

April 20, 2018

Submitted Electronically

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street NW
Washington, DC 20005

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

Dear Mr. Smith:

On behalf of the Bond Dealers of America (“BDA”), I am submitting this letter to provide comments to the MSRB’s Regulatory Notice 2018-03 (Request for Input on Draft Frequently Asked Questions Regarding Rule G-42 and the Making of Recommendations) (the “Notice”). BDA is the only DC-based group representing the interests of securities dealers and banks focused on the U.S. fixed income markets. We welcome this opportunity to present our comments.

The BDA believes that the scenarios presented in the Notice do not provide meaningful guidance and create ambiguities.

The BDA believes that the scenarios in the Notice are too general or too simple to provide meaningful guidance and they contain a number of questions concerning the exact facts in the scenarios. None of the scenarios involve “real world” factual problems where our members actually deal with difficult interpretative questions. In addition, several of the scenarios contained interpretative questions concerning the exact underlying facts that substantially eroded away their value. In reviewing the scenarios, we doubt that the MSRB would be able to present a set of scenarios that deal with difficult-enough and meaningful fact patterns without creating more questions than answers. Accordingly, we believe that the Notice accomplishes its purpose without the scenarios and we would recommend deleting the scenarios for these reasons.

The BDA believes that the Notice needs to more clearly explain that it is not intended to interpret the SEC’s FAQs or Municipal Advisor Rule.

The BDA believes that the Notice needs to be clearer in that it solely interprets the term “recommendation” for Rule G-42 and is not intended to interpret or clarify the way that the SEC uses the same term in the FAQs and the Municipal Advisor Rule. In fact, the SEC broadly uses the concept of an implied recommendation as part of the definition of “advice” in the FAQs which, as we discuss in the next comment, is not how recommendation should be interpreted for purposes of Rule G-42. We believe that the Notice needs to be very clear that the MSRB is solely interpreting the term “recommendation” in Rule G-42, clearly address the fact that the same word is used both in the SEC’s FAQs and Municipal Advisor Rule, and be clear that the Notice is not intended to address any of the SEC statements.

The MSRB should consider adding clarification that there is no concept of “implied recommendation” like that under broker-dealer rules.

The BDA believes that the MSRB should provide a section of the FAQs that provides specific guidance that there is no concept of implied recommendation under the MSRB’s municipal advisor rules. Under general broker-dealer principles, dealers can be implied to make a recommendation to an investor to purchase securities merely by selling those securities to the investor. In addition, the SEC uses the concept of implied recommendation in its FAQs. Under Rule G-42, however, as the MSRB implies in the Notice, a municipal advisor is not deemed to make a recommendation merely because the municipal advisor participated in a municipal securities issuance. As the MSRB explains in the FAQs, a recommendation requires specific, affirmative actions by a municipal advisor and mere participation in the transaction does not suffice.

While the BDA is appreciative of the opportunity to review and comment on the Notice, the BDA continues to believe that the MSRB should follow a formal interpretative guidance process for these kinds of advisories.

The BDA appreciates that the MSRB has afforded the industry an opportunity to review and provide comments to the Notice. As we mentioned in our comment letter to the MSRB’s request for comment relating to advisories, the BDA strongly believes that the MSRB should follow a formal interpretative guidance process to ensure that the legal standing of the FAQs is clear. As we mentioned in our earlier letter, the informal process of advisories can place municipal advisors in a difficult situation – believing that they should respond to more restrictive informal guidance but also believing that they cannot rely on more permissive guidance because the informal advisory does not have the force and effect of law. Accordingly, we continue to urge the MSRB to consider using the formal interpretative guidance process for the FAQs and other advisories.

* * *

Thank you for the opportunity to provide these comments.

Sincerely,

A handwritten signature in blue ink that reads "Michael Nicholas". The signature is written in a cursive, flowing style.

Michael Nicholas
Chief Executive Officer