



March 10, 2014

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

RE: MSRB Draft Rule G-42

Dear Mr. Smith:

On behalf of the more than 1,500 member organizations of the American Public Transportation Association (APTA), I write to provide comments on the Municipal Securities Rulemaking Board's (MSRB) draft rule G-42 concerning the duties of non-solicitor municipal advisors, which was published on January 9, 2014.

About APTA

APTA is a non-profit international trade association of more than 1,500 public and private member organizations, including public transit systems; high-speed intercity passenger rail agencies; planning, design, construction and finance firms; product and service providers; academic institutions; and state associations and departments of transportation. More than ninety percent of Americans who use public transportation are served by APTA member transit systems.

APTA speaks for its members. Its Board of Directors reiterated that fact on March 9, 2013, when it adopted the following statement: "While APTA encourages its members to provide specific examples or impacts in support of the association's positions, APTA crafts its comments to represent those of all APTA members. The association goes to great lengths to ensure its regulatory comments represent the consensus views of our members. Every APTA member has the opportunity to review drafts, participate in discussions, and assist in crafting those consensus comments. In short, we speak with a single voice and, when the rare instance occurs that we cannot reach consensus, we do not speak at all. APTA's comments are those of our more than 1,500 members. This consensus-based method of crafting regulatory comments is a factor underlying APTA's selection as one of Washington's most trusted brands in a broad survey conducted by the National Journal and we encourage all federal agencies to recognize the representative nature of the association's regulatory comments."

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Summary Comments

As drafted, rule G-42 could effectively halt public transportation projects, most funded with assistance from the US Department of Transportation through the Federal Transit Administration (FTA). Specifically, we are concerned that the Federally-mandated planning process that supports decision making leading to the issuance of securities (the work that engineering firms do) is being viewed by MSRB in the same context as the marketing of specific securities (the work that underwriters, investment bankers, and independent financial advisors do). For that reason, we request activities conducted by engineering and consulting firms pursuant to public transportation planning and oversight under the provisions of Title 49, United States Code, Chapter 53, be deemed “engineers providing engineering advice” and specifically exempted from coverage under the rule.

Financial Planning Associated with Public Transportation Investments

It has long been a practice of FTA to rely upon transportation planning professionals – and not municipal advisors – for financial analysis in the planning process leading up to (but not including) the issuance of debt.

FTA’s expectations regarding the level of detail and integration between engineering, transportation planning, and financial planning is well-documented and long standing. FTA’s involvement, through its Office of Planning, began in the mid-1970s on the Washington Metrorail Alternatives Analysis and the early 1980s in several other Alternatives Analyses (e.g., Houston, Miami) and other major investment projects. FTA was particularly concerned with the ability of project sponsors to develop realistic, well-documented financial projections that demonstrated their capacity to not only construct and operate the proposed projects but also to continue – over the long-term – to operate the underlying existing transit services and renew and replace the assets that supported those services. Among its concerns was the internal consistency among the various inputs to the financial plans (e.g., that the same demographic projections were applied to project ridership and fare revenue as well as dedicated tax revenue; that the same level of service projections were applied to project ridership and fare revenue as well as operating and maintenance cost; that the average fare paid per passenger – and future increases – applied in the projection of fare revenue were applied to project ridership). Understanding these internal consistencies and the integration of the highly technical results of the planning and engineering disciplines demanded that this work be executed by transportation planning professionals.

From the late 1980s through the early 2000s, FTA developed its New Starts planning process and specific requirements for the development of financial plans. These requirements emphasized the integration of engineering, travel demand modeling, urban planning, environmental planning, and financial planning.

By the late 1980s, FTA engaged engineering and consulting firms subject to the municipal advisor rule to develop and teach courses on financial planning for major transit investments. Subsequently, under contract to FTA’s grantee, the National Transit Institute (NTI), firms now subject to the rule have developed and delivered the NTI course on “Financial Planning in

Transportation.” The audience for that course includes transit agencies, metropolitan planning organizations, and state departments of transportation.

Specific FTA Requirements for the Development of Financial Plans

The following documents establish the professional standards that FTA expects of its project sponsors for the development of financial plans:

- Alternatives Analysis (Corridor Planning) Financial Plans - Procedures and Technical Methods for Transit Project Planning.
http://www.fta.dot.gov/planning/newstarts/planning_environment_2396.html
See Part II, Chapter 8 Financial Planning for Transit.
- New Starts Financial Plans - Guidance for Transit Financial Plans.
http://www.fta.dot.gov/publications/reports/other_reports/publications_1336.htm
| See attachment “gftfp.pdf”
- New and Small Starts Evaluation and Rating Process Final Policy Guidance, August 2013, http://www.fta.dot.gov/documents/NS-SS_Final_PolicyGuidance_August_2013.pdf
- Full-Funding Grant Agreements Guidance Circular 5200.1A
http://www.fta.dot.gov/laws/circulars/leg_reg_4119.html. This includes several references to the depth analysis of the financial plan (e.g., Chapter II, Section 8; references to “Local Financial Commitment”).

Extent and Limits to the Scope of Work of Firms Developing New Starts Financial Plans

Engineering and consulting firms supporting project sponsors develop financial plans subject to the above noted regulations and guidance. FTA relies on those financial plans in its determination of which of many competing projects are recommended to Congress for funding. Fifty percent of the evaluation score FTA assigns to projects during its review is based on “financial commitment,” which is evidenced by the financial plans.

It should be noted that FTA does not intend the financial plans developed to satisfy its evaluation and oversight functions to be applied to support the actual issuance of a particular security, nor are they suited for that purpose. FTA’s intent is solely to support the planning process leading to the federal commitment to proceed with a project. Once that commitment is reached, engineering and consulting firms step back and independent financing advisors step forward to prepare the financial plan that is actually presented to investors. An example of this kind of “hand-off” was the development of the financial plan for the New Starts submission of the San Francisco Municipal Transportation Agency (SFMTA). The financial plan was initially developed by an engineering firm and SFMTA used the results of that financial plan in its New Starts submissions to FTA. Once SFMTA committed to the plan, they engaged their independent financial advisor to prepare the financial plan that was the basis for the actual issuance of debt.

Long-Term Perspective of New Starts Financial Plans

The financial planning work examines specific funding sources, typically dedicated taxes and the timing and rates of taxation necessary to support the issuance of debt to fund the projects examined. These analyses include cash flow analyses (with a 20- to 30-year planning horizon), including consideration of alternative forms of short- and long-term debt financing. These cash flow analyses typically address alternative project implementation schedules within the context of uncertainty with respect to project cost, inflation and interest rates, ridership and market response to fare increases, dedicated non-federal funding, and the level and timing of federal grant funding. FTA expects that financial plans submitted that include debt financing be able to demonstrate that the financial tests applied by the project sponsor (e.g., debt service coverage) be consistent with issuance of prior debt or meet conventional expectations of the capital market.

In most cases, the financial plans submitted to FTA address the entirety of the financial obligations of the project sponsor. The capital needs addressed include not only the proposed New Starts project, but also the continuing infrastructure renewal and replacements needs of the project sponsor, the cumulative cost of which – over the analysis period – typically exceeds the construction cost of the New Starts project. As a result, these financial plans project the need for multiple (possibly annual) debt issuances throughout 20- to 30-year planning horizon. This long-range perspective greatly surpasses the relatively narrow intent of the rule which appear to focus solely on a specific near-term financing.

FTA Does Not Expect Third Parties to Rely on New Starts Financial Plans

Some of the firms previously engaged in preparing financial plans responding to FTA regulation and guidance are or were associated with Certified Public Accounting firms. Such firms followed the professional Prospective Financial Reporting Guidelines of the American Institute of Certified Public Accountants (AICPA) and these guidelines have implicitly become integrated within FTA expectations for standards of practice. In particular, the AICPA Guidelines fundamentally distinguish between prospective financial reports which are for internal use only (that is, financial planning studies) and prospective financial reports which are relied on by third parties (that is reports which are included in the Offering Statements or Official Statements (OSs) associated with the issuance of securities). The standards and disclosure requirements with regard to prospective financial reports which are relied upon by third parties (that is, investors) are and should be far more stringent than the corresponding requirements for internal use only reports. FTA did not and does not expect that the financial plans developed to support its regulations and guidance rise to the standards of financial plans to be relied upon by third parties.

FTA Expects Consideration of Alternative Forms of Financing in New Starts Financial Plans

FTA has advocated specific alternative forms of financing (e.g., TIFIA loans) and alternative forms of project delivery. FTA and its sister agency, the Federal Highway Administration (FHWA) funded the development of state-of-the-practice reports regarding financing, including:

- “Financing Capital Investment: A Primer for the Transit Practitioner Public-Private Partnerships.” Transit Cooperative Research Program, Report 89, 2003, http://onlinepubs.trb.org/Onlinepubs/tcrp/tcrp_rpt_89a.pdf
- National Cooperative Highway Research Program. “Future Financing Options to Meet Highway and Transit Needs.” Web-only Document 102. December 2006. http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_w102.pdf

These reports were intended to provide project sponsors with financing options. While FTA makes no demands that such financing structures be implemented, it encourages project sponsors to consider such options. FTA has been satisfied that the engineering and consulting firms that the project sponsors engaged to prepare financial plans have adequately addressed such options.

FTA specifically does not consider the financing structure applied in the New Starts financial plan submitted to FTA as a “recommendation.” It recognizes that the ultimate decision about the structuring of the debt will depend upon the future financial condition of the project sponsor and capital market conditions, which may change subsequent to the development of financial plans submitted to FTA.

Failure to Exempt These Services from Coverage Under Rule G-42 Would Create a Conflict of Interest for Engineering Firms

The draft rule states: “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.” A duty of loyalty requires a municipal advisor to deal honestly and in good faith with the municipal entity and to act in the municipal entity’s best interests without regard to financial or other interests of the municipal advisor. While this duty may not, in the normal course of events, cause any conflicts for engineers, there are circumstances when such duties could come into direct conflict with the engineer’s professional and ethical responsibilities.

As extensively explained by our colleagues from the American Council of Engineering Companies (ACEC), engineering is heavily regulated by state boards of engineering, and is founded on the assessment of professional credentials and personal integrity as a condition of licensure. The regulations of the various state licensing boards for professional engineers delineate the ethical duty of the engineer to uphold the safety, health, and welfare of the public. For example, the Commonwealth of Virginia’s Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers, and Landscape Architects’ current regulations, which have the force and effect of law, provide as follows:

The primary obligation of the professional is to the public. The professional shall recognize that the health, safety, and welfare of the public are dependent upon professional judgments, decisions, and practices. If the professional judgment of the professional is overruled under circumstances when the health, safety, and welfare, or any combination thereof, of the public are endangered, the professional shall inform the employer and client of the possible consequences and notify appropriate authorities.

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The same obligation is reflected in the codes of ethics of private professional associations such as ACEC and the National Society of Professional Engineers (NSPE), as well as related professional associations such as the American Institute of Architects (AIA) and the American Society of Civil Engineers.

In the course of providing the services described above to public transportation project sponsors, it is conceivable that circumstances could arise in which the engineer would find himself or herself facing a conflict between breaching the fiduciary obligations of a municipal advisor and violating the ethical obligations imposed upon the engineer under applicable state licensing board regulations and/or one or more professional associations. These conflicting ethical obligations would create a Hobson's choice for these professionals and their firms.

Faced with Impossible Choices, Engineering Firms Could Elect to Withdraw from the Public Transportation Market Altogether

The number of engineering firms with the necessary skill set to undertake public transportation project planning under the FTA's extensive New Starts program framework is quite limited and the universe of transit projects relatively small. Financial analysis, as described above, is an integral part of that planning process and cannot reasonably be separated from the myriad other tasks. With the threat of conflicting professional obligations, draft rule G-42 could effectively force those firms from our limited market.

We appreciate the opportunity to assist in this important rulemaking. For additional information, please contact James LaRusch, APTA's chief counsel and vice president corporate affairs, at (202) 496-4808 or jlarsch@apta.com.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Michael P. Melaniphy".

Michael P. Melaniphy
President & CEO

MPM/jpl