BDA Bond Dealers of America

1909 K Street NW • Suite 510
Washington, DC 20006
202.204.7900
www.bdamerica.org

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Submitted Electronically

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

RE: MSRB Request for Input on Compliance Support

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 2017-22 (MSRB Seeks Input Compliance Support) (the "Notice"). The BDA is very concerned with the publication of the recent compliance advisories and some of the other advisories, and appreciates the opportunity to provide these comments concerning how the MSRB should approach advisories in the future.

The BDA encourages the MSRB to only use formal interpretive guidance to provide compliance guidance with respect to MSRB Rules.

The BDA believes that using an informal compliance advisory approach to providing guidance concerning new MSRB rules has created three problems. First, it does not allow a needed dialogue between industry participants and the MSRB. Dealers and municipal advisors raised a number of substantive concerns with the recent dealer and municipal advisor compliance advisories. In some instances, the concern was that the MSRB had created additional conduct standards that exceeded MSRB Rules within the advisories. In other instances, dealers and municipal advisors were confused by some of the statements in the advisories because they found those statements open to a number of interpretations. All of these concerns would have been addressed through a comment period that is part of the formal interpretive guidance process. Second, the informal compliance advisory process raised the question of whether the substantive guidance was retroactive in application. Unlike formal interpretive guidance, the MSRB's informal compliance advisories were not clear that they only applied prospectively. Dealers and municipal advisors had already developed compliance regimes within their firms and had a track record of complying with the MSRB Rules covered in the advisories. BDA members were highly concerned that FINRA or SEC examiners would view the advisories as applicable to conduct that occurred before the publication of the advisory. Finally, dealers and municipal advisors were left confused as to whether the guidance in the advisories had the force and effect of law – or had enough of the perception of the force and effect of law, that they were tantamount to the same. Thus, dealers and municipal advisors did not know what to do with areas of the advisories where they just disagreed with the MSRB concerning the application of MSRB Rules. Given these concerns, the BDA believes that the MSRB should not publish these compliance advisories unless they are solely intended to remind dealers and municipal advisors of existing rules. To the extent that the MSRB breaks new

interpretive ground, the BDA believes that the MSRB should use the formal interpretive guidance process.

To illustrate our concerns, below are specific areas with respect to the Compliance Advisory for Municipal Advisors (the "MA Advisory") that the MSRB published in June 2017:

- ***Rule G-42 Guidance***. We have two concerns about the Rule G-42 guidance in the MA Advisory. First, under the fourth bullet under *Potential Violative Conduct*, the MSRB expresses the conflicts of interest rules in a much more expansive way than required by Rule G-42 because it suggests that the municipal advisor may be required to disclose fee-sharing arrangements with deal participants even when they are not related to the municipal entity client or obligated person at issue, and which the municipal advisor has concluded are not material to the client. Second, the last bullet point under *Potential Violative Conduct* suggests that a municipal advisor should not just disclose material, legal or disciplinary events, but also figure out which of those events a municipal entity client or obligated person should focus on. Rule G-42 only requires disclosure of the events themselves and does not require any such further specialized disclosure.

- ***Rule G-20 Guidance***. Under the Rule G-20 guidance in the MA Advisory, we object to three points of guidance. First, under both of the discussions of potential violative conduct and considerations, there is a reference to a requirement to review "frequent or extensive" gifts of meals or entertainment. We interpreted these references to impose a requirement beyond that which exists in Rule G-20 that imposes an objective requirement of $100 per year. Second, under the discussion of considerations, the MA Advisory discusses the need for municipal advisors to monitor gifts, gratuities and entertainment their associated persons receive from other entities. We believe that this monitoring requirement is new and not found in MSRB rules. Third, under the discussion of considerations, the MA Advisory suggests that the MSRB rules impose a requirement that municipal advisors monitor state and local laws governing gifts and gratuities. While our members have historically tracked these laws as a matter of business compliance, we do not believe that the MSRB rules require this and an examination of a municipal advisor's compliance with these laws should not be the subject of an examination.

- ***Rules G-2, G-3 and A-12 Guidance***. Under the third paragraph of guidance concerning Rules G-2, G-3 and A-12, the MA Advisory seems to suggest that a firm is not qualified as a municipal advisor if any natural person associated with such municipal advisor is properly qualified. We understand that such a circumstance would represent a violation of the MSRB rules, but we do not believe that it would represent a disqualification of the firm.

- ***Rules G-44, G-8 and G-9 Guidance***. Under the last consideration under the guidance concerning Rules G-44, G-8 and G-9, the MA Advisory suggests that municipal advisors are responsible for retaining a range of communications that we believe far exceeds the requirements for record keeping under the Rules G-8 and G-9.

Our members have similar experiences with other advisories as well, each of which could be meaningfully addressed through the form of a comment process. Accordingly, the BDA strongly

believes that compliance advisories need input from the industry to ensure that unintended consequences do not happen.

In particular, the BDA strongly encourages the MSRB to <u>not</u> provide compliance advisories with respect to long-standing MSRB Rules.

The BDA encourages the MSRB to avoid advisories to address compliance concerns relating to long-standing rules. If the MSRB learns of concerns relating to dealer or municipal advisory compliance with long-standing MSRB rules, the BDA strongly encourages the MSRB to use formal rule-making procedures to address those concerns – as the informal advisory process is not appropriate to address regulatory concerns relating to long-standing rules.

The BDA encourages the MSRB to provide careful consideration in advisories that address legal issues outside of MSRB Rules.

The BDA shares the concerns of other industry members concerning the selective disclosure advisory, as some of the statements that the MSRB provided in that advisory, muddled issuers' understanding of the Federal antifraud laws. While we do believe that the MSRB serves a valuable role in educating issuers, and informing them of the implications of the Federal antifraud laws should be included in that responsibility, any such efforts should be completed in coordination with the input of the SEC and the industry. Topics like selective disclosure can involve many different, very legitimate practices in the industry that the MSRB should understand and take into consideration the experience of the industry before providing guidance to issuers and the municipal securities market concerning the Federal antifraud laws.

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Thank you for the opportunity to provide these comments.

Sincerely,

Mike Nicholas
Chief Executive Officer