

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



C F X I N C O R P O R A T E D

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April 16, 2018

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

Re: MSRB Notice 2018-03

Dear Mr. Smith:

cfX Incorporated (“cfX”) appreciates the opportunity to offer input on the draft frequently asked questions for MSRB Rule G-42 published in Notice 2018-03.

Draft question 6 asks “What are the obligations of a municipal advisor when making a G-42 Recommendation?” The answer describes two obligations: 1. to have made a suitability determination, and 2. subsequently to inform the client.

cfX advises sophisticated municipal entities who have significantly experienced and knowledgeable staff. We often make several G-42 Recommendations to a client each year under ongoing engagement. Our written supervisory procedures implemented pursuant to Rule G-44 ensure no Rule G-42 Recommendation is made without a prior suitability determination, and that a written explanation of the basis for such determination is preserved pursuant to Rule G-8. cfX’s written supervisory procedures then require an offer be made to inform the client of the basis for this determination pursuant to Rule G-42d(ii).

As cfX’s municipal entity clients are highly knowledgeable with regard to complex municipal securities transactions, and know that a suitability determination is a precondition for all of our G-42 Recommendations, they may not desire to be informed of the basis for our determination. Time, cost or other concerns may lead a municipal entity to conclude that it is unnecessary for cfX to provide such information in connection with some or any municipal securities transactions. A client may not believe that being informed of our rationale is necessary for their own independent determination.

Do municipal entities have the right to waive, by contract or otherwise, the requirement that municipal advisors inform them of the basis for a suitability determination under Rule G-42(d)(ii)? Would a municipal advisor be permitted under Rule G-42(c) and



Supplementary Material .04 to enter into a contract that relieves the G-42(d)(ii) obligation to inform? Can a municipal advisor fulfill its responsibilities under G-42 by properly reaching a suitability determination and maintaining the relevant records, even if the client elects not to be informed with respect to a particular G-42 Recommendation? cfX asks that this matter be addressed in the question 6 response or elsewhere. Thank you.

Sincerely,

Benjamin Madorsky
Chief Compliance Officer

Comment on Notice 2018-03

from Kim Wyatt, Kensington Capital Advisors

on Thursday, February 22, 2018

Comment:

Thank you for the opportunity to make comments on the draft Frequently Asked Questions Regarding Rule G-42 and the Making of Recommendations. In the draft question 10, there is a discussion of the recording keeping requirements under Rule G-8 as it relates to recommendations.

Specifically, footnote 35 states that "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)."

I propose that the MSRB add detailed commentary regarding the definition of a recommendation for the recordkeeping purpose of Rule 15Ba1-8(a)(4) as a comparison to the definition of a G-42 Recommendation. The detailed commentary would be helpful in ensuring that Municipal Advisors accurately define and preserve documents that are material to making a recommendation. This commentary could be placed within the resources for Rule G-8 and/or G-42.

Thank you.
Kim Wyatt



**Comments of National Association of Health and Educational Facilities Finance
Authorities (Notice 2018-03)
April 16, 2018**

The National Association of Health and Educational Facilities Finance Authorities ("NAHEFFA" or the "Association") appreciates the opportunity to comment on Notice 2018-03 -- Request for Input on Draft Frequently Asked Questions Regarding Rule G-42 and the Making of Recommendations-- as it applies to municipal advisors who are contracted by conduit issuers or conduit borrowers.

NAHEFFA is a national association of mostly statewide tax-exempt bond issuing authorities which are created and empowered by state laws and recognized by the Internal Revenue Code. A primary purpose of these authorities is to provide conduit financing for nonprofit healthcare and education institutions and other charities. NAHEFFA's mission is to support access to readily available, low-cost capital financing options for these institutions. The Association promotes the common interests of its member organizations and seeks to enhance the effectiveness of such organizations and their programs. The Association focuses its efforts on issues which directly influence the availability of, or access to, financing options, including tax-exempt financing, for health and educational institutions.

NAHEFFA supports the mission of the MSRB and specifically supports the MSRB federal regulation of municipal financial advisors.

We filed comments on March 10, 2014 related to then draft Rule G – 42, MSRB regulatory notice 2014 – 01. In those comments, we raised several issues specific to the conduit financing structure and the use of Municipal Advisors (“MAs”) in that context by issuers and borrowers. Most of the issues that we presented were left unaddressed in the final rule.

We appreciate that MSRB invited us to renew these concerns. On November 30, 2016, we requested written guidance that would clarify for our members, our borrowers, other conduit issuers and borrowers and municipal advisors throughout the United States that our understanding of G – 42 is correct, allowing for the continuation of flexible and highly productive arrangements to the mutual benefit of borrowers and issuers.

Our request for guidance revolved around ensuring (i) the ability of an Authority's municipal advisor to advise the borrower in conduit financing transactions, (ii) the ability of a conduit borrower's municipal advisor to advise the Authority in conduit financing transactions, and (iii) that the borrower and an Authority can use the same municipal advisory firm. As a foundation, we believe that for these scenarios to work within the regulatory regime, the MA must make full disclosures to both parties.

**Comments of National Association of Health and Educational Facilities Finance
Authorities (Notice 2018-03)
April 16, 2018**

About eight months later, on, July 13, 2017 guidance was issued. <http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-42.aspx?tab=2>. Unfortunately, as we have discussed with MSRB, we and our advisors have not found the guidance useful. The guidance is more in the nature of a list of obvious, relevant considerations than a clear path forward on the use of MA's in our sector. Further, as we also have noted in informal and formal comments to the MSRB, the process of developing the guidance would have benefited greatly from outreach to the many conduit issuers and other groups, besides our own, through a regular notice and comment process.

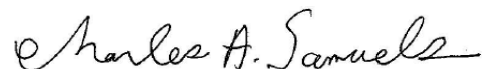
Now, clearly based on a significant amount of work, the present notice was issued. Draft FAQ 9 is specifically directed at conduit issuers and notes the different obligations that MA's have to nongovernmental borrowers (obligated persons) and governmental issuers or borrowers. Yet, surprisingly, there is no mention of the existing guidance, which is still on the MSRB website, either in this FAQ or anywhere else in the document. <http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-42.aspx?tab=2>.

This raises the question whether that guidance is still considered to be relevant and valid. If it has been withdrawn as a practical or technical matter -- which we would support because it is not particularly useful -- the MSRB should make this clear in this FAQ. If it is not withdrawn and is still applicable, then surely it should be referenced in FAQ 9 and perhaps elsewhere in the document and its learnings used to answer some of the questions.

We suggest that the MSRB use the opportunity of the FAQ to either integrate this existing guidance with the FAQs or make clear that it has been withdrawn. It also would be helpful to use this FAQ 9 or new questions to deal with the issues presented in our previous request for guidance so that clear answers to our outstanding questions are provided (some within the G-42 recommendations requirements for obligated persons context and some outside of that related to advice).

Thank you for providing us with the opportunity to comment on these important issues.

Respectfully submitted,



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April 16, 2018

Mr. Ronald W. Smith, Corporate Secretary
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RE: MSRB Notice: 2018-03

Dear Mr. Smith:

The National Association of Municipal Advisors (“NAMA”) welcomes the opportunity to submit comments to the MSRB for Notice 2018-03. As an initial matter, we are grateful that the MSRB is accepting public comments on these FAQs and hope going forward that such action becomes routine.

NAMA appreciates the work that the MSRB has done to develop FAQs to help municipal advisors (“municipal advisor” or “MAs”) comply with MSRB Rule G-42 (“Rule G-42”) by clarifying the meaning of the term “recommendation” in the context of MSRB Rule G-42. Although the MSRB had previously stated¹ in response to comments on Rule G-42 proposals that providing a more “prescriptive” definition of recommendation was unnecessary, it has been clear from concerns raised at recent market events that a more workable understanding of the word “recommendation” is necessary specifically for purposes of MSRB Rule G-42(d). Market participants, including former MSRB Board members, have publicly raised concerns about the unrealistic compliance burdens imposed on MAs if the word “recommendation” for purposes of MSRB Rule G-42 was read as broadly as it is in other securities law contexts.

Importantly, on page 4 of the Notice the MSRB observes that “The principles discussed in this compliance resource were established in the MSRB’s regulatory filings with the SEC that were associated with the development of MSRB Rule G-42.” Given this assertion, the MSRB should characterize the FAQs as something greater than a “compliance resource.” If the principles highlighted in the FAQs were part of the regulatory record considered and approved by the Securities and Exchange Commission (“SEC”) when it approved MSRB Rule G-42, then MAs will be able to be assured that compliance with the adopted *Exchange Act* principles highlighted in the FAQs can be relied on for compliance with at least MSRB Rule G-42(d). Market participants should feel secure that principles that were articulated in the regulatory record and approved by action of the SEC (as opposed to SEC staff) – as the MSRB asserts is the case here -- can be relied on for compliance.

Before we comment on specific aspects of the FAQs we also note that the MSRB’s references to the regulatory record in this Notice highlight the fact that the MSRB sees aspects of their comment letter responses to the SEC on proposed rulemaking as principles or insights that provide important guidance or clarifications to questions that arose during the MSRB’s and SEC’s comment periods (and many would argue remain unaddressed in the actual rule text or supplemental material). If these principles or guidance contained in the “regulatory record” should be used by MAs to better understand the rulemaking or seek answers to outstanding questions, the MSRB should more prominently display these filings (and their associated principles) within the resources section of each Rule. In addition, as some of these filings are very lengthy and contain much extraneous material and

¹ <https://www.sec.gov/comments/sr-msrb-2015-03/msrb201503-44.pdf> at page 54

discussion, a key way to assist practitioners may be to flag or index the sections of the MSRB filings that articulate principles or guidance not specifically included in the rule text or supplemental material. In many cases, the additional explanations or offers by the MSRB to study or clarify matters related to the proposed rulemaking are crucial to getting the proposed rules approved by the SEC. Therefore, these aspects of the regulatory record should be more clearly available to practitioners. Further, the MSRB should provide the public with information about the role these MSRB comment letters play in understanding rulemaking and compliance in the “MSRB Types of Compliance Information” document.

Below are our comments on each FAQ and scenario (lines noted in double underline reflect the language in the Notice). Responses to the general questions asked on page 3 of the Notice can be found at the end of this letter. Overall, most of our comments relate to and support the MSRB’s articulation of a two-pronged approach to determining what constitutes a MSRB G-42 recommendation that requires both (1) a call to action and (2) a specific issuance or product.

FAQ 1

Fundamentally this FAQ is about Rule G-42(d) which does not use the term “advice.” Therefore, an extended discussion of the SEC’s definition of “advice” is not necessary and confuses the overall message of this FAQ which is about MSRB Rule G-42(d). It is enough to say that “advice” means the same as in Section 15B of the *Exchange Act* (and footnoting that municipal advisors have a fiduciary duty when providing advice to their municipal entity clients) and then get right to the discussion of what “recommendation” means for purposes of Rule G-42(d). The last sentence of the recommendation in FAQ 1 more properly belongs in FAQs 5 and 6 that talk about the rule consequences of making a G-42 recommendation and that sentence should be deleted from FAQ 1. Finally, the MSRB should clarify that mutual bond insurance is not a municipal financial product even though the municipal entity is using the proceeds of an issuance of municipal securities to purchase insurance that promises future dividends or reduced premiums to the municipal entity.

Overall for FAQ 1 we would recommend making subgroups or separate questions to address the variety of topics covered in this question.

- **How does MSRB Rule G-42 define advice and what is different in that definition from the SEC MA Rule?** MSRB Rule G-42 defines advice the same as Section 15B of the Exchange Act. 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. Accordingly, if a communication would constitute advice under the Act and rules and regulations thereunder for purposes of applying the definition of “municipal advisor,” then that communication would also be deemed advice for purposes of Rule G-42.²
- **How does the MSRB Rule G-42 define recommendation?** 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”). (see additional discussion below)

² 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. 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.”

- **What would not be considered a recommendation under Rule G-42?** There are ancillary issues related to recommendations that would not be actual recommendations for Rule G-42 purposes. 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 (advice carrying with it a fiduciary duty). 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 (or not 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 (or not 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.

In addition to a municipal advisor's G-42 recommendation requirements, it is important to remember that under G-42, municipal advisors have a duty of loyalty and duty of care to their municipal entity clients and a duty of loyalty to their obligated person clients (see further discussion in FAQ 9).

FAQ 2

This FAQ is largely repetitive of FAQ 1 and should be consolidated with the answer to “**How does the MSRB Rule G-42 define recommendation.**”

FAQ 3

On the MSRB's web site under Rule G-42, there is no reference to MSRB Notice 2002-30. Furthermore, a reading of this Notice is unhelpful in determining what is a “call to action” for purposes of municipal advisory activity. Most of the Notice uses the word “recommendation” rather than the phrase “call to action” and most of the examples involve “recommendations” of multiple securities which is not consistent with the second prong identified by the MSRB requiring specificity.

We strongly recommend that the MSRB develop similar guidance specifically for municipal advisors related to the interpretation of the phrase “call to action” instead of citing 16-year-old interpretative guidance for broker/dealers that would likely not be easily (or ever) found by municipal advisors and, even if found, does not provide workable guidance in the context of Rule G-42. Nevertheless, structurally for the FAQs it is helpful to have something that addresses the first prong of the two-pronged analysis of a Rule G-42 recommendation.

FAQ 4

The presentation of this question would be less confusing if it asked “How can a municipal advisor determine if the second prong of the Rule G-42 recommendation analysis requiring specificity is satisfied?”

FAQ 5

The question here could be simplified to “Why is it necessary to determine whether a municipal advisor has made a Rule G-42 recommendation? A lot of the answer here is duplicative of information in FAQs 1 and 6. We suggest that the MSRB focus on the requirements of Rule G-42(d) and keep ancillary discussions about advice separate and minimal.

FAQ 6

This question should be rephrased to solely discuss the issue of suitability (suggestion - What role does suitability play when making a Rule G-42 recommendation?). The next question should then be about the reasonable diligence responsibilities a MA must conduct to know their client (rephrase of FAQ8) (suggestion – What responsibilities does a MA have to conduct reasonable diligence to know and retain essential facts concerning the client?).

In answering this second question, it is notable that the MSRB cites its comment letter of December 16, 2015 to say that municipal advisors are not “expected” to go to impractical lengths to determine whether their recommendation was made on inaccurate or incomplete information. They also say that Rule G-42(d) requires a municipal advisor to give “timely, full and fair” disclosure even though this was apparently only stated in the rule filing and does not appear in the Rule G-42 rule text or Supplemental Material. These are both examples of the issue we noted earlier about the MSRB burying important clarifying points in comment letters rather than adding them to the rule text or Supplemental Material.

Additionally, the MSRB should further expand this discussion (in current FAQ 8) of what is meant by “a reasonable inquiry,” when making a recommendation and that the MA “does not need to go to impractical lengths to determine the accuracy and completeness of the information on which it basis its recommendation.”

We also note that the MSRB’s assertion in FAQ 6 about the meaning of the last sentence of Rule G-42(d) and clauses (i) to (iii) appears more broad than a plain meaning of the rule would indicate. Clauses (i) to (iii) only appear to apply to reviews of recommendations of other parties. Further the discussion in the last part of FAQ 6 is not about the definition of Rule G-42 recommendations, and should be deleted.

FAQ 7

MSRB’s statement referring to its December 16, 2015 response to comments that this provision does not require the MA to conduct suitability analysis on any reasonably feasible alternative..... unless it is part of the MA’s scope of services to the client, is important and another key element of rule guidance that has not been previously highlighted.

FAQ 8

See comments n FAQ 6.

FAQ 9

As noted above, the MSRB should focus these FAQs on the meaning of Rule G-42 recommendation and keep ancillary discussions to a minimum or separated. This question should be rephrased to “Is there any difference in the duties and obligations a municipal advisor owes when providing a G-42 recommendation to a municipal entity client versus an obligated person client?” For purposes of this question it is more accurate to state that Rule G-42(d) imposes the same general obligations on G-42 recommendations regardless of whether they are provided to a municipal entity or obligated person. As a footnote the MSRB could note that other provisions of Rule G-42 impose additional obligations but not confuse the fact that obligations under Rule G-42(d) apply uniformly regardless of the client.

As a side note the MSRB should take the opportunity to rework the “interpretative guidance” that the MSRB released on July 13, 2017 regarding non-solicitor MAs work related to obligated persons. The MSRB should consider withdrawing or significantly revising this letter which unfortunately has not proved helpful to MAs nor many obligated persons. That guidance was unfortunately much more dense than necessary and did not directly respond to the questions that were posed to the MSRB by market participants. The answer to virtually all of those questions could have been far more straightforward – yes the municipal advisor can engage in the dual

representation (with conduit issuer and conduit borrower) described provided appropriate disclosures are met and the conflict is not unmanageable or objected to by either client.

We would also like to suggest a new scenario to help address the issue of Rule G-42 recommendations for issuer and obligated person scenarios borrowing from some of the scenarios in that July 13, 2017. The guidance should indicate which (if not both) entities the MA would have been deemed to have provided a G-42 recommendation in these (direct or indirect) dual representations.

FAQ 10

The second paragraph of this response is more properly a footnote.

Scenarios

We would suggest noting in the FAQ questions the Scenario that references information relayed in the answer.

Scenario 1

We appreciate the MSRB taking the position that simply stating a municipal entity “may wish to restructure a prior bond issue” is not a Rule G-42 recommendation. Rather a municipal advisor would have to be more directive and state that in the view of the municipal advisor, the municipal entity “**should** restructure its debt.” This relatively clear line will aid municipal advisors in facilitating compliance.

Scenario 2

We appreciate the MSRB taking the position that simply presenting preliminary reactions to proposed issuances or products to a municipal entity is not a Rule G-42 recommendation. Again, this relatively clear line will aid municipal advisors in facilitating compliance.

Scenario 4

We appreciate the MSRB recognizing the reality that municipal entities may have already determined to proceed with an issuance of municipal securities or a municipal financial product and simply executing that issue or product does not constitute a Rule G-42 recommendation.

General Questions

Does the FAQ ask and answer appropriate questions relevant to MA’s compliance with Rule G-42/making recommendations?

The FAQs need to be more clear that they are only about obligations under Rule G-42(d). The document should also indicate that telling a municipal entity client NOT to go forward with a specific financing would be considered a recommendation. See comments above, especially in FAQ 1. Additionally, some of the questions should be consolidated and some are off-topic and therefore confusing.

Does the draft clearly distinguish between advice and recommendation?

This Notice does a reasonable job of articulating what constitutes a Rule G-42 recommendation that triggers additional obligations and recordkeeping requirements. Ancillary issues (outside of the core discussion of what constitutes a Rule G-42 recommendation and what obligations follow from that), such as advice under the MA Rule’s fiduciary standard should be minimized. Importantly, the Notice (and the MSRB in general) should not rely on largely inapplicable guidance relating to dealer rules to establish principles for municipal advisor specific rules.

Does this help with the understanding of the rule?

The questions should be more parsed out (see comments to FAQ 1) and clearly discuss each matter at hand rather than discuss various items in one sentence or area.

Are there additional questions that should be asked?

We have raised the issue of delineating the draft questions into further questions, and adding questions where greater clarity is needed.

Are scenarios helpful?

The scenarios are all similar in their message – is the scenario a call to action or not. We would argue that additional scenarios would be helpful to complement various issues raised by our comments and that have come forward in various educational forums including Rule G-42 responsibilities related to dual representation of obligated persons and municipal entity clients in conduit borrowings. Based on the scenarios and analysis presented we would expect the MSRB to also take the position that advising on issues such as competitive vs. negotiated sale vs. private placement is not considered to be a G-42 recommendation if the specific issuance has already been decided but rather would be considered advice from the municipal advisor.

We again appreciate the MSRB’s efforts to develop MSRB Rule G-42 FAQs related to recommendations. This FAQ is great opportunity for the MSRB to provide greater clarity about the rulemaking and with changes to solely focus the document on the definition of a Rule G-42 recommendation, it will be useful to all MAs and MA firms, especially small MA firms, which has the added benefit of helping to fulfill MSRB’s duty to small MA firms.

Finally, we would reiterate our position, shared by many other organizations, that the MSRB continue to seek public comment and dialogue with municipal market participants on its publications, guidance, rulemaking and educational efforts.

We would welcome the opportunity to discuss our comments with MSRB staff and answer any questions they may have.

Sincerely,



Susan Gaffney
Executive Director



April 16, 2018

VIA ELECTRONIC DELIVERY

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street NW Suite 1000 Washington, DC 20005

Re: MSRB Notice 2018-03: Request for Input on Draft Frequently Asked Questions Regarding Rule G-42 and the Making of Recommendations

pfm

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Dear Mr. Smith:

PFM Financial Advisors LLC (PFM¹) would like to thank the Municipal Securities Rulemaking Board ("MSRB") for providing additional clarity in the Draft Frequently Asked Questions Regarding Rule G-42 and the Making of Recommendations in MSRB Notice 2018-03 (hereinafter, referred to as the "Draft FAQs"). Throughout the development of Rule G-42 the MSRB has requested comment from the public regarding the rule in order to understand, address, and balance the concerns of market participants within the municipal securities industry with respect to establishing a new regulatory regime for municipal advisors. Accordingly, PFM appreciates and welcomes the opportunity to respond to the Draft FAQs in order to assist the MSRB in facilitating its efforts focused on providing additional guidance. PFM is an affiliate of Public Financial Management, Inc., and the combined financial advisory services business has been in operation for over 40 years, and is the top-ranked municipal advisor in the nation in terms of both number of transactions and total dollar amount according to Thomson Reuters as of December 2017.¹ Therefore, we are hopeful that our comments, grounded in a broad-based perspective, will prove helpful in providing further refinement of the Draft FAQs presented.

¹ PFM's financial advisory business consists of both Public Financial Management Inc. and PFM Financial Advisors LLC. PFM Financial Advisors LLC commenced operations on June 1, 2016, and all financial advisory relationships previously serviced by Public Financial Management Inc. are now in the process of transferring and being assigned to PFM Financial Advisors LLC.



I. **Does the term “Recommendation” Apply in Instances when a Municipal Advisor Advises a Municipal Entity or Obligated Person Client to “Refrain From Engaging in” a Municipal Securities Transaction or Product**

PFM suggests that as the MSRB refines the FAQs additional clarification is provided with respect to Draft FAQ questions 1 thru 4 related to the definition of the term “recommendation.” The Draft FAQs define a “recommendation” as advice that “exhibits both a call to action and a specificity as to what municipal financial product or issuance of a municipal security the municipal advisor is advising the municipal advisory client to proceed with.” This definition in the Draft FAQs appears to differ from the definition of a “recommendation” cited in the adopting release issued by the Securities and Exchange Commission (the “Commission”) in connection with implementation of MA regulation under the Dodd-Frank Act, in which the Commission stated that “what constitutes a recommendation for purposes of a municipal advisor, is consistent with the FINRA approach” and that “an important factor in the inquiry is whether considering its content, context and manner of presentation, the information communicated to the municipal entity or obligated person reasonably would be viewed as a suggestion that the municipal entity or obligated person either *take action or refrain from taking action* regarding a municipal financial product or the issuance of a municipal security [emphasis added].”² While the Draft FAQs appear to address the affirmative taking of action, it is unclear as to whether an act of a municipal advisor advising a municipal entity or obligated person for purposes of differentiating the provision of “advice” versus a “recommendation” includes a suggestion “to refrain” from engaging in a specific municipal securities transaction or product. As this seems to have been omitted from guidance regarding what constitutes a “recommendation” in the Draft FAQs, we seek clarity as to whether such omission was intended, or if a “recommendation” (G-42

² Section 975 of the Dodd-Frank Act enacted new municipal advisor provisions as additional sections of Section 15B of the 1934 Act. The Commission adopted final rules implementing the new legislation in late 2013. See *Registration of Municipal Advisors*, SEC Rel. No. 34-70462 (Sep. 20, 2013), 78 FR 67468 (Nov. 12, 2013) (“Adopting Release”). *CF.* 78 FR 67468 at 67480.



Recommendation) would include the act of advising a municipal client to either *engage in or refrain from engaging in* a municipal securities transaction or product. If the latter, then PFM respectfully requests that scenarios or questions addressing both actions be included within the MSRB's Draft FAQs for clarity.

II. Guidance Related to Documents to Be Maintained in Memorialization of Suitability; Appreciable Risks to be Disclosed With Respect to Transactions; and Practical Examples Illustrating Distinction Between Advice and G-42 Recommendation

With respect to Question 5 of the Draft FAQs, while it is understood that a G-42 Recommendation requires a municipal advisor to create a copy of any document created by the municipal advisor that memorializes the basis for any determination as to suitability³, PFM believes that the MSRB should also provide municipal advisors with a list of documents, or types of substantive information which should be included in documents, to consider as examples to assist in ensuring that appropriate records with respect to suitability are being adequately maintained. Such a listing of documents or substantive information, which by no means should be construed as exhaustive, could provide greater consistency and meaningful memorialization with respect to performing and documenting the suitability analysis. For instance, examples of documents, or types of substantive information which should be included in documents that may serve to aid municipal advisors in memorializing the basis for suitability could include, but not be limited to (each, to the extent applicable): Indentures; Authorizing Resolutions; Ordinances; Loan Documentation; Credit Memorandums; Ratings Agency Presentations; Ratings Agency Reports; and Transaction Summaries.

Further, it would be helpful if the MSRB provided additional guidance for specific transaction types or products (e.g. Competitive Sale, Negotiated Sale, Refundings,

³ MSRB Rule G-8 (h)(iv)(A).



Direct Placement, Derivatives, etc.) as to what appreciable risks could be considered by municipal advisors for disclosure so as to ensure that municipal clients receive a more balanced and robust disclosure of the material benefits and risks associated with recommendations of municipal securities transaction or municipal financial products.

Lastly with respect to Question 5, in assisting municipal advisors in understanding the distinctions between advice and G-42 Recommendations, it may be important for the MSRB to also note in its revisions to the Draft FAQs that municipal advisor observations or analyses about a client that stop short of providing "advice" or a "recommendation" as contemplated by Rule G-42 (e.g., analysis of a municipal client's debt capacity) are informational in nature and do not constitute municipal advice or a G-42 Recommendation, although they may form the basis of the municipal advisor's "advice" or a G-42 Recommendation. The same is also true of "considerations" or a series of options, including advantages and disadvantages, provided by municipal advisors without indication as to the municipal advisor's recommendation (e.g. possibilities for a method of sale). This should clearly be distinguished from guidance concerning a recommendation (G-42 Recommendation) where there is a specific call to action (or potentially to inaction) with respect to a specific municipal securities product or a municipal securities transactions.

Sincerely,

Catherine Humphrey-Bennett
Municipal Advisory Compliance Officer

cc: Rebecca Olsen, Securities and Exchange Commission, Office of Municipal Securities

April 16, 2018

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street NW, Suite 1000
Washington, DC 20005

RE: Comments to Notice 2018-03, Request for Input on Draft FAQ's
Regarding Rule G-42 and the Making of Recommendations

Dear Mr. Smith:

Piper Jaffray & Co. ("Piper") is pleased to respond to the notice issued by the Municipal Securities Rulemaking Board (the "MSRB") on February 15, 2018, entitled, Notice 2018-03, Request for Input on Draft Frequently Asked Questions Regarding Rule G-42 and the Making of Recommendations (the "Request"). Piper Jaffray conducts a meaningful amount of municipal advisory business and as such have worked closely to understand and put in place mechanisms to comply with the various provisions of Rule G-42. We have closely read the frequently asked questions and scenarios in the MSRB's Request.

You have asked for comments about whether the draft FAQ's and scenarios provide relevant guidance and add to our understanding of the rule. My comments include some general reaction to the Request as well some specific feedback on the questions and scenarios presented.

Overview Comments Regarding to the Issuance of FAQ's and Scenarios

In its Request, the MSRB stresses that this release is a "compliance resource" that is designed "to enhance understanding of the provisions of MSRB Rule G-42" and is "not meant to be interpretive guidance". I have some concerns that, by putting out the FAQ's and scenarios, the MSRB is entering into a gray area by providing guidance that is not actually interpretive guidance and "does not guarantee compliance with regulatory requirements". While I found some of the FAQ's to be helpful, I found most of the scenarios to be somewhat confusing and of limited help. I do not have any major concerns with this particular release or areas where I have a strong disagreement with the conclusions drawn. However, I do caution the MSRB to be very thoughtful about this approach to furthering understanding of its rules. There is a fine line between providing helpful guidance, confusing guidance and, of greater concern, the possibility of

inadvertently creating new rule interpretations through a unique form of guidance rather than through the rulemaking process. I do not believe that this Request creates new rule interpretations but future releases of this type could cross that line if the MSRB is not very careful and thoughtful about its use of this type of “compliance resource”.

Feedback on the FAQ’s

As noted above, I found the FAQ’s to generally be helpful as an analysis and reminder of how to think through the concepts of “advice” and “recommendation”. As a starting point for my comments, I believe that the regulatory construct around the concept of advice and who is a municipal advisor is overly complex which creates challenges in understanding and establishing a system to comply with the rules and manage a municipal advisory business. This is primarily the result of the complexity of the SEC’s activity based approach to defining an MA and advice in its MA Rule. Unfortunately, the MSRB is forced to develop its own rules within the confines of the SEC Rule which causes complexity in the MSRB Rules.

I found the first 10 FAQ’s to mostly be a helpful overview and reminder of what advice is, what a recommendation is, the difference between a “recommendation” and a “G-42 Recommendation” (the fact that there are two different types of recommendations points out the complexity of the MA regulatory construct) and what a municipal advisor’s duties are relative to G-42 Recommendations. An area that could create confusion is where the difference lies between advice on the “structure, timing and terms” of a financing (which does not give rise to a G-42 Recommendation) and the “recommendation of a municipal securities transaction or municipal financial product” (which is a G-42 Recommendation). For example, Question 1 states that bond insurance is a “term” of a financing and not a “specific issuance of municipal securities or a municipal financial product”. I accept and generally agree with this answer but could debate this conclusion. Later in the Scenarios, the implication is that certain debt structures could represent a G-42 Recommendation but you could also argue that advice on a delayed principal amortization is really just advice on “structure”. My point is that there is still potentially confusion about when a recommendation is just about “structure and terms” as opposed to being a G-42 Recommendation as a “municipal finance product or issuance”. I could come up with other examples of situations where this difference is uncertain or could be debated based on the information in the FAQ’s.

With regard to FAQ 11, I did not find this question as helpful because, in my experience, clients are rarely asking us as an advisor to review a third party’s recommendation based solely on whether it is suitable. While a suitability analysis is required under the rule, in most cases an advisory client would be asking us for feedback on the third party recommendation on matters other than suitability. Question 12 introduced a concept that I will comment on more below, namely that a G-42 recommendation requires “a call to action” rather than just commentary on a financing idea or introduction of a financing idea as worth considering. While I agree with this

concept, I believe that it demonstrates the complexity of trying to give guidance on facts and circumstance based rules when the facts in real client situations are always more complicated and nuanced than the guidance being described.

Feedback on the Scenarios

I found the six scenarios described in the Request as less helpful than the FAQ's. While the examples in the scenarios are interesting food for thought about how to apply Rule G-42, I found the information in the scenarios as too simplified to draw firm conclusions and could argue an opposite answer from the guidance that is given for a number of the scenarios.

In particular, the guidance in Scenario 1 that the advice given is not a G-42 Recommendation stems largely from the advisor's language in commenting that the city "may wish to" restructure its debt. In Scenario 3 the facts are slightly different but the conclusion that the advisor provided a G-42 Recommendation in that scenario is based on their informing the city that it "should" issue its debt in a particular manner. I am somewhat troubled with the guidance that the difference in whether an advisor has provided a G-42 Recommendation is based primarily on the language used by the advisor relative to "should" or "may". In real life scenarios, the discussions tend to be more complex than this and could involve a mix of discussions, emails and formal written analysis. The guidance seems to be suggesting that as long as an advisor is careful in his/her wording that the advisor can always avoid making a G-42 Recommendation. I do not believe that enforcement agencies doing an examination of a transaction would have this flexible a view in most cases. I believe that in many cases, an advisor who leads his client to a conclusion through a series of discussions without ever saying that the client "should" proceed with a particular transaction or product would be deemed to have made a G-42 Recommendation regardless of the actual language used.

In Scenario 2, I agree with the conclusion that the advisor did not make a G-42 Recommendation. However, I could make a reasonable argument that the information provided to the school district relative to the three comparable offerings in the market is not really advice at all (as it is described in the scenario) but rather is just factual information. This gets to the complexity of the definition of advice under the MA Rule and whether this information is sufficiently particularized to this client to be considered advice or is just factual pricing information from the market that may be of interest to the school district.

Scenario 4 provides another example of how the nuances of the advisor's actions are important to determining whether it has given advice or a recommendation. As described, I agree with the conclusion that the advisor did not give a G-42 Recommendation but the scenario introduces the concept of an agreement to "limit the scope" of the advisor's activities which does not appear to me to be relevant to the conclusion (which will ultimately be based on activities of the advisor). It also suggests

in the conclusion that the outcome would be different if the advisor had “urged” the city to proceed. As above, this highlights the language used by the advisor as critical to the analysis. This scenario also implies that the municipal advisor gave “advice” by merely providing information on how similar bonds have recently priced which could be construed as just providing factual information that would not constitute advice.

In Scenario 5, the conclusion of the scenario is that the advisor’s tax projection calculations “may be advice” but are not a call to action or a G-42 Recommendation. I agree with the conclusion but the more complex issue in this scenario is whether these calculations actually are advice which is indeterminable from the limited facts here. I believe these calculations may or may not be advice depending on the details of the analysis.

In Scenario 6, I am not certain that the conclusion that the advisor made a G-42 Recommendation is correct. This points out again the complexity of the rule and the challenge in drawing definitive conclusions. I could argue that the language of the scenario which states that the advisor presented a document “detailing the structure and certain terms” of an offering demonstrates that the advisor was only providing advice related to “structure, timing and terms” of an offering which does not make it a call to action or a G-42 Recommendation. The scenario here does not specify the wording of the language used by the advisor (“could”, “should”, “may”) which was a key element of whether a G-42 Recommendation had been made in several of the previous scenarios.

Conclusions to My Comments

I hope that I have not sounded too critical in my comments because I believe that the MSRB has made a well intended attempt to provide guidance around what are very complex rules. The distinctions around what is advice, what is a call to action and when a G-42 Recommendation has been made are quite nuanced. Overall, the guidance is helpful, with the questions and answers in my mind being much more helpful than the scenarios. I believe that the scenarios point out how difficult it is to apply facts and circumstance concepts to theoretical scenarios with a limited set of facts. As a result, I would urge the MSRB to state that the scenarios are useful primarily as examples of ways to think about the application of the rules rather than as a definitive answer to a particular limited set of facts.

I believe that the MSRB should think carefully about whether the language based conclusions (“should” vs. “may”) in the scenarios are actually good guidance for advisors. This seems to be too simple an analysis that would negate other facts and communication that are present in most actual advisory relationships. I would also ask the MSRB to think carefully about whether and how the complexities of the municipal advisor rule structure can be made simpler as it considers future rulemaking in this area.

Ronald W. Smith

April 16, 2018

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Lastly, the Request demonstrates the complexity of the MSRB giving guidance on its own rules when the definitions under those rules (such as the definition of “advice”) are determined by referring to SEC rules. Because of this interconnection, it is impossible for the MSRB to give any guidance that creates any certainty for municipal advisors without the SEC reviewing, opining and agreeing with this guidance. This is the challenge created by a regulatory regime where multiple regulators have developed different rules related to similar activities.

I appreciate the opportunity to comment and would be happy to further discuss my views and experience on these issues with the MSRB staff. Feel free to contact me with any questions that you might have regarding this comment letter.

Sincerely,

A handwritten signature in cursive script that reads "Frank Fairman". The signature is written in dark ink and is positioned above the typed name and title.

Frank Fairman
Managing Director
Head of Public Finance Services



April 16, 2018

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street NW, Suite 1000
Washington, DC 20005

Re: MSRB Notice 2018-03: Request for Input on Draft Frequently Asked Questions Regarding Rule G-42 and the Making of Recommendations

Dear Mr. Smith:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ greatly appreciates this opportunity to respond to Notice 2018-03 (the “Notice”)² issued by the Municipal Securities Rulemaking Board (the “MSRB”) requesting comment on draft frequently asked questions and proposed responses (“FAQs”) regarding Rule G-42 and the making of recommendations. According to the MSRB, the FAQs are intended to provide market participants with an enhanced understanding of the provisions of Rule G-42 on duties of non-solicitor municipal advisors (“municipal advisors”) related to providing “advice” and “recommendations” and related provisions of Rule G-8 on books and records.

We applaud the MSRB’s effort to seek information and insight from commenters to further inform the development of the FAQs for publication. We previously expressed the need for more published MSRB interpretive guidance and stated that market participants could benefit from interpretive guidance with respect to Rule G-42 and the recordkeeping requirements associated with MSRB rules.³ We do, however, have a few concerns with (1) the proposed

¹ SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over \$2.5 trillion for businesses and municipalities in the U.S., serving clients with over \$18.5 trillion in assets and managing more than \$67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² MSRB Notice 2018-03, Request for Input on Draft Frequently Asked Questions Regarding Rule G-42 and the Making of Recommendations (Feb. 15, 2018).

³ See Letter to Corporate Secretary, MSRB regarding MSRB Notice 2017-22: Request for Comment on Compliance Support, from Leslie M. Norwood, Managing Director and Associate General Counsel, dated January 23, 2018.

FAQs, (2) the scenarios, and (3) the process that are set forth herein. Also, responses to the MSRB's specific questions are attached hereto as Appendix A.

I. Concerns with the FAQs

Ambiguity and Imprecision

While the FAQs are helpful in providing some clarity as to what constitutes a Rule G-42 Recommendation, we are concerned about the absence of discussion regarding rules of the Securities and Exchange Commission ("SEC"). The MSRB acknowledges in the FAQs that there may be instances where, under SEC rules, the advice given by a municipal advisor may be characterized as a recommendation, but the same advice given would not constitute a G-42 Recommendation. This divergence causes confusion and creates ambiguities and imprecisions in the FAQs. For example, in FAQ 10, the MSRB emphasizes that it is important to remember that a municipal advisor has obligations to maintain and preserve books and records pursuant to SEC rules that go beyond its obligations under Rule G-8. Specifically, the MSRB states that advice that lacks specificity regarding a municipal financial product or an issuance of municipal securities (i.e., advice that is not a G-42 Recommendation) may, nevertheless, rise to the level of a recommendation for purposes of SEC rules and, if so, the records relating to such recommendation would be required to be maintained in accordance with SEC Rule 15Ba1-8(a)(4). In this instance, the identification of the divergence is appreciated but further guidance should be provided to help ensure that municipal advisors understand the recordkeeping requirements of both SEC and MSRB rules. Notably, in 2017, one of the most frequently observed examination violations by the SEC's Office of Compliance Inspection and Examinations was with respect to municipal advisors that failed to make and keep documents material to a recommendation made to a client.⁴

We are similarly concerned about the absence of discussion regarding the interpretive guidance provided by the SEC's Office of Municipal Securities on the advice standard (the "OMS FAQs").⁵ For example, in FAQ 1, the MSRB states that if a communication would constitute advice under the Securities Exchange Act of 1934 ("Exchange Act") and rules and regulations thereunder for purposes of applying the definition of "municipal advisor," then that communication would also be deemed advice for purposes of Rule G-42. This guidance is helpful. It is unclear, however, whether and how the OMS FAQs, which provide interpretive guidance about the advice standard, would apply when determining whether a communication would be deemed advice for purposes of Rule G-42.⁶ While we understand that the OMS FAQs

⁴ See SEC National Exam Program Risk Alert, Volume III, Issue I (November 7, 2017) [available at https://www.sec.gov/files/observations-from-municipal-advisor-examinations.pdf](https://www.sec.gov/files/observations-from-municipal-advisor-examinations.pdf).

⁵ See Registration of Municipal Advisors Frequently Asked Questions, SEC's Office of Municipal Securities, [available at https://www.sec.gov/info/municipal/mun-advisors-faqs.shtml](https://www.sec.gov/info/municipal/mun-advisors-faqs.shtml).

⁶ The OMS FAQs were published on January 10, 2014, and on January 13, 2014, the SEC temporarily stayed the effective date of the final rules to provide market participants with additional time to, among other things,

are not rules, regulations, or statements of the SEC, they are critical in helping our members understand the scope and application of the SEC final rules, including the advice standard.⁷

We believe the lack of discussion regarding SEC rules and the OMS FAQs and their application will cause confusion for municipal advisors, including examination and enforcement staff. As such, we strongly encourage a coordinated effort in connection with the development of the FAQs. In the past, the MSRB has coordinated with the Financial Industry Regulatory Authority (“FINRA”), in consultation with the SEC, on an interpretive guidance project.⁸ This type of coordination is critical when regulated entities must comply with similar rules from two separate regulators. The same is true here because municipal advisors must comply with both SEC and MSRB rules.

Importantly, one of the eight principles that SEC Chairman Clayton has identified as helping guide the future work of the SEC is the importance of coordination.⁹ Specifically, Chairman Clayton stated that “not only is coordination between and among regulators essential – but coordination and open communication between regulators and the industries that they regulate is also vitally important.”¹⁰ We strongly encourage the MSRB to coordinate directly with SEC staff and market participants in further developing the FAQs, including in connection with the development of SEC staff interpretive guidance, if appropriate.

Use of Mandatory Terms

Throughout the FAQs, the MSRB in certain instances uses terms, such as “must” and “requires,” however, use of these mandatory terms should only be used to describe any existing statutory or regulatory requirements. For example, in FAQ 1, the MSRB makes clear that Rule G-42 does not specifically define the term “recommendation” or the phrase “recommendation of

analyze the OMS FAQs. See Securities Exchange Act Release 34-71288 (January 13, 2014) 79 FR 2777 (January 16, 2014).

⁷ We are concerned that the MSRB may not be discussing the relevance and application of the OMS FAQs simply because they are not adopted by the SEC. For example, in connection with the MSRB’s proposed rule change related to its advertising rules, commenters suggested that the MSRB adopt the SEC’s staff definition of testimonial by either adopting certain staff no-action guidance or completely adopting staff interpretive guidance. The MSRB chose not to adopt the SEC’s staff definition by stating, among other things, that the staff definition is staff guidance and not guidance issued by the SEC. See Securities Exchange Act Release No. 34-82616 (February 1, 2018) 83 FR 5474 (February 7, 2018).

⁸ See MSRB Notice 2017-12, MSRB Provides Implementation Guidance on Confirmation Disclosure and Prevailing Market Price (July 12, 2017).

⁹ See Remarks at the Economic Club of New York, by Chairman Jay Clayton (July 12, 2017) available at <https://www.sec.gov/news/speech/remarks-economic-club-new-york>.

¹⁰ See Opening Remarks at the National Compliance Outreach Program for Broker-Dealers, by Chairman Jay Clayton (July 27, 2017) available at <https://www.sec.gov/news/public-statement/clayton-statement-cco-program-broker-dealers>.

a municipal securities transaction or municipal financial product.” The MSRB then goes on to state that “[h]owever, 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”).” While we don’t disagree with this interpretation, we do think defining a new term using principles stated in the rulemaking record (i.e., G-42 Recommendation) and including it in a “compliance resource” is problematic. For more information regarding our concerns identifying the FAQs as a “compliance resource,” please see heading III. Concerns with the Process.

Following the Rulemaking Record More Closely

There are instances where the MSRB provides a citation to the rulemaking record but the language in the FAQs does not necessarily support the statement. For example, in FAQ 6, the MSRB cites to the Rule G-42 rulemaking record in connection with a municipal advisor’s reasonable determination that it is not basing a G-42 Recommendation on materially inaccurate or incomplete information. The MSRB states that “a municipal advisor would not be expected to go to impractical lengths to make such a determination.” The rulemaking record, however, uses the mandatory term “required.” Specifically, the MSRB stated twice in the rulemaking record that “a municipal advisor would not be required to go to impractical lengths to determine the accuracy and completeness of the information.” By changing the term from “required” to “expected,” the MSRB appears to be loosening the language. We suggest that the MSRB more closely review the statements made in the FAQs along with the citations that support these statements.

Specificity

Throughout the FAQs, the MSRB states that “specificity as to what municipal financial product or issuance of municipal securities the municipal advisor is advising a client to proceed with” is a critical factor in determining whether a recommendation is a G-42 Recommendation. A specificity determination is the second prong of the two-pronged analysis. The MSRB provides an example in FAQ 4 that states that if advice by a municipal advisor to a client details a specific municipal securities offering then it is a specific issuance. This interpretation is helpful and we appreciate this guidance, however, we also think that the FAQs should include guiding principles for determining how the specificity prong of the analysis could be satisfied in other scenarios.

II. Concerns with the Scenarios

General

We appreciate the effort of the MSRB in developing the scenarios. We have a few general concerns. First, the scenarios only concern the application of Rule G-42. We think it would be appropriate in the scenarios to include analysis of other rules that may affect municipal

advisors. For example, could the scenarios trigger the application of SEC rules. Second, each of the scenarios includes a municipal advisor that has been engaged or hired by the client. We think it would be appropriate to include scenarios where the municipal advisor has not been formally hired or engaged by the client. Third, the scenarios all involve or are related to the issuance of municipal securities. We think including other scenarios regarding the investment of proceeds of municipal securities and recommendation of and brokerage of municipal escrow investments would be helpful. Fourth, none of the scenarios are of a municipal advisor that is providing an implied recommendation. We think addressing the potential of implied recommendations would be helpful. Fifth, we think it would be helpful to introduce other facts into the scenarios, such as, for example, when a municipal advisor is advising an issuer on deciding between a negotiated versus competitive offering, fixed rate offering versus variable rate, and variable rate offering with a swap. Lastly, the scenarios are generally directed toward non-dealer municipal advisors. We think it would be helpful to provide scenarios that include other types of dually-registered municipal advisors (e.g., investment advisor/municipal advisor or broker-dealer/municipal advisor).

Scenario 2

In Scenario 2, the municipal advisor provides the school district with general information and the MSRB concludes that there is no G-42 Recommendation since there is no call to action. We are concerned that this scenario may cause confusion because SEC rules are not discussed or even mentioned in the analysis. For example, the general information that the municipal advisor provides appears to fit within the general information exclusion of Rule 15Ba1-1(d)(1)(ii).¹¹ In such case, there would be no need to discuss Rule G-42 because it would not apply.¹² By not discussing or even mentioning the applicability of SEC rules, the FAQs become ambiguous and imprecise. Again, as mentioned in heading I. Concerns with the FAQs – Ambiguity and Imprecision, we suggest that the MSRB coordinate directly with SEC staff and market participants in further developing the FAQs, including in connection with the development of SEC staff interpretive guidance, if appropriate.

Additionally, in Scenario 2, the MSRB states that the general information described in the scenario was made about and in the preliminary stages of developing a plan to issue municipal securities and is not a call to action. The MSRB then goes on to conclude that communications to a client that concern preliminary matters, or minor ancillary matters that relate to, but are not calls to action to proceed with, an issuance or municipal financial product are not G-42 Recommendations. We believe that communications about and in the preliminary stages versus communications that concern preliminary matters are very different concepts. We

¹¹ Exchange Act Rule 15Ba1-1(d)(1)(ii).

¹² The standards of conduct required by Rule G-42 are only applicable to a municipal advisor when conducting municipal advisory activities. For example, if certain communications made by an engaged municipal advisor are outside the scope of municipal advisory activities (e.g., general information), then such communications would not be subject to the standards of conduct in Rule G-42.

are concerned that the lack of clarity surrounding these two different concepts will cause confusion.¹³

Scenario 3

In Scenario 3, a municipal advisor provides a five-year plan that will allow the city to undertake certain projects. The plan also informs the city that it should issue five municipal bond offerings and specifies the timing, terms, and structure for each issuance. It appears that including the information about the five municipal bond offerings is the trigger that makes the five-year plan a G-42 Recommendation. This guidance is helpful, however, we also believe that guidance should be provided with respect to when such a five-year plan would not constitute a G-42 Recommendation.

Scenario 4

In Scenario 4, the city informs the municipal advisor that it has determined to privately place debt with a particular bank. We understand, based on the language used in the scenario, that the MSRB is trying to limit the scope of the scenario to avoid discussion of whether the municipal advisor must determine whether the debt is a bank loan or security. We think, however, including such discussion is appropriate since the MSRB has in the past stated that firms must determine whether the nature of a financing instrument is a security or a loan and the consequences of failing to perform this analysis may be significant.¹⁴

Additionally, in Scenario 4 the MSRB states that there is no G-42 Recommendation, however, it is unclear why this is the outcome of the analysis. Is this the outcome because the City already determined to issue the bonds? Is this the outcome because the City already determined to issue the bonds and also decided the method of sale, structure, timing and amount? What are the factors that make this not a G-42 Recommendation? We also think more guidance should be provided that addresses if and how a municipal advisor could rely on an issuer's determination to issue the bonds independently of the municipal advisor to limit the scope of the engagement and duties of determining suitability. Also, including a scenario where a municipal advisor limits the scope of the engagement in connection with a broadly drafted multi-year contract would be helpful.

¹³ For example, in Scenario 2, the municipal advisor provided general information about the favorable results of other similar school districts, including information about the basic terms of each issuance. If, after the presentation, the school district decided to move forward with an issuance because of the favorable results of the other school districts, would the analysis be any different (e.g., could an examiner conclude that the presentation was a G-42 Recommendation because it did not concern preliminary matters).

¹⁴ See MSRB Notice 2016-12, Direct Purchases and Bank Loans as Alternatives to Public Financing in the Municipal Securities Market (April 4, 2016).

Scenario 6

In Scenario 6, a municipal advisor is asked to assist in structuring a municipal securities offering that will allow the county to borrow funds over a 30 year period. The MSRB determines that a G-42 Recommendation has been made when the municipal advisor has presented a document to the county detailing the structure and terms of an offering of municipal securities that the municipal advisor believed was in the best interest of the county. It is unclear why the MSRB emphasized the best interest of the county in its analysis. This standard is already required under Rule G-42. We are concerned that the current analysis does not clearly focus on satisfaction of the two-pronged analysis and may confuse market participants.

III. Concerns with the Process

Interpretive Guidance

Well-designed interpretive guidance serves many important or even critical functions in regulatory programs.¹⁵ Interpretive guidance, used properly, increases efficiency, and enhances fairness by providing the public clear notice of the line between permissible and impermissible conduct while ensuring equal treatment of similarly situated parties.¹⁶ The MSRB makes clear that the FAQs are not meant to be interpretive guidance.¹⁷ The MSRB intends that the FAQs serve as a “compliance resource.”¹⁸ According to the MSRB, the intent of a “compliance resource” is to highlight key rule provisions or considerations to enhance the understanding of a rule, by for example, providing a checklist, sample template or fact sheet.¹⁹

The FAQs, however, are not simply a “compliance resource” that provide a checklist, sample template, or fact sheet. Instead, the FAQs provide interpretive guidance that clarifies the application of the principles of MSRB rules. For example, in the response to FAQ 3 the MSRB states that dealer guidance principles on suitability of recommendations are applicable to municipal advisors when determining whether advice to a client would be considered a call to action. While we agree that the rulemaking record supports this assertion, the rulemaking record does not state that the same principles are equally applicable to municipal advisors for determining whether advice rises to the level of a G-42 Recommendation. In this example, the

¹⁵ See Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 FR 3432 (January 25, 2007).

¹⁶ Id.

¹⁷ Supra note 2.

¹⁸ Id.

¹⁹ See MSRB Compliance Resource: Types of Compliance Information available at <http://www.msrb.org/~media/Files/Resources/MSRB-Types-of-Compliance-Information.ashx?la=en>.

MSRB demonstrates that it is clarifying the application of the principles of an MSRB rule, which is considered interpretive guidance by the MSRB.²⁰

The FAQs also provide more prescriptive information about obligations and conduct under Rule G-42. For example, the various hypothetical scenarios and related analyses used in the FAQs relate to the imposition and enforcement of Rule G-42. In the scenarios and related analysis, the MSRB clearly demonstrates that it is providing prescriptive information about obligations and prohibited conduct under Rule G-42, which is considered interpretive guidance by the MSRB.²¹

Based on these concerns and assuming that the MSRB addresses our other concerns stated herein, we request that the MSRB classify the FAQs as interpretive guidance.

File Interpretive Guidance with the SEC

A cornerstone of the regulatory framework for municipal advisors is MSRB Rule G-42. During the development of Rule G-42, the MSRB requested public comment two times.²² The SEC requested public comment four times, including on the related amendments that sought to address and balance the concerns of the public.²³ At each stage of the rulemaking process, the MSRB coordinated with the SEC and considered all comments submitted, as reflected in a number of revisions to the rule text that were responsive to or derivative of comments received. The SEC played a significant role in the development of Rule G-42, including by, among other things, making findings and determinations that Rule G-42 is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the MSRB.²⁴

SEC review and the public comment process, established pursuant to Exchange Act Section 19(b) and Rule 19b-4 thereunder, are intended to ensure that the self-regulatory organizations, including the MSRB, carry out the purposes of the Exchange Act.²⁵ Rule 19b-4,

²⁰ Id.

²¹ Id.

²² See MSRB Notice 2014-01, Request for Comment on Draft MSRB Rule G-42, on Duties of Non-Solicitor Municipal Advisors (January 9, 2014); and MSRB Notice 2014-12, Request for Comment on Revised Draft MSRB Rule G-42, on duties of Non-Solicitor Municipal Advisors (July 23, 2014).

²³ See Securities Exchange Act Release No. 34-74860 (May 4, 2015) 80 FR 26752 (May 8, 2015); Securities Exchange Act Release No. 34-75628 (August 6, 2015) 80 FR 48355 (August 12, 2015); Securities Exchange Act Release No. 34-75737 (August 19, 2015) 80 FR 51645 (August 25, 2015); and Securities Exchange Act Release No. 34-76420 (November 10, 2015) 80 FR 71858 (November 17, 2015).

²⁴ See Securities Exchange Act Release No. 34-76753 (December 23, 2015) 80 FR 81614 (December 30, 2015).

²⁵ The legislative history of the Securities Acts Amendments of 1975, which establishes rulemaking procedures for self-regulatory organizations, makes clear that Congress chose to develop a unique pattern of regulation combining both industry and government responsibility and that the self-regulatory organizations are

among other things, requires the SEC to determine whether a proposed rule change, including certain interpretations, are consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the MSRB.²⁶ The SEC's review and public comment process are extremely important to our membership and we strongly believe that any interpretation that provides guidance about a significant MSRB rule should benefit from such review and process.²⁷

In the past, the MSRB has filed interpretive guidance with the SEC using the Rule 19b-4 process under either Exchange Act Section 19(b)(2)²⁸ or Section 19(b)(3)(A).²⁹ Specifically, from 2005 through 2012, the MSRB filed with the SEC nine interpretations under Section 19(b)(2) and five interpretations under Section 19(b)(3)(A), including frequently asked questions and answers concerning the application of Rule G-37. Since 2013, however, the MSRB has filed

intended to be subject to the SEC's control and have no governmentally derived authority to act independently of SEC oversight. See House Report No. 94-229, 94th Congress 1st Session, House Committee on Interstate and Foreign Commerce (May 19, 1975).

²⁶ 17 CFR 240.19b-4.

²⁷ In addition, the Rule 19b-4 process, among other things, helps to (i) provide broader notice to the public about the request for comment (not just regulated entities that receive regulatory notices), (ii) ensure that the public is aware of the interpretive guidance, if approved, and (iii) ensure that regulated entities could rely on the interpretive guidance since it has the full force and effect of MSRB rules.

²⁸ See SR-MSRB-2005-11, Securities Exchange Act Release No. 34-53961 (December 13, 2005) (MSRB providing interpretive guidance relating to the definition of solicitation for purposes of Rules G-37 and G-38); SR-MSRB-2006-03, Securities Exchange Act Release No. 34-53715 (April 25, 2006) (MSRB providing interpretive guidance on customer protection obligations relating to 529 college savings plans); SR-MSRB-2007-01, Securities Exchange Act Release No. 34-55957 (June 26, 2007) (MSRB providing an interpretation of Rule G-14 reports of sales and purchases); SR-MSRB-2009-17, Securities Exchange Act Release No. 34-61110 (December 3, 2009) (MSRB providing interpretive guidance regarding Rule G-17); SR-MSRB-2010-07, Securities Exchange Act Release No. 34-62830 (September 2, 2010) (MSRB providing interpretive notice regarding Rule G-37 on political contributions); SR-MSRB-2011-03, Securities Exchange Act Release No. 34-63946 (February 22, 2011) (MSRB providing an interpretive notice concerning Rule G-23); SR-MSRB-2011-09, Securities Exchange Act Release No. 34-65263 (September 6, 2011) (MSRB providing interpretive notice concerning application of Rule G-17); SR-MSRB-2012-04, Securities Exchange Act Release No. 66625 (March 20, 2012) (MSRB providing interpretive notice on the duties of dealers that use the services of broker's brokers); and SR-MSRB-2012-05, Securities Exchange Act Release No. 34-66772 (April 9, 2012) (MSRB providing interpretive notice concerning the application of Rule G-17 to sophisticated municipal market professionals).

²⁹ See SR-MSRB-2005-01, Securities Exchange Act Release No. 34-51020 (January 11, 2005) (MSRB providing interpretive notice regarding Rule G-17 on disclosure of certain material information); SR-MSRB-2009-08, Securities Exchange Act Release No. 34-60359 (July 21, 2009) (MSRB providing interpretive guidance on disclosure and other sales practices obligations relating to sales of municipal securities to individual and other retail investors); SR-MSRB-2009-14, Securities Exchange Act Release No. 34-60690 (September 18, 2009) (MSRB providing interpretive guidance on use of electronic confirmations produced by clearing agencies or qualified vendors); SR-MSRB-2010-01, Securities Exchange Act Release No. 34-61647 (March 4, 2010) (MSRB providing interpretive questions and answers on the application of Rule G-37); and SR-MSRB-2010-04, Securities Exchange Act Release No. 34-62322 (June 7, 2010) (MSRB providing interpretive questions and answers concerning the public access facility).

only one interpretive notice with the SEC.³⁰ In fact, the MSRB has instead, in an effort to streamline and codify existing guidance, requested approval from the SEC to delete existing guidance.³¹ While SIFMA supports the MSRB's efforts to promote regulatory efficiency by streamlining and codifying existing guidance, there is a serious risk that MSRB interpretive guidance is not being properly submitted to the SEC for approval. The goal of streamlining and codifying must be balanced with the benefit of providing interpretive guidance that has been reviewed and approved by the SEC using Rule 19b-4. The U.S. Department of the Treasury has recommended that the self-regulatory organizations, including the MSRB, adopt and release an action plan to review and update its rules, guidance and procedures on a periodic basis.³² We strongly believe that the MSRB should critically analyze its past and current practices regarding interpretive guidance.

Additionally, the MSRB's policy on interpretive guidance states that "[g]enerally, interpretive guidance must be filed with the SEC if it is not reasonably and fairly implied by an existing rule."³³ This language follows Rule 19b-4(c). We are concerned that certain FAQs appear to be reasonably and fairly implied by the rulemaking record, instead of by Rule G-42. While the rulemaking record is an important part of the rulemaking process, it is not the rule. If the FAQs are not reasonably and fairly implied by Rule G-42, then they shall be deemed to be a proposed rule change under Rule 19b-4(c).

Based on these concerns and assuming that the MSRB addresses our other concerns stated herein, we request that the MSRB submit the FAQs to the SEC using the process established by Rule 19b-4.

Coordinate with other Regulators

We are also concerned that certain regulators may not be aware or become aware of the FAQs, if finalized. For example, with respect to a filing that is submitted to the SEC using the Rule 19b-4 process, the SEC, Federal Reserve, the Comptroller of the Currency, and the Federal

³⁰ See SR-MSRB-2016-03, Securities Exchange Act Release 34-77316 (MSRB providing interpretive notice concerning the application of the amended pricing formula). While we understand that the MSRB and SEC may coordinate informally regarding certain interpretive guidance, such as the implementation guidance on confirmation disclosure and prevailing market price, we are still concerned about the lack of interpretive guidance that is subject to the Rule 19b-4 process.

³¹ See SR-MSRB-2013-07, Securities Exchange Release No. 34-70593 (October 1, 2013) (MSRB proposing the deletion of certain interpretive guidance); and SR-MSRB-2015-09, Securities Exchange Release No. 34-75932 (September 16, 2015) (MSRB proposing the deletion of prior interpretive guidance).

³² See U.S. Department of the Treasury, A Financial System that Creates Economic Opportunities Capital Markets (October 2017) available at <https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf>.

³³ MSRB Policy on Interpretive Guidance, available at <http://www.msrb.org/Rules-and-Interpretations/MSRB-Policy-on-Interpretive-Guidance.aspx>.

Deposit Insurance Corporation are all directly made aware of the filing based on the requirements set forth in Form 19b-4.³⁴ Since the MSRB relies on the SEC, FINRA and federal bank regulators to conduct examinations and enforcement investigations, it is important that they are made aware or become aware of the FAQs. Based on these concerns and assuming that the MSRB addresses our other concerns stated herein, we request that the MSRB coordinate with the SEC, FINRA, and federal bank regulators in connection with the FAQs, including staff that is responsible for examinations and enforcement investigations.

Coordinate with Market Participants

In the FAQs, the MSRB states that “though it is not routine” for the MSRB formally to seek written comments on draft frequently asked questions, given the unique nature of the application of Rule G-42, the MSRB believes that market participation and public input would help ensure the FAQs provide useful compliance assistance. We believe that coordination and open communication between the MSRB and market participants should become routine. As noted by SEC Chairman Clayton, such coordination and communication are vital.³⁵ We encourage the MSRB to continue to coordinate and communicate with market participants in connection with the FAQs and any other types of significant compliance information, including interpretive guidance.³⁶

IV. Conclusion

SIFMA and its members applaud the MSRB for its effort to seek information and insight from commenters to further inform the development of the FAQs. As previously noted, it is the view of our members that, in recent years, too much interpretation of MSRB rules has occurred through examination and enforcement investigations rather than by published MSRB guidance.³⁷ We appreciate the opportunity to provide input and your consideration of the views presented

³⁴ See Form 19b-4, available at <https://www.sec.gov/files/form19b-4.pdf>.

³⁵ Supra note 10.


³⁶ Supra note 19.

³⁷ See Letter to Corporate Secretary, MSRB, regarding MSRB Notice 2017-22: Request for Comment on Compliance Support, from Leslie M. Norwood, Managing Director and Associate General Counsel, dated January 23, 2018.

Mr. Ronald W. Smith
Municipal Securities Rulemaking Board
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herein. We stand ready to provide any additional information or assistance that the MSRB might find useful. Please do not hesitate to contact me at (212) 313-1130 with any questions.

Sincerely yours,

A handwritten signature in black ink, appearing to be 'L. Norwood', written over a faint, light-colored signature line.

Leslie M. Norwood
Managing Director and
Associate General Counsel

cc: ***Securities and Exchange Commission***
Rebecca Olsen, Director, Office of Municipal Securities

Municipal Securities Rulemaking Board
Lynnette Kelly, Executive Director
Michael Post, General Counsel
Lanny Schwartz, Chief Regulatory Officer

Appendix A

Responses to the MSRB's Questions

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?**

Response: See heading I. Concerns with FAQs.

- **Do the draft FAQs clearly distinguish giving "advice" from making a "recommendation" under the rule? If not, where is additional clarification needed?**

Response: See heading I. Concerns with FAQs.

- **Do the proposed responses to the FAQs add to the understanding of the rule? How could they be improved to provide greater understanding?**

Response: If SEC rules and OMS FAQs are not discussed, certain FAQs are ambiguous and imprecise. As previously mentioned, we suggest that the MSRB coordinate directly with SEC staff and market participants in further developing the FAQs, including in connection with the development of SEC staff interpretive guidance, if appropriate. See heading I. Concerns with FAQs.

- **Are there additional questions that the MSRB should respond to related to making recommendations under Rule G-42?**

Response: See heading I. Concerns with FAQs.

- **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?**

Response: See heading II. Concerns with Scenarios.