revise the written compliance policies or supervisory procedures. Although paragraph (b) specifically requires reviews to be conducted at least annually, municipal advisors should consider the need, in order to comply with all of the other requirements of this rule, for interim reviews.

.05 Chief Compliance Officer. A chief compliance officer has a unique and integral role in the administration of a municipal advisor's compliance processes. A chief compliance officer is a primary advisor to the municipal advisor on its overall compliance scheme and the policies and procedures that the municipal advisor adopts in order to comply with applicable rules. To fulfill this role, a chief compliance officer should have competence in the process of (1) gaining an understanding of the services and activities that need to be the subject of written compliance policies and written supervisory procedures; (2) identifying the applicable rules and standards of conduct pertaining to such services and activities based on experience and/or consultation with others; (3) developing, or advising other business persons charged with the obligation to develop, policies and procedures that are reasonably designed to achieve compliance with applicable rules and standards of conduct; and (4) developing programs to test compliance with the municipal advisor's policies and procedures. It is the intention of this rule to foster regular and significant interaction between senior management and the chief compliance officer regarding the municipal advisor's comprehensive compliance program. The chief compliance officer may be a principal of the firm or a non-employee of the firm. If a non-employee, then the person designated as chief compliance officer must have the competence described above and the municipal advisor retains ultimate responsibility for its compliance obligations.

.06 Responsibility for Compliance Functions. The chief compliance officer, and any compliance officers that report to the chief compliance officer, shall have responsibility for and perform the compliance functions contemplated by this rule. Nothing in this rule, however, is intended to limit or discourage the participation by any of the employees of the municipal advisor in any aspect of the municipal advisor's compliance program.

.07 Ability of Chief Compliance Officer to Hold Other Positions. The requirement to designate a chief compliance officer does not preclude that person from holding any other positions within the municipal advisor, including serving in any position in senior management or being designated as a supervisory principal, provided that person can discharge the duties of chief compliance officer in light of all of the responsibilities of any other positions.

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Rule G-8: Books and Records to be Made by Brokers, Dealers, ~~and~~ Municipal Securities Dealers, and Municipal Advisors

(a) - (g) No change.

(h) *Municipal Advisor Records*. Every municipal advisor that is registered or required to be registered under section 15B of the Act and the rules and regulations thereunder shall make and keep current the following books and records:

(i) Reserved.[10]

(ii) Reserved.

(iii) *Records Concerning Compliance with Rule G-44*.

(A) The written supervisory procedures required by Rule G-44(a)(i);

(B) A record of all designations of persons responsible for supervision as required by Rule G-44(a)(ii).

(C) Records of the reviews of written compliance policies and written supervisory procedures as required by Rule G-44(a) and (b); and

(D) A record of all designations of persons as chief compliance officer as required by Rule G-44(c).

[10] As previously noted, draft Rule G-8(h) includes reserved subparagraphs (i) and (ii), for books and records provisions that the MSRB has proposed in connection with draft Rule G-42. *See supra* n.6.

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Rule G-9: Preservation of Records

(a) - (g) No change.

(h) *Municipal Advisor Records*. Every municipal advisor shall preserve the books and records described in Rule G-8(h) for a period of not less than five years, provided that the records described in Rule G-8(h)(iii)(B) and (D) shall be preserved for the period of designation of each person designated and for at least six years following any change in such designation.

Alphabetical List of Comment Letters on Notice 2014-04 (February 25, 2014)

1. American Bankers Association: Letter from Cristeena G. Naser, Vice President and Senior Counsel, dated May 1, 2014

2. Bond Dealers of America: Letter from Michael Nicholas, Chief Executive Officer, dated April 28, 2014

3. Edwin C. Blitz Investments, Inc.: E-mail from Edwin Blitz dated March 18, 2014

4. Investment Company Institute: Letter from Tamara K. Salmon, Senior Associate Counsel, dated April 15, 2014

5. LIATI Group, LLC: E-mail from Weldon Fleming dated March 10, 2014

6. MSA Professional Services, Inc.: Letter from Gilbert A. Hantzsch, Chief Executive Officer, dated April 28, 2014

7. National Association of Independent Public Finance Advisors: Letter from Jeanine Rodgers Caruso, President, dated April 28, 2014

8. Raftelis Financial Consultants, Inc.: Letter from Alexis F. Warmath, Vice President, and Christopher P.N. Woodcock, President, Woodcock & Associates, Inc., dated April 28, 2014

9. Roberts Consulting, LLC: E-mail from Jonathan Roberts dated March 13, 2014

10. Securities Industry and Financial Markets Association: Letter from David L. Cohen, Managing Director, Associate General Counsel, dated April 25, 2014

11. Tibor Partners Inc.: E-mail from William Johnston dated February 25, 2014

American Bankers Association

Cristeena G. Naser
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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)[1] 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).[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 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.

[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 (cite).

ABA believes that with respect to municipal advisory activities of bank trust departments and trust companies (hereinafter, "bank fiduciaries"),[4] 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."[5] 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.[6] 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.

[4] 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.
[5] Draft Rule G-44 at 7.
[6] 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.[7]

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:

[7] 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.[8]

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.[9] Such examinations include reviewing written policies and procedures that address the supervision of bank fiduciary activities and the bank's management of collective funds.[10] 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."[11] 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

[8] 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.
[9] 12 CFR § 4.6.
[10] 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.")
[11] 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.[12]

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,

Cristeena G. Naser

[12] 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.

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April 28, 2014

VIA ELECTRONIC MAIL

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA 22314

RE: MSRB Notice 2014-04 (February 25, 2014): Request for Comment on Draft MSRB Rule G-44, on Supervisory and Compliance Obligations of Municipal Advisors

Dear Mr. Smith:

On behalf of the Bond Dealers of America ("BDA"), I am pleased to submit this letter in response to Municipal Securities Rulemaking Board ("MSRB") Notice 2014-04, regarding Draft Rule G-44 ("Draft Rule G-44").[1] Under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act")[2], Congress, among other things, amended Section 15B of the Securities Exchange Act of 1934 ("Exchange Act") to provide for the regulation by the Securities and Exchange Commission ("SEC") and the MSRB of municipal advisors and to grant the MSRB certain authority to protect municipal entities and obligated persons. The Dodd-Frank Act accordingly grants the MSRB broad rulemaking authority over municipal advisors and municipal advisory activities. Among other rules published and soon-to-be published by the MSRB, Draft Rule G-44 is an important component of the regulatory framework for municipal advisors and we welcome this opportunity to provide our comments on Draft Rule G-44.

Supply Minimum Standards for Municipal Advisors of All Sizes

While we appreciate the MSRB's attempt to draw from aspects of existing supervision

[1] See MSRB Notice 2014-04 (February 25, 2014).
[2] Pub. Law No. 111-203, 124 Stat. 1376 (2010).

and compliance regulation under other regimes, we are concerned that Draft Rule G-44 is too flexible in allowing for market participants to determine and carve out for themselves an accommodation if they are small advisor firms. The MSRB states in Draft Rule G-44 that for the subset of municipal advisors that are municipal securities dealers, the existing supervisory requirements of MSRB Rule G-27 serve as a baseline and the draft Rule G-44 supervisory requirements are no more stringent than the baseline Rule G-27 requirements. While this is true, the BDA believes that this sets a lower baseline and that some of the requirements imposed on municipal securities dealers in Rule G-27 should also be extended to municipal advisors under Draft Rule G-44. It is reasonable as stated by the MSRB in its request for comment "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."[3] Therefore, we would suggest that the MSRB set forth minimum standards for which all municipal advisory firms must meet when establishing supervisory and compliance procedures, but allow firms to then decide how they will implement these supervisory and compliance procedures to fit within their particular business model. The BDA understands and appreciates that there exists various types of business models making up the industry but we caution against using the size of a firm as a reason to make allowances if such allowances would in any way diminish the regulatory parameters the MSRB is attempting to put in place under a municipal advisor regulatory regime. Small or one-man shops should not be permitted the opportunity, purposefully or otherwise, to diminish their obligation toward meeting the demands of the rule and this regulatory regime should in fact be comparable to the regulatory regimes for other entities and persons in the financial services industry. We believe firms of all sizes and business models should be held to the same standard of service and should be required to meet the requirements of the law.

Outsourcing of the CCO Role

While the BDA agrees with the MSRB's decision to permit the outsourcing of the Chief

[3] See MSRB Notice 2014-04 (February 25, 2014), pg. 7.

Compliance Officer (CCO) role in Draft Rule G-44, we would like to ask that the MSRB also make clear within the language of Draft Rule G-44 itself that the firm itself remains ultimately responsible for any decisions made or affected by the CCO, whether this position is outsourced or not. We believe this is especially important when it comes to having a clear understanding of the rule's requirements for both FINRA examiners and municipal advisors. As we have said in previous letters on various topics, the BDA believes a critical component of crafting workable rules is in the MSRB's ability to draft a rule that can be read and interpreted similarly by examiners and firm employees alike. While the model of requiring written supervisory procedures complemented by the designation of a CCO to be responsible for compliance processes is a widely accepted regulatory model across the financial services industry, the language in Paragraph .05 of the Supplementary Material should be included in the rule and make it clear that the CCO can be a principal of the firm or a person external to the firm though in either case the municipal advisor retains ultimate responsibility for its compliance obligations.

Self-Certification

The BDA believes Draft Rule G-44 should require all municipal advisors to complete a periodic self-certification regarding the meeting of professional qualification standards by its associated persons as well as to certify to the municipal advisor's ability to comply, and history of complying, with all applicable regulatory requirements. It is critical for municipal advisors to self-certify that they are meeting the same professional qualification standards as those already established by those affiliated with broker-dealer firms. The MSRB should also recognize that self-certification is already required of broker-dealer firms and so municipal advisors who are also broker-dealers should not be unduly burdened by having to double up on their self-certification but that current practices and procedures need only be updated (and not duplicated) in order to reflect the incorporation of the additional requirements of the municipal advisor function. We are understanding of your concern not to place smaller municipal advisory firms at a competitive disadvantage but these regulations need to apply to all municipal advisors without regard to size much like the rules for broker-dealers. We believe that it is in the public interest and necessary for the protection of investors, municipal entities, and

obligated persons that Draft Rule G-44 be applied to all municipal advisors regardless of their size or organizational structure.

Delay in Implementation

Given the interaction and interdependence of each rule and regulation required to construct a complete regulatory framework for municipal advisors, the BDA believes the MSRB should delay implementation of all of its rules and regulations falling under the municipal advisor regulatory regime and wait until all rules and regulations have gone through the following steps before it moves to formalize the implementation deadline: publication for comment, revised to reflect changes received as a result of the comment period and subsequently approved by the SEC. Additionally, we believe an implementation date of six months following the approval of the last of the rules in the regulatory regime by the SEC is fair, given the complexity of the entirety of the municipal advisor regulatory regime. This is particularly important for a rule like Draft Rule G-44, which relies on the information forthcoming in other rules falling under the municipal advisor regulatory regime that is not yet available in order to establish complete supervisory procedures and compliance obligations. Since the regulations and regulatory framework governing municipal advisors and municipal advisory activities by the MSRB is so important to the industry, it is that much more important to allow for the appropriate time frame for all municipal advisors to understand their obligations and the requirements of the new regulatory environment in which they operate in order to put forth complete supervisory procedures that will comply with the all the rules and regulations from the outset. Therefore, we ask that you consider delaying the implementation of Draft Rule G-44, and any and all other municipal advisor rules, until at least six months after all the rules that will comprise the MSRB's entire regulatory framework have been finalized and approved by the SEC.

Thank you for the opportunity to present our views on Draft Rule G-44.

Sincerely,

Michael Nicholas

Chief Executive Officer

Comment on Notice 2014-04

from Edwin Blitz, Edwin C. Blitz Investments, Inc.

on Tuesday, March 18, 2014

Comment:

In light of the amended and pending rules, it is time for MSRB to consider the practical and realistic manner in which College Plans should be placed under the purview and regulations of FINRA. Most, if not all, College plans are offered by Mutual Fund Sponsors subject to review by FINRA at time of audit.
Since we only engage in the sale of Municipal Bonds through Mutual Funds, why must we remain under the jurisdiction of MSRB. Our sale of College plans does not justify the fees incurred each year from MSRB.
It is our hope that reason will prevail and the sale of College Mutual Find Plans will no longer require registration under the MSRB.

INVESTMENT COMPANY INSTITUTE

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202/326-5800 www.ici.org

April 15, 2014

Ronald W. Smith, Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, Virginia 22314

Re: MSRB Notice 2014-04 Relating to Supervisory and Compliance Obligations of Municipal Advisors

Dear Mr. Smith:

The Investment Company Institute (ICI)[1] appreciates the opportunity to provide comments to the Municipal Securities Rulemaking Board (MSRB) on its proposal to adopt a new Rule G-44, which will subject municipal advisors to supervisory and compliance obligations.[2] The Institute supports the rule's adoption.[3] We believe it is appropriate, and in the interest of municipal clients, for the MSRB to impose compliance and supervisory obligations on municipal advisors inasmuch as other securities professionals are subject to similar obligations. We commend the MSRB for undertaking this rulemaking and for seeking to ensure that its proposed requirements are substantively similar to or consistent with those imposed on Federally-registered broker-dealers and investment advisers. Such consistency is particularly important for our members that are also subject to oversight by the SEC and/or FINRA because it will enable them to leverage their existing policies, procedures, and systems to comply with the MSRB's requirements.

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[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $16.8 trillion and serve more than 90 million shareholders.

[2] *See Request for Comment on Draft MSRB Rule G-44, on Supervisory and Compliance Obligations of Municipal Advisors,* MSRB Notice No. 2014-04 (Feb. 25, 2014), which is available at: http://www.msrb.org/~/media/Files/Regulatory-Notices/RFCs/2014-04.ashx?n=1.

[3] Our comments on the rule are limited to its impact on our members that must register as municipal advisors due to their involvement in a state's 529 college savings plan. In addition to supporting Rule G-44, we also support the revisions proposed to MSRB Rules G-8 and G-9, which would incorporate the records demonstrating an advisor's compliance with Rule G-44 into the MSRB's rules relating to required records and preservation of such records, respectively.

OVERVIEW OF PROPOSED RULE G-44

As proposed, Rule G-44 would consist of three substantive subdivisions and seven items of Supplementary Material. In summary, the three substantive subdivisions would require each registered municipal advisor to: establish, implement, and maintain a supervisory system that meets certain criteria and designate one or more supervisory principals; implement policies to maintain, review, test, and modify the advisor's written supervisory and compliance policies and procedures; and designate a Chief Compliance Officer ("CCO"). The proposed rule's Supplementary Material would clarify a variety of issues relating to the rule including, among others, its application to smaller advisors, the importance of tailoring the advisor's policies and procedures to the adviser's business, and issues to consider in connection with designating principals and a CCO.

CONSISTENCY OF RULE G-44 WITH OTHER REGULATORY REQUIREMENTS

As noted above, the Institute supports the MSRB's proposal because its requirements are consistent with those imposed on other securities professionals under the Federal securities laws. In particular, the requirements of the rule are substantively similar to those of SEC Rule 206(4)-7 under the Investment Advisers Act of 1940, Compliance Procedures and Practices, which applies to all Federally-registered investment advisers, as well as to FINRA Rule 3110, Supervision, and FINRA Rule 3130, Annual Certification of Compliance and Supervisory Processes, which apply to FINRA members. Also, while the provisions of Rule G-44's Supplementary Material .01-.04[4] are not expressly addressed in the rules of the SEC or FINRA, they are consistent with such rules and will provide additional clarity to assist municipal advisors in complying with the MSRB's rule. As such, these provisions do not appear to be problematic for municipal advisors, nor would they appear to result in additional compliance burdens for such advisors. The provisions of Supplementary Material .05-.07[5] appear to be consistent with the requirements in Supplementary Material .05, .06, and .08 to FINRA Rule 3130, respectively. As such, these provisions would also not appear to raise concerns for municipal advisors.

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[4] This Supplementary Material provides as follows: .01 clarifies that the municipal advisor's written supervisory procedures should be tailored to the advisor's business and take into account any "red flags;" .02 provides guidance regarding the rule's application to small municipal advisors with one or a small number of associated persons; .03 clarifies the criteria a municipal advisor must consider in designating supervisory principals and it discusses their responsibility; and .04 discusses the minimum requirements of the advisor's required annual review of its compliance policies and supervisory procedures.

[5] This Supplementary Materials provides as follows: .05 discusses the CCO's competence and the CCO's role within the advisory organization and clarifies that a CCO is not required to be an employee of the advisor; .06 expressly vests responsibility for the compliance functions of the rule in the CCO and provides that the advisor may have other employees participate in any aspect of the advisor's compliance program; and .07 clarifies that the advisor's CCO is not precluded from holding any other position within the municipal advisor, including serving in senior management or as a designated supervisory principal, provided the CCO can discharge all such responsibilities.

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For the reasons discussed above, we support adoption of Rule G-44. We recommend that, in adopting the rule, the MSRB provide municipal advisors a sufficient period of time within which to be fully compliant with its requirements. While, as noted above, the rule's requirements are largely consistent with existing regulatory requirements imposed on other SEC or FINRA registrants, in order to be fully compliant with Rule G-44, municipal advisors will need sufficient time to either adopt or revise any relevant existing compliance and supervisory policies, procedures (including testing processes), and systems to expressly accommodate the new rule's requirements, and hire or appoint necessary qualified personnel as CCO and supervisory principals. It should be remembered that, in implementing Rule G-44, municipal advisors may also be engaged in implementing other new rules and requirements imposed on municipal advisors by the MSRB. Accordingly, to avoid unduly straining the resources of such advisors, we recommend the MSRB provide advisors a minimum of 12 months to comply with the new rule.

We appreciate the opportunity to provide these comments and your consideration of them. If you have any questions, please contact the undersigned at (202)326-5825.

Sincerely,
/s/
Tamara K. Salmon
Senior Associate Counsel

Comment on Notice 2014-04

from Weldon Fleming, LIATI Group, LLC

on Monday, March 10, 2014

Comment:

We are a small firm with only two persons involved in municipal advisory activites. This is not our main line of business but is appropriate for a few of our clients. The imposistion of a supervisory scheme similar to FINRA will be a major cost in terms of time and money to initiate and maintain. My guess is that there will also follow some sort of periodic examination that will result from the imposistion of the rules. Again a starin on limited time bandwith.

April 28, 2014

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

Re: MSA Professional Services, Inc. Comments on Draft Rule G-44

Dear Mr. Smith:

On behalf of MSA Professional Services, Inc. (MSA) – a Midwest leader in engineering, architectural, transportation, funding and planning services for municipalities – I appreciate the opportunity to comment on the Municipal Securities Rulemaking Board's (MSRB) draft Rule G-44, regarding Supervisory and Compliance Obligations of Municipal Advisors.

MSA would appreciate direction and clarification from the MSRB as we proceed with drafting internal and external policy frameworks to achieve and sustain compliance with Municipal Advisor (MA) provisions contained within Dodd-Frank. While Dodd-Frank provisions draw a large swath across numerous professional services previously unregulated by the Securities and Exchange Commission (SEC) and the MSRB, it fails to clearly state, define or demonstrate the level of analysis and due diligence expected of regulated MAs regarding supervisory obligations outlined in the provisions.

The rule outlines the need for specific written supervisory procedures and compliance policies for each firm providing MA services.

- Will the MSRB be releasing an outline containing format guidelines or contextual requirements for each policy and procedures manual to follow, or should MA firms self-determine these documents based on direction provided in G-42?

Paragraph .01 of the Supplementary Material specifies several factors that MAs' written supervisory procedures must take into consideration, including the advisor's size, organizational structure, nature and scope of activities, and number of offices.

- Will larger MA firms be held to a stricter standard for MA compliance as compared to smaller MA firms as it relates to acceptable policy and procedure development and implementation?

Draft Rule G-44(a)(ii) requires MAs to designate one or more municipal advisor principals (MAP) to be responsible for the supervision required by the draft rule. Paragraph .03 of the Supplementary Material specifies the authority and specific qualifications required for MAPs responsible for supervisory functions.

> *"They must have the authority to carry out the supervision for which they are responsible, including the authority to implement the municipal advisor's established written supervisory procedures and*

take any other action necessary to fulfill their responsibilities. They also must have sufficient knowledge, experience and training to understand and effectively discharge their supervisory responsibilities."

- Will these additional experience, training and knowledge metrics referenced for MAPs be identified in subsequent MSRB Notices? What metrics will the MSRB use to determine "experience, training and knowledge" outside of the qualification requirements referenced in *MSRB Notice 2014-08*?

- What is the proper (MSRB-approved) ratio for appropriate compliance with MA activities:
    - One certified MA representative per firm?
    - One certified MA representative per state per firm?
    - One certified MA representative per "X" # of clients per firm?

While Paragraph .01 of the Supplementary Material specifies several factors that MAs must take into consideration in drafting and implementing supervisory procedures and gives flexibility to achieve compliance, the subjective nature of that analysis may not provide the appropriate structure for maintaining continuity with fiduciary requirements outlined in the legislation. A more objective, metric-based approach would be preferable; one which ***clearly*** defines the appropriate number of MA representatives required to fulfill regulatory responsibilities.

- Can the Chief Compliance Officer (CCO) and/or the designated MAP also serve in a functional municipal advisor representative capacity? Can the duties of the CCO and MAP be vested in the same person? Can a person serve as a municipal advisor representative, CCO and MAP for a firm?

- If a firm decides to outsource the CCO functions as identified in Paragraph .06 of the Supplementary Material, is that entity operating under the MA registration of the firm, or must he/she be subsequently registered as an individual MA (MA-I)?
    - A previous issuance contained a provision which stated that if a firm chooses to subcontract with an independent MA on behalf of its clients, said MA could not have been associated with the firm for two years.
        - Will the same provisions apply to the CCO position?

What rationale did the MSRB use in determining the above?

- This requirement, if enforced, may prevent access and participation to the MA services market by qualified professionals who could provide the MA services at a reduced cost for municipalities.
- Additionally, please explain the rationale and intent behind the two-year duration outlined in the legislation.

The Draft amendments to Rule G-3 would define a municipal advisor representative as "a natural person who is associated person of a municipal advisor, other than a person whose functions are solely as clerical or ministerial, who engages in municipal advisory activities as defined in Rule -13."

It is unclear to many firms, including MSA, whether the acting MA representative needs to be *physically in attendance* at meetings and discussions where financing options are outlined for projects in order to maintain compliance with the provisions. Although this question might be most appropriately addressed as it relates to *Notice 2014-08*, guidance from the MSRB is sorely needed on this topic. The interpretation will ***significantly impact communities and consultants,*** as it directly relates to the development of Supervisory Policies and Procedures outlined in G-44.

Project Scenario:
Community "X" is in need of municipal advisory services in conjunction with an infrastructure project.

Their consultant (Company "Y") is registered as a Municipal Advisor with the MSRB and also has individual employees registered / certified as municipal advisors.

Employee "A" is the registered / certified MA for Company "Y" and performs the financial analysis and evaluation in conjunction with the municipal advisory services for Community "X".

Employee "A" provides a written report to Employee "B" (engineer of the same company) to deliver to the community to provide background of financing options in conjunction with general project discussions.

- Question 1: Does this meet the requirements of MA provisions outlined by the MSRB?
- Question 2: Must Employee "A" be physically in attendance at meetings where preliminary financing discussion occurs in advance of a potential project in order to maintain MA compliance?

MSA believes that the above scenario should qualify as fulfilling MA provisions and the intent of fulfilling a fiduciary duty to municipal clients outlined by the MSRB and required by Dodd-Frank. If this scenario, however, would require the physical attendance of the registered / certified MA from Company "Y" at ***each*** meeting where financing options are discussed, this will significantly increase the cost of each project for the community – far outweighing the benefits of municipal advisor services provided.

General Questions Outlined in notice 2014-04:

Does draft Rule G-44 strike an appropriate balance between a principles-based and a prescriptive approach to supervision? If not, explain why and in what areas draft Rule G-44 should be more principles-based or prescriptive.

Requiring the MA representative for a municipal advisor firm to be physically in attendance at meetings where project financing alternatives are discussed seems overtly cost-prohibitive for each project, especially during preliminary discussions. This approach, if required by the regulations, is too heavily weighted towards a prescriptive-based approach and will impact the upfront and long-term financing costs for municipal projects.

MSA recommends that MA compliance activities can take place by an MA and that information be provided to another employee of the MA firm for delivery and discussion and still meet the intent of the regulations – especially during preliminary project discussions. There is a time and place for active, in-person MA participation on a municipal project, but requiring physical attendance at ***every*** meeting where financing alternatives may or may not be discussed is cost-prohibitive. A more principles-based approach should be applied; one that allows for the community and MA to determine if attendance is warranted or appropriate.

Is Draft Rule G-44 appropriately accommodating for small and single person municipal advisors? If not, describe how the draft rule can be modified to be more appropriately accommodating.

While provisions outlined in G-44 appear to accommodate smaller and single person MA firms, MSA questions whether a small firm can meet the litany of compliance mandates in a cost-effective manner, while still preserving the fiduciary duty with municipal clients.

Conversely, Paragraph .02 of the Supplementary emphasizes the flexibility of the draft rule and its benefits to smaller firms. Policies and procedures must take into consideration "the advisor's size, organizational structure, nature and scope of activities and number of offices."

This statement would suggest that the Policies and Procedures developed and implemented by MA firms will differ based on the above. This would seem to hold larger firms to a higher standard than smaller firms. MSA recommends a prescriptive approach be applied to the Policies and Procedures outlined in G-44 – one that places clear, regulatory requirements on all firms, regardless of size.

Do commenters agree or disagree that municipal advisors should be able to outsource the CCO function pursuant to the draft rule and that the CCO should not be required to be a principal or even an associated person of the municipal advisor?

While we agree that the CCO position as an outsourced position could help promote and improve the fiduciary duties required by MA regulations, ultimately, compliance falls squarely on the shoulders of MA firms. Thus, MSA questions whether MA firms will elect to use outside CCOs due to liability and exposure concerns.

Questions:

- Will outside CCOs be subject to the same two-year provision outlined for MA duties being performed by a former employee of the MA firm?
- Can an outsourced CCO provide compliance services for multiple MA firms?

Should draft Rule G-44 require municipal advisors to complete a periodic self-certification regarding the meeting of professional qualification standards by its associated persons and the municipal advisor's ability to comply, and history of complying, with all applicable regulatory requirements?

This requirement seems practical and feasible, though certification metrics should be outlined by the

MSRB for consistency amongst all regulated firms, regardless of size.

To the extent that Draft Rule G-44 and the draft amendments to Rules G-8 and G-9 impose costs on municipal advisors, will these costs be passed on to municipal entities or obligated persons in the form of higher fees?

Yes, any costs associated with MSRB MA compliance, whether directly or indirectly related to a specific project or MA activity, will be passed along to clients in the form of higher fees.

What are the initial and ongoing costs associated with making and preserving the additional records required by the draft amendments to Rules G-8 and G-9?

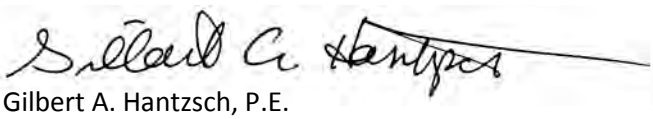
The development and implementation of adequate policies and procedures, annual filing and/or certification requirements, and the preservation of client records for retention compliance will add an additional expense to MA firms. This will result in additional costs for MA participants that will be passed along to municipalities, the ultimate beneficiary of these services. It would be premature to attempt to quantify these costs at this time as there are still unanswered questions regarding what types of information will be required for regulatory retention compliance.

Will Draft Rule G-44 have benefits in terms of protecting municipal entities, obligated persons and investors?

As mentioned in both the SEC Final Rule and *Notice 2014-04*, there is "little publicly available information about the municipal advisor industry." As such, benefits to municipal entities would seem clear as they relate to required informational transparency and the requirement of a supervisory structure in place to protect, promote and preserve a municipal advisor's fiduciary duty respective to municipal clients.

Unfortunately, without adequate input, clear direction or direct communication to municipalities, it leaves the "explaining" up to the MA services industry. How to explain the costs and benefits of regulatory compliance to the benefitting municipalities is a missing piece that has not received adequate attention. These costs will be initially absorbed by the MA industry but will most likely be recouped through MA activities in the future – resulting in higher project costs for municipalities. The potential "unfunded mandate" for MA compliance will not remain unfunded in perpetuity.

MSA appreciates the opportunity to provide comment on the Draft Rule G-44 and would welcome any direction the MSRB could provide on the above questions and comments that will help facilitate a smooth transition in the A & E industry to adopt the appropriate Municipal Advisor compliance policies, protocols and procedures.



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April 28, 2014

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA 22314

Re: MSRB Notice 2014-04

The National Association of Independent Public Finance Advisors ("NAIPFA") appreciates this opportunity to provide comments in connection with Municipal Securities Rulemaking Board ("MSRB") Notice 2014-04 – Request for Comment on Draft MSRB Rule G-44, on Supervisory and Compliance Obligations of Municipal Advisors (the "Notice").

The following numbered comments are provided in response to the questions bearing the same number as set forth in the Notice:

1. Proposed rule G-44 (the "Proposed Rule") does strike the appropriate balance between a principles-based and a prescriptive approach to supervision. Notwithstanding the comments contained herein, NAIPFA strongly encourages the MSRB to retain the overall tone and structure of the Proposed Rule.

2. The Proposed Rule appropriately accommodates small and single person municipal advisors by, among other things, allowing supervisory systems to be tailored to the size of the firm. In addition, NAIPFA appreciates and supports the fact that the Proposed Rule allows Municipal Advisor Representatives to serve in the capacity of supervisor and/or chief compliance officer. NAIPFA is, however, unclear as to what the last portion of Supplementary Material Paragraph .02 Small Municipal Advisor requires in terms of the development of a compliance policy. The applicable portion of Paragraph .02 is as follows:

> In the case of a municipal advisor with a single associated person, the written supervisory procedures must address the manner in which, in the absence of separate supervisory personnel, such procedures are nevertheless reasonably designed to achieve compliance with applicable rules.

From a compliance policy development stand point, this provision is vague and ambiguous, and would present a significant challenge for firms seeking to develop a sufficient policy. As such, NAIPFA requests that additional substantive guidance be provided. This additional guidance should address how a single associated person's written supervisory procedures are to be prepared to accomplish this directive. In the absence of such additional guidance, it seems

unlikely that most firms will be able to draft appropriate policies to address the dictates of this provision.

3. We agree with the Proposed Rule that Municipal Advisors should be able to outsource the Chief Compliance Officer ("CCO") function. We also agree that there should be no requirement that the CCO be either a principal or an associated person of a Municipal Advisor. This allows for flexibility within an industry where the size of firms can vary significantly from one firm to the next. As written, the Proposed Rule also ensures that small firms in particular will be afforded the ability to determine for themselves whether they have the financial capacity to employ a CCO or whether outsourcing such responsibilities is a better suited approach.

4. NAIPFA sees no value in requiring Municipal Advisors Representatives to complete a periodic self-certification. Such a requirement would appear to simply create an additional regulatory burden. Further, we do not believe that such a requirement will result in clients of a Municipal Advisor achieving any appreciable benefits. Therefore, NAIPFA opposes the creation of a self-certification requirement, unless some objective basis can be provided that indicate such a requirement would result in a decrease in the number of compliance violations.

5. To the best of our knowledge, since the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") and the imposition of a federal fiduciary standard on Municipal Advisors, no enforcement actions have been brought against a Municipal Advisor for breach of fiduciary duty. Therefore, due to the lack of objective evidence indicating that firms have engaged in widespread violations of their fiduciary duties, NAIPFA does not believe that a need exists for the MSRB to articulate supervisory/compliance obligations at this time. In this regard, the costs, time and effort that will be required to be expended by Municipal Advisors will likely outweigh any incremental benefits that may be realized by municipal entities and obligated persons. That being said, to the extent that the MSRB believes that there is a need for it to articulate such obligations, we do believe that the Proposed Rule would adequately address that need.

6. With respect to Municipal Advisors who are not broker-dealers or investment advisors, the only baseline referenced within the Notice that appears applicable to this group is with respect to the Dodd-Frank Act. Notably, however, the discussion within the Notice relative to this baseline focuses more on the Dodd-Frank Act's mandate that the MSRB develop a regulatory system for Municipal Advisors rather than on the economic baseline associated with the Dodd-Frank Act. This is important if, for purposes of the economic analysis, the Proposed Rule's economic impact will be judged based upon the passage of the Dodd-Frank Act, because prior to the Dodd-Frank Act there existed no law or rule requiring a Municipal Advisor who was not otherwise a broker-dealer or investment advisor to maintain a supervisory system. Therefore, for purposes of determining the economic impact of the Proposed Rule, for many Municipal Advisors the economic baseline would be Zero Dollars ($0). Thus, any dollar spent by such Municipal Advisors in complying with the Proposed Rule will represent a new, and potentially significant, financial burden upon them.

7. The costs of implementing any rule, both in terms of out of pocket expenses as well as in terms of the amount of time necessary for firms to engage in compliance related activites, will either directly or indirectly be passed on to municipal entities and obligated persons. Notably, these costs will be disproportionately borne by small municipal advisor firms and there is little likelihood that these firms have the financial capacity, or desire, to absorb these costs internally. Rather, it is much more likely that these costs will be passed on to their clients in order to allow these firms to continue to operate their businesses in a manner consistent with their past practices. Alternatively, these companies may be forced to consolidate or go out of business because, again, it is not likely that these firms will absorb these costs. However, regardless of whether firms pass these costs along, merge or go out of business, the net result will be an increase in the costs of issuance, either by way of increased fees or as a result of diminished competition due to the consolidation of Municipal Advisor firms.

8. Because the Proposed Rule is merely proposed at this time, and because Municipal Advisors who are not broker-dealers or investment advisors have not historically preserved books and records in the manner and to the extent required under the Proposed Rule or soon to be effective SEC Rule 15Ba1-8 ("15Ba1-8"), it is difficult to estimate at this time the full cost of compliance. That being said, from an administrative and ease of compliance standpoint, NAIPFA respectfully requests that proposed Rule G-9(h) be amended to state that the records described in Rule G-8(h)(iii)(B) and (D) only be required to be preserved for the duration of a person's designation as a supervisor and/or chief compliance officer and for at least five years following any change in such designation. This would harmonize this portion of G-9 with the similar portions of 15Ba1-8 relating to items such as the requirement that firms retain records relating to the "names of persons who are currently, or within the past five years were, associated with the municipal advisor." Since 15Ba1-8 mandates a five year retention period following any such person's disassociation, it would make sense from an efficiency and compliance standpoint to impose a similar five year retention requirement under proposed rule G-9(h) absent some compelling justification to the contrary. Conversely, establishing a six year retention requirement when all other similar retention requirements are five years creates an inconsistent and overly complex regulatory regime that is not likely to achieve any appreciable benefit for municipal entities or obligated persons. Rather, proposed rule G-9(h) will likely unnecessarily increase compliance costs as well as unintentional compliance violations.

9. Since there have been no recorded breaches by Municipal Advisors of their fiduciary duty obligations since the enactment of the Dodd-Frank Act, it is unclear at this time whether the Proposed Rule will have any benefits in terms of protecting municipal entities, obligated persons or investors beyond the protections put in place by the Dodd-Frank Act itself. What is clear, however, is that the Proposed Rule's mandates will result in Municipal Advisors having to incur compliance related expenses, which will in turn increase costs of issuance.

10. Except as otherwise discussed herein, NAIPFA does not believe there are any other costs or benefits that the MSRB should consider with respect to the Proposed Rule. That being said, the MSRB's should in developing these or any other rules be concerned with whether their proposed rule will benefit municipal entities and obligated persons and, to the extent that there is

a quantifiable benefit, whether that benefit outweighs the potential costs to Municipal Advisors, taking into consideration the likelihood that such costs will, directly or indirectly, be passed on to municipal entities and obligated persons.

11. An alternative to the Proposed Rule that the MSRB may wish to consider is whether to refrain from implementing the Proposed Rule at this time. An additional alternative would be to exempt single person firms from developing a compliance manual to the extent that such firms are not otherwise required to maintain policies pursuant to any other applicable law, rule or regulation. Since sole proprietors will be obligated to monitor their own activities regardless of MSRB rulemaking and because such individuals will be disproportionately burdened by the Proposed Rule, NAIPFA does not believe that requiring sole proprietors to undertake such activities will result in any appreciable benefit to municipal entities or obligated persons.

12. The Proposed Rule may have a significant impact on competition. It may also have a significant impact on both market efficiency and capital formation. For example, the development and implementation of compliance systems may cause disruptions to firm business practices. This outcome will likely result in a slowdown in the capital formation process. In addition, firms may merge or simply cease engaging in municipal advisory activities, which will decrease competition. Further, regulations such as this that result in an increase in overhead expenditures will likely present a barrier to entry into the market that may dissuade otherwise willing and qualified individuals from becoming Municipal Advisors. This will in turn impede competition within the market. In light of the foregoing, we are concerned that the Proposed Rule has the potential to increase costs of issuance without any appreciable benefit to municipal entities and obligated persons beyond those benefits that have and will continue to arise out of the Dodd-Frank Act itself.

13. As noted in number 11 above, the imposition of supervisory obligations on sole proprietors is likely not necessary or appropriate since such individuals will be obligated to monitor their own compliance thereby making a requirement that they maintain supervisory procedures superfluous.

In addition to the foregoing comments, NAIPFA requests additional guidance on the Proposed Rule's effective date. Specifically, we would welcome a clarification with respect to when the Proposed Rule will be effective, or with respect to how the effective date will be determined following the Proposed Rule's enactment. In this regard, NAIPFA requests that the Proposed Rule have an effective date that is at least ninety (90) days following the date on which it is enacted.

Sincerely,

Jeanine Rodgers Caruso

Jeanine Rodgers Caruso, CIPFA
President, National Association of Independent Public Finance Advisors

cc: The Honorable Mary Jo White, Chairman
The Honorable Kara Stein, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Michael Piwowar, Commissioner
The Honorable Daniel M. Gallagher, Commissioner
Lynnette Kelly, Executive Director, Municipal Securities Rulemaking Board

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April 28, 2014

Mr. Ronald Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA 22314

Subject: Comments on MSRB Draft Rule G-44

Dear Mr. Smith:

Thank you for the opportunity to comment on Draft MSRB Rule G-44 on Supervisory and Compliance Obligations of Municipal Advisors. By way of introduction and to provide some context for the comments to follow, our firm provides financial planning and rate consulting services primarily for government-owned water, wastewater and storm water utilities. We employ less than 50 people, almost all of which are professional consultants, and have offices in six different states. One of our primary service areas is the development of utility financial planning and rate models that provide forecasts of utility revenues and expected financial results, particularly as these results are impacted by various capital planning alternatives and debt financing strategies. The objective of these studies is to provide the information necessary to adjust utility rates and charges to ensure the financial sufficiency of the utility operations, which is typically operated as a separate government enterprise fund. This information often includes general assumptions related to funding sources to meet capital investment needs, including various forms of borrowing, but is not represented as a recommendation to undertake a particular course of action or borrowing.

In addition, our firm also provides assistance to government-owned utilities to develop financial forecasts and related documentation to support a particular debt issue or loan for the utility. This assistance may be in the form of a formal financial feasibility study report included as a component of the Official Statement for revenue bonds, or may take the form of a financial forecast included as part of the application and documentation required for private placement loans, State Revolving Fund Loans, or other types of borrowing. We do not provide the type of advice and expertise typically provided by an independent financial advisor (FA) and/or underwriter that address the specific parameters and terms for issuing debt. We typically function as one member of a team of financial advisors (including the FA, underwriter, bond counsel, underwriter's counsel, and consulting engineers) engaged by a municipal entity to assist in issuing debt, particularly for revenue bonds secured solely by the utility revenues generated by the utility enterprise fund. Clearly this is a highly specialized and focused area of knowledge and expertise that does not have a lot in common with other areas of municipal finance and municipal advisory services.

In our opinion, this distinction between general rate and financial planning studies, and studies and assistance related to a specific bond issue or loan (debt issuance support), is significant and important in the context of how the regulations related to municipal advisory services may be applied to our firm. Our interpretation of the proposed regulations for municipal advisors is that only those studies or assistance related to a specific debt issue or loan falls within the definition of municipal advisory activities and constitutes the provision of "advice" to municipal clients, as the term "advice" is defined in the Final Rule adopted by the SEC amending Section 15B of the Securities Exchange Act. To this end, our firm was registered as a Municipal Advisor as soon as the first guidelines were made public.

In contrast, we would argue that financial planning and rate studies that are generated to facilitate the utility rate setting process and the evaluation of capital planning alternatives, and that are not associated with a plan or course of action to enter into a specific loan or debt issue, do not constitute municipal advisory activities and advice, as defined in the Final Rule. However, we are waiting on additional guidance and information from the MSRB to determine if our interpretation of the Final Rules and other related rules and regulations is valid and acceptable. The final interpretation of whether all of these activities are judged to fall within the definition of municipal advisory services, or only those debt issuance support services associated with a specific loan or debt issue, will have a significant impact on our firm and the level of effort and costs associated with maintaining compliance with the proposed rules governing Municipal Advisors. Needless to say, the burden placed on our firm to address regulatory compliance requirements, including additional overhead and management costs incurred, will be passed to our clients in the form of increased fees and costs.

Given the nature of our consulting practice, and the importance we have always placed on providing high quality products and services for our clients, and the assumption we have always maintained of a fiduciary duty and a duty of care and loyalty to our clients, our firm has, of necessity, maintained high levels of supervision and oversight on all engagements. We maintain high levels of involvement by senior personnel, who possess substantial experience and expertise, on all of our engagements, and particularly those involving debt issuance support services. However, in the absence of government oversight and regulatory compliance requirements, it has not been necessary to develop and maintain written records of supervisory and compliance policies and procedures.

Draft Rule G-44 requires that we now develop written supervisory procedures that are "reasonably designed to ensure that the conduct of the municipal advisory activities of the municipal advisor and its associated persons are in compliance with applicable rules". As currently stated, this language is insufficient. How are we to know if the written policies and procedures drafted to address the applicable rules are reasonable and sufficient? Will the MSRB provide samples of written procedures and rules to provide a guide for addressing this requirement? Who is responsible for determining if the written policies and procedures that are developed are adequate? Will they be reviewed by someone at the MSRB and approved? Although it is clear that draft Rule G-44 provides some flexibility to tailor these written procedures and policies to address specific characteristics of our firm (including size, number of offices, and types of services provided), the lack of guidance on what these written policies need

to address serves to increase the burden and cost of compliance. How are we to know, and how is the MSRB to know, if all firms that provide comparable services are maintaining comparable written procedures and policies? What mechanisms are available to ensure that other specialized firms that may address other types of specialized municipal financing issues will maintain comparable levels of compliance? The requirement to maintain written supervisory policies and procedures seems to require a level of effort and cost that does not provide a commensurate level of benefit to the clients that we serve.

Similar comments and concerns are raised by the requirement for conducting a periodic review and update of the written policies and procedures for supervision and regulatory compliance. Also, it is not clear when these written policies and procedures will need to be in place. Will the final version of Rule G-44 provide a specific deadline for when written policies and procedures need to be in place?

The requirement to designate one or more municipal advisory principals and one individual as a chief compliance officer to be responsible for providing appropriate levels of supervision for municipal advisory services raises other concerns, particularly for smaller firms and sole proprietor firms. In our case, if the majority of the services we provide are determined to fall within the definition of municipal advisory services, this will impact the number of principals needed to be designated as responsible for supervisory functions. If only those services that we define as debt issuance support fall into this category, then compliance with supervisory requirements (not to mention the disclosure requirements proposed in draft Rule G-42) becomes much more manageable and cost effective. How large does a firm have to be, or how large does a municipal advisory practice area have to be, before it is necessary to designate additional principals as having supervisory roles? Again, the draft Rule G-44, as currently written, does not provide adequate guidance for smaller firms that provide a limited and specialized set of services that fall under the municipal advisor definition, to be able to effectively and efficiently address the requirements of Rule G-44.

Responses to specific questions listed in MSRB Regulatory Notice 2014-04

1) Although it seems unlikely that a more prescriptive approach would be helpful or advantageous to municipal entities, the current principles-base approach is made less effective due to the ambiguous nature of the language and lack of applicable and useful guidance on how compliance may be achieved by firms who are trying to develop written policies and procedures for the first time. Given the broad nature of the types of services and types of firms that may be impacted by these rules, it will be extremely difficult to provide reasonable guidance that covers all situations. The impact of these rules is likely to be a reduction in the number of firms providing certain kinds of municipal advisory services, particularly in more specialized areas of municipal activities. This will make it harder for municipal entities to procure the advice and expertise they need to make informed decisions, and may serve to increase the level of risk associated with borrowing money to address capital needs. Given the magnitude of these capital needs, particularly in the water and sewer industry, any policy that increases the difficulty, cost and risk associated with borrowing money, can only be considered as counter-productive.

2) See comments to question 1.

3) Yes, this ability may be essential for fairly small firms to be able to address these requirements.

4) It is not possible to address this question at this time given that the development of professional certification standards is currently the least well defined and articulated of the compliance requirements proposed for Municipal Advisors.

5) In spite of the comments provided above, it would seem that some form of rules and regulations related to supervision and compliance obligations will be necessary, and advantageous. However, the requirement to maintain written records of supervisory and compliance policies and procedures may be unnecessary, may not provide any additional benefits, and may be overly burdensome and costly.

6) No comment.

7) Almost certainly.

8) As noted above, as currently written, it is very difficult to determine the extent of the impact and additional costs that might be incurred to achieve compliance with the various rules affecting municipal advisory services. However, we believe these rules will add at least 5 percent to the cost of providing debt issuance support services for our clients, while providing little benefit to the client in terms of an improved product or to the public (and lenders) in terms of reduced risk.

9) As noted above, and with respect to the specific services provided by our firm and other similar firms that serve the water and wastewater utility industry and whose role as a Municipal Advisor is fairly limited, the benefits will be small. This must be weighed against the risk that certain information and services relied upon by government-owned utilities to facilitate the process of borrowing money may become more expensive and less readily available.

10) No comment.

11) Some distinction needs to be made between those Municipal Advisors that provide assistance and advice to address a broader range of municipal borrowing functions and municipal advisory services, and those that are focused on more specialized and narrowly focused forms of assistance. However, since there are likely to be a significant number of exceptions and special types of municipal advisory assistance provided within the broader field of municipal borrowing and finance, developing a comprehensive and fair set of rules will be problematic, at best. One possible way to carve out some specialized areas of assistance might be to recognize different rules or standards of enforcement for services addressing debt incurred by separate enterprise funds with independent revenue sources to service that debt.

12) If there is any effect, it will be to limit the number of firms that are available to provide assistance to Municipal Entities, particularly for debt issues associated with particular enterprise funds and specific industries.

13) See comments above.

Again, we appreciate the opportunity to provide comments to the MSRB as you develop the rules and regulation affecting Municipal Advisors. We understand that our comments and concerns are very specific and address how the proposed rules and regulation may affect our business and our ability to continue to provide certain services to our clients, and that these services are highly specialized for a particular industry. If we can be of assistance in providing further information about the services we provide to government-owned water and sewer utilities, please do not hesitate to contact me.

We have also shared our comments with another firm that is affiliated with ours and provides similar services as an independent sole proprietor, Woodcock and Associates. Mr. Woodcock is also registered as a Municipal Advisor and has reviewed and supports the comments we have provided and is added as a signatory to this letter.

Sincerely,
RAFTELIS FINANCIAL CONSULTANTS, INC.

Alexis F. Warmath
Vice President

WOODCOCK & ASSOCIATES, INC.

Christopher P.N. Woodcock
President

Comment on Notice 2014-04

from Jonathan Roberts, Roberts Consulting, LLC

on Thursday, March 13, 2014

Comment:

For sole proprietors (speaking from the position in which I sit) - what written policy on supervision can you have? There is one thing documenting within your deal files the evidence that rules and laws are being adhered to, but it is quite another matter to have to draft a full procedure manual on how one would conduct self-supervision.

And I might add - how is it necessary for me to assign the responsibility for the management of monitoring this supervision to myself? And just what am I to do in any self-imposed self-evaluations? Spend the time to documenting that too? Why are my deal files not enough?

How the MSRB concludes that this supervision manual is requisite for a one man show - and to then state that it is not overly burdensome and should not create a competitive disadvantage is just a farce. The undue burden is absurd. Who but a larger organization can spread these costs and time and attorney's fees to produce such a manual - and still be able to source and do a deal to turn a profit? I see this as a stab at trying to eliminate the little guy.

As a societal matter - is it that we want to encourage a bunch of pack rats running around not getting the proper legal advice and pretending they are adhering to the rules and regulations by creating these manuals? - or do we want real adherence to the rules that make sense in the protection the public's interests? Why can I not just devote my attention to those issues and put those items in my real client deal files that shows consideration and demonstrates that I am adhering to the rules and regulations?

And I am sorry - it is not the isolating of each rule that needs to be addressed when the MSRB considers the "burdens of its rule making." The MSRB needs to consider the rules in the context of the whole. In separation I would agree - none of these rules are too much burden BY THEMSELVES. But from the totality of all rules perspective - I must say many a sole proprietor is going to struggle.

Just by way of example (and there are many examples I could add on and on): What factor does this supervisory manual burden contribute when it is added to the rule that one must disclosure the requirement of not having insurance. For a sole proprietor, could that result in a competitive disadvantage to larger Municipal Advisory firms? Or for that matter could it be a competitive disadvantage compared to some unregulated mortgage broker/advisors that are not dealing in municipal securities? (Mortgage brokers are what I consider to be one of my prime sources of competition - I do zero work with states, municipalities, school districts, etc. - its all for-profit developer based and or 501(c)3 based financing - primarily of real estate and capital assets). If a unregulated mortgage broker does not need to disclose this - what is my disclosure going to do to help me?

I looked into that insurance thing immediately upon the starting of my own business. I mean, who might not want to be insured as to the risks of the business in which they operate? Right? But as a one man show - who is it that is seeking to be insured? Answer: My company/myself. And against what actions am I seeking to be insured? Answer: Those brought upon me for acts of my own negligence. From a sole proprietor perspective, there is no supervision that can overcome that.

So what does the MSRB think? Could you reasonably imagine that this type of insurance would be readily available? And even if it were - does the MSRB reasonably suspect such insurance would come at an affordable price? I submit to you that only large firms with cross supervision procedures and standards of oversight would ever be eligible for such insurance - in this regard this supervisory manual would not do a thing for me but may continue to advantage my larger competitors (and to digress: yet the MSRB wanted to know if insurance should be required?????!!).

I want to ask the MSRB this question - If per Dodd-Frank legislation the problem was that "they" were too big to fail - is this piling on of regulations a means to force the outcome that all others might be too small to succeed?

I just can't seem to understand the MSRB's perspective that the burden of supervision - the writing of manuals and the like - is not an unnecessary burden to sole proprietor operations. Again, why can't sole proprietor operations be supervised as to the adherence to the rules and regulations simply by review of the deal files that they keep? (Though I am further sympathetic to the two three and four man show too, I will let those other small shops fend for themselves.)

Respectfully Submitted,

Jonathan Roberts
Roberts Consulting, LLC

sifma
Invested in America

April 25, 2014

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

Re: MSRB Notice 2014-04 – Request for Comment on Draft MSRB Rule G-44, on Supervisory and Compliance Obligations of Municipal Advisors and associated amendments to Rules G-8 (on Books and Records) and G-9 (on Preservation of Records) (February 25, 2014)

Dear Mr. Smith:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the Municipal Securities Rulemaking Board's ("MSRB") Request for Comment on Draft MSRB Rule G-44, on Supervisory and Compliance Obligations of Municipal Advisors and associated amendments to Rules G-8 (on Books and Records) and G-9 (on Preservation of Records) (February 25, 2014) (collectively, the "Proposal").

I. Executive Summary

SIFMA continues to support the MSRB's efforts to ensure that municipal advisors[2] are properly supervised and that all municipal advisors adopt a supervisory structure for engaging in municipal advisory activities[3]. We commend the MSRB for proposing a supervisory regime for

[1] SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

[2] For purposes of proposed Rule G-44, "municipal advisor" shall mean a municipal advisor required to be registered under section 15B of the Securities Exchange Act of 1934 and the rules and regulations thereunder.

[3] See letter to Ronald W. Smith, MSRB, from David L. Cohen, SIFMA, dated June 24, 2011, available at http://www.sifma.org/issues/item.aspx?id=26101

municipal advisors of similar robustness as the requirements of MSRB Rule G-27 - resulting in a level regulatory playing field for all municipal advisors[4].

II. Elements of Supervisory System

SIFMA supports the elements of the supervisory system requirements contained in the Proposal. Draft Rule G-44 follows a widely accepted model in the securities industry of a reasonable supervisory system complemented by the designation of a chief compliance officer (CCO). The draft rule draws on aspects of existing supervision and compliance regulation under other regimes, including those for broker-dealers under rules of the MSRB and the Financial Industry Regulatory Authority (FINRA) and for investment advisors under the Investment Advisers Act of 1940 (Advisers Act).

In summary, draft Rule G-44 requires:

- A supervisory system reasonably designed to achieve compliance with applicable securities laws:
- Written supervisory procedures;
- The designation of one or more municipal advisor principals[5] to be responsible for supervision;
- Compliance processes reasonably designed to achieve compliance with applicable securities laws;
- The designation of a CCO to administer those compliance processes; and
- At least annual reviews of compliance policies and supervisory procedures.

SIFMA believes that all of the elements listed above are critical to implementing a comprehensive supervisory system of controls. Municipal advisors should consider as a business practice some of the specifics contained in Rule G-27 (such as review of correspondence and conducting internal inspections) that are not prescribed in the Proposal.

[4] This is in contrast to MSRB Notice 2011-28 (May 25, 2011), which proposed Rule G-44 require all non-dealer municipal advisors to adopt a "basic" supervisory system, while dealers subject to Rule G-27 would be required to maintain a "detailed" supervisory system. We do note, however, that the Proposal is less prescriptive than Rule G-27's requirements.

[5] See MSRB Notice 2014-04 at Note 2 ("The MSRB intends to propose amendments to MSRB Rules G-2 and G-3 to create the "municipal advisor principal" classification, define the term and require qualification in accordance with the rules of the MSRB.")

III. Record Keeping and Preservation of Records

SIFMA supports the proposed amendments in the Proposal to Rule G-8 and Rule G-9.

The draft amendments to Rules G-8 and G-9, in summary, require each municipal advisor to make and keep records of:

- Written supervisory procedures;
- Designations of persons as responsible for supervision;
- Written compliance policies;
- Designations of persons as CCO; and
- Reviews of compliance policies and supervisory procedures.

SIFMA believes these record keeping and retention requirements are reasonable and are in line with existing MSRB record keeping and record retention requirements.

IV. Economic Analysis

SIFMA believes that the economic analysis conducted by the MSRB justifies the supervisory system elements and record keeping requirements contained in the Proposal. Draft Rule G-44 is intended to prevent unlawful conduct and to help detect and promptly address unlawful conduct when it does occur. The primary purpose of the SEC's Municipal Advisor Rule[6] was to regulate previously unregulated municipal advisors. We concur with the MSRB that for the subset of municipal advisors that are municipal securities dealers, the existing supervisory requirements of MSRB Rule G-27 serve as a baseline. For this subset of municipal advisors, the draft Rule G-44 supervisory requirements are no more stringent than the baseline Rule G-27 requirements. Existing procedures under Rule G-27 may already cover dealer activities that are newly defined as municipal advisory activity. It is important to note that while the Proposal is comprehensive, it is not as prescriptive as the supervisory obligations of dealers contained in Rule G-27.

For the subset of municipal advisors that are also FINRA-registered dealers of municipal securities, the FINRA supervision and compliance requirements also serve as a baseline. The relevant FINRA rules require, among other things, that each dealer have a reasonable supervisory system, comprehensive compliance processes, and a CCO.

An additional baseline applies to municipal advisors who are also registered as investment advisers and subject to the requirements of the Advisers Act. The Advisers Act gives the SEC authority to punish failures by investment advisers (IAs) to reasonably supervise. In

[6] *See* Registration of Municipal Advisors, Release No. 34-70462 (September 20, 2013), 78 FR 67467 (November 12, 2013), available at http://www.sec.gov/rules/final/2013/34-70462.pdf.

addition, the SEC requires IAs to have written compliance policies and procedures and designate a CCO as responsible for the administration of those procedures.

V. Designation of Chief Compliance Officer

Broker-dealers are required to designate a chief compliance officer that is an associated person of the firm and duly licensed[7]. Draft Rule G-44 would allow municipal advisors to outsource the CCO function. While requiring a CCO to be a duly licensed associated person of the firm is a higher and more rigorous standard, than permitting the CCO function to be outsourced, SIFMA does not object to the Proposal's flexibility on this aspect, which has precedent for investment advisors under the Investment Advisors Act of 1940[8]. In either case, the municipal advisor retains ultimate responsibility and liability for its compliance obligations. If outsourced, compliance will only be as good as the outsourcer. Non-dealer municipal advisors should be aware that enforcement regulators often site "failure to supervise" along with a substantive rule violation.

VI. Implementation Period

Any regulatory scheme takes time to implement properly. Therefore, SIFMA requests that when Rule G-44 is adopted, the MSRB provides for a reasonable implementation period to develop and implement supervisory policies and procedures, as well as systems and controls, which would be no less than six months, before the Proposal becomes effective.

VII. Conclusion

SIFMA sincerely appreciates this opportunity to comment upon the Proposal. SIFMA supports the MSRB's efforts to ensure that all municipal advisors are properly supervised and that municipal advisors adopt a supervisory structure for municipal activities.

Please do not hesitate to contact me with any questions at (212) 313-1265.

Sincerely yours,

David L. Cohen
Managing Director
Associate General Counsel

[7] *See* FINRA Rule 3130.

[8] *See* Section 202(25) of the Advisers Act and Rule 206(4)-7, 17 CFR § 275.206(4)-7.

cc:

Municipal Securities Rulemaking Board
Lynnette Kelly, Executive Director
Michael L. Post, Deputy General Counsel
Darlene Brown, Assistant General Counsel

Comment on Notice 2014-04

from william johnston, Tibor partners Inc

on Tuesday, February 25, 2014

Comment:

i am a one man operation with one client and have been in the business in one form or the other for over 30 years. This whole thing is nonsense and will ultimately deprive my client from access to valuable advoce.

The Yuba Group LLC

Yuba Group Advisors LLC
130 West 30th Street, Loft 12C
New York, NY 10001
T 212 518 6166
F 212 937 3872
www.yubagroup.com

April 28, 2014

Via electronic submission
Ronald W. Smith, Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA 22314

Re: MSRB Notice 2014-04 Request for Comment on Draft Rule G-44 on Supervisory and Compliance Obligations of Municipal Advisors and 2014-08 Request for Comment on Establishing Professional Requirements for Municipal Advisors

The Yuba Group appreciates the opportunity to provide comments in response to the Municipal Securities Rulemaking Board ("MSRB") Request for Comments ("ROC") on Proposed Rule G-44 on Supervisory and Compliance Obligations of Municipal Advisors, as well as MSRB Request for Comment on Establishing Professional Qualifications for Municipal Advisors. The Yuba Group commends the MSRB's continued efforts in working with and listening to market participants as new MSRB Municipal Advisor ("MA") rules are drafted. We have participated in the three webinars that have been offered on the new MA rules and previously submitted comments earlier this year on Draft Rule G-42 on Duties of Non-Solicitor Municipal Advisors.

Background

As stated in our comment letter on Draft Rule G-42, the Yuba Group is a seven-person advisory firm formed in 2010. Our work is focused solely on higher education and not-for-profit institutions. In addition to assisting with tax-exempt and taxable debt transactions, as well as interest rate swaps, we provide on-going services related to capital financing, debt policy/capacity and rating strategies.

Our clients include a range of public and private colleges and universities, as well as research, cultural and other types of not-for-profit institutions. Current clients include several Ivy League institutions and other major research universities – both public and private- as well as liberal arts schools and "niche" institutions. We do not advise any issuing authorities. Our partners and other personnel have many years of prior experience at investment banks, rating agency and other financial services and swap advisory firms.

Comments

Although the 2014-04 and 2014-08 ROCs were published separately, we are submitting a combined response to both since there are many overlapping issues included in the draft rules.

Although the MSRB has indicated on many occasions that it has taken into account small Municipal Advisor firms for all of the proposed rules, it is our view that the approach to the supervisory provisions and the professional requirements are still quite biased toward larger firms and do not make adequate accommodations for smaller and single-person firms. Simply put, larger firms are able to spread all of the actual and "opportunity" costs of compliance over a larger number of clients and employees. As stated in our comment letter on draft Rule G-42, the financial model of small MA firms is fairly straightforward; the "opportunity cost" of the time we spend on compliance issues is time that is not available to spend on client matters and directly impacts our "bottom line" negatively. With fewer people and no other business lines than our advisory work, smaller firms are impacted much more than larger ones by the proposed MA regulations. Below are some examples as well as some suggestions on how the MSRB might consider accommodating smaller and single person advisors by making the compliance process more efficient and less time-consuming.

1. Combine the MA tests. The two-tiered approach to initially imposing a requirement to pass a municipal advisor representative test in 2015 followed in the future by a municipal advisor principal test requires anyone who is engaged in a management or supervisory role to take two separate tests, effectively doubling both the fees and the time needed to prepare and take such tests. A few suggestions:
   - Roll out the supervisor test first, and if supervisor passes, then the individual test would be waived. Imposing a test first on supervisors would also be consistent with the MSRB's proposed requirement for written supervisory procedures and the importance of adequate supervision. Additionally, one could argue that in a smaller firm, junior people are supervised more closely due to the more intimate nature of the work environment.
   - Consider eliminating the need for a representative and/or replace it by an apprenticeship period and self-imposed professional standards. If an advisor is being supervised adequately, a qualifying test for representatives would not be necessary.

   We recommend that the MSRB make the supervisor test available before, or simultaneously with the representative test and eliminate the need for a supervisor to take both tests. For smaller firms, the MSRB could also consider eliminating the need for non supervisors to take the representative test if supervised closely or serving an apprentice period.

2. Reconsider "grandfathering" and/or developing a shorter test for previously registered supervisors and representatives. Although the MSRB has indicated that it is not permitting any individuals to be grandfathered, we continue to be concerned that the requirements unfairly impact smaller firms. Since many advisors were formerly investment bankers who may have been registered previously, could there be an abbreviated test which just deals with the regulatory issues and not fundamentals of municipal bonds?

   We recommend that the MSRB reconsider the approach against grandfathering.

3. Combine proposed rules in fewer ROCs. Arguably, the proposed supervisor and professional qualifications could have been included in a single ROC publication since there are many overlapping issues and implications. Instead, two separate ROCs and webinars for such ROCs essentially have required twice the amount of time for all firms to review and participate. Even for those of us that may have engaged external compliance advisors, we still need to review all of the proposed rules, discuss them with our advisors and incorporate them into our practices. This has been an extremely time-consuming effort which in a smaller firm is felt more dramatically than larger ones. For example, the fees charged by a compliance consultant to a small firm are no less than those charged to a larger one, except for the number of MA-I forms that need to be reviewed, and the time spent in analyzing rules and establishing regulatory practices is also no less than for the larger ones. In addition, the actual costs and "opportunity costs" associated with our time are spread over a much smaller number of employees and clients.

   We recommend the MSRB better accommodate smaller firms by consolidating regulatory communications and rules into fewer publications and webinars.

During the MSRB webinar on the professional qualifications, a MSRB representative stated that the test structure was deliberately designed to mirror that for the broker-dealers, which by nature are large firms. **We urge the MSRB to abandon the "mindset" of imposing the approach to broker-dealer regulations to MAs and consider more closely the perspective of a small firm and its time constraints and fee structure. In order to minimize the impact of the MA regulations on the fees we charge our clients, we are hopeful that the MSRB's approach to regulating MAs will be done in the most efficient manner possible. Reducing the number of ROCs, tests, proposed rules and webinars involved in the implementation of the SEC and MSRB rules would certainly be a great start.**

Economic Analysis

In our comment letter on Proposed Rule G-42, we provided an estimate of approximately $50,000 for the first six months of 2014 for our small firm, which included:

- Registration fees, time allocated to training staff, issuers;

- Outside consultant assistance for new rules and advice;
- Time allocation internally to learn the rules, discuss the rules, create internal documents, and prepare registration documents; and
- Time allocation for client education.

We would like to increase this estimate by an additional $40,000 to reflect the following time and expenses associated with the actual implementation:

- Selection of outside consultant;
- Participation in three MSRB webinars and a Bond Buyer webinar;
- Review of additional MSRB ROCs;
- Preparation of MSRB comment letters;
- Drafting and review of draft written supervisory procedures ("WSP");
- Drafting and review of revisions to engagement letters to reflect additional disclosures;
- Drafting and review of revisions to Employee Handbook to reflect regulatory issues;
- Preparing individual amendments to existing engagements;
- Firm training regarding content of WSP;
- Increase in email server fees to be able to comply with five-year record retention requirements;
- IT consultant fees to implement email server change; and
- Employee time required to implement computer changes to migrate email server.

This results in an estimated $90,000 cost of implementation for the first six months of 2014 due to regulatory issues, or over $12,000 per employee.

In addition, our comment letter on Rule G-42 included an estimate of $89,000 for the future cost of the expected professional tests, time studying, and lost wages to the firm. Since at least three of us will also be required to take a supervisory test, the two-tiered approach to professional requirements increases our estimate by another $38,000 to over $125,000 just for the professional requirements.

We encourage the MSRB to continue considering the potential impact and costs of compliance on small firms as it develops professional standards and requirements, both with respect to increased out-of-pocket costs and the opportunity cost of our time.

In closing, we recognize the challenges of drafting rules that will impact advisors, bankers and issuers with varying degrees of expertise and resources, and appreciate the opportunity to respond to the MSRB. We are hopeful that the MSRB will take our comments into consideration.

Thank you.
Linda Fan
Managing Partner

MSRB
Municipal Securities Rulemaking Board

Regulatory Notice

2014-01

Publication Date
January 9, 2014

Stakeholders
Municipal Advisors, Issuers, General Public

Notice Type
Request for Comment

Comment Deadline
March 10, 2014

Category
Fair Practice

Affected Rules
Rule G-8; Rule G-9

Request for Comment on Draft MSRB Rule G-42, on Duties of Non-Solicitor Municipal Advisors

Overview

The Municipal Securities Rulemaking Board ("MSRB") is seeking comment on draft Rule G-42 on standards of conduct and duties of municipal advisors when engaging in municipal advisory activities other than the undertaking of solicitations. The MSRB is also seeking comment on associated draft amendments to Rules G-8, on books and records, and G-9, on the preservation of records.

Comments should be submitted no later than March 10, 2014, and may be submitted in electronic or paper form. Comments may be submitted electronically by clicking here. Comments submitted in paper form should be sent to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board, 1900 Duke Street, Suite 600, Alexandria, Virginia 22314. All comments will be available for public inspection on the MSRB's website.[1]

Questions about this notice should be directed to Michael L. Post, Deputy General Counsel, or Kathleen Miles, Associate General Counsel, at 703-797-6600.

Background

In the aftermath of the financial crisis of 2008, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[2] Congress, among other things, amended Section 15B of the Securities Exchange Act of 1934 ("Exchange Act") to provide for the

[1] Comments are posted on the MSRB website without change. Personal identifying information such as name, address, telephone number, or email address will not be edited from submissions. Therefore, commenters should only submit information that they wish to make available publicly.

[2] Pub. Law No. 111-203, 124 Stat. 1376 (2010).

regulation by the Securities and Exchange Commission ("SEC") and the MSRB of municipal advisors[3] and to grant the MSRB certain authority to protect municipal entities[4] and obligated persons.[5] The Dodd-Frank Act accordingly grants the MSRB broad rulemaking authority over municipal advisors and municipal advisory activities.[6] The Dodd-Frank Act's legislative history indicates Congress was concerned that the municipal securities market had

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[3] Section 15B(e)(4)(A) of the Exchange Act defines the term "municipal advisor" to mean, in relevant part and subject to certain exceptions,

> a person (who is not a municipal entity or an employee of a municipal entity) that (i) provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or (ii) undertakes a solicitation of a municipal entity.

As noted below, the SEC has adopted final rules on the registration of municipal advisors that sets out the SEC's definition of "municipal advisor" to which the municipal advisor regulatory regime is to apply. The term "municipal advisor" is used in this notice, draft Rule G-42 and the associated amendments to Rules G-8 and G-9 with the same meaning as set forth in the SEC definition, but excluding solicitors.

[4] Section 15B(e)(8) of the Exchange Act defines the term "municipal entity" to mean:

> any State, political subdivision of a State, or municipal corporate instrumentality of a State, including ---- (A) any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality; (B) any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof; and (C) any other issuer of municipal securities.

[5] Section 15B(e)(10) of the Exchange Act defines the term "obligated person" to mean:

> any person, including an issuer of municipal securities, who is either generally or through an enterprise, fund, or account of such person, committed by contract or other arrangement to support the payment of all or part of the obligations on the municipal securities to be sold in an offering of municipal securities.

[6] Section 15B(b)(2) of the Exchange Act provides that

> [t]he Board shall propose and adopt rules to effect the purposes of this title 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 securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors.

been subject to less regulation than corporate securities markets, and particularly that "[d]uring the [financial] crisis, a number of municipalities suffered losses from complex derivatives products that were marketed by unregulated financial intermediaries."[7] The regulation of municipal advisors and their advisory activities is, as the SEC has recognized, generally intended to address problems observed with the conduct of some municipal advisors, "including 'pay to play' practices, undisclosed conflicts of interest, advice rendered by financial advisors without adequate training or qualifications, and failure to place the duty of loyalty to their clients ahead of their own interests."[8]

As discussed in more detail below, the Dodd-Frank Act itself specifically establishes that a fiduciary duty is owed by a municipal advisor to its municipal entity clients.[9] By contrast, the Dodd-Frank Act does not impose a fiduciary duty with respect to a municipal advisor's obligated person clients.[10]

The SEC and MSRB have developed registration regimes for municipal advisors. In September 2010, the SEC adopted, and subsequently extended, a temporary registration program for municipal advisors.[11] In November 2010, the MSRB amended its rules to require municipal advisors to register with the MSRB.[12] Any municipal advisor engaging in municipal advisory activities

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[7] S. Rep. No. 111-176, at 38 (2010).

[8] Exchange Act Release No. 34-70462, (September 20, 2013), 78 FR 67468 (November 12, 2013) ("SEC Final Rule") at 67469; *see id.* at 67475 nn.104-6 and accompanying text (discussing relevant enforcement actions). *See also*, MSRB, Unregulated Municipal Market Participants—A Case for Reform, April 2009, http://www.msrb.org/Market-Disclosures-and-Data/Market-Statistics/~/media/Files/Special-Publications/MSRBReportonUnregulatedMarketParticipants_April09.ashx.

[9] Section 15B(c)(1) of the Exchange Act provides:

> A municipal advisor and any person associated with such municipal advisor shall be deemed to have a fiduciary duty to any municipal entity for whom such municipal advisor acts as a municipal advisor, and no municipal advisor may engage in any act, practice, or course of business which is not consistent with a municipal advisor's fiduciary duty or that is in contravention of any rule of the Board.

[10] *See* SEC Final Rule at 67475 n.100.

[11] *See* Exchange Act Release No. 34-62824 (September 1, 2010); 75 FR 54465 (September 8, 2010).

[12] *See* Exchange Act Release No. 34-63308 (November 12, 2010); 75 FR 70335 (November 17, 2010).

after December 31, 2010, without registering with the MSRB is in violation of MSRB rules.[13] In December 2010, the SEC proposed a permanent registration regime for municipal advisors.[14]

Recently, on September 18, 2013, the SEC acted on that proposal and adopted final rules to, among other things, define who is a municipal advisor, establish a permanent registration regime for that defined set of persons, and establish basic recordkeeping requirements for such advisors ("SEC Final Rule").[15] The SEC Final Rule, scheduled to take effect January 13, 2014, differs significantly from the original proposal in many respects. For example, the SEC Final Rule generally expands the scope of the exclusions and exemptions from the definition of municipal advisor, and provides additional guidance to market participants about what constitutes "advice."

With the adoption of the SEC Final Rule, the MSRB has formally re-engaged in its development of a regulatory framework for municipal advisors. A cornerstone of that regulatory framework is draft Rule G-42 establishing certain core standards of conduct and duties of municipal advisors,[16] other than when engaging in solicitation activities.[17]

The Exchange Act, as amended by the Dodd-Frank Act, contains several grants of rulemaking authority that form the statutory basis for this rulemaking initiative. Section 15B(b)(2) directs the MSRB to undertake certain rulemaking with respect to brokers, dealers, and municipal securities

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[13] *See* MSRB Notice 2010-50 (November 15, 2010).

[14] Exchange Act Release No. 34-63576 (December 20, 2010), 76 FR 824 (January 6, 2011).

[15] *See supra* note 10.

[16] SEC Final Rule at 67519 n.679 (recognizing that the regulation of municipal advisors includes the "application of standards of conduct . . . that may be required by the Commission or the MSRB, and other requirements unique to municipal advisors that may be imposed by the MSRB").

[17] Draft Rule G-42 does not address the duties of a municipal advisor when undertaking a solicitation of a municipal entity or obligated person within the meaning of Section 15B(e)(9) of the Exchange Act and the rules and regulations thereunder. The MSRB intends to undertake separate rulemaking with regard to solicitation activities, which may raise issues particular to those activities, at a later date. Municipal advisors engaged in such activities are reminded that they currently are subject to the MSRB's basic fair practice rule, Rule G-17, which applies to all municipal advisors as well as to brokers, dealers and municipal securities dealers.

dealers ("dealers") and municipal advisors who provide advice to or on behalf of municipal entities and obligated persons with respect to municipal financial products and the issuance of municipal securities.[18] Such rulemaking includes, under Section 15B(b)(2)(L)(i), the establishment of rules with respect to municipal advisors to accomplish several ends, including "prescrib[ing] 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." Section 15B(b)(2)(C) grants the MSRB authority to adopt rules to prevent fraud and in general to protect investors, municipal entities, obligated persons, and the public interest.

Previously, in the exercise of its rulemaking authority under the Dodd-Frank Act, the MSRB amended Rule G-17 on fair dealing to provide that municipal advisors, in the conduct of their municipal advisory activities, must deal fairly with all persons and not engage in any deceptive, dishonest, or unfair practice.[19]

Summary of Draft Rule G-42 and the Draft Amendments to Rules G-8 and G-9

Draft Rule G-42 (Duties of Non-Solicitor Municipal Advisors) sets forth the basic duties and responsibilities of a municipal advisor. The regulatory regime for municipal advisors includes a fiduciary duty and other standards of conduct.[20] As noted by the SEC, however, Section 975 of the Dodd-Frank Act did not define the contours of a municipal advisor's fiduciary duty. In addition, the SEC did not undertake to define the fiduciary duty or other standards of conduct of a municipal advisor as part of its Final Rule.[21]

Draft Rule G-42 elaborates on the duties of a municipal advisor, including the fiduciary duties of a municipal advisor towards its municipal entity clients. The approach towards fiduciary duties in draft Rule G-42 flows from the distinctions drawn in the Dodd-Frank Act between a municipal advisor's duties owed to clients that are municipal entities on the one hand, and obligated persons, on the other. In practice, under many circumstances, these distinctions may not be material insofar as municipal advisors have,

[18] *See* supra note 7.

[19] *See* Exchange Act Release No. 34-63599; File No. SR-MSRB-2010-16 (December 22, 2010).

[20] *See* SEC Final Rule at 67519 n.679.

[21] *See* SEC Final Rule at 67475 n.100.

with respect to all clients, a duty of care and a duty to deal fairly and to not engage in any deceptive, dishonest, or unfair practice.[22] Nevertheless, as discussed below, the MSRB invites comment on whether draft Rule G-42 appropriately limits the application of the fiduciary duty to municipal advisors' municipal entity clients, or should extend such fiduciary duty to all clients, including obligated persons, under the MSRB's issuer protection mandates.

Irrespective of any fiduciary duties, draft Rule G-42 subjects municipal advisors to a duty of care in the conduct of their municipal advisory activities. In addition, draft Rule G-42 requires municipal advisors to disclose conflicts of interest and certain other information to their clients and document their municipal advisory relationship. Draft Rule G-42 does not permit a municipal advisor to recommend that a client enter into any municipal securities transaction or municipal financial product unless the advisor has a reasonable basis for believing that the transaction or product is suitable for the client. If engaged to do so by its client, a municipal advisor also would be required to undertake a review of a recommendation made by a third party regarding a municipal securities transaction or municipal financial product. Draft Rule G-42 prohibits a municipal advisor (and any affiliate) from engaging in any transaction in a principal capacity to which the municipal entity or obligated person client of the municipal advisor is a counterparty, except for activity that is expressly permitted by underwriters under Rule G-23. The draft rule also enumerates certain other prohibited activities.

Draft Rule G-42 includes Supplementary Material that provides additional guidance on such topics as: aspects of the duty of care, aspects of the duty of loyalty, responsibilities if a client pursues an action independent of or contrary to advice provided by a municipal advisor, limitations of the scope of the municipal advisory engagement, and the requirements to provide certain disclosures to investors. The Supplementary Material also includes provisions specifically addressing the suitability of recommendations and the requirement to know one's client.

Draft Rule G-42 includes definitions, for purposes of the rule, of "advice," "affiliate of the municipal advisor," "municipal advisor, ""municipal advisory activities," "municipal advisory relationship," "municipal advisory business," "municipal entity," "obligated person," and "official statement." The terms "advice," "municipal advisor," "municipal advisory activities," "municipal entity," and "obligated person" are based upon the interpretations of statutory definitions given in the SEC Final Rule.

[22] *See* SEC Final Rule at 67511 n.574 and accompanying text.

The draft amendments to MSRB Rules G-8 (on books and records) and G-9 (on preservation of records) require, by reference, the keeping of all of the records required by the SEC Final Rule. In addition, the draft amendments to Rule G-8 would include specific recordkeeping requirements that would correspond to certain specific requirements of draft Rule G-42 that are not necessarily covered by the SEC Final Rule. The draft amendments to Rule G-9 require municipal advisors generally to preserve records for not less than five years.

The MSRB requests comment on draft Rule G-42 and the associated draft amendments to Rules G-8 and G-9.

Request for Comment

Standards of Conduct
Under draft Rule G-42(a), each municipal advisor in the conduct of its municipal advisory activities for an obligated person client is subject to a duty of care. Each municipal advisor in the conduct of its municipal advisory activities on behalf of a municipal entity client is subject to a fiduciary duty, which includes, without limitation, a duty of care and a duty of loyalty.

The Supplementary Material in the draft rule provides guidance on the meaning of the duty of care and the duty of loyalty. The duty of care, as described in Supplementary Material .01, means, without limitation, that a municipal advisor must: (a) exercise due care in performing its municipal advisory activities; (b) possess the degree of knowledge and expertise needed to provide the client with informed advice; (c) make a reasonable inquiry as to the facts that are relevant to a client's determination as to whether to proceed with a course of action or that form the basis for any advice provided to the client; and (d) undertake a reasonable investigation to determine that the municipal advisor is not basing any recommendation on materially inaccurate or incomplete information. In addition, a municipal advisor that is engaged by a client in connection with either an issuance of municipal securities or a municipal financial product that is related to an issuance of municipal securities must also undertake a thorough review of the official statement for that issue unless otherwise directed by the client and so documented in writing.

The duty of loyalty, as described in Supplementary Material .02, requires, without limitation, a municipal advisor to deal honestly and with the utmost

good faith with a municipal entity client and act in the client's best interests without regard to the financial or other interests of the municipal advisor.

As a general matter, the duties created by the draft rule would be, as provided in Supplementary Material .06, in addition to any state law or other duties, including fiduciary duty laws.

Disclosure of Conflicts of Interest and Other Information

Draft Rule G-42(b) requires a municipal advisor to fully and fairly disclose to its client in writing all material conflicts of interest, and to do so at or prior to the inception of a municipal advisory relationship. These include any actual or potential conflict of interest that might impair the advisor's ability to render unbiased and competent advice to or on behalf of the client.

To aid municipal advisors in meeting these disclosure obligations, draft Rule G-42(b) includes a non-exhaustive list of specific items requiring disclosure. These items include the provision by any affiliate of certain advice, services, or products to or on behalf of the client; payments to obtain or retain the client's municipal advisory business; payments received from third parties to enlist the municipal advisor's recommendations; any fee-splitting arrangements with any provider of investments or services to the client; conflicts that may arise from the use of the form of compensation under consideration or selected by the client; and any other engagements or relationships of the municipal advisor or any affiliate that might impair the advisor's ability either to render unbiased and competent advice to or on behalf of the client or to fulfill its fiduciary duty to the client, as applicable. Draft Rule G-42(b) also requires disclosure of the amount and scope of coverage of professional liability insurance that the municipal advisor carries (*e.g.*, coverage for errors and omissions, improper judgments, or negligence), deductible amounts, and any material limitations on such coverage, or a statement that the advisor does not carry any such coverage. Finally, draft Rule G-42(b) requires disclosure of any legal or disciplinary event that is (a) material to the client's evaluation of the municipal advisor or the integrity of its management or advisory personnel; (b) disclosed by the municipal advisor on the most recent Form MA filed with the SEC; or (c) disclosed by the municipal advisor on the most recent Form MA-I filed with the SEC regarding any individual actually engaging in or reasonably expected to engage in municipal advisory activities in the course of the engagement.

Paragraph .05 of the Supplementary Material provides that the conflicts disclosures must be sufficiently detailed to inform the client of the nature, implications and potential consequences of each conflict and must also

include an explanation of how the advisor addresses or intends to manage or mitigate each conflict.

Documentation of the Municipal Advisory Relationship

Under draft Rule G-42(c), municipal advisors must evidence each of their municipal advisory relationships by a writing entered into prior to, upon or promptly after the inception of the municipal advisory relationship. The documentation would be required to include, at a minimum, certain key terms and disclosures: (i) the form and basis of direct or indirect compensation, if any; (ii) the reasonably expected amount of any such compensation (stated in dollars to the extent it can be quantified); (iii) the scope of municipal advisory activities to be performed and any limitations on the scope of the engagement; (iv) in the case of municipal advisory activities relating to a new issue or reoffering of municipal securities, the specific undertakings, if any, requested by the client to be performed by the advisor relating to the preparation or finalization of the official statement or similar disclosure document; and (v) certain terms relating to the termination of the municipal advisory relationship or, if there are no such terms, then a statement to that effect. Section (c) also requires the relationship documentation to include the conflict and other information required to be disclosed by section (b).

Draft Rule G-42(c) requires that the municipal advisor amend or supplement the writing during the term of the municipal advisory relationship as necessary to reflect changes in or additions to the terms or information required to be disclosed by section (b) or (c). For example, if the basis of compensation or scope of services changed during the term of the relationship, the municipal advisor would be required to amend or supplement the writing. The same would be true in the case of material conflicts of interest discovered after the initial writing had been provided or entered into. To avoid the necessity for amendments or supplementation based on very minor changes in the amount of reasonably expected compensation, a revised writing would only be required on the basis of a change that is material. The amendment and supplementation requirement in draft Rule G-42(c) applies to any changes and additions that are discovered, or should have been discovered, based on the exercise of reasonable diligence by the municipal advisor.

Draft Rule G-42(c) is modeled in part on MSRB Rule G-23, which requires that a dealer that enters into a financial advisory relationship with an issuer must evidence that relationship in writing prior to, upon, or promptly after the relationship has been entered into. The writing would not need to be a two-party agreement. For example, if state law provided for the procurement of

municipal advisory services in a manner that did not include a bilateral agreement, the municipal advisor could send a letter referencing the procurement document and containing the terms and disclosures that would be required by draft Rule G-42(b) and (c).

Because in some cases a client may have already reached a decision regarding a particular type of municipal securities transaction or financial product, and in other cases a client may have engaged another professional to undertake certain duties in connection with a municipal securities transaction, Supplementary Material .04 provides that a municipal advisor and its client may limit the scope of the municipal advisory relationship to certain specified activities or services. The municipal advisor, however, is not permitted to alter the standards of conduct or duties imposed by the draft rule with respect to that limited scope.

Review of the Official Statement

Except for the default requirement pursuant to the duty of care to review thoroughly the official statement, the draft rule does not prescribe specific responsibilities to be undertaken with regard to the official statement. Draft Rule G-42(c)(iv) reflects the MSRB's view that it is generally the prerogative of the client to determine the scope of the municipal advisory activities to be performed by the advisor and any limitations on the scope of the engagement. Draft Rule G-42(c)(v) would require that the specific undertakings, if any are requested by the client to be performed by the advisor with respect to the preparation and finalization of the official statement or similar document, be included in the documentation of the municipal advisory relationship. The provisions of draft Rule G-42(c)(v) may encourage the client to consider at the outset of the transaction whether and to what extent the client wants the municipal advisor to have responsibilities with regard to the official statement or similar disclosure document in light of the particular circumstances of the transaction, including the roles of any other parties involved (*e.g.*, disclosure counsel, bond counsel, swap counsel or counsel to the obligated person). If the municipal advisor and client so agree, they may exclude from the scope of the municipal advisory relationship the default requirement to thoroughly review the official statement.

Disclosure to Investors

Paragraph .07 of the Supplementary Material requires that the municipal advisor provide written disclosure to investors of any affiliation that meets the requirements of subsection (b)(ii) of the draft rule, if a document prepared by the municipal advisor or the affiliate is included in an official statement for an issue of municipal securities (*e.g.*, accountant's letter, bond

opinion, feasibility study). This requirement would be satisfied if the municipal advisor's affiliate were to provide written disclosure of the affiliation to investors. For example, if the advisor for a bond issue were affiliated with the accounting firm that would certify as to the issuer's financial statements, the disclosure of affiliation could be included in the accounting firm's letter to the issuer or disclosures concerning the accounting firm, which would be included in the official statement for the bonds. The purpose of these disclosures would be to alert investors to the affiliation.[23]

Recommendations

Section (d) provides that a municipal advisor must not recommend that its client enter into any municipal securities transaction or municipal financial product unless the advisor has a reasonable basis for believing that the transaction or product is suitable for the client. The advisor also is required to discuss with its client its evaluation of the material risks, potential benefits, structure and other characteristics of the recommended municipal securities transaction or municipal financial product; the basis upon which the advisor reasonably believes the recommended transaction or product is suitable for the client and whether the municipal advisor has investigated or considered other reasonably feasible alternatives. With respect to a municipal entity client, the advisor must only recommend a transaction or product that is in the municipal entity client's best interest.

Paragraph .08 of the Supplementary Material provides guidance related to an advisor's suitability obligations. Under that provision, a municipal advisor's determination of whether a municipal securities transaction or municipal financial product is suitable for the client must be based on numerous factors: the client's financial situation and needs, objectives, tax status, risk tolerance, liquidity needs, experience with municipal securities transactions or municipal financial products, financial capacity to withstand changes in market conditions and any other material information known by the municipal advisor about the client and the municipal securities transaction or municipal financial product, after reasonable inquiry.

Paragraph .09 of the Supplementary Material includes a "Know Your Client" obligation which, drawing upon similar rules adopted by the Financial Industry Regulatory Authority ("FINRA") and the Commodity Futures Trading

[23] The draft amendments to Rule G-8 provide that, if the disclosure of the affiliation to investors is not provided in the official statement, the records of the municipal advisor must include a copy of the disclosure provided by the municipal advisor or its affiliate to such investors.

Commission ("CFTC"), requires the advisor to use reasonable diligence to know and maintain essential facts concerning the client and in support of the advisor's fulfillment of its suitability obligations.[24] The facts "essential" to "knowing your client" include those required to effectively service the municipal advisory relationship with the client; act in accordance with any special directions from the client; understand the authority of each person acting on behalf of the client; and comply with applicable laws, regulations and rules.

As a practical matter, a client may at times elect a course of action either independent of or contrary to the advice of its municipal advisor. Paragraph .03 of the Supplementary Material would provide that the advisor is not required *on that basis* to disengage from the municipal advisory relationship.

Review of Recommendations of Other Parties

Section (e) addresses situations when a municipal advisor may be asked to evaluate a recommendation made to its client by another party, such as a recommendation by an underwriter to an obligated party of a new financial product or financing structure. Draft Rule G-42(e) requires that a municipal advisor, if requested to do so and if the review of others' recommendations is within the scope of the engagement, discuss with its client its evaluation of the material risks, potential benefits, structure and other characteristics of the recommended municipal securities transaction or municipal financial product. The advisor would also be required to discuss with the client whether the advisor reasonably believes that the recommended transaction or product is, or is not, suitable for the client and the basis for such belief, as well as whether the municipal advisor has investigated or considered other reasonably feasible alternatives.

Principal Transactions

Section (f) prohibits a municipal advisor, and any affiliate of a municipal advisor, from engaging in any transaction in a principal capacity to which the municipal entity or obligated person client of the municipal advisor is a counterparty. To avoid a conflict with another MSRB rule, an exception is

[24] *See, e.g.,* FINRA Rule 2090 (Know Your Customer), Exchange Act Release No. 34-63325; SR-FINRA-2010-039 (November 17, 2010), 75 FR 71479 (November 23, 2010) and the CTFC's Subpart H-Business Conduct Standards for Swap Dealers and Major Swap Participants Dealing with Counterparties, including Special Entities, 17 CFR § 23.402(b), 77 FR 9823 (February 17, 2012). Notably, the CFTC's rule applies to dealings with special entity clients, defined to include states, state agencies, cities, counties, municipalities, other political subdivisions of a State, or any instrumentality, department, or a corporation of or established by a State or political subdivision of a State. *See* the definition of special entity in 17 CFR § 23.401(c).

allowed for activity that is expressly permitted by underwriters under Rule G-23. The MSRB notes that principal transactions by municipal advisors is an area of particular concern and has proposed to prohibit such transactions rather than allow them with the client's consent. It is questionable whether, given the high potential for self-dealing in such situations, a client consent following any amount of disclosure should be considered to be valid. Comment on whether this is the appropriate regulatory approach to principal transactions is requested below.

Specified Prohibitions

Draft Rule G-42(g) specifically prohibits certain types of activities by a municipal advisor, including: receiving excessive compensation; delivering an invoice for fees or expenses that does not accurately reflect the municipal advisory activities actually performed or the personnel that actually performed those services; misrepresenting its capacity, resources and knowledge in response to requests for proposals or qualifications or in oral presentations to a client or prospective client; making or participating in any fee-splitting arrangements with underwriters; and making or participating in any undisclosed fee-splitting arrangements with providers of investments or services to a client of the municipal advisor. In addition, a municipal advisor would be prohibited from making payments for the purpose of obtaining or retaining municipal advisory business, other than reasonable fees paid to another municipal advisor (registered as such with both the SEC and MSRB) for a solicitation of a municipal entity or obligated person as described in Section 15B(e)(9) of the Exchange Act.

Applicability to Municipal Fund Securities

The regulation of municipal advisors, as the SEC has recognized,[25] is relevant to municipal fund securities.[26] Paragraph .10 of the Supplementary Material highlights the draft rule's application to municipal advisors whose municipal advisory clients are sponsors or trustees of municipal fund securities.

[25] SEC Final Rule at 67472-67473.

[26] The term "municipal fund security" refers to, among other things, interests in governmentally sponsored 529 college savings plans and local government investment pools and is defined in MSRB Rule D-12 to mean "a municipal security issued by an issuer that, but for the application of Section 2(b) of the Investment Company Act of 1940, would constitute an investment company within the meaning of Section 3 of the Investment Company Act of 1940."

Books and Records

The draft provisions on record-keeping would be the first revisions to Rules G-8 and G-9 to address the books and records that must be made and preserved by municipal advisors registered or required to be registered with the MSRB. The SEC Final Rule already establishes a comprehensive record-keeping and preservation regime for municipal advisors that requires records, related to municipal advisory activities, of:

- all written communications received and sent by such municipal advisor;
- each version of all policies and procedures of the municipal advisor;
- any document created by the municipal advisor that was material to the making of a recommendation to a client or that memorializes the basis for that recommendation;
- all written agreements entered into by the municipal advisor with any municipal entity, employee of a municipal entity, or an obligated person or otherwise relating to the business of such municipal advisor; and
- the names of associated persons.

The draft amendments to Rules G-8 and G-9 incorporate by reference all of these record-keeping provisions of the SEC Final Rule. The draft amendments, in addition, include requirements that correspond to certain specific requirements of draft Rule G-42 that are not necessarily covered by the SEC Final Rule. This includes keeping a copy of any document created by a municipal advisor that was material to its review of a recommendation made by another party. This also includes the keeping of any document that memorializes the basis for any conclusions of the municipal advisor as to suitability. Finally, this includes, unless it is included in the official statement for an issue of municipal securities, a copy of any disclosure provided by the municipal advisor, or any affiliate, to investors as required by Supplementary Material .07.

The draft amendments to Rule G-9 require records to be preserved for not less than five years—the same period required by the SEC Final Rule. In addition, the draft amendments to Rule G-9(e) expressly provide that municipal advisors may retain records using electronic storage media or by other similar medium of record retention, subject to the retrieval and reproduction requirements of the rule. The provision for this means of compliance is made generally applicable, so as to expressly accommodate the use of electronic storage media by dealers as well as municipal advisors. Draft section (k) of Rule G-9 provides that whenever a record is preserved by a municipal advisor on electronic storage media, if the manner of storage

complies with SEC Rule 15a1-8(d) under the Exchange Act, it will be deemed to be preserved in a manner that is in compliance with the requirements of Rule G-9. This provision gives municipal advisors the choice to comply with either the SEC's or the MSRB's preservation requirements.

General Matters

In addition to any other subject which commenters may wish to address related to draft Rule G-42 and the draft amendments to Rules G-8 and G-9, the MSRB seeks public comment on the specific questions below. The MSRB particularly welcomes statistical, empirical, and other data from commenters that may support their views and/or support or refute the views or assumptions contained in this request for comment.

1) Draft Rule G-42 follows the Dodd-Frank Act in deeming a municipal advisor to owe a fiduciary duty, for purposes of the draft Rule G-42, only to its municipal entity clients. Is carrying forward that distinction in the draft rule appropriate in light of the services a municipal advisor provides to its obligated person clients? Would having a uniform fiduciary standard applied to *all* of a municipal advisor's clients facilitate compliance with the draft rule or provide better protection for issuers? If so, are there any legal impediments to the MSRB extending a fiduciary duty in the draft rule to all clients of a municipal advisor?

2) Do commenters agree that a municipal advisor that is engaged by a client in connection with either an issuance of municipal securities or a municipal financial product that is related to an issuance of municipal securities should have an obligation, unless agreed to otherwise by the advisor and client, to review thoroughly the entire official statement? Should a municipal advisor be permitted to limit the scope of the engagement such that the advisor is not required to review the official statement? If so, under what circumstances should this limitation be allowed? Should any duty to review the official statement be limited to any portions of the official statement directly related to the scope of municipal advisory services?

3) Would draft Rule G-42(c)(vi) have benefits in terms of encouraging municipal entity and obligated person clients to carefully consider at the outset of a transaction any obligations it may have in connection with the preparation and distribution of the official statement and the extent to which it has engaged professionals, as necessary, to assist it in fulfilling its responsibilities?

4) Do commenters agree or disagree that there is a need to specifically require disclosure of conflicts of interest that may arise from the form of

compensation under consideration by the client and/or selected by the client?

5) Draft Rule G-42 allows fee-splitting arrangements with providers of investments or services to a municipal entity or obligated person client, but requires written full and fair disclosure of the arrangement. Should such fee-splitting arrangements be prohibited, regardless of whether they are fully and fairly disclosed?

6) Is draft Rule G-42(b)'s requirement that the disclosure of conflicts of interest and other information be provided at or prior to the inception of the municipal advisory relationship the appropriate timeframe?

7) Should a municipal advisor be required to obtain a written acknowledgment from the client of receipt of the conflicts disclosure and consent to any conflicts disclosed before proceeding with a municipal advisory engagement?

8) Should a municipal advisor be required to disclose legal and disciplinary events that relate to an individual that is employed by the municipal advisor even if the individual is not a part of (or reasonably expected to be part of) the advisor's team working for the client?

9) Should the MSRB, in furtherance of its mandate under the Dodd-Frank Act to protect municipal entities and obligated persons, require professional liability insurance by municipal advisors, and, if so, should the MSRB specify the minimum amount and terms of such coverage?

10) Would the cost of professional liability insurance be an undue barrier to entry for a potential municipal advisor?

11) Should an advisor be required to review any feasibility study as a part of the information considered in its evaluation of whether a transaction it recommends is suitable for the client?

12) Should a municipal advisor (or its affiliate) be permitted to engage in certain types of principal transactions with its client, with full and fair disclosure and written client consent? If so, what types of principal transactions should be allowed?

13) Should the treatment of principal transactions differ based upon whether a municipal advisor has a fiduciary duty to the client?

Economic Analysis

In proposing draft Rule G-42 and the draft amendments to Rules G-8 and G-9, the MSRB has been guided by its policy on the use of economic analysis in rulemaking. The MSRB is sensitive to the costs imposed by its rules and has sought to tailor the draft rule and amendments so as not to impose unnecessary or inappropriate costs and burdens on municipal advisors. In accordance with this policy, the Board considered the following factors with respect to draft Rule G-42 and the draft amendments to Rules G-8 and G-9: 1) the need for the draft rule and how the draft rule will meet that need; 2) relevant baselines against which the likely economic impact of elements of the draft rule can be considered; 3) reasonable alternative regulatory approaches; and 4) the potential benefits and costs of the draft rule and the main alternative regulatory approaches. Each of these factors is discussed in detail below.

1. **The need for the draft rule and how the draft rule will meet that need.**

Prior to the enactment of the Dodd-Frank Act, municipal advisors were largely unregulated as to their municipal advisory activities.[27] As noted, the Dodd-Frank Act amends the Exchange Act to provide new protections for municipal entities and obligated persons in connection with the issuance of, or the investment of the proceeds of, municipal securities, and to grant the MSRB a role in the protection of municipal entities and obligated persons. The Dodd-Frank Act establishes a federal regulatory regime that requires municipal advisors to register with the SEC, grants the MSRB certain regulatory authority over municipal advisors, and imposes, among other things, a federal statutory fiduciary duty on municipal advisors when advising municipal entity clients. Municipal advisors advising municipal entities are prohibited from engaging in any act, practice, or course of business which is not consistent with that fiduciary duty. In addition, Congress directed that the MSRB develop rules reasonably designed to prevent acts, practices, or courses of business by municipal advisors that are inconsistent with their fiduciary duty, as applicable. Neither the Dodd-Frank Act nor the recently adopted SEC Final Rule prescribe the duties and obligations of municipal advisors beyond a general statement that municipal advisors shall be deemed to have a fiduciary duty to any municipal entity for whom the municipal advisor acts as a municipal advisor. Therefore, there is a need for regulatory guidance with respect to the duties of municipal advisors and the

[27] Prior to the Dodd-Frank Act, certain MSRB rules applied to a subset of municipal advisors consisting of dealers acting as financial advisors in connection with new issues of municipal securities.

prevention of breaches of a municipal advisor's fiduciary duty to its municipal entity clients.

Draft Rule G-42 also establishes standards of conduct and duties for municipal advisors when engaging in municipal advisory activities for obligated persons and provides guidance to these advisors as to what conduct would satisfy these duties and obligations.

The MSRB believes that by articulating specific standards of conduct and duties for municipal advisors, draft Rule G-42 will assist municipal advisors in complying with the statutorily-imposed requirements of the Dodd-Frank Act, and help prevent failures to meet those requirements. The draft rule is expected to aid municipal entities and obligated persons that choose to engage municipal advisors in connection with their issuances of municipal securities as well as transactions in municipal financial products by promoting higher ethical and professional standards of such advisors. The MSRB also believes that articulating standards of conduct and duties of municipal advisors will enhance the ability of the MSRB and other regulators to oversee the conduct of municipal advisors, as contemplated by the Dodd-Frank Act.

2. Relevant baselines against which the likely economic impact of elements of the draft rule can be measured.

In considering the economic consequences of draft Rule G-42 and the draft amendments to Rules G-8 and G-9, the MSRB has defined and analyzed several baselines to serve as points of reference. Given that the draft rule contains many different elements, the MSRB has considered a separate baseline for one or more different elements. The purpose of the baselines is to compare, on the one hand, the expected state with draft Rule G-42 in effect to, on the other hand, the baseline state prior to the rule taking effect. The economic impact of the draft rule is considered to be the difference between these two states.

For draft Rule G-42, one relevant baseline for analysis is the Dodd-Frank Act, which subjected municipal advisors to a statutory fiduciary duty with respect to municipal entity clients. The MSRB considers the obligations imposed by this duty to be a baseline, such that the costs and benefits of draft Rule G-42 should be measured by any change from this existing state. Although the statute imposed this fiduciary duty, it does not describe or clarify its elements. Draft Rule G-42 can be viewed as establishing guidance and clarification with respect to this fiduciary duty and potentially prescribing means designed to prevent breaches of this duty.

The MSRB considers MSRB Rule G-17 to be a relevant baseline for the standards of conduct and duties for municipal advisors when engaging in municipal advisory activities for obligated persons. This rule, as amended in 2010, requires municipal advisors to deal fairly with all persons and not engage in any deceptive, dishonest, or unfair practice. Although Rule G-17 applies to all municipal advisors, the MSRB does not regard it as the baseline for municipal advisors with municipal entity clients because the fiduciary duty imposed by the Dodd-Frank Act represents a higher baseline state for these municipal advisors. Draft Rule G-42 can be viewed, to a certain extent, as articulating guidance on the conduct required for municipal advisors to meet their existing duty to deal fairly with all persons (including obligated persons).

The Dodd-Frank Act prohibits municipal advisors from engaging in any fraudulent, deceptive, or manipulative act or practice, as pertinent here, in connection with providing advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities. The MSRB considers this prohibition also to serve as a baseline for standards of conduct for municipal advisors.

A subset of municipal advisors who are also dealers are subject to MSRB Rule G-23 which establishes requirements with respect to the conflict of interest that can arise in the context of dealers who may seek to switch roles between financial advisor and underwriter to issuers with respect to the issuance of municipal securities. In particular, Rule G-23(c) provides that a dealer that enters into a financial advisory relationship must evidence that relationship in writing prior to, upon, or promptly after the relationship has been entered into. Rule G-23 also prohibits a dealer that has a financial advisory relationship with the issuer in connection with a new issue from acting as an underwriter or placement agent for such new issue. For this subset of municipal advisors, the applicable set of standards and requirements of Rule G-23 is considered by the Board to be a baseline.

In addition to the Dodd-Frank Act and the MSRB's existing rules, the SEC Final Rule on registration of municipal advisors provides baselines for particular elements of draft Rule G-42. The SEC Final Rule requires disclosure in registration forms of certain disciplinary history and conflicts of interest. Draft Rule G-42 requires disclosure of at least some similar information. Although draft Rule G-42 would require disclosure directly to clients rather than through submissions to a regulator, the MSRB considers the SEC Final Rule to serve as a relevant baseline.

Another relevant consideration when analyzing the duties under draft Rule G-42 is current state law. For example, to the extent that municipal advisors owe a fiduciary duty to their clients under the laws of at least some states,[28] the MSRB regards these laws as a baseline.

Finally, the MSRB considers existing requirements in the SEC Final Rule on recordkeeping and record preservation to serve as a baseline. These requirements are the existing state against which additional requirements by the MSRB can be compared. In addition, municipal advisors who are also registered as dealers or investment advisors are subject to recordkeeping requirements under those regulatory regimes that can serve as baseline requirements for that subset of the municipal advisor population.

3. Identifying and evaluating reasonable alternative regulatory approaches.

The MSRB policy on economic analysis in rulemaking addresses the identification and evaluation of reasonable regulatory alternatives.

One alternative to the draft rule would be for the MSRB not to engage in additional rulemaking, and thus, not establish guidance with respect to the duties and obligations of municipal advisors. Under this alternative, the needs of municipal advisors for guidance on avoiding and potentially preventing breaches of the broad statutorily-imposed requirements of the Dodd-Frank Act would go unmet.

Another alternative is for the MSRB to use a solely principles-based approach to its rulemaking on this subject. Under this approach, the regulatory objectives would be specified but individual firms would be free to select the means used to meet these objectives. Employing a solely principles-based approach, however, may provide insufficient guidance on meeting the standards of conduct for municipal advisors required under the Dodd-Frank Act and on establishing means for preventing breaches of applicable fiduciary duties. The MSRB believes that the duties and obligations articulated in the draft rule, although some are relatively more prescriptive, provide balanced and useful guidance. In addition, this balanced approach serves to minimize the risks attendant to the framework of municipal securities regulation involving multiple enforcement organizations.

[28] *See, e.g.*, *In re O'Brien Partners, Inc.*, Securities Act Release No. 7594, Investment Advisors Act Rel. No. 1772, A.P. File No. 3-9761 (Oct. 27, 1998), 1998 SEC LEXIS 2318, at 31 n.20 (citing *Production Credit Ass'n of Lancaster* v. *Croft*, 423 N.W. 2d 544, 547 (Wis. App. 1988); *Recorded Picture Co.* v. *Nelson Entertainment, Inc.*, 61 Cal. Rptr. 2d 742, 754 (Ct. App. 2 Dist. 1977)).

The MSRB invites public comment to suggest alternative regimes as well as comments on the potential costs and benefits of alternative regimes.

4. **Assessing the benefits and costs, both quantitative and qualitative, of the draft rule and the main alternative regulatory approaches.**

Below, the MSRB preliminarily addresses the likely costs and benefits of the draft rule against the context of the economic baselines discussed above, primarily in terms of the specific changes from the baseline and, to some degree, in terms of the potential overall impact on the market for municipal advisory services. In considering these costs, benefits and impacts, the MSRB addresses reasonable alternatives, where applicable.

At the outset, the MSRB notes it is currently unable to quantify the economic effects of draft Rule G-42 and the amendments to Rules G-8 and G-9 because the information necessary to provide reasonable estimates is not available. The MSRB observes, as the SEC also observed in its Final Rule, that there is little publicly available information about the municipal advisory industry. In addition, estimating the costs for municipal advisory firms to comply with the draft rule is hampered by the fact that these costs depend on the business activities and size of these municipal advisory firms, which can vary greatly. Given the limitations on the MSRB's ability to conduct a quantitative assessment of the costs and benefits associated with the draft rule, the MSRB has thus far considered these costs and benefits primarily in qualitative terms.

Benefits

The MSRB believes that the draft rule would result in a number of benefits by enhancing protections to municipal entities, obligated persons and investors and by providing guidance to municipal advisors for complying with the requirements of the Dodd-Frank Act.

The MSRB believes that one benefit of the draft rule is that it enhances protections to municipal entities and obligated persons by ensuring that these entities have available to them sufficient information to make meaningful choices about engaging a municipal advisor. These protections would also be enhanced as a result of the draft rule's guidance for municipal advisors that may assist these advisors in complying with, or help prevent breaches of, their fiduciary and fair-dealing duties. To the extent that this guidance increases the likelihood of compliance by municipal advisors, municipal entities and obligated persons will benefit. Investors in municipal bond offerings may benefit from the draft rule to the extent that a municipal

entity issuing bonds that uses a municipal advisor is more likely to receive services that reflect a higher ethical and professional standard than otherwise would be the case. Municipal entities, obligated persons and investors also may benefit to the extent that making explicit the core restrictions on certain activities in which the municipal advisor has a self-interest would reduce the incidence of self-dealing or other similar activities that can directly or indirectly raise costs of a financing that ultimately would be borne by municipal entities, obligated persons or investors.

The MSRB believes that the draft rule provides needed guidance and clarification with respect to the standards of conduct and duties of a municipal advisor that would meet the purposes of the Dodd-Frank Act. The draft rule also prescribes for municipal advisors means that may prevent breaches of these duties. Therefore, this guidance provides a benefit to municipal advisors who could otherwise face greater uncertainty about the standards of conduct and duties required to meet certain of the requirements of the Dodd-Frank Act, particularly, as noted, given the regulatory framework for municipal securities regulation involving multiple enforcement organizations.

The MSRB believes that one benefit of the draft rule may follow from the increased level of information disclosed to clients by municipal advisors relative to the baseline, which may lead to an improvement in the selection of municipal advisors. As a result of the information disclosed through the draft rule, municipal entities and obligated persons may be able to more easily establish objective criteria to use in selecting municipal advisors and may increase the likelihood that municipal advisors are hired because of their qualifications as opposed to other reasons.

The draft rule should also result in improved quality-based competition among municipal advisors to the extent that the clients of municipal advisors rely on the information that would be required to be disclosed by the rule in the municipal advisor selection process.

Costs

In this section we preliminarily analyze the potential costs of the draft rule relative to the appropriate baseline. Our analysis does not consider all the costs associated with the draft rule, but instead focuses on the incremental costs attributable to the draft rule's requirements that exceed the baseline case. The costs associated with the baseline case are in effect subtracted from the costs associated with the draft rule in order to isolate the costs attributable to the incremental requirements of the draft rule.

The MSRB recognizes that municipal advisors would incur costs to meet the standards of conduct and duties contained in draft Rule G-42 and the amendments to Rules G-8 and G-9. These costs may include additional compliance costs and additional recordkeeping costs. To ensure compliance with the disclosure obligations of the draft rule, municipal advisors may incur costs by seeking advice from legal and compliance professionals when preparing disclosures to clients. However, the MSRB believes that some of these costs are accounted for in the baseline requirements of the SEC Final Rule which requires disclosure of at least some similar information, such as the disclosure of disciplinary history. Draft Rule G-42 may impose additional costs on municipal advisors as it requires disclosure of additional information and requires that information be disclosed directly to clients rather than through submissions to a regulator. The magnitude of these additional costs is not quantifiable using available data and the MSRB seeks public comment on this cost component.

Municipal advisors may incur additional recordkeeping costs as a result of the draft rule. The MSRB considers existing requirements in the SEC Final Rule on record-keeping and record preservation to serve as a baseline. As the SEC recognized in its economic analysis of its recordkeeping requirements, municipal advisors should already be maintaining books and records as part of their day-to-day operations. In addition, municipal advisors who are also registered as broker-dealers or investment advisors are currently subject to the recordkeeping requirements of those regulatory frameworks. Against these baselines, the MSRB believes that the costs associated with the few additional recordkeeping requirements associated with draft Rule G-42 will not be very significant, but seeks public comment on the magnitude of these costs.

The MSRB believes that any increase in municipal advisory fees attributable to the additional costs of the draft rule compared with the baseline state will be, in the aggregate, minimal and that the cost per municipal advisory firm will be spread across the number of advisory engagements for each firm. The MSRB recognizes, however, that for smaller municipal advisors with fewer clients, the cost of compliance with the draft rule's standards of conduct and duties may represent a greater percentage of annual revenues, and thus, such advisors may be more likely to pass those costs along to their advisory clients.

The MSRB recognizes that, as a result of these costs, some municipal advisors may decide to exit the market, curtail their activities, consolidate with other firms, or pass the costs on to municipal entities and obligated persons in the form of higher fees. The MSRB believes, however, that municipal advisors

may exit the market for a number of reasons, including business reasons separate from reasons involving the costs associated with the draft rule. The MSRB believes that municipal advisors that have been subject to past disciplinary actions may decide to exit the market rather than disclose that information directly to clients, which could improve the quality of the market for municipal advisory services and, therefore, benefit municipal entities and obligated persons. The Board recognizes that some of the municipal advisors that may exit the market for financial reasons could be small municipal advisors and that such exit from the market may lead to a reduced pool of municipal advisors.

The MSRB has also considered the possibility that some compliance costs could be greater in the absence of the draft rule. By articulating the duties and obligations of municipal advisors and by prescribing means that will prevent breaches of these duties, the draft rule may reduce possible confusion and uncertainty about what is required in order to comply with the Dodd-Frank Act. Therefore, the draft rule may reduce certain costs of compliance that might have otherwise been incurred by allowing municipal advisors to more quickly and accurately determine compliance requirements.

Effect on Competition, Efficiency and Capital Formation

The MSRB considered that the costs associated with the draft rule relative to the baseline may lead some municipal advisors to consolidate with other municipal advisors. For example, some municipal advisors may determine to consolidate with other municipal advisors in order to benefit from economies of scale (*e.g.*, by leveraging existing compliance resources of a larger firm) rather than to incur separately the costs associated with the draft rule. The MSRB believes that the market for municipal advisory services is likely to remain competitive despite the potential exit of some municipal advisors, including small municipal advisors, consolidation of municipal advisors, or lack of new entrants into the market.

As noted above, the increased level of information disclosed by municipal advisors relative to the baseline may lead to an improved municipal advisor selection process which may increase the willingness of municipal entities and obligated persons to use municipal advisors. This, in turn, may contribute to a more efficient capital formation process as municipal entities and obligated persons may make different decisions about issuance relative to other financing options.

Request for Comment on Economic Analysis

In furtherance of the MSRB's policy on economic analysis, the MSRB requests public comment on the potential economic consequences which may result from the adoption of draft Rule G-42 and the draft amendments to Rules G-8 and G-9. Commenters are encouraged to provide supporting data, studies, or other information related to their views of the economic effects of the draft rule. In particular, the MSRB welcomes any information regarding the potential to quantify likely benefits and costs. In addition to comments on the potential economic consequences associated with the draft rule, the MSRB also requests comment to help identify the potential benefits and costs of the regulatory alternatives suggested by commenters. The MSRB also requests comment on the competitive or anticompetitive effects, as well as efficiency and capital formation effects, of the draft rule and draft amendments on any market participants.

The Dodd-Frank Act provides that MSRB rules may not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons provided that there is robust protection of investors against fraud. The MSRB is sensitive to the potential impact of the requirements contained in draft Rule G-42 on small municipal advisors. The MSRB understands that some small municipal advisors and solo practitioners, unlike larger municipal advisory firms, may not employ full-time compliance staff and that the cost of ensuring compliance with the requirements of the draft rule may be proportionally higher for these smaller firms. The MSRB, preliminarily, believes that the draft rule is consistent with the Dodd-Frank Act's provision with respect to burdens imposed on small municipal advisors. In order to minimize any significant burdens on small municipal advisors, however, the MSRB is particularly interested in receiving meaningful feedback regarding the potential economic impact of the draft rule and draft amendments on small municipal advisors. The MSRB will consider such feedback in light of the Dodd-Frank Act provision.

In addition to any issues raised by this analysis about which interested persons may wish to comment, the MSRB specifically requests that commenters address the following questions:

1) Do commenters agree or disagree that a need exists for the MSRB to articulate the duties of municipal advisors or to prescribe means of preventing breaches of a municipal advisor's fiduciary duty to its municipal entity clients? If so, do commenters agree or disagree that the draft rule addresses those needs?

2) The MSRB proposes to use the fiduciary duty already imposed on municipal advisors by the Dodd-Frank Act to serve as a baseline for evaluating the economic impact of the draft rule's articulation of standards of conduct and duties for municipal advisors when engaging in municipal advisory activities for municipal entity clients. Is this an appropriate baseline?

3) The MSRB proposes to use the fair-dealing requirements under MSRB Rule G-17 to serve as a baseline for evaluating the economic impact of the draft rule's articulation of standards of conduct and duties for municipal advisors when engaging in municipal advisory activities for obligated persons. Is this an appropriate baseline?

4) The MSRB proposes to use the Dodd-Frank Act's prohibition on municipal advisors from engaging in any fraudulent, deceptive, or manipulative act or practice in connection with advising a client to serve as a baseline for evaluating the economic impact of the draft rule's articulation of standards of conduct for municipal advisors (regardless of whether the client is a municipal entity or obligated person). Is this an appropriate baseline?

5) The MSRB proposes to use the existing requirements for dealers who act as financial advisors to issuers with respect to the issuance of municipal securities to serve as a baseline for evaluating the economic impact of the draft rule's articulation of standards of conduct and duties for this subset of municipal advisors. Is this an appropriate baseline?

6) The MSRB proposes to use the required disclosures in registration forms of certain disciplinary history and legal events contained in the SEC Final Rule to serve as a baseline for evaluating the economic impact of the draft rule's disclosure requirements. Is this an appropriate baseline?

7) The MSRB proposes to use the recordkeeping and record preservation requirements contained in the SEC Final Rule to serve as a baseline for evaluating the economic impact of the draft rule's recordkeeping and record preservation requirements. Is this an appropriate baseline?

8) In addition to the baselines proposed above, are there other relevant baselines that the MSRB should consider?

9) Please compare the costs and benefits of having disciplinary histories and legal events disclosed through registration forms versus disclosure directly to the client.

10) Are there lower-cost alternatives to requiring disclosure of the amount of professional liability coverage carried by the municipal advisor that would provide comparable benefits to clients of municipal advisors?

11) Would additional benefits accrue if the MSRB were to impose different or additional recordkeeping requirements and, if so, what would these requirements entail?

12) To the extent that draft Rule G-42 establishes new, or clarifies existing, standards of conduct and duties for municipal advisors, will this cause a change in the quality of advice offered by municipal advisors?

13) To the extent that draft Rule G-42 and the draft amendments to Rules G-8 and G-9 impose costs on municipal advisors, will these costs be passed on to municipal entities or obligated persons in the form of higher fees?

14) To the extent that the requirements of draft Rule G-42 enhance the oversight of municipal advisors, will this affect the willingness of market participants to use municipal advisors?

15) To the extent that the requirements of draft Rule G-42 enhance the oversight of municipal advisors, will this lead to different issuance costs and financing terms for issuers?

16) To the extent that the requirements of draft Rule G-42 lead to reduced issuance costs and better financing terms for issuers, will this improve capital formation?

17) Would the requirements of draft Rule G-42 assist municipal entities or obligated persons in making hiring decisions with respect to municipal advisors?

18) What are the initial and ongoing costs associated with making and preserving the additional records required by the draft amendments to Rules G-8 and G-9?

19) Are there additional costs or benefits to recordkeeping that the MSRB should consider? If so, please explain.

20) If the draft rule is adopted, what are the likely effects on competition, efficiency and capital formation?

21) How will the requirements of draft Rule G-42 affect potential municipal advisors' decisions with respect to entry into the market?

22) What training costs would the requirements of draft Rule G-42 cause at municipal advisory firms to ensure compliance?

23) Will draft Rule G-42 have benefits in terms of protecting municipal entities, obligated persons and investors?

24) Will the requirements of draft Rule G-42 impose any burden on small municipal advisors that is not necessary or appropriate?

25) Will the requirements of draft Rule G-42 create advantages for large municipal advisor firms relative to smaller municipal advisor firms?

January 9, 2014

* * * * *

Text of Proposed Amendments[29]

Rule G-42: Duties of Non-Solicitor Municipal Advisors

(a) *Standards of Conduct.*

(i) A municipal advisor to an obligated person client shall, in the conduct of all municipal advisory activities for that client, be subject to a duty of care.

(ii) A municipal advisor to a municipal entity client shall, in the conduct of all municipal advisory activities for that client, be subject to a fiduciary duty that includes a duty of loyalty and a duty of care.

(b) *Disclosure of Conflicts of Interest and Other Information*. A municipal advisor must, at or prior to the inception of a municipal advisory relationship, provide the client with a document making full and fair disclosure of all material conflicts of interest, including disclosure of:

(i) any actual or potential conflicts of interest of which it is aware after reasonable inquiry that might impair its ability either to render unbiased and competent advice to or on behalf of the client or to fulfill its fiduciary duty to the client, as applicable;

(ii) any affiliate of the municipal advisor that provides any advice, service, or product to or on behalf of the client that is directly or indirectly related to the municipal advisory activities to be performed by the disclosing municipal advisor;

[29] Underlining indicates new language; strikethrough denotes deletions.

(iii) any payments made by the municipal advisor directly or indirectly to obtain or retain the client's municipal advisory business;

(iv) any payments received by the municipal advisor from third parties to enlist the municipal advisor's recommendation to the client of its services, any municipal securities transaction or any municipal financial product;

(v) any fee-splitting arrangements involving the municipal advisor and any provider of investments or services to the client;

(vi) any conflicts of interest that may arise from the use of the form of compensation under consideration or selected by the client for the municipal advisory activities to be performed;

(vii) any other engagements or relationships of the municipal advisor or any affiliate of the municipal advisor that might impair the advisor's ability either to render unbiased and competent advice to or on behalf of the client or to fulfill its fiduciary duty to the client, as applicable;

(viii) the amount and scope of coverage of professional liability insurance that the municipal advisor carries (*e.g.*, coverage for errors and omissions, improper judgments, or negligence), deductible amounts, and any material limitations on such coverage, or a statement that the advisor does not carry any such coverage; and

(ix) any legal or disciplinary event that is (a) material to the client's evaluation of the municipal advisor or the integrity of its management or advisory personnel; (b) disclosed by the municipal advisor on the most recent Form MA filed with the Commission; or (c) disclosed by the municipal advisor on the most recent Form MA-I filed with the Commission regarding any individual actually engaging in or reasonably expected to engage in municipal advisory activities in the course of the engagement. If a municipal advisor has disclosed a legal or disciplinary event on any form referenced in section (b) or (c) of this rule, the advisor must provide the client with a copy of the relevant sections of the form or forms.

If a municipal advisor concludes that it has no material conflicts of interest, the municipal advisor must provide written documentation to the client to that effect.

(c) *Documentation of Municipal Advisory Relationship*. A municipal advisor must evidence each of its municipal advisory relationships by a writing entered into prior to, upon or promptly after the inception of the municipal advisory relationship. The writing must be dated and include, at a minimum,

(i) the form and basis of direct or indirect compensation, if any, for the municipal advisory activities to be performed;

(ii) the reasonably expected amount of any such compensation (stated in dollars to the extent it can be quantified);

(iii) the information regarding conflicts of interest and other matters that is required to be disclosed by section (b) of this rule;

(iv) the scope of the municipal advisory activities to be performed and any limitations on the scope of the engagement;

(v) in the case of municipal advisory activities relating to a new issue or reoffering of municipal securities, the specific undertakings, if any, requested by the client to be performed by the municipal advisor with respect to the preparation and finalization of an official statement or similar disclosure document; and

(vi) the date, triggering event, or means for the termination of the municipal advisory relationship, or, if none, a statement that there is none.

During the term of the municipal advisory relationship, the writing must be promptly amended or supplemented to reflect any changes in or additions to the terms or information required by section (b) or this section (c), and the revised writing must be promptly delivered to the client, provided that this requirement applies with respect to subsection(c)(ii) of this rule only if the change in the amount of reasonably expected compensation is material. This amendment and supplementation requirement applies to any changes and additions that are discovered, or should have been discovered, based on the exercise of reasonable diligence by the municipal advisor.

(d) *Recommendations*. A municipal advisor must not recommend that its municipal entity or obligated person client enter into any municipal securities transaction or municipal financial product unless the advisor has a reasonable basis for believing, based on the information obtained through the reasonable diligence of the advisor, that the transaction or product is suitable for the client. In addition, the municipal advisor must discuss with its client:

(i) the municipal advisor's evaluation of the material risks, potential benefits, structure, and other characteristics of the recommended municipal securities transaction or municipal financial product;

(ii) the basis upon which the municipal advisor reasonably believes that the recommended municipal securities transaction or municipal financial product is suitable for the client; and

(iii) whether the municipal advisor has investigated or considered other reasonably feasible alternatives to the recommended municipal securities transaction or municipal financial product that might also or alternatively serve the client's objectives.

With respect to a client that is a municipal entity, a municipal advisor may only recommend a municipal securities transaction or municipal financial product that is in the client's best interest.

(e) *Review of Recommendations of Other Parties.* When requested to do so by its municipal entity or obligated person client and within the scope of its engagement, a municipal advisor must undertake a thorough review of any recommendation made by any third party regarding a municipal securities transaction or municipal financial product. In addition, the municipal advisor must discuss with its client:

(i) the municipal advisor's evaluation of the material risks, potential benefits, structure, and other characteristics of the recommended municipal securities transaction or municipal financial product;

(ii) whether the municipal advisor reasonably believes that the recommended municipal securities transaction or municipal financial product is suitable for the client, and the basis for such belief; and

(iii) whether the municipal advisor has investigated or considered other reasonably feasible alternatives to the recommended municipal securities transaction or municipal financial product that might also or alternatively serve the client's objectives.

(f) *Principal Transactions.* Except for an activity that is expressly permitted under Rule G-23, a municipal advisor, and any affiliate of a municipal advisor, is prohibited from engaging in any transaction, in a principal capacity, to which a municipal entity or obligated person client of the municipal advisor is a counterparty.

(g) *Specified Prohibitions.* A municipal advisor is prohibited from:

(i) receiving compensation that is excessive in relation to the municipal advisory activities actually performed;

(ii) delivering an invoice for fees or expenses for municipal advisory activities that do not accurately reflect the activities actually performed or the personnel that actually performed those services;

(iii) making any representation or the submission of any information about the capacity, resources or knowledge of the municipal advisor, in response to requests for proposals or qualifications or in oral presentations to a client or prospective client, for the purpose of obtaining or retaining municipal advisory business that the advisor knows or should know is materially false or misleading;

(iv) making, or participating in, any fee-splitting arrangements with underwriters, and any undisclosed fee-splitting arrangements with providers of investments or services to a municipal entity or obligated person client of the municipal advisor; and

(v) making payments for the purpose of obtaining or retaining municipal advisory business other than reasonable fees paid to another municipal advisor registered as such with the Commission and the Board for a solicitation of a municipal entity or obligated person as described in Section 15B(e)(9) of the Act.

(h) *Definitions*.

(i) "Advice" shall, for purposes of this rule, have the same meaning as in Section 15B(e)(4)(A)(i) of the Act and the rules and regulations thereunder.

(ii) "Affiliate of the municipal advisor" shall mean, for purposes of this rule, any person directly or indirectly controlling, controlled by, or under common control with such municipal advisor.

(iii) "Municipal advisor" shall, for purposes of this rule, have the same meaning as in Section 15B(e)(4) of the Act and the rules and regulations thereunder; provided that it shall exclude a person that is otherwise a municipal advisor solely with respect to either activities within the meaning of Section 15B(e)(4)(A)(ii) or any solicitation of a municipal entity or obligated person within the meaning of Section 15B(e)(9) of the Act.

(iv) "Municipal advisory activities" shall, for purposes of this rule, have the same meaning as the activities specified in Section 15B(e)(4)(A) of the Act and the rules and regulations thereunder, provided that they shall exclude the activities within the meaning of Section 15B(e)(4)(A)(ii) of the Act and the rules and regulations thereunder and any solicitation of a municipal entity or obligated person within the meaning of Section 15B(e)(9) of the Act and the rules and regulations thereunder.

(v) A "municipal advisory relationship" shall, for purposes of this rule, be deemed to exist when a municipal advisor engages in or enters into an agreement to engage in municipal advisory activities for a municipal entity or obligated person client.

(vi) "Municipal advisory business" shall mean, for purposes of this rule, the provision of advice to or on behalf of a municipal entity or an obligated person with respect to the issuance of municipal securities or municipal financial products by a municipal advisor whether for compensation or otherwise.

(vii) "Municipal entity" shall, for purposes of this rule, have the same meaning as in Section 15B(e)(8) of the Act and the rules and regulations thereunder.

(viii) "Obligated person" shall, for purposes of this rule, have the same meaning as in Section 15B(e)(10) of the Act and the rules and regulations thereunder.

(ix) "Official statement" shall, for purposes of this rule, have the same meaning as in Rule G-32(d)(vii).

---Supplementary Material:

.01 Duty of Care. Municipal advisors must exercise due care in performing their municipal advisory activities. The duty of care includes, but is not limited to, the obligations discussed in this section. A municipal advisor must possess the degree of knowledge and expertise needed to provide the municipal entity or obligated person client with informed advice. A municipal advisor also must make a reasonable inquiry as to the facts that are relevant to a client's determination as to whether to proceed with a course of action or that form the basis for any advice provided to the client. A municipal advisor that is engaged by a client in connection with either an issuance of municipal securities or a municipal financial product that is related to an issuance of municipal securities must also undertake a thorough review of the official statement for that issue, unless otherwise directed by the client and documented under subsection (c)(iv) of this rule. A municipal advisor must undertake a reasonable investigation to determine that it is not

basing any recommendation on materially inaccurate or incomplete information. Among other matters, a municipal advisor must have a reasonable basis for:

(a) any advice provided to or on behalf of a client;

(b) any representations made in a certificate that it signs that will be reasonably foreseeably relied upon by the client, any other party involved in the municipal securities transaction or municipal financial product, or investors in the municipal entity client's securities or securities secured by payments from an obligated person client; and

(c) any information provided to the client or other parties involved in the municipal securities transaction when participating in the preparation of an official statement for any issue of municipal securities with respect to which the advisor is advising.

.02 Duty of Loyalty. Municipal advisors must fulfill a duty of loyalty in performing their municipal advisory activities for municipal entity clients. The duty of loyalty includes, but is not limited to, the obligations discussed in this section. A municipal advisor must deal honestly and with the utmost good faith with a municipal entity client and act in the client's best interests without regard to the financial or other interests of the municipal advisor. A municipal advisor to a municipal entity client must either eliminate or provide full and fair disclosure to the client about each of its material conflicts of interest. A municipal advisor must investigate or consider other reasonably feasible alternatives to any recommended municipal securities transaction or municipal financial product that might also or alternatively serve the municipal entity client's objectives.

.03 Action Independent of or Contrary to Advice. If a municipal entity or obligated person client of a municipal advisor elects a course of action that is independent of or contrary to advice provided by the advisor, the advisor is not required on that basis to disengage from the municipal advisory relationship.

.04 Limitations on the Scope of the Engagement. Nothing contained in this rule shall be construed to permit the municipal advisor to alter the standards of conduct or impose limitations on any of the duties prescribed herein. If requested or consented to by the municipal entity or obligated person client, however, a municipal advisor may limit the scope of the municipal advisory relationship to certain specified activities or services. If the municipal advisor engages in a course of conduct that is inconsistent with any such agreed upon limitations, it may result in negating the effectiveness of such limitations.

.05 Conflicts of Interest. Disclosures of conflicts of interest by a municipal advisor to its municipal entity or obligated person client must be sufficiently detailed to inform the client of the nature, implications and potential consequences of each conflict. Such disclosures also must include an explanation of how the advisor addresses or intends to manage or mitigate each conflict.

.06 Applicability of State or Other Laws. Municipal advisors may be subject to fiduciary or other duties under state or other laws. Nothing contained in this rule shall be deemed to supersede any more restrictive provision of state or other laws applicable to the activities of municipal advisors.

.07 Disclosure to Investors. If all or a portion of a document prepared by a municipal advisor or any of its affiliates is included in an official statement for any issue of municipal securities by or on behalf of its municipal entity or obligated person client, the municipal advisor must provide written disclosure to investors, which disclosure may be provided in the official statement, of any affiliation that meets the criteria of subsection (b)(ii) of this rule. This disclosure requirement shall be deemed satisfied if the relevant affiliate provides the required written disclosure to investors.

.08 Suitability. A determination of whether a municipal securities transaction or municipal financial product is suitable must be based on the client's financial situation and needs, objectives, tax status, risk tolerance, liquidity needs, experience with municipal securities transactions or municipal financial products generally or of the type and complexity being recommended, financial capacity to withstand changes in market conditions during the term of the municipal financial product or the period that municipal securities to be issued in the municipal securities transaction are reasonably expected to be outstanding and any other material information known by the municipal advisor about the client and the municipal securities transaction or municipal financial product, after reasonable inquiry.

.09 Know Your Client. A municipal advisor must use reasonable diligence, in regard to the maintenance of the municipal advisory relationship, to know and retain the essential facts concerning the client and concerning the authority of each person acting on behalf of such client. The facts "essential" to "knowing a client" include those required to:

(a) effectively service the municipal advisory relationship with the client;

(b) act in accordance with any special directions from the client;

(c) understand the authority of each person acting on behalf of the client; and

(d) comply with applicable laws, regulations and rules.

.10 529 College Savings Plans and Other Municipal Fund Securities. This rule applies equally to municipal advisors to sponsors or trustees of 529 college savings plans and other municipal fund securities. All references in this rule to an "official statement" include the plan disclosure document for a 529 college savings plan and the investment circular or information statement for a local government investment pool.

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Rule G-8: Books and Records to be Made by Brokers, Dealers, ~~and~~ Municipal Securities Dealers, and Municipal Advisors

(a) - (g) No change.

(h) *Municipal Advisor Records*. Every municipal advisor that is registered or required to be registered under section 15B of the Act and the rules and regulations thereunder shall make and keep current the following books and records:

(i) *General Business Records.* All books and records described in Rule 15Ba1-8(a)(1)-(8) under the Act.

(ii) *Records Concerning Duties of Non-Solicitor Municipal Advisors pursuant to Rule G-42.*

(A) A copy of any document created by a municipal advisor that was material to its review of a recommendation by another party or that memorializes the basis for any conclusions as to suitability; and

(B) Unless included in the official statement for an issue of municipal securities, a copy of any disclosure provided by the municipal advisor or any affiliate of the municipal advisor to investors, as required by the provisions of Rule G-42 Supplementary Material .07.

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Rule G-9: Preservation of Records

(a) - (d) No change.

(e) *Method of Record Retention.* Whenever a record is required to be preserved by this rule, such record may be retained either as an original or as a copy or other reproduction thereof, or on microfilm, ~~electronic or~~ magnetic tape, electronic storage media, or by the other similar medium of record retention, provided that such broker, dealer, ~~or~~ municipal securities dealer, or municipal advisor shall have available adequate facilities for ready retrieval and inspection of any such record and for production of easily readable facsimile copies thereof and, in the case of records retained on microfilm, ~~electronic or~~ magnetic tape, electronic storage media, or other similar medium of record retention, duplicates of such records shall be stored separately from each other for the periods of time required by this rule.

(f) *Effect of Lapse of Registration.* The requirements of this rule shall continue to apply, for the periods of time specified, to any broker, dealer, ~~or~~ municipal securities dealer, or municipal advisor which ceases to be registered with the Commission, except in the event a successor registrant shall undertake to maintain and preserve the books and records described herein for the required periods of time.

(g) No change.

(h) *Municipal Advisor Records*. Every municipal advisor shall preserve the books and records described in Rule G-8(h) for a period of not less than five years.

(i) *Municipal Advisor Records Related to Formation and Cessation of its Business*. Every municipal advisor shall comply with the provisions of Rule 15Ba1-8(b)(2) and (c) under the Act.

(j) *Records of Non-Resident Municipal Advisors.* Every non-resident municipal advisor shall comply with the provisions of Rule 15Ba1-8(f) under the Act.

(k) *Electronic Storage of Municipal Advisor Records Permitted.* Whenever a record is required to be preserved by this rule by a municipal advisor, such record may be preserved on electronic storage media in accordance with section (e). Electronic preservation of any record in a manner that complies with Rule 15a1-8(d) under the Act will be deemed to be in compliance with the requirements of this rule.

Alphabetical List of Selected Comment Letters on Notice 2014-01 (January 9, 2014)

1. Cooperman Associates: Letter from Joshua G. Cooperman dated March 10, 2014

2. Lamont Financial Services Corporation: Letter from Robert A. Lamb, President, dated March 10, 2014

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March 10, 2014

VIA Electronic Mail

Municipal Standards Rulemaking Board
www.msrb.org

Ladies and Gentlemen:

This is in reference to your Regulatory Notice 2014-01 issued on January 9, 2014.

As a sole practiiciner municipal specific financial advisory firm since 1989, I am concerned with the impact the draft Rule will have on our practice and similarly situated firms, as well as the institutionalization it may promote in the field, to the detriment of municipal clients and conduit issuers, who will face less choice and options and higher costs for professional advice.

1. ECONOMIC ISSUES; REGULATORY SCOPE

The Notice correctly states that a consequence of the Rule may be a higher cost burden on smaller firms (at 25), and that the Act only permits regulatory burdens appropriate or consistent with the Act's purposes of preventing fraud and protecting statutorily protected parties. The genesis of the Act's provisions was inappropriate conduct by a small group of advisors, which the Act mitigates against by providing a strict fiduciary standard.

Perhaps it would be better to determine first, with the actual experience of time, whether the Act itself has resolved the issues Congress was concerned with before the MSRB resorts to the regulatory authority provided in the Act. Rather than burden the entire field of FA's with time-consuming and costly regulations, it may be appropriate to determine what, if any, abuses or inappropriate conduct remain requiring the regulatory surveillance of this Rule and others. Alternatively, the Board should consider initially limiting the Rule to an enumeration of prohibited forms of conduct and practices, rather than imposing extensive compliance, supervision, etc.

Assuming a specific need for action now can be demonstrated by the Board, the proposed Rule and its accompanying Notice do not provide appropriate data or a specific cost benefit analysis showing why the regulatory burdens, particularly on small firms, are justified, The Board concedes that it has little data, but justifies compliance with its own

policies and the Act's requirements through a listing of generalized non-specific benefits. It concedes that the cost burden may reduce competition, and increase costs to the FA firms and potentially their municipal clients, but does not propose any mitigation for this. Therefore, the Board may not have adequately satisfied its own policies in formulating certain provisions of the draft Rule.

There is no suggestion of a streamlined checklist from the Board to promote compliance/reduce costs or a sample timeline for firms to consider. No proposed forms to facilitate compliance are provided, and on a recent webinar, staff from the MSRB dismissed the suggestion of a baseline compliance manual to reduce administrative costs for smaller firms. No estimate of the time or expense for compliance is provided, as is applicable to other federal agencies such as the IRS through the OMB. Rather, the Board considers FA firms like the larger broker-dealers it administers, with their larger profit margins and embedded compliance staff. However, unlike broker-dealers, FA firms do not handle client funds or direct client investments—they only offer advice and guidance to their principals (the municipal clients), which is a more restricted template for regulation. This distinction should be considered further.

Accordingly, the Board needs to address in more concrete detail specific costs of the proposed Rule, especially on small shops, and whether the benefits accruing are specifically (and not in a generalized manner) material enough to impose the burdens, as recognized by the Congressional draftsmen in the statute.

2. COMPETITIVE IMPACTS

As more entrepreneurial in nature, smaller and one-person firms can be more flexible in their terms and arrangements with clients, and can offer services on a more cost effective basis, without compromising quality. In many cases, professionals from the larger FA firms or broker dealers populate these entities, offering the same level of expertise that they provided at the larger entities. As smaller firms are not controlled by larger financial institutions, with bonus pools and parent companies to consider, they can be more accommodating on services and rates. For example, as a member of my Town's citizen's finance committee, I offer free FA services to the Town, saving it over $150,000 in FA fees, as well as $140,000 from negotiating a reduction in swap trade profits with the Town's broker-dealer I also provide discounted rates to my local elementary school district.

Furthermore, when Trinity County in Northern California faced a potential TRAN default and Chapter 9 filing, at the County Treasurer's request I organized a team of 3 FA's to provide services to replace the County's debt with a longer term obligation, with reduced FA fees, closing a very difficult transaction the day before the potential default. The amount of services required did not justify the fee for the assignment, which larger broker-dealer firms had declined. Two of the FA's subsequently used their expertise to assist Vallejo and Stockton with their bankruptcy problems.

The Board is correct in its assumption that negative competitive consequences may flow from the Rule for smaller firms, and lead to consolidations or exit from the field, apart from those whose exit is welcomed. Should the Rule require an extensive formalized policy and procedure ritual, even for one-person operations, this burden may diminish the pool of firms and individuals available, and lessen competition. It could also lead to the institutionalization of the field, where larger firms, akin to oligarchies, dominate, and where alternatives and ideas available to issuers are limited to those accepted by larger institutions. For example, in 1996 I was asked to assist a Christian school to finance a new junior high-high school campus on a 40 acre site in San Jose. Despite the negative feedback from one large bond counsel, through a lengthy two year process we were able to arrange an initial $28 million tax-exempt private placement financing, avoiding closure of the school as its lease of public facilities had lapsed. It is now a 2000+ student facility. The initial negative reading (which differed from that of other large bond counsel) and extensive time commitment would have made this difficult to undertake in a larger, more bureaucratized setting.

3. INSURANCE MANDATES

The market for FA e&o insurtance is very sparse and spotty, particularly for small firms, which do not generate significant premium income to insurers. Deductibles and premiums have increased, and in the case of my carrier, policy terms have been cut from three years to two years, which could herald their exit (I have a zero controversy and claims history). The Act was not intended to address such administrative issues, as its emphasis was preventing fraud, and the Board's focus should remain there.

The Board can be helpful by fostering and approving insurance pools for smaller firms and estabilishing a national database on claims to provide insurers with industry-wide data that hopefully indicate this is a profitable line of business.

No mandate for insurance should be required of FA's and disclosure of insurance terms should be voluntary with the issuers, much as it is now with individualized requirements by issuers in each FA RFP, etc.

4. EXTENSION OF RULES TO DODD-FRANK ACT NON-LISTED PARTIES

This concept is again broadening the scope of the statute, without Congressional evidence of concern here, as well as having mischievous consequences respecting multiple fiduciary relationships. For example, in conduit transactions, the FA usually is engaged by the borrower, not issuer. In fact, the obligation is non-recourse to the issuer, whose involvement is principally for the upfront fee income and smaller annual payments. If the FA is obligated to both parties, not by their choice but by regulatory fiat, this may lead to conflicts that potentially may not be waivable, as well as extra expense. For FA's to operate most effectively, they need to be answerable to one client per transaction.

5. OFFICIAL STATEMENT REVIEW

Any action by the Board on this topic vis-à-vis FA's only adds additional requirements and cost where clear lines of responsibility already exist. Disclosure counsel is responsible for the Official Statement, both its drafting and content. To the extent it is based upon information provided by the issuer or borrower, this is frequently noted in a disclaimer by the Disclosure Counsel in the Official Statement. While most FA's review it, adding regulatory responsibility will create unnecessary potential conflicts among the financing team, including potential impasses regarding language or revisions, and add cost to the issue. It also potentially makes the FA a guarantor of the issuer and the disclosure counsel, which position is not appropriate to the FA's role (and for which it is not being compensated).

Many FA's now add a statement in their fee paragraph as to their involvement, which should suffice to guide investors, without further mandates from the Board. . A corollary consequence is that this imposition potentially diminishes insurance availability for FA's given the uncertainties it creates in responsibility, liability and risk.

6. FEASIBILITY STUDY/ANCILLARY DOCUMENT REVIEW

The FA's role is not to guarantee the financing, the Issuer, the borrower or the work of bond counsel or disclosure counsel, which may be a potential consequence of your proposal on feasibility study evaluation. The FA's role is more limited in nature, to review of financial structures, cashflows, financial assumptions, financial risk to the issuer or its enterprise and similar questions.

The FA is not acting as, nor is capable of serving as, supervisory engineer, architect, zoning administrator, attorney, real estate professional or appraiser, and it is inappropriate to require these responsibilities of FA's. Nor are they expert enough to be legally able to evaluate the bonafides of these professionals. As a matter of caution, FA's may review these documents, but mandating review creates a legal liability that merges the FA's role to that of supervisory professional over the other participants. This is beyond the scope and purpose of the statute, and the FA's expertise. It creates the very circumstances for FA's that the Board should want to avoid.

7. FEE SPLITTING

Smaller FA firms may outsource some of their back office tasks, such as computer run generation, to other entities, which may include FA's. This may be done on a per project or per hour basis, and payment to the entity would typically not be dependent upon successful conclusion of the financing or payment to the FA of its fee. As the payments are made by the FA firms for discrete services, akin to payments to a temporary employment agency or consultant, they should **not** be considered within the concept of fee splitting.

Similarly, where two FA firms contract with the issuer to perform services for a predetermined fee, that is disclosed to the issuer (similar to what was required by keep Trinity County from a Chapter 9 filing), this type of arrangement should be permissible under the Board's rules.

8. TIMING OF FA CONTRACT APPROVAL; IMPLIED CONFLICT WAIVER

Issuers prefer to approve all documents, including fee agreements, at one time, which may be close to the date the POS is released. Potentially the draft rule imposes a new timeline, requiring the FA fee agreement approval first, before any other steps are taken. This doubles the internal work for the issuer's staff.

To avoid unnecessary additional steps, the Board should clarify that so long as an issuer is provided the specifics of the fee arrangement in writing ab initio by the FA, which ratification can occur subsequently, this will satisfy the Rule.

Similarly, FA's may provide computer runs and other financing strategy materials to a prospective issuer, as part of the outreach efforts of the FA. This also may arise in the context of presentations to an issuer or multiple issuers on debt alternatives or specific potential debt issuances; The Board should clarify that this does not constitute the performance of FA services for purposes of timing of fee disclosures, until the issuer(s) consent(s) to proceed.

Regarding conflicts of interest arising from compensation arrangements, all fee arrangements or services contracts by definition involve adverse interests between parties. Other personnel in the municipal finance business, subject to similar SEC anti-fraud rules, do not have written conflicts disclosure. What is the justification or need for action here? Ditto for the issuer "consent" mandate under consideration by the Board.

"Common sense" says that logically the parties to a fee agreement, just like an underwriting purchase agreement, by definition have adverse interests, without further need for disclosure.

9. RECORD RETENTION/POLICY MANUALS

To avoid unnecessary costs and duplication for one-person and small FA shops, the Board should clarify that maintenance of drafts of documents and emails on the firm's email site or through their ISP (such as gmail, Microsoft, facebook, yahoo, aol, etc.) will comply with the records retention requirements. Absent this clarification, smaller firms may feel compelled to invest in duplicative services, incurring needless expense.

To reduce costs of compliance for smaller firms, the Board should also provide a draft of a prototype baseline policy and procedures guide that smaller FA firms can adopt or modify, as needed, or assist FA user groups with this type of endeavor.

This will reduce potential deficiencies in any later supervision or examination of FA firms through the Board's rules.

10. COST RECOVERY; MAINTAINING FA PROFESSIONALS

Depending upon the level of support from the Board or its staff, the costs of compliance could become very large and extensive. My firm does not "nickel and dime" its clients with charges for each item or request,, but rather seeks long-term relationships.

However, should the costs for compliance be significant, which I fear will occur under the draft's current version, I will need to surcharge for regulatory compliance, much like San Francisco restaurants now do for City-imposed health care insurance on restaurant personnel. This will be an economic disadvantage for smaller firms.

As fewer firms translate to less competition and potentially greater institutionalization, (possibly leading to an oligarchy), the Board should review the economic and competitive consequences of the draft Rule in more detail before proceeding.

Higher cost will also create a barrier to entry for newer FA's or those transitioning from other fields, particularly if the proposed exam is not properly designed and implemented. Ditto for any supervision rules. The touchstone of Dodd-Frank was fraudulent or improper behavior, and the Board should not wander from this specific purpose with myriad other proposals.

11. ADMINSTRATIVE- QUESTIONS POSED (AT 25-28)

#1 The Board should not list the required deliverables, as they are customized to each client.
#4 Obligated person expansion discussed in Para. 4 above.
#6 , 7 ;and 9 Discussed above. All should be as simple as possible and use existing technology or information disclosures already available.
#10 and 11. Discussed in separate paragraphs above, including Para. 3 and 9. .
#12 Extensive oversight activities will likely reduce the willingness of FA's to consider creative solutions—rather adopting "run of the mill" responses.
#13 and 15. See Para 10 above.
#14. I believe the very fact of a registration requirement, which can be revoked, has already promoted FA utility among issuers. Further strictures will at most provide minor incremental benefits.
#16 and 17. Negative.
#20 See Para. 1, 2 and 10 above.
#21. See Para. 10 above. Remember that we are competing for new blood against hedge funds and potentially more lucrative industries.
#24 and 25. Draft Rule G-42 will create advantages for larger firms, whose economic consequence has not been sufficiently addressed by staff, other than a mention in passing.

The Board should wait for some period of time to determine how the Act is ameliorating the problem with which Congress was concerned. There is always time later to create and implement new regulations. See above generally.

As a 25 year veteran of this industry, at the tail end of my career, the concerns above are only partially for me. Much of my cautionary suggestions are intended to alert the Board to long-term deleterious effects its rulemaking may have. The vitality and vibrancy of this "niche" depend upon an appropriate regulatory matrix not impacting adversely the desirability for both present and future participants.

While Congress gave the Board rulemaking authority, it should be used judiciously, timely, efficiently and effectively, and should work to sustain and leverage on the benefits obtained from this industry, whose vast majority of participants provide appropriate financial and economic advice to issuers.

Respectfully Submitted,

Joshua G. Cooperman

LAMONT
Financial Services Corporation

March 10, 2014

Mr. Ronald Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, Virginia 22314

Dear Mr. Smith,

Thank you for the opportunity to comment on the Proposed Rule G42, the Duties of Non-Solicitor Municipal Advisors. I appreciate that the Board thoughtfully considered the role of the municipal advisor with respect to its duties to issuer clients and the increased transparency that the rule should help foster. However, there are several aspects of the rule that are laced with probably incorrect assumptions and that may result in the Rule being less effective or more burdensome than desired. There are other aspects in which the Proposed Rule may have over-reached and may negatively affect the cost structure of the industry.

I believe that the municipal advisor industry accepts that they have a fiduciary duty, which includes both a duty of loyalty and a duty of care. However, in implementing these principals, like everything in life, the devil is in the details.

Recommendations. The proposed Rule has a flawed assumption that all municipal advisors would be making recommendations in nearly every instance regarding a municipal financial product or financing. For approximately half of Lamont's issuer clients, they do not seek a recommendation from their municipal advisor about whether to proceed with a transaction. They believe they are sufficiently capable of weighing the risks in a transaction and making their own decision about whether to proceed. These are large sophisticated issuers with multi-billion dollar debt portfolios. They want their municipal advisor to assist them in executing the transaction and helping them get the best price when the issue comes to market. Does this fact pattern suggest, for those clients who do not seek a recommendation from their municipal advisor, only a suitability review/determination is necessary from the municipal advisor? If the answer is in the affirmative, then this should be made explicit in the discussion of limiting the municipal advisor arrangement. If the answer is no, then the Rule will have the consequence of increasing the cost of compliance to the municipal advisor, which will in turn increase the cost to the issuer client.

The Rule will make work for the municipal advisor in order to comply with the requirements of the Rule. My fear is that if the issuer does not want the advisor to make a recommendation, the municipal advisor will be faced with a very difficult problem: the issuer will not want to pay the advisor to consider and paper over its work as though a recommendation to move forward was

made, even though a recommendation was not required, just to avoid a books and records examination problem by the SEC or FINRA. This could create a cost to the municipal advisor, since the client may refuse to pay for the compliance related cost.

Official Statement. In general, I agree with the premise that municipal advisors should thoroughly review an issuer's official statement to make sure that the official statement fairly presents the client to investors. This would especially be true for issuers that come to market infrequently, have had economic set-backs or are under any distress. This would also be true for obligated parties in a transaction, as they are the credit behind the issuer of the bonds. However, if the issuer has issued bonds multiple times in the course of a year, I would submit that an initial thorough review of the official statement in any year with a review of the changes in each subsequent issuance should be sufficient for the municipal advisor to discharge its duties. Further, if the issuer has competent disclosure counsel that it hired for multiple transactions, then a municipal advisor should be able to rely on competent disclosure counsel to provide accurate and full disclosure about the issuer and the transaction.

E&O Insurance Disclosure. While I believe that Errors and Omissions insurance should be required of all municipal advisors as part of their overall professional qualifications, it may create a barrier to entry in the municipal advisor business. However, before the Board explicitly requires such insurance, the Board should do research to thoroughly understand the coverage being provided. For example, very few carriers actually provide E&O insurance for practitioners in the municipal bond business. Some advisors carry E&O insurance designed for management consultants under the theory that they solely provide advice to municipal issuers, but do not have any other duties regarding the recommendation of municipal financial products. The cost differential may be five times or more for bond business coverage versus management consultant coverage. In addition, the policy limits are more restrictive for the bond business coverage. As a result of this disparity, unless or until the Board had satisfied itself as to which coverage was appropriate to address its concern over professional qualifications, I would not recommend that the Board take any position on what is sufficient coverage while ascertaining that such coverage would be generally available in the marketplace. We have seen numerous RFPs where an issuer has established insurance requirements that are not generally available to municipal advisors, and have to back-track on the requirements during the RFP process.

Affiliates. Lamont, like many municipal advisors that created investment advisory affiliates in order to comply with SEC rules regarding bidding escrows and similar matters for its municipal clients, has an affiliate that is staffed by persons who work at Lamont Financial Services (LFS) but are specifically licensed to work as an investment advisor. Some broker dealers who bid to provide such escrows require that Lamont Investment Advisors (LIA, registered with state regulators since it does not manage money) establish a brokerage agreement with them, where the BD places the securities versus payment until such time as the issuer's trustee settles the account with the broker dealer. We are concerned that while such practices would satisfy the

broker dealer, that under the Rule it would have the appearance of being a principal transaction while it is really an agent transaction.

In addition, we are concerned about the compensation disclosure requirements of the Rule. At Lamont, LIA does not pay commissions or referral fees to LFS personnel whose clients ask us to bid escrows, investments, or value swaps. However, for employee compensation, both LIA and LFS are treated as one pool. The distribution of such employee compensation would occur at the end of our fiscal year and would not be known and is not necessarily tied to the fees for which the affiliate actually did the work. Conflict of Interest disclosures related to this activity would, of necessity, be so general as to be virtually meaningless.

General Conflict Disclosures. True conflict disclosures, as opposed to conflicts regarding the method of payment, should be discussed at the outset of the relationship and signed off by the issuer official. Fee splitting and other similar arrangements are very problematic and should be prohibited. Payment of fees by a third party, such as an investment provider, should be fully disclosed as to the dollar value of the payment. . This approach benefits the issuer, since the fee is included in the yield on the investment, reducing any arbitrage payment to the IRS. Further, the permissible fees are limited by the IRS.

Payments by affiliates would represent a potential conflict and should be disclosed if the affiliate is engaged in a principal transaction or if it directly manages investments with authority to actively manage the investments

Conflict Disclosures Regarding Method of Payment. While I appreciate the need to provide disclosures regarding payments by third parties to the municipal advisor, providing the proposed disclosures regarding methods of compensation seems to run the risk of being so obvious as to insult the intelligence of the issuer official. All of Lamont's issuer clients actively manage their municipal advisor relationships as they are very cost conscious. For certain clients, who have multiple municipal advisors, the issuers are required to determine which advisor will do what task to avoid duplication of effort. The level of disclosure being proposed could be provided to issuers but should only be done based upon an analysis by the municipal advisor as to the level of sophistication of the client as an issuer and manager.

Protecting Issuers. In discussing the SEC definition and the Proposed Rule G42, the most common refrain I hear from Issuers large and small is that the SEC and MSRB's desire to protect issuers only makes more work for the Issuer. This may be because Lamont has mostly large and sophisticated clients. However, regarding the MA rules, it should be recognized by the Board that large and sophisticated issuers have devised their own approaches to interacting with underwriters and municipal advisors, and the Board should consider developing a sophisticated issuer exemption for those portions of the Rule that would not benefit sophisticated issuers. If the Board is unable to define a sophisticated issuer, the Board could allow the municipal advisor to make such a determination based upon his knowledge of his client in its suitability assessment.

Books and Records. While I clearly understand that much of the books and records requirement is necessary to establish that the advisor is following the Rule, there are a few aspects that are not particularly clear that could create substantial burdens on municipal advisors. For example, would it be MSRB's intent to have all emails and client records saved in the same folder in electronic media? This could represent expensive updates to our systems if this is required. Further, is it the intent of the Rule that municipal advisors save every presentation made by an underwriter to its MA client, or only the ones the issuer decides to go forward with? Would this also be true for RFP's? Lamont's clients regularly receive RFP's from underwriters that may be four or more inches thick. For some of our clients, we receive up to 50 proposals in an RFP cycle. This is a lost of paperwork to be stored.

Is the "saving of presentations" requirement to tie to underwriter recommendations that might be prompted by an IRMA letter? This could create a very large document management problem, since many of these pitch books and presentations come in paper versions only. Scanning these documents will also cause the municipal advisor to expend a lot of clerical time for little benefit and would be burdensome to municipal advisors both large and small.

Economic Justification. I believe that the Board took an "easy pass" on economic justification by taking a position that the SEC requires most of this in its rule making and the Board is just making clear what the duties and responsibilities would be for recordkeeping. While I agree that this is a baseline, the Board should not approach this as a shelter from engaging in further econo9mic analysis. Some of the administrative requirements are all part of running an advisory business, such as contracts, engagement letters, and retention of files and emails. However, based upon the issues outlined above, I can easily imagine that the paperwork associated with the Rule could take 20-25 percent of an advisor's time to complete, some of it against the client's wishes. In addition, as discussed above, the costs associated with professional liability policies vary greatly based upon the type of coverage being provided.

I believe that the effect of the SEC definitions and the Rule will be that over time, a substantial number of small firms will find it difficult to comply with the requirements and seek to merge with larger or better equipped partners. It would not surprise me to see that the headcount of the industry will be relative constant, but that the number of reporting firms will decline by 20%.

I do not agree with the view that compliance costs will be spread amongst all of a firm's clients and should not raise the cost of doing business or the cost to issuers. The cost of compliance with the Rule is mostly going to be in the daily cost of documentation the MA's review of presentation by underwriters, considering and documenting alternatives, and the requirement to develop recommendations in writing to our clients, all in preparation for an eventual examination by the SEC or FINRA. This is not a small task. The problem for MA's is that their clients may not find the notion of documenting all these facts helpful to getting the transaction done, and will not appreciate the effort to comply with the Rule. As a result, they may not be willing to pay for this, and the MA may have to eat it as an expense. Given the small margins in the MA business,

a 20% loss of productivity can be debilitating to a MA firm in the short-term, before prices can be adjusted by the MA and the client.

Answers to Questions

Q1. Should the fiduciary standard apply to all of a municipal advisor's clients? Yes for its municipal advisory activities. However, we think that the Dodd Frank standard is appropriate, especially since certain municipal advisors are being hired in cases of municipal distress. In such cases, the municipal advisory firm may not represent the municipal entity or the obligated party, but may represent other creditors.

Q2. Should the advisor thoroughly review the entire official statement? As discussed above, this is a case-by-case issue, and depends upon how often the issuer is in the market, disclosure counsel, etc.

Q3. At the outset of a transaction, the issuer client is usually asking questions regarding what resources it will need to complete the transaction. I don't really think the Rule will serve to foster this in any material way.

Q4. I think that the disclosure of conflicts related to compensation sends a message to the issuer official that they are not competent.

Q5. To be clear, I am not in favor of fee splitting. However, allowing an investment provider to pay fees related to the solicitation of the investment by the municipal advisor, and which is within the permitted limits of the IRS rules, should be acceptable so long as it is disclosed to the issuer and to each investment provider on the bid list.

Q6. True conflicts should be disclosed at the outset of the relationship or during contract development.

Q7. Yes, which could be done in an email, in the engagement letter, or in a contract with the issuer?

Q8. I believe that if the offending individual has been terminated from the firm, then such disclosure of past events is less than useful unless there was also a finding of supervisory weaknesses. If the individual is still at the firm, then disclosure is required.

Q9. As stated above, E&O insurance should be a professional qualification. I would suggest that the MSRB be quite careful in making this a requirement, as discussed above. Before requiring such insurance, the Board should determine that there are sufficient providers and the average cost of a policy that covers practitioners in the municipal advisor business that work on transactions is commercially reasonable.

Q10. It may become a barrier to entry to small firms who provide MA services on less than a full time basis.

Q11. This question is too general to answer in the affirmative. I think that the municipal advisor should review documents that support the credit structure of the bond issue. In most circumstances, the municipal advisor will be involved in all aspect of the transaction, and so would have reviewed the documents and may have provided comments to the documents. However, depending upon when the municipal advisor is engaged, the balance of the financing team may have already thoroughly vetted the feasibility document. In some cases, the municipal advisor is the last to be hired, and in such circumstances is generally hired to supervise the pricing of the transaction. It is difficult to write rules that govern all circumstances, since situations vary so much.

Q12 and Q13. I don't think that the MA rule should conflict with dealer rules regarding principal transactions, recognizing that a fiduciary duty to the issuer will require additional verification steps to ensure that the pricing has been at least as good as having a third party in the transaction. The MA who is acting as a principal should provide the issuer with a third party data source to verify the pricing of investments or municipal financial products. Failing that, the MA should offer to bring in a third party verification of the pricing from firms for which it does not engage in active trading relationships.

Closing Comment

I believe that the Rule addresses issues related to fiduciary duty and suitability, and does a good job at providing insight about the issues that MAs must address and procedures for demonstrating compliance with the Rule. Further, I think the MA industry should be regulated, provided that we can find ways to make it less burdensome.

Portions of the Rule should have further review by the Board to insure that the number of unintended consequences can be minimized.

Thank you for the opportunity to provide my comments on the Proposed Rule G-42.

Yours truly,

Robert A. Lamb
President

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