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[Rule G-42](#), [Rule G-8](#)

MSRB Answers Frequently Asked Questions Regarding MSRB Rule G-42 and Making Recommendations

Overview

On February 15, 2018, the Municipal Securities Rulemaking Board (MSRB) sought public input on draft answers to frequently asked questions and related scenarios (FAQs) regarding MSRB Rule G-42, on duties of non-solicitor municipal advisors, and the making of recommendations. The MSRB received eight comment letters¹ and revised the draft FAQs to reflect these comments as well as insight gained from the MSRB's ongoing engagement with the industry regarding compliance with Rule G-42.

[FAQs Regarding MSRB Rule G-42 and Making Recommendations](#), published today as a compliance resource for municipal advisors, provides further explanation of Rule G-42, particularly with respect to making a recommendation and the obligations for municipal advisors that result therefrom. Access the FAQs and other compliance resources in the [Compliance Center](#) on MSRB.org. It should be noted that the FAQs do not create new legal or regulatory requirements, or new interpretations of

¹ Letter from Michael Nicholas, Chief Executive Officer, Bond Dealers of America, dated April 20, 2018 (the "BDA Letter"); Letter from Benjamin Madorsky, Chief Compliance Officer, dated April 16, 2018 (the "cfX Letter"); Email from Kim Wyatt, Kensington Capital Advisors, dated February 22, 2018 (the "Kensington Capital Email"); Letter from Charles A. Samuels, Counsel for NAHEFFA, National Association of Health and Educational Facilities Finance Authorities, dated April 16, 2018 (the "NAHEFFA Letter"); Letter from Susan Gaffney, Executive Director, National Association of Municipal Advisors, dated April 16, 2018 (the "NAMA Letter"); Letter from Catherine Humphrey-Bennett, Municipal Advisory Compliance Officer, PFM Financial Advisors LLC, dated April 16, 2018 (the "PFM Financial Letter"); Letter from Frank Fairman, Managing Director, Head of Public Finance Services, Piper Jaffray & Co., dated April 16, 2018 (the "Piper Jaffray Letter"); and Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated April 16, 2018 (the "SIFMA Letter"). In addition, the MSRB received oral comments from the Financial Industry Regulatory Authority (FINRA).



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existing requirements and should not be interpreted by municipal advisors or examining authorities as establishing new standards of conduct.

The MSRB is sensitive to the challenges of complying with a new regulatory framework and believes that additional support may be useful on various aspects of Rule G-42, particularly the distinction between giving “advice” and making a “recommendation.” The MSRB tailored the final FAQs to be responsive to input received so that they serve as a useful compliance resource to enhance municipal advisors’ understanding and application of Rule G-42.

Background

MSRB Rule G-42, on duties of non-solicitor municipal advisors, and related amendments to MSRB Rule G-8, on books and records, became effective on June 23, 2016 and established core standards of conduct for municipal advisors that engage in municipal advisory activities, other than municipal advisory solicitation activities (for purposes of this notice “municipal advisors”). Rule G-42 sets forth core requirements a municipal advisor must meet when, among other things, providing advice or making a recommendation to a municipal entity or obligated person client about a municipal securities transaction or municipal financial product.

Response to Comments

In response to the MSRB’s request for input, commenters generally noted their appreciation for the opportunity to comment on the FAQs. Some commenters suggested drafting edits or formatting changes to help clarify a particular FAQ or scenario (*e.g.*, moving a question; combining and/or rewording questions). The MSRB incorporated a number of these changes.

Commenters also suggested more substantive changes. For example, some commenters thought the FAQs should reference relevant Securities and Exchange Commission (SEC) rules or guidance to, for example, assist a municipal advisor in making an initial determination regarding whether the communication in question was “advice.”² Other commenters thought cross-referencing SEC rules or guidance caused confusion³ or that the FAQs should clearly state that they are not intended to interpret SEC rules or guidance.⁴

² SIFMA Letter at p. 2-3 and 5, and FINRA.

³ NAMA Letter at p. 2.

⁴ BDA Letter at p. 1.

Because the main goal of the FAQs is to help market participants determine when a recommendation has been made pursuant to Rule G-42 (for purposes of this notice, “G-42 Recommendation”), the MSRB revised the FAQs to indicate that the reader should assume the information in each FAQ has been deemed to meet the definition of “advice” for purposes of Rule G-42, and as defined under Section 15B of the Securities Exchange Act of 1934 (the “Exchange Act”). By assuming that each FAQ addresses a situation that has already been deemed to be “advice,” the potential confusion or need for an explanation of SEC rules or guidance is eliminated.

Some commenters focused on the use of particular words in the scenarios as being indicative of whether a G-42 Recommendation had been made.⁵ To address these comments, the MSRB inserted a footnote to clarify that each G-42 Recommendation determination is based on the prevailing facts and circumstances of a particular communication and that a G-42 Recommendation cannot be avoided merely by using a certain word such as “could” or “may.”

Commenters suggested the MSRB revise the FAQs to provide guidance on recordkeeping requirements related to Rule G-42.⁶ One commenter suggested that the MSRB add detailed commentary of the definition of “recommendation” for recordkeeping purposes under SEC rules and guidance in comparison to the definition of a G-42 Recommendation.⁷ Another commenter asked for specific examples of the documents that a municipal advisor should maintain to establish suitability or other aspects of compliance with the rule.⁸ The MSRB has considered these comments and determined that the requested guidance comparing “recommendation” under the applicable recordkeeping regimes is outside the scope of these FAQs. However, the MSRB will consider the comments and suggestions for potential compliance resources or guidance at a later date. With respect to providing a list of documents to be maintained for compliance with recordkeeping rules, the MSRB believes municipal advisors are best equipped to determine the appropriate and most relevant records to be maintained for compliance with Rule G-8. There are a number of documents that might

⁵ NAMA Letter at p. 5 and Piper Jaffray Letter at p. 3-4.

⁶ Kensington Capital Email at p. 1; PFM Letter at p. 3, and SIFMA Letter at p. 2.

⁷ Kensington Capital Email at p. 1.

⁸ PFM Letter at p. 3.

warrant being maintained and it would be difficult, if not impossible, for the MSRB to provide a list of documents that a municipal advisor may create to memorialize the basis for any determination as to suitability or that are material to a municipal advisor's review of a recommendation by another party. Alternatively, providing a sample list of documents might be misconstrued as the MSRB requiring municipal advisors to create and maintain particular documents.

Commenters questioned the lack of reference in the FAQs to the MSRB's prior guidance for municipal advisors in conduit financing scenarios.⁹ One commenter suggested the MSRB integrate the conduit issuer guidance into the FAQs or clarify that it has been withdrawn,¹⁰ while another suggested the MSRB use the FAQs to "rework" the prior guidance or consider withdrawing it.¹¹ In response to commenters, the MSRB has added a footnote in FAQ 9 to cross-reference the current conduit issuer guidance.

Commenters expressed concern over the MSRB's characterization of the FAQs as a compliance resource,¹² and requested that the MSRB characterize the FAQs as interpretive guidance¹³ or something other than a compliance resource.¹⁴ As noted in the FAQs, the FAQs discuss principles established in the MSRB's regulatory filings associated with the development of Rule G-42. The MSRB, therefore, continues to believe the FAQs do not create new legal or regulatory requirements; nor do they assert new interpretations of existing requirements. For that reason, the MSRB continues to consider the FAQs a compliance resource to enhance municipal advisors' understanding and application of Rule G-42.¹⁵

The MSRB welcomes additional comments and questions about the FAQs or other compliance matters via a dedicated mailbox, compliance@msrb.org

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⁹ See [Regulatory Notice 2017-13 \(July 13, 2017\)](#).

¹⁰ NAHEFFA Letter at p. 2.

¹¹ NAMA Letter at p. 4.

¹² NAMA Letter at p. 1; Piper Jaffray Letter at p. 1 and SIFMA Letter at p. 7.

¹³ SIFMA Letter at p. 8.

¹⁴ NAMA Letter at p. 1.

¹⁵ See [MSRB Compliance Resource: Types of Compliance Information](#).