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[Rule G-42](#)

Request for Input on Draft Frequently Asked Questions Regarding Rule G-42 and the Making of Recommendations

Overview

The Municipal Securities Rulemaking Board (MSRB) is requesting input from market participants and the public on a draft set of frequently asked questions (FAQs) related to certain aspects of MSRB Rule G-42, on duties of non-solicitor municipal advisors. The purpose of this notice is to seek information and insight from commenters to further inform the MSRB's development of the FAQs for publication.

The MSRB invites market participants and the public to submit comments in response to this request, along with any other information they believe would be useful to the MSRB in developing the FAQs. Information may be submitted through April 16, 2018 in electronic or paper form. [Information provided in response to this request may be submitted electronically by clicking here.](#) Information submitted in paper form should be sent to Ronald W. Smith, Corporate Secretary, MSRB, 1300 I Street NW, Washington, DC 20005. Generally, all information submitted will be made available for public inspection on the MSRB's website.¹

Questions about this request for input should be directed to Margaret Blake, Associate General Counsel, at 202-838-1500.

Background

The MSRB received approval from the Securities and Exchange Commission (SEC) of Rule G-42, on duties of non-solicitor municipal advisors, and related amendments to MSRB Rule G-8, on books and records, on December 23, 2015. The rule became effective June 23, 2016 and established core

¹ Comments generally are posted on the MSRB website without change. For example, 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.



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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.

Throughout the development of Rule G-42, the MSRB sought public comment regarding the rule to understand, address and balance the concerns of municipal entities and obligated persons, their municipal advisors, broker-dealers and other financial services providers, investors, and the public, with the mandate to establish a new regulatory framework for municipal advisors.² During the process, the MSRB carefully considered each set of comments received, as reflected in revisions to the rule text that were responsive to or derivative of such comments.³ The MSRB believes the final rule was greatly enhanced by the active participation of commenters throughout the rulemaking process. Consistent with the MSRB’s general practice, we continue to monitor the impact of Rule G-42 compliance on municipal advisors and the market.

The MSRB has continued to engage with the municipal advisor industry and other stakeholders regarding compliance with Rule G-42. For example, the MSRB has issued education pieces, hosted webinars and jointly hosted compliance outreach events regarding municipal advisors’ obligations under the rule.⁴ In addition, at various industry-related events, the MSRB has continued to welcome questions and discussions related to Rule G-42.

Request for Input

Because municipal advisors were not regulated in their capacity as municipal advisors prior to the Dodd-Frank Act, the MSRB is sensitive to the challenges of complying with a new regulatory framework. As a result, the MSRB

² Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111–203, 124 Stat. 1376 (2010) (“Dodd-Frank Act”).

³ See e.g., Letter from Michael L. Post, MSRB, to Secretary, SEC, dated August 12, 2015; and Letter from Michael L. Post, MSRB, to Secretary, SEC, dated December 16, 2015.

⁴ See e.g., [Compliance Workshop: MSRB Rule G-42 Advice and Recommendations](#); [Webinar on MSRB Rule G-42: Duties of Municipal Advisors](#); [Municipal Advisors: Understanding Standards of Conduct](#); and [SEC, FINRA and MSRB Joint Compliance Outreach Program for Municipal Advisors](#).

believes that additional support may be useful on various aspects of this key rule, and particularly the distinction between giving “advice” and making a “recommendation.” The MSRB has prepared draft FAQs setting forth questions received on this topic along with proposed responses. The MSRB intends for the FAQs to serve as a compliance resource to enhance municipal advisors’ understanding and application of Rule G-42. The FAQs are not meant to be interpretive guidance and all proposed answers are derived directly from the rulemaking record.⁵

Though it is not routine for the MSRB formally to seek written comments on draft FAQs or similar compliance materials, given the unique nature of the application of Rule G-42 to newly regulated entities, coupled with stakeholders’ requests for further engagement with respect to the MSRB’s compliance support activities, the MSRB believes market participation and public input will provide useful insight and will help ensure that the FAQs provide useful compliance assistance. Prior to publication, the MSRB accordingly is seeking input regarding the content and appropriateness of the proposed FAQs, as well as the usefulness of the draft responses. In addition to any other input in this regard, the MSRB specifically seeks input on the following questions:

- Do the draft FAQs ask and answer the appropriate questions relevant to supporting a municipal advisor’s compliance with the relevant obligations under Rule G-42?
- Do the draft FAQs clearly distinguish giving “advice” from making a “recommendation” under the rule? If not, where is additional clarification needed?
- Do the proposed responses to the FAQs add to the understanding of the rule? How could they be improved to provide greater understanding?
- Are there additional questions that the MSRB should respond to related to making recommendations under Rule G-42?
- Are the scenarios presented practical and helpful in understanding the application of the rule to municipal advisory activities? Do the scenarios realistically reflect market activity? If not, how could they be improved?

⁵ See [MSRB Compliance Resource: Types of Compliance Information](#).

February 15, 2018

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Text of Draft Compliance Resource

Draft FAQs on MSRB Rule G-42 Provisions Related to Making Recommendations to Clients

The intent of these answers to frequently asked questions (FAQs) is to enhance understanding of provisions of MSRB Rule G-42, on duties of non-solicitor municipal advisors, related to providing “advice” and “recommendations” and related provisions of Rule G-8, on books and records.

The following FAQs provide content that can assist municipal advisors in developing supervisory procedures reasonably designed to ensure compliance with applicable securities laws and regulations, including MSRB rules.⁶ The principles discussed in this compliance resource were established in the MSRB’s regulatory filings associated with the development of Rule G-42. These FAQs do not create new legal or regulatory requirements, or new interpretations of existing requirements, and municipal advisors, enforcement agencies and others should not view this information as doing so. The obligations under Rule G-42 outlined in these FAQs also apply, consistent with MSRB Rule D-11, to the municipal advisor firm’s associated persons who engage in municipal advisory activities on its behalf.

Examples and considerations herein are designed to assist with compliance with applicable MSRB rules in appropriate circumstances, and some municipal advisors may be able to use them as a resource in tailoring compliance and supervisory programs to their business. It is important to understand that adherence to the principles outlined in this resource does not guarantee compliance with regulatory requirements or create a safe harbor from regulatory responsibilities. Additionally, the MSRB does not require municipal advisors to implement any specific practices described in this resource that extend beyond the requirements of existing MSRB rules and applicable federal securities laws.

Frequently Asked Questions about the Distinction Between Advice and a Recommendation Under MSRB Rule G-42 by a Non-Solicitor Municipal Advisor

1. MSRB Rule G-42 uses the term “advice” in certain provisions and the term “recommendation” in other provisions. How are these terms defined for purposes of Rule G-42?

Advice. Rule G-42(f)(1) defines the term “advice” to have the same meaning as the term has when used in Section 15B of the Securities Exchange Act (the “Act”) and the rules and regulations thereunder.⁷ Accordingly, if a communication would constitute advice under the Act and rules and regulations

⁶ See MSRB Rule G-44, on supervisory and compliance obligations of municipal advisors.

⁷ See [Registration of Municipal Advisors](#), Release No. 34-70462 (September 20, 2013), 78 FR 67467 (November 12, 2013) (“SEC Adopting Release”).

thereunder for purposes of applying the definition of “municipal advisor,”⁸ then that communication would also be deemed advice for purposes of Rule G-42.⁹

The SEC has noted that, for purposes of the definition of a municipal advisor, the term “advice” includes, without limitation, a recommendation that is particularized to the specific needs, objectives, or circumstances of a municipal entity or obligated person (hereinafter “MA Client” unless otherwise specified) with respect to municipal financial products or the issuance of municipal securities, including with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues, based on all the facts and circumstances.¹⁰ However, the SEC has indicated it does not believe “the term ‘advice’ is susceptible to a bright-line definition . . . [but instead] can be construed broadly, and that, therefore, the determination of whether a person provides advice to or on behalf of a municipal entity or an obligated person regarding municipal financial products or the issuance of municipal securities depends on all of the relevant facts and circumstances.”¹¹

Recommendation. Rule G-42 does not specifically define the term “recommendation” or the phrase “recommendation of a municipal securities transaction or municipal financial product.”¹² However, in order for a communication by a municipal advisor to be a recommendation for purposes of Rule G-42, it must, as a threshold matter, be advice and that advice must exhibit *both* a call to action and a specificity as to what municipal financial product or issuance of municipal securities the municipal advisor is advising the MA Client to proceed with (hereinafter a “G-42 Recommendation”). The MSRB emphasized in the Rule G-42 rulemaking record that there are communications that *relate to* an issuance of municipal securities or a municipal financial product, and are advice triggering many other provisions of the rule, but that do not

⁸ Exchange Act Section 15B(e)(4)(A)(i) defines a municipal advisor, other than a solicitor municipal advisor, as “a person (who is not a municipal entity or any 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”

⁹ Exchange Act Rule 15Ba1-1(d)(1)(ii) establishes an advice standard noting that, for purposes of the municipal advisor definition, advice excludes, among other things, the provision of general information that does not involve a recommendation regarding municipal financial products or the issuance of municipal securities (including with respect to the structure, timing, terms and other similar matters concerning such financial products or issues). The SEC has provided certain examples of general information, including information of a factual nature without subjective assumptions, opinions, or views, and information that is not particularized to a specific municipal entity or type of municipal entity. See SEC Adopting Release at 67479.

¹⁰ See SEC Adopting Release at 67480.

¹¹ See SEC Adopting Release at 67479; see also, Registration of Municipal Advisors Frequently Asked Questions at <https://www.sec.gov/info/municipal/mun-advisors-faqs.shtml#>

¹² In this context, the recommendation of a municipal securities transaction means the recommendation of an issuance of municipal securities.

trigger the suitability obligations of Rule G-42(d) because they are not *recommendations of* a transaction or product.¹³ For example, if the structure, timing and terms of a transaction are otherwise established and before going to market the municipal advisor advises the issuer to purchase bond insurance, this communication would be advice *relating* to the terms of the issuance of municipal securities. However, this communication would not be a G-42 Recommendation because it is not a call to action to proceed with a specific issuance of municipal securities or a municipal financial product.

Note that there may be times, depending on the particular facts and circumstances, when advice is not a G-42 Recommendation, but a subsequent communication is a G-42 Recommendation because it is a call to action to proceed with a specific municipal financial product or issuance of municipal securities based on the advice previously provided. For example, if a municipal advisor advises its MA Client on the structure and terms of an issuance of municipal securities that the MA Client should consider for its next financing, and several months later, the municipal advisor advises the MA Client that it should proceed with the described issuance, the later call to action is a G-42 Recommendation and the prior advice on the structure and terms of the issuance is the basis for that G-42 Recommendation. Accordingly, in this example, the municipal advisor's obligation to undertake a reasonable investigation to determine that it is not basing any recommendation on materially inaccurate or incomplete information and make a suitability determination, would include an analysis of the structure and terms because it was embedded in the G-42 Recommendation as the basis for the call to action.¹⁴

2. How does one determine when a municipal advisor's "advice" constitutes a G-42 Recommendation?

Determining whether advice constitutes a G-42 Recommendation requires a two-pronged analysis. First, does the nature and specificity of the advice to or on behalf of the MA Client include elements generally present in a communication considered a "call to action" aimed at a specific client; and second, is the municipal advisor advising the client to proceed with a specific municipal financial product or issuance of municipal securities.

There may be instances where, under SEC rules, the advice given by a municipal advisor may be characterized as a recommendation, but the advice given would not constitute a G-42 Recommendation because it does not meet both prongs of the two-pronged analysis — a call to action aimed at a specific client; and advising the client to proceed with a specific municipal financial product or issuance of municipal securities. For example, a communication by a municipal advisor to an MA Client advising the MA Client to review and consider three alternative offerings that may provide a model for the MA Client's next issuance could constitute advice under SEC rules and, therefore, advice for purposes of Rule G-42. However, even though the communication in the example may include a call to action directed at the MA

¹³ See Rule filing SR-MSRB-2015-03, 80 FR 26752 (May 8, 2015) (Notice of filing of proposed rule change regarding proposed new Rule G-42 and proposed amendments to Rule G-8) ("Initial Rule Filing") at 26756.

¹⁴ See *e.g.*, Rule G-42, Supplementary Material .01, Duty of Care.

Client, the communication does not meet both prongs of the two-pronged analysis set forth above. That is, the advice is not a call to action to proceed with a specific municipal financial product or a specific issuance of municipal securities and, therefore, the advice would not constitute a G-42 Recommendation.

3. How can a municipal advisor determine if advice given to or on behalf of an MA Client includes a “call to action”?

The MSRB has previously issued guidance to dealers with respect to their obligations on suitability of recommendations in MSRB Notice 2002-30, which provides general principles for determining whether a dealer’s communication to a customer constitutes a recommendation.¹⁵ The MSRB explained in the Rule G-42 rulemaking record that those same principles are adopted for municipal advisors in determining whether advice to an MA Client reasonably would be viewed as a call to action to the client to proceed with an issuance of municipal securities or enter into a municipal financial product.¹⁶

For example, the dealer guidance provides that, “the test for determining whether any communication . . . constitutes a recommendation . . . requires an analysis of the content, context, and presentation of the particular communication or set of communications” and to conduct such an analysis, one should examine “the underlying substantive information transmitted to the customer and consideration of any other facts and circumstances, such as any accompanying explanatory message.”¹⁷

The dealer guidance also provides that “in general, the more individually tailored the communication is to a specific customer . . . about a security or group of securities, the greater the likelihood is that the communication may be viewed as a recommendation” and whether, “given its content, context, and manner of presentation – a particular communication from a dealer to a customer reasonably would be viewed as a ‘call to action,’ or suggestion that the customer engage in a securities transaction.”¹⁸ These principles are equally applicable to municipal advisors for determining whether advice rises to the level of a G-42 Recommendation.

4. How can a municipal advisor determine if advice to or on behalf of an MA Client includes advice to proceed with a specific municipal financial product or issuance of municipal securities?

For advice to be considered a G-42 Recommendation, it must exhibit both a call to action and a specificity as to what the municipal advisor is advising the MA Client to proceed with – a *specific* municipal financial

¹⁵ [MSRB Regulatory Notice 2002-30 \(September 25, 2002\)](#) (“dealer guidance”).

¹⁶ See Initial Rule Filing at 26755-26756 and n. 18 (regarding call to action), at 26771-26772, 26775, 26776 (regarding suitability analysis). MSRB Response to Comments, dated December 16, 2015, p. 54 (regarding call to action and other general principles for determining whether a particular communication constitutes a recommendation).

¹⁷ MSRB Regulatory Notice 2002-30 (September 25, 2002).

¹⁸ *Id.*

product or a *specific* issuance of municipal securities. For example, a municipal advisor’s advice to or on behalf of an MA Client that details a specific municipal securities offering and advises the client to proceed with the offering is a G-42 Recommendation because it contains *a call to action to proceed with* a specified issuance of municipal securities.

Notably, more general advice to an MA Client that it is merely *regarding* or *with respect to* or *in connection with* a municipal financial product or the issuance of municipal securities, including with respect to the structure, timing, terms and other similar matters concerning such issuance or financial products, but is not a call to action to proceed with a specific transaction, would not be a G-42 Recommendation.¹⁹

5. Why is it necessary in understanding Rule G-42 to distinguish between providing advice and providing advice that is a call to action to or on behalf of an MA Client to proceed with a specific municipal financial product or issuance of municipal securities?

It is necessary to recognize whether the advice a municipal advisor provides includes a G-42 Recommendation because Rule G-42 imposes additional obligations on the municipal advisor when making a G-42 Recommendation.

As the MSRB stated in response to public comments during the development of Rule G-42, these additional requirements provide safeguards that are “necessary to promote the integrity of the municipal advisory relationship and protect clients from the potentially costly consequences of transactions undertaken based on unsuitable recommendations.”²⁰ These additional safeguards include the requirement, pursuant to Rule G-42(d), to undertake an analysis to determine that the G-42 Recommendation is suitable for the MA Client based on the information the municipal advisor obtained through its reasonable diligence.

Relatedly, when making the requisite suitability determination for a G-42 Recommendation, Rule G-8(h)(iv) requires a municipal advisor to maintain a copy of any document created by the municipal advisor “that memorializes the basis for any determination as to suitability.”²¹

Importantly, if the MA Client is a municipal entity, the municipal advisor’s duty of loyalty imposes a higher standard than that of suitability, as the duty of loyalty requires that the municipal advisor’s G-42 Recommendation, like all advice provided, be in the client’s best interests without regard to the financial or other interests of the municipal advisor.²²

¹⁹ See, *infra*, Scenario 1.

²⁰ See MSRB Response to Comments, dated December 16, 2015, p. 48.

²¹ This would include, when requested by the MA Client and within the scope of the engagement, the suitability analysis necessary in reviewing a recommendation of another party to determine if that recommendation is or is not suitable for the MA Client.

²² Rule G-42, Supplementary Material .02, Duty of Loyalty. See also, *infra* FAQ 9.

6. What are the obligations of a municipal advisor when making a G-42 Recommendation?

Making a G-42 Recommendation triggers the obligation to have made a suitability determination.²³ In determining suitability, a municipal advisor must have a *reasonable basis* to believe that the recommended transaction or product is suitable for the client, based on information obtained through the *reasonable diligence* of the municipal advisor. A determination of whether a municipal financial product or issuance of municipal securities is suitable must be based on numerous factors, as applicable to the particular type of client. Supplementary Material .09 provides guidance on making suitability determinations and includes a non-exhaustive list of factors a municipal advisor is required to consider in making its suitability determination; and Supplementary Material .10 provides, in part, that a municipal advisor is required to use reasonable diligence to know and retain essential facts concerning the client.²⁴

“[T]he veracity of the information on which a municipal advisor bases its recommendation can have a significant impact on the ability of a municipal advisor to make informed and suitable recommendations.”²⁵ Therefore, pursuant to its duty of care, a municipal advisor is required to undertake a reasonable determination that it is not basing a G-42 Recommendation on materially inaccurate or incomplete information.²⁶ However, a municipal advisor would not be expected to go to impractical lengths to make such a determination.²⁷

After making a suitability determination, the municipal advisor is obligated, pursuant to Rule G-42(d), to inform the client of:

- The municipal advisor’s evaluation of the material risks, potential benefits, structure, and other characteristics of the recommended issuance of municipal securities or municipal financial product;
- The basis upon which the municipal advisor reasonably believes that the recommended issuance of municipal securities or municipal financial product is, or (as may be applicable in the case of a review of a recommendation) is not, suitable for the client; and

²³ As noted above, with respect to its municipal entity clients, as opposed to obligated person clients, a municipal advisor must also ensure that its G-42 Recommendations comport with its fiduciary duty and particularly its duty of loyalty pursuant to Supplementary Material .02, Duty of Loyalty.

²⁴ See Initial Rule Filing at 26756 (discussing non-exclusive list of factors to conduct suitability analysis and know your customer requirements).

²⁵ See MSRB Response to Comments, dated December 16, 2015, p. 48.

²⁶ Rule G-42, Supplementary Material .01, Duty of Care.

²⁷ See MSRB Response to Comments, dated December 16, 2015, p. 48-49.

- Whether the municipal advisor has investigated or considered other reasonably feasible alternatives to the recommended issuance of municipal securities or municipal financial product that might also or alternatively serve the client’s objectives.

Rule G-42(d), however, does not specify the method by which the municipal advisor must inform the client. Instead, a municipal advisor has the flexibility to determine the appropriate method(s) for informing any particular client, so long as the method is consistent with the duty of care and, as applicable, duty of loyalty owed to the client. Additionally, the municipal advisor should ensure the client receives timely, full and fair notification of the material risks and benefits of the recommendation.²⁸

7. What are a municipal advisor’s obligations to present additional information about reasonably feasible alternatives?

Under Rule G-42(d)(iii), the municipal advisor is obligated to *inform* its clients *whether* it considered or investigated reasonably feasible alternatives to the G-42 Recommendation that it made to its client that might also or alternatively serve the client’s objectives. This provision does not require a municipal advisor to consider or investigate reasonably feasible alternatives, it only requires that the municipal advisor *inform* its clients *whether* it did consider or investigate reasonably feasible alternatives.²⁹ Again, a municipal advisor has the flexibility to determine the appropriate method(s) for informing any particular client, so long as the method is consistent with the duty of care and, as applicable, duty of loyalty owed to the client.

In addition, this provision does not require the municipal advisor to conduct a suitability analysis on any reasonably feasible alternative it considered or investigated or provide its client with an exhaustive list of alternative financings together with its recommendation.³⁰ Note, however, that if the scope of the municipal advisor’s engagement with the client provides that the municipal advisor will undertake to consider or investigate reasonably feasible alternatives to a recommendation, the municipal advisor would be obligated to take additional steps or present additional information to the client about any reasonably feasible alternatives the municipal advisor has considered.

²⁸See Initial Rule Filing at 26775.

²⁹ See Rule filing SR-MSRB-2015-03, 80 FR 81614 (December 30, 2015) (Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1 and Amendment No. 2, Consisting of Proposed New Rule G-42, on Duties of Non-Solicitor Municipal Advisors, and Proposed Amendments to Rule G-8, on Books and Records to be Made by Brokers, Dealers, Municipal Securities Dealers, and Municipal Advisors) at 81625.

³⁰ See MSRB Response to Comments, dated December 16, 2015, p. 55.

8. How does the duty of care apply when making a G-42 Recommendation to or on behalf of an MA Client?

The duty of care is a core principle underlying many of Rule G-42's obligations, including the making of a G-42 Recommendation. Municipal advisors must undertake a reasonable inquiry to determine that they are not basing any G-42 Recommendation on materially inaccurate or incomplete information.³¹ The municipal advisor is required to investigate the accuracy and completeness of the information using reasonable diligence, but it is important to understand that the municipal advisor need not go to impractical lengths to determine the accuracy and completeness of the information on which it bases its G-42 Recommendation.³² For example, it would be relevant to the analysis of whether a municipal advisor conducted a reasonable investigation if certain information was difficult to obtain, non-public, created or controlled by the client, or otherwise not accessible through reasonable diligence by the municipal advisor.

9. Does Rule G-42 impose additional duties and obligations on a municipal advisor when it makes a G-42 Recommendation to or on behalf of a municipal entity client as opposed to an obligated person client?

Yes, while a municipal advisor making a G-42 Recommendation to either a municipal entity client or an obligated person client must be guided by the requirements and principles contained in the recommendation-related portions of Rule G-42, the municipal advisor is subject to elevated standards as a fiduciary in its relationships with municipal entity clients as opposed to obligated person clients. A municipal advisor that makes a G-42 Recommendation to or on behalf of a municipal entity client is not only required to determine that the G-42 Recommendation is suitable based on a reasonable investigation and not based on any materially inaccurate or incomplete information, but also owes the municipal entity a duty of loyalty.³³

The duty of loyalty applies to all municipal advisory activities in which the municipal advisor engages for or on behalf of the municipal entity client. The duty of loyalty requires the municipal advisor to deal honestly and with the utmost good faith with the municipal entity client and act in the client's best interests without regard to the financial or other interests of the municipal advisor. Thus, the duty of loyalty provides an additional and more rigorous standard for municipal advisors in that any G-42 Recommendation to a municipal entity client of a specific municipal financial product or issuance of municipal securities must be in the client's best interests and without regard to any of the financial or other interests of the municipal advisor.³⁴

³¹ See Rule G-42 Supplementary Material .01, Duty of Care.

³² See MSRB Response to Comments, dated December 16, 2015, p. 48-49.

³³ See Rule G-42 Supplementary Material .02, Duty of Loyalty.

³⁴ See Initial Rule Filing at 26755, n. 17 (regarding the duty of loyalty).

10. What are the duties and obligations related to recordkeeping under MSRB Rule G-8, on books and records, when a municipal advisor makes a G-42 Recommendation?

Additional obligations under Rule G-8, on books and records, may be triggered when a municipal advisor makes a G-42 Recommendation. Recognizing that G-42(d) requires a municipal advisor to make a suitability determination before making a G-42 Recommendation, Rule G-8(h)(iv), in part, requires a municipal advisor to maintain a copy of any document created by the municipal advisor “that memorializes the basis for any determination as to suitability.”

It is important to remember that a municipal advisor has obligations to maintain and preserve books and records pursuant to the Act beyond its obligations under Rule G-8. Specifically, SEC Rule 15Ba1-8(a)(4) under the Act requires a municipal advisor to maintain a copy of any document created that was material to making a recommendation to an MA Client or that memorializes the basis for that recommendation. This obligation would, therefore, be applicable, but not limited, to a G-42 Recommendation.³⁵

11. If a client requests that a municipal advisor review a third party’s recommended municipal financial product or issuance of municipal securities, is it considered a G-42 Recommendation when the municipal advisor informs the client whether the third party’s recommended product or issuance is, or is not, suitable?

No, so long as the communication is limited to the municipal advisor informing the client, after conducting the review required pursuant to Rule G-42(d), that the third party’s recommended municipal financial product or issuance is, or is not, suitable. In that case, the communication, although most certainly advice, would not be a G-42 Recommendation.

Nonetheless, apart from the permissibility to conclude that the third-party recommendation is not suitable, a municipal advisor reviewing and evaluating a third-party recommendation is subject to all of the same requirements as a municipal advisor making a G-42 Recommendation. The municipal advisor must conduct a suitability analysis, which requires fulfillment of the duties and obligations in Rule G-42 related to suitability, know your client, the duty of care and, if applicable, the duty of loyalty.

In addition, Rule G-8(h)(iv) requires a municipal advisor to maintain a copy of any document created by the municipal advisor that was material to its review of a recommendation by another party and, to the extent such document does not also memorialize the basis for determining whether the third-party recommendation is or is not suitable for the MA Client, a copy of any document created by the municipal advisor that memorializes the basis for the suitability determination.

³⁵ As noted above, a G-42 Recommendation is unique in that it is advice that includes a call to action to proceed with a specific municipal financial product or issuance of municipal securities. Advice that lacks specificity regarding a municipal financial product or issuance of municipal securities may, nevertheless, rise to the level of a recommendation for purposes of the Act and records relating to such recommendation would be required to be maintained according to Rule 15Ba1-8(a)(4).

12. When reviewing a third party's recommended municipal financial product or issuance of municipal securities, is it a G-42 Recommendation when the municipal advisor provides an alternative?

If a municipal advisor informs a client on the suitability of a third party's recommendation and also advises the client on one or more alternative municipal financial products or the issuance of municipal securities, such communication could be, depending on the characteristics of the advice, a G-42 Recommendation.

If a municipal advisor advises a client that the third party's recommended municipal financial product or issuance of municipal securities is suitable and merely identifies one or more alternatives that it also believes are worth considering, the municipal advisor has not made a G-42 Recommendation because the municipal advisor's advice did not include a call to action for the client to proceed with a specific municipal financial product or issuance of municipal securities. If, however, the municipal advisor determines that at least one option, such as the third party's recommended transaction, is suitable, and advises the client to proceed with the third party's recommended transaction, then that advice would be a G-42 Recommendation.

Scenarios illustrating when a municipal advisor does or does not make a Rule G-42 Recommendation of a municipal financial product or an issuance of municipal securities

Scenario 1

A municipal advisor is hired to advise a city regarding the possible issuance of municipal securities. The city is struggling financially and has been for at least 15 years. During the prior five-year period, the city was advised by another municipal advisor and, based on the prior municipal advisor's advice, issued municipal securities three times. The city informs the current municipal advisor that the city is having difficulty servicing this debt. As part of its engagement, the municipal advisor reviews the city's financial management plan and prior issuances and informs the city that its prior decision to repay most of its outstanding debt over a 10-year period may not have been optimal. In the analysis, the municipal advisor notes that one of the prior bonds issued is currently callable, interest rates remain low, and the city may wish to restructure its debt to lengthen the stream of debt service payments to make debt service more manageable.

Analysis: Under Rule G-42, the statements that the municipal advisor included in its analysis of prior bond issuances and the city's total outstanding obligations to investors do not rise to the level of a recommendation. The statements are responses to the city's request for municipal advisory services, and although the communication is particularized to the specific needs, objectives or circumstances of the municipal entity, the statements do not include a call to action to the city to proceed with a specific municipal securities issuance or a municipal financial product. If the communication had included affirmative statements to proceed with a specific issuance (*e.g.*, "In my view, the city should restructure its debt"), the communication would have been a G-42 Recommendation. As "advice," the communication triggers Rule G-42 generally, but does not trigger the additional duties and obligations, such as the obligation to make a suitability determination, that apply when a municipal advisor makes a G-42 Recommendation.

Although the advice is not a G-42 Recommendation, in advising the city, the municipal advisor is required to act in the municipal entity client's best interest without regard to the financial or other interests of the municipal advisor. In addition, even in the case of advice that falls short of being a G-42 Recommendation, a subsequent communication that does meet the requirements described here to be a G-42 Recommendation, might, at that time, require analysis of a subject that was addressed in previous advice.

Scenario 2

A municipal advisor is retained by a school district, which is a municipal entity, to advise the school district on all aspects of a new bond issuance. Shortly after being hired, a junior employee of the municipal advisor prepares a document that identifies past issuances of municipal securities (excluding very small issuances) offered by school districts of approximately the same size as the school district, located in the same state as the school district, and subject to the same restrictions and legal requirements. In addition, the basic terms of each issuance are summarized. At one of the initial meetings, the senior municipal advisor summarizes the terms of three of the offerings identified by the junior employee. The senior municipal advisor concludes her presentation to the school district, noting that in the current market, investors continue to accept the coupon and other terms as used in the prior three issuances, and she would expect the offering under discussion to provide similarly favorable results for the school district. The municipal advisor concludes her remarks stating, "I wanted to present this information to you today to obtain your preliminary reactions, but I have not finished my review of all options and I'd like to meet again later to discuss my conclusions."

Analysis: Although the municipal advisor discussed one or more offerings and advised the client of three offerings that may provide a model for the school district's next issuance, the municipal advisor did not recommend a specific municipal securities transaction with this communication. Consistent with the approach in the case of dealers, an important factor in determining whether a communication is a G-42 Recommendation is whether the municipal advisor's communication to its client could reasonably be viewed as a "call to action" to proceed with a specific municipal securities transaction or a specific municipal financial product. The communication described here was made about, and in, the preliminary stages of developing a plan to issue municipal securities for the school district and is not a "call to action." Moreover, the municipal advisor accompanied the communication with an explanation that she provided the information to begin a discussion and that she had not completed a review. As noted earlier, although all facts and circumstances surrounding any communication from a municipal advisor to the client must be considered, communications by a municipal advisor to a client that concern preliminary matters, such as those described above, or minor or ancillary matters that relate to, but are not calls to action to proceed with, a municipal securities issuance or a municipal financial product are not G-42 Recommendations.

Note that even in the case of advice that falls short of being a G-42 Recommendation, a subsequent communication that does constitute a G-42 Recommendation requiring a suitability analysis, depending on the particular facts and circumstances, might, at that time, require analysis of a subject that was addressed in previous advice. Also, note that because the client is a municipal entity, the municipal advisor is required to act in the client's best interest without regard to the municipal advisor's financial or other

interests, whether providing advice or making a recommendation or otherwise providing municipal advisory services.

Scenario 3

A municipal advisor has entered into a multi-year engagement with a city and periodically provides advice to the city. The city gives the municipal advisor a list of infrastructure improvements and new projects the city wants to undertake, which the city estimates will require \$40 million in financing to complete. The city asks the municipal advisor to provide a five-year plan that will allow the city to undertake the projects and not subject the city's residents to a property tax increase, or to limit a property tax increase to no more than \$50, on average, per homeowner. The municipal advisor presents a five-year plan to the city that includes a discussion of the city's requirements and concludes that to finance the projects having the highest priority and to stay within the mandate not to increase property taxes by more than \$50 per homeowner, only \$20 million bonds may be issued in the next five years. The plan also informs the city that it should issue five municipal bond offerings during the five-year period, specifying when each issuance should occur, and for each municipal security to be offered, the structure to be used, and other terms. The City Council approves the five-year plan.

Analysis: In the five-year plan, the municipal advisor has provided advice to the city and also made G-42 Recommendations. The statements regarding the five municipal bond offerings constitute G-42 Recommendations because the municipal advisor's statements were, as to each offering, a call to action regarding a specific municipal securities issuance. That is, the municipal advisor communicated to the city that it should make the issuances and described specific bonds, including when they should be issued, the structure to be used and other terms.

Scenario 4

The same municipal advisor described in Scenario 3 is called by the city 18 months after the City Council approves the five-year plan with a schedule for five bond offerings. The municipal advisor is asked to assist with an additional financing that the city has determined must be concluded in the last quarter of the current year. The city also informs the municipal advisor that the city has determined the structure and amount of the bond offering and will privately place the debt with a particular bank. The municipal advisor agrees to assist with the issuance and agrees with the city to limit the scope of the engagement to matters that have not already been decided by the client. The municipal advisor has several meetings with the city and provides advice only regarding aspects of the bond sale not previously decided by the city, such as how similar bonds have priced recently, but does not provide advice on matters that were previously decided by the city, such as the identity of the investor (the bank), method of sale (a private placement), structure, timing and amount.

Analysis: The municipal advisor has not made a G-42 Recommendation to the city. The city dictated the structure of the municipal securities to be offered, their timing and to whom the municipal securities would be sold. None of the actions undertaken or the communications made by the municipal advisor regarding the aspects of the offering not previously decided by the city constitute a call to action to proceed with a specific issuance of municipal securities or municipal financial product, though these actions or communications may constitute advice. In the alternative, if the municipal advisor had not limited the scope of the engagement, but rather had discussed how similar bonds had priced recently and

also urged the city to move forward with the private placement at the agreed-upon price, the municipal advisor would have made a G-42 Recommendation because it gave advice that was a call to action to proceed with the specific issuance of municipal securities. As a result of the unlimited scope of the engagement, the municipal advisor would be required to fulfill its suitability obligations with respect to the full recommended transaction.

Scenario 5

A municipal advisor has a multi-year engagement with a county and periodically provides advice to the county. The County Board of Supervisors is contemplating several projects and asks the municipal advisor to advise it of the impact on property taxes, if the county issued, in the next year, \$8 million, \$10 million or \$18 million in municipal securities. The municipal advisor makes the calculations and advises the County Board of the approximate additional tax burden to the average resident of the county for each possible issuance amount.

Analysis: The municipal advisor's communication with the County Board may be advice regarding the potential impact that issuing municipal securities of three different sizes may have on the county's taxpayers, but it is not a G-42 Recommendation. The municipal advisor's communication may be considered advice in that it addresses a future issuance of municipal securities. However, even if advice in connection with a possible future bond offering, the communication is not a G-42 Recommendation because it is not a call to action to proceed with a specific issuance of municipal securities.

Scenario 6

A municipal advisor has a multi-year engagement with a county and periodically provides advice to the county. The County Board is contemplating several projects and asks the municipal advisor to assist it in structuring a municipal securities offering that will allow the county to borrow \$30 million dollars over 30 years. The municipal advisor presents a document to the County Board detailing the structure and certain terms of a municipal securities offering that the municipal advisor believes is in the best interests of the county. The communication was developed based on information about the county the municipal advisor obtained through its reasonable diligence, and includes a thorough profile of the county, conservative financial projections regarding revenues to be obtained from the completed projects and other information consistent with the municipal advisor's obligations under Rule G-42.

The County Board votes to proceed with the offering. In subsequent meetings with the County Board, the municipal advisor states to county officials that certain risks to investors should be clearly and thoroughly documented and discussed in the offering statement. The County Board agrees and asks the municipal advisor to provide a summary insert for the offering statement, outlining the risks the municipal advisor brought to the county's attention. The municipal advisor's draft summary would be reviewed, supplemented and revised by underwriter's counsel prior to inclusion in the offering statement.

Analysis: In this case, the municipal advisor made a G-42 Recommendation of an offering of municipal securities when, in response to the County Board's request, the municipal advisor presented the document to the County Board detailing the structure and certain terms of an offering of municipal securities that the municipal advisor believed was in the best interests of the county. The municipal advisor's subsequent comment to the County Board that certain risks should be clearly and thoroughly documented in the

official statement is not considered a G-42 Recommendation. Instead, such statements are likely advice with respect to an offering of a municipal security.

Additional Resources

Documents that may also be helpful to review include:

- [SR-MSRB-2015-03 - MSRB Proposed Rule Change to Adopt New Rule G-42](#) *(April 24, 2015)*
- [MSRB Response to Comments on SR-MSRB-2015-03](#) *(August 12, 2015)*
- [MSRB Response to Comments on SR-MSRB-2015-03](#) *(December 16, 2015)*
- [Securities and Exchange Commission \(SEC\) Final Municipal Advisor Registration Rule](#) *(see discussion regarding advice)*
- [SEC FAQs on Registration of Municipal Advisors](#) *(updated September 20, 2017)*