

January 19, 2022

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

Transmitted electronically

Comments on MSRB Notice 2021-12

Dear Mr. Smith,

The Bond Dealers of America is pleased to provide comments on MSRB Notice 2021-12, “Request for Input on Draft Compliance Resources for Dealers and Municipal Advisors Concerning New Issue Pricing” (the “DCR”). BDA is the only DC-based organization exclusively representing the interests of securities dealers and banks focused on the US fixed income markets.

BDA generally believes the DCR is a useful resource for underwriters and MAs with respect to compliance with relevant MSRB rules related to new issue pricing. The document generally lays out an overview of relevant rule requirements in a well-organized manner.

We agree with the MSRB’s assertion that compliance resources in general should “not create new legal or regulatory requirements or new interpretations of existing requirements,” and we do not believe the DCR would create new or different compliance standards for the rules it addresses. Some of our recommendations in this letter focused on the issues raised in the DCR would create new compliance standards and for that reason would not be appropriate for inclusion in the document, and we do not intend for those recommendations to be included in the final version of the DCR. Rather, those recommendations would be better implemented through rule amendments or interpretive guidance as appropriate.

### ***Flexibility***

It is vitally important that MSRB rules and compliance resources provide the maximum flexibility for underwriting firms in designing and implementing written supervisory procedures (WSPs) around the activity of pricing new issues. There is a wide range of firms of all sizes and business models among municipal underwriters. There are dealers who underwrite just a handful of deals per year, and there are dealers who underwrite multiple deals every week. Firms have different degrees of resources and different organizational structures. At some firms, the underwriter—the person at the dealer firm principally responsible for establishing new issue prices—is also the supervisor. Smaller dealers in particular face challenges in developing and implementing robust supervisory procedures with limited resources and personnel. For these reasons we ask the MSRB to maintain maximum flexibility with respect to WSPs associated with pricing to facilitate compliance for firms of all types and sizes.

### ***Documentation issues***

MSRB Rule G-8, “Books and Records to be Made by Brokers, Dealers, and Municipal Securities Dealers and Municipal Advisors,” is the MSRB’s rule governing maintenance of books and records. As a general matter, BDA believes that all documentation requirements associated with any rule in the MSRB’s rulebook should be specified in Rule G-8. This is the rule firms look to when developing WSPs related to books and records retention.

The DCR states “the MSRB does not expect firms to be able to fully document and recreate every aspect of the pricing process for supervisory and examination purposes,” and we agree fully with this approach. Documentation related to pricing should be sufficient for a supervisor, auditor, or examiner to review the underwriter’s process in determining a price, but it is not necessary for a supervisor or examiner after the fact to come to their own opinion as to what a fair price should have been. Documentation standards should reflect this approach.

The DCR for MAs states that “Rule G-42 does not preclude a municipal advisor from excluding advice related to pricing a new issuance from its scope of services with a client” as long as the limitations on the MA’s scope of services to the issuer are documented in the MA’s relationship documentation required under Rule G-42, and the MA acts, depending on all of the facts and circumstances, in a course of conduct consistent with such limitation. We believe this is a useful reminder as MAs assess their applicable policies and procedures.

Some BDA underwriter members have stated that their comfort with meeting their fair pricing obligations would be helped by knowing affirmatively whether there is a MA engaged in the transaction and whether that MA has limited the scope of its engagement to exclude advice on pricing per MSRB Rule G-42 Supplementary Material .04. The MSRB may want to examine the question of an appropriate means to inform the entire deal team about the scope of engagement of the MA. This is not an issue which could be addressed through a compliance resource.

The DCR states “the duty of fair dealing under Rule G-17 includes an implied representation that the price an underwriter pays to an issuer is fair and reasonable, taking into consideration all relevant factors, including the best judgment of the underwriter as to the fair market value of the issue at the time it is priced.” “Fair and reasonable” is also the pricing standard in MSRB Rule G-30, “Prices and Commissions.” We believe fair and reasonable is an appropriate regulatory standard for defining dealer pricing duties.

### ***Examinations***

Dealers are periodically examined by both FINRA and the SEC for compliance with MSRB rules. While the MSRB’s pricing-related rules for underwriters are generally clear and specific, our members frequently report that FINRA and SEC examiners expect to see levels of detail in pricing-related documentation that exceeds the requirements of MSRB rules. Some examiners seem to believe that they should be able to fully recreate the pricing process and come to the same conclusion as the underwriter did when the transaction was priced in the market, while the MSRB appropriately recognizes in the DCR that the realities of the pricing process make it impossible to recreate or fully document this process. We urge the Board to work closely with FINRA and the SEC to ensure that examiners fully understand the compliance requirements related to pricing, especially documentation standards.

BDA believes the DCR is in general a useful tool to underwriters and MAs seeking to comply with MSRB rules related to new issue pricing. The DCR generally reflects requirements imposed in the MSRB's rulebook and does not suggest any new or different compliance standards than what are reflected in the rules. In that respect the DCR is a welcome document, and we urge the MSRB to finalize its publication.

As always, please call or write if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Decker". The signature is fluid and cursive, with the first name being more prominent.

Michael Decker  
Senior Vice President

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January 18, 2022

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

Dear Mr. Smith:

Please accept, on behalf of First River Advisory, my comments on the MSRB's *Request for Comment on Draft Compliance Resources for Dealers and Municipal Advisors Concerning New Issue Pricing*. First River Advisory is a registered Municipal Advisor. Accordingly, these comments shall be limited to the *Municipal Advisor Considerations for Assessing Written Supervisory Procedures Regarding New Issue Pricing*.

First River Advisory is focused on providing financial advisory services to non-profit hospitals. Many of First River Advisory's clients exhibit weak credit characteristics, so when tax-exempt, long-term, fixed-rate bonds represent the solution selected by the client, such bonds are usually offered through a securities broker-dealer to the high-yield market in the context of a negotiated sale. First River Advisory has also advised hospitals in connection with bank credit facilities which are not Municipal Securities and with the negotiation and termination of Municipal Financial Products such as interest rate swaps. Oversight of pricing of these instruments is typically among the scope of services provided by First River Advisory, and is evidenced in its Relationship Documentation with clients. Actual procedures for executing these functions are set forth in First River Advisory's *Written Supervisory Procedures*.

In general, First River Advisory is supportive of the MSRB's efforts to produce Compliance Resources, rather than to promulgate a new Rule. For those MA firms which elect to provide new issue pricing services to clients, these Compliance Resources provide such MA firms with the flexibility to tailor those services to their clients and those clients' circumstances, without being proscriptive. This is especially important to First River Advisory because its clients' transactions and their circumstances are somewhat out of the "mainstream" of most Municipal Securities transactions. I am satisfied that First River Advisory's *Written Supervisory Procedures* address its role in new issue pricing, which will be reflected on my next annual certification.

The theme of these Compliance Resources appears to require that MA firms "do what they say they're going to do" and document accordingly. None of the FAQs really address the "what

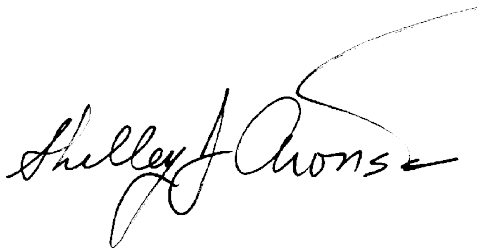
they say they're going to do," which is consistent with what appears to be the MSRB's understanding the MA firms need the flexibility to craft their own procedures and standards according to their practices and circumstances. Indeed, six of the nine FAQs relate to Relationship Documentation, but none prescribe any actual new issue pricing activities.

I understand that SEC examiners have been looking into MAs' role in new issue pricing. It will be important for the MSRB to convey to the SEC that its examinations should be limited to a firm's adherence to its own policies and procedures and the adequacy of documentation thereon. Correspondingly, there would need to be at least some appreciation among examiners that MA firms' practices vary widely. Perhaps examiners need to take some time at the outset of an examination to have sufficient dialogue with MA firm principals to gain an adequate understanding. Even though there appears to be some belief among examiners that a role in new issue pricing is a fundamental service that MAs should be providing, the MSRB should point out that an MA firm may exclude such service in its Relationship Documentation with its clients (FAQ #2).

First River Advisory suggests that the MSRB consider adding the concept of pricing Municipal Financial Products to these Compliance Resources, to be applicable to MA firms which offer this service.

First River Advisory believes that these Compliance Resources are sufficient and does not believe any amendments to Rules G-17 and G-42 would be in order.

As always, I am available to MSRB staff to explore these comments further. Cordially,





January 19, 2022

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

**RE: MSRB Notice 2021-12: Municipal Advisor Considerations for Assessing Written Supervisory Procedures Regarding New Issue Pricing**

Dear Mr. Smith:

The National Association of Municipal Advisors (NAMA) appreciates the opportunity to comment on the MSRB's draft compliance resource related to municipal advisor new issue pricing services. NAMA represents independent municipal advisor firms and individual municipal advisors (MA) from across the country and serves to educate and represent its members on market and regulatory matters.

NAMA supports making MAs aware of the importance of new issue pricing and regulatory considerations related to any work on new issue pricing. Over the past few months NAMA has held numerous educational events where this topic has been highlighted, and we have heard the SEC's concerns and focus on the issue. We will continue our efforts to educate our members and provide resources to improve awareness of the intersection of Rules G-17, G-42, and G-44 and the MA's role as advisor, and specifically new issue pricing services.

There are many aspects of the proposed resource that would be helpful to MA firms, especially smaller MA firms. However, we have concerns about the MSRB's focus on new issue pricing without discussion of at what point the "pricing" process starts, as well as general policy matters.

The structuring of a security is complex, and each decision has an impact on price. We have assumed for purposes of this letter that the MSRB is using "pricing" to talk about the period of time on a municipal securities transaction when material transactional terms are determined (including, but not limited to, optional redemption provisions, maturity structure, credit enhancements, covenants, etc.), an issuer's constraints towards couponing restrictions, targeted marketing efforts, as well as when preliminary pricing scales and distribution strategy are developed under a negotiated underwriting. We question the need to isolate this process from the other services performed by the MA during the development of a municipal securities transaction. The MSRB's own writings and resources (e.g., Model WSP), address how a firm ensures compliance with MSRB rules; the MSRB has not focused its writings on particular aspects or respective scope of services related to an individual MA's work. We have supported the MSRB's principles-based approach to transaction-related regulatory duties for MAs, and we are concerned that this document steps away from that approach. If indeed the MSRB is now determining that its resources and guidance will be more prescriptive about specific MA services and practices, there needs to be a larger – and more policy oriented - conversation.

Further, there are many areas of advice that the MA may provide clients that are not specifically addressed in a firm's WSP. We are confident that our members can decide whether or not they require specific supervisory procedures related to certain aspects of their MA services included in their WSPs, and we have concern that a requirement to include supervisory procedures specific to pricing will lead to requirements for specific procedures related to other MA activities. (For instance, how an MA approaches and documents advice related to competitive vs negotiated sale, purchasing bond insurance and other credit enhancements, whether bonds should be callable, and many other variables.) Therefore, we ask that the MSRB both avoid language that appears to insist that MA firms incorporate written new issue pricing procedures into their WSPs (see especially suggestions to FAQ #8) and have a conversation about its intentions and what this type of document may mean about the MSRB's work related to MAs and specifically to the transaction-related work of MAs.

We agree with the MSRB about the importance of MA firm processes, supervisory procedures and documentation practices. It is important for the MSRB to state that the information provided in this resource may be helpful to MAs, but the resource should not impose or imply additional requirements for MAs and MA firms. Each firm needs to make its own determination about if and how their services are represented in their WSPs, including for new issue pricing.

Below, are detailed responses to the questions posed in the resource, and suggestions on how both the FAQs and the questions for consideration could be better organized to best assist MA firms.

### Overview Section

We strongly encourage the MSRB to add additional narrative to this section to emphasize the fact that pricing a municipal securities transaction includes many variables, each of which may respectively impact pricing and be considered by the MA as they work through the process with their client. Advice about these variables is given over time and decisions may be made and then changed throughout the process, leading to a final acceptance of the pricing. We think that recognition of the fluid dynamic about MA work and services would enhance the resource by giving further perspective on the complexity of MA new issue pricing services and the supervision of those activities.

### Request for Input

*Do the FAQs pose questions that are relevant to supporting regulated entity compliance with the relevant obligations?*

Yes, the FAQs are relevant and could assist MAs with understanding their compliance obligations. In addition to our substantive comments on the issues raised in this resource, we suggest that there could be some consolidation of items, as well as additional headings and have included these suggestions in Attachment A.

*Do the proposed responses to the FAQs add to regulated entities' understanding of the relevant rules? How could they be improved to provide greater understanding?*

Yes, the document is helpful in understanding the relevant rules. Please see Attachment A for further comment.

*Are there additional questions to which the MSRB should respond? If so, please offer suggestions.*

The MSRB has adequately covered the relevant compliance matters related to their rulebook and MA new issue pricing services.

*Are the questions presented in the Questions for Consideration section(s) practical and helpful in assessing relevant policies and procedures? Are there any additional questions for consideration that would be helpful to add to the resources? Are there any that should be removed? If so, please explain.*

The items proposed in the Questions for Consideration are generally practical and helpful. However, we would like to make some suggestions on the section and have included those in Attachment B.

*Are there any other steps the MSRB can take to assist dealers and municipal advisors in assessing their relevant policies and procedures?*

We believe that the resource assists MAs with reviewing and considering if their policies and procedures are robust enough to meet compliance requirements. There are no other steps that the MSRB should take related to these matters.

*How could the format or presentation of the draft new issue pricing compliance resources be revised to aid understanding? For example, does the FAQ format facilitate understanding? Does the Questions for Consideration format facilitate understanding?*

Please see NAMA's suggestions in Attachments A and B related to the format and presentation of information.

*Do the draft new issue pricing compliance resources appropriately convey the flexibility a firm has in tailoring its supervisory system to its business activities? If not, how are drafts too restrictive or permissive? How can the drafts be improved in this respect?*

NAMA supports the MSRB's acknowledgement that MA firm practices and MA services reasonably vary between firms, between clients and in individual transactions. It is important to NAMA and its members that the MSRB recognize that the manner in which new issue pricing services are approached, documented and supervised can differ among firms. We have noted several places in Attachments A and B where the drafts are too restrictive in appearing to suggest that written procedures related to new issue pricing might be required for every MA firm and have commented to alter or remove such language. We request that the MSRB further acknowledge this fact in the document and suggest that it create a shaded box or other type of 'stand out' presentation of this important point.

*Rather than (or in addition to) issuing the draft new issue pricing compliance resources to aid in understanding current obligations and in assessing a regulated entities' current supervisory and compliance procedures, should the MSRB consider amending the relevant rules (e.g., Rules G-17 and G-42) or adopting/amending formal interpretive guidance that expressly defines a regulated entity's obligations with respect to new issue pricing? a. If so, how would the standards posed in such an amendment or guidance differ from the content in the draft new issue pricing compliance resources? b. If so, would there be a need for amendments or guidance with respect to any other rules that may also be relevant to a regulated entity's new issue pricing obligations?*

At this time, NAMA does not see the need nor support amendments to Rules G-17, G-42 or G-44, related to this matter. Rather, a larger dialogue on how the duties of MAs might relate specifically to new issue pricing would be more valuable versus the prescriptive nature of formal rule amendments.



## QUESTIONS RELATED TO MSRB'S DRAFT DOCUMENT 'UNDERWITER CONSIDERATIONS FOR ASSESSING SUPERVISION OF NEW ISSUE PRICING'

In the accompanying piece for underwriters, we note that the MSRB does not discuss the importance of MSRB Rule G-11 for underwriters and their pricing duties. As Rule G-11 is entitled *Primary Offering Practices*, it would seem imperative to mention the need for underwriters to have compliance standards related to following issuer direction in new issue pricing (e.g., retail order period), as well as demonstrating that a firm can detect and discourage instances of flipping.

### OTHER POLICY MATTERS

Guidance. In 2018, NAMA commented on the numerous types of guidance and resources that the MSRB develops for regulated entities.<sup>1</sup> At the time we suggested that the MSRB establish transparent mechanisms for what the purpose, goal and expected outcome is for the types of documents produced, and consider having a smaller set of guidance/resources available. We further asked the MSRB to explain what determines if a piece will be SEC-approved interpretive guidance, non-SEC approved guidance, FAQs or one-off commentary on how MSRB rulemaking should apply to regulated entities (e.g., compliance corner emails, MuniEdPro offerings, etc.). While this particular draft guidance would be easily identified as applying to G-42 and G-44 duties, we again stress the value that clear categorization (by Rule or topic) of information that the MSRB has provided over the years would be helpful and welcome. Additionally, the MSRB should also clearly distinguish on its website which "Interpretive Guidance" has been approved by the SEC.

Used by Examiners. In many of the compliance resources the MSRB has produced there is a disclaimer that the publications *do not create new regulatory or legal requirements or new interpretations of existing requirements and should not be interpreted by regulated entities or examining authorities as establishing new standards of conduct.* We would expect the same to apply to this resource. We do note that during discussions of this publication there have been comments that this resource was drafted to address concerns of SEC and FINRA examiners and could be utilized to help with their efforts.

We would welcome a discussion with the MSRB and SEC staff about how guidance is applied in examinations and how to best facilitate understanding within the Exam staff, enforcement staff and the MSRB about the duties and roles of MAs, using this key issue of new issue pricing as a prompt. We have noted previously, there are few, if any, experienced MAs on the staff of either the SEC, the MSRB or FINRA; thus it is critically important for there to be continued and robust communication among the MSRB, practitioners and regulators about MA duties and services and how rulemaking is implemented 'on the ground.'

Additionally, we continue to be interested in instances where the MSRB may provide verbal or specific information and guidance to examiners and enforcement staff about MA rulemaking and MA practices (as well as for broker/dealer rules and practices). Distribution of this information to regulated entities could assist all parties, especially MAs, in complying with MSRB rules that generally have no existing legal precedent and/or interpretive guidance. As noted above, regarding the need to label and streamline the types of information/guidance that the MSRB produces, one suggestion is to post and distribute a list of topics that the MSRB has discussed with examiners and provide any relevant information that could be made public and would be useful to MAs (and other regulated entities). This information could be provided in the MSRB's annual report or similar and more frequent communications.

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<sup>1</sup> <https://www.msrb.org/rfc/2017-22/nama.pdf>

Communicating with Municipal Advisors

We continue to suggest that the MSRB reach out to NAMA and municipal advisors as they begin to conceptualize and develop guidance and rulemaking. Gaining practical knowledge about MA practices at the beginning of the process would help drafters gain better 'practical' footing and could help all involved with developing stronger draft documents rather than regulated entities reacting to proposals and comments at the end of the process.

Thank you again for the opportunity to comment on this resource. We would very much welcome and appreciate the opportunity to further discuss our comments with MSRB staff.

Sincerely,

A handwritten signature in cursive script that reads "Susan Gaffney". The signature is written in black ink and is positioned below the word "Sincerely,".

Susan Gaffney  
Executive Director

## FREQUENTLY ASKED QUESTIONS

The following FAQs are intended to show the application of the duties and obligations under Rules G-42 and G-44 to municipal advisor pricing activities. Municipal advisors may be able to use these FAQs as a resource in tailoring their compliance and supervisory programs.

### **1. With respect to the scope of services, what information should be included in the documentation evidencing the municipal advisor's relationship with its client?**

Pursuant to Rule G-42(c), a municipal advisor must evidence each of its municipal advisory relationships in a dated writing or writings (referred to as "Relationship Documentation") that include(s), among other things, the scope of the municipal advisory activities to be performed and any mutually agreed upon limitations on such scope. While the MSRB has not dictated the specific format or more specific content requirements for what must be included in the Relationship Documentation's scope of services section, the Relationship Documentation should include sufficient details to allow both the municipal advisor and the client to understand the services that the municipal advisor will provide and any mutually agreed upon limitations from the engagement.

Additionally, because the Relationship Documentation may be comprised of more than one writing, municipal advisors should consider whether they may have expressly or impliedly undertaken to perform certain services described in a document other than an engagement letter (e.g., a response to a Request for Proposals/Request for Qualifications ("RFP/RFQ")).

### **2. May a municipal advisor exclude certain advice, such as advice regarding the pricing of a new issuance, from its scope of services with a client, and accordingly how should that be documented?**

Yes. Supplementary Material .04 of Rule G-42 permits a municipal advisor flexibility to limit the scope of municipal advisory activities to be performed to certain specified activities or services, so long as such limitations are requested or expressly consented to by the client. This applies to services related to pricing of a new issuance. Accordingly, Rule G-42 does not preclude a municipal advisor from excluding advice related to pricing a new issuance from its scope of services with a client.

For documentation purposes, if a municipal advisor and its client mutually agree that the scope of services for a new municipal advisory engagement will not encompass the provision of advice related to pricing a new issuance, then the municipal advisor's Relationship Documentation should be drafted to reflect this agreed-upon limitation. [from original question #3]

~~However, per Supplementary Material .04 of Rule G-42, if a municipal advisor engages in a course of conduct that is inconsistent with an otherwise valid limitation in its Relationship Documentation, then the municipal advisor may negate the effectiveness of such limitation. For example, if a municipal advisor's Relationship Documentation excludes the provision of advice to a client regarding the pricing of a new issuance and, nonetheless, the municipal advisor provides advice to the client regarding the pricing of a new issuance, then the municipal advisor's conduct would be subject to the applicable standards regardless of the limitation included in the Relationship Documentation (i.e., a duty of care for obligated person clients and the duties of care and loyalty for municipal entity clients).~~

3. How should a municipal advisor address a situation, including for documentation purposes, where they perform pricing or other services that are not reflected in the Relationship Documentation or where such activity is stated as an exclusion of services with a client? Under what circumstances does the Relationship Documentation need to be amended or revised?

**3. If a municipal advisor and its client mutually agree to exclude certain municipal advisory activities from an engagement, how should the municipal advisor reflect that limitation in its relationship documentation?**

However, per In Supplementary Material .04 of Rule G- 42, if a municipal advisor engages in a course of conduct that is inconsistent with ~~an otherwise valid~~ a stated limitation in its Relationship Documentation, then the limitation cited in the Relationship Documentation is invalid. The municipal advisor should then supplement/amend the Relationship Documentation as soon as possible. ~~municipal advisor may negate the effectiveness of such limitation.~~

~~In addition, Supplementary Material .06 of Rule G-42 requires that a municipal advisor's Relationship Documentation be promptly amended or supplemented to reflect any material changes or additions during the term of the municipal advisory relationship. Accordingly, if for example a municipal advisor and its client mutually agree that the scope of services for an existing municipal advisory engagement should be amended to exclude the provision of advice related to pricing a new issuance, then the municipal advisor's Relationship Documentation should be amended or supplemented to reflect this agreed-upon limitation.~~

For example, if a municipal advisor and its client initially agree to a more general scope of services at the outset of the relationship, but subsequently refine their expectations of the services to be performed, the Relationship Documentation must be amended or supplemented promptly to reflect any material modifications. Further as an example, if a municipal advisor and its client mutually agree that the scope of services for an existing municipal advisory engagement should be amended to exclude or include ~~the provision of~~ advice related to pricing a new issuance, then the municipal advisor's Relationship Documentation should be amended or supplemented to reflect this agreed-upon limitation or addition.

As a reminder, a municipal advisor's conduct is ~~As an~~ ~~For~~ [example, if a municipal advisor's Relationship Documentation excludes the provision of advice to a client regarding the pricing of a new issuance and, nonetheless, the municipal advisor provides advice to the client regarding the pricing of a new issuance, then the municipal advisor's conduct would be subject to the applicable standards regardless of any language the limitation included in the Relationship Documentation that purports to limit the municipal advisor's duty (i.e., a duty of care for obligated person clients and the duties of care and loyalty for municipal entity clients). [from original question #2]

**4. Is it inconsistent with Rule G-42(c), on documentation of the municipal advisory relationship, if the municipal advisor's Relationship Documentation is silent or otherwise ambiguous with respect to whether the municipal advisor will provide pricing advice?**

Maybe, depending on all of the facts and circumstances, including the services that are actually performed.<sup>4</sup> While Rule G-42(c) requires a municipal advisor's Relationship Documentation to accurately describe the agreed-upon scope of services to be performed during an engagement with a client, the rule does not require the scope of services incorporated into the Relationship Documentation to address every eventuality that potentially may (or may not) arise in the course of a client engagement.

However, municipal advisors should be very mindful of any aspects of a scope of services, that, intentionally or unintentionally, are left unspecified, open ended, or are otherwise undetermined. In such instances, municipal advisors should consider whether their Relationship Documentation is appropriately tailored and sufficiently

clear as to the municipal advisory services that they intend to perform. They should also be mindful that any subsequent material changes or additions to the agreed-upon scope of services must be reflected in an amendment or supplement to the Relationship Documentation. *See also FAQs 5 and 6.*

**5. If the Relationship Documentation is silent or otherwise ambiguous with respect to whether advice on pricing is included in a scope of services, does a municipal advisor have any pricing-related obligations under Rule G-42?**

Maybe, depending on the municipal advisory activities actually performed and the other facts and circumstances of the engagement. Silent or otherwise ambiguous Relationship Documentation will not relieve the municipal advisor of any of the specific obligations and duties prescribed by Rule G- 42. As one example, Supplementary Material .04 of Rule G-42 makes clear that municipal advisors are not permitted to alter the standards of conduct or impose any limitations on the duties prescribed by the rule. In other words, the Relationship Documentation cannot alter the baseline duties of loyalty and care a municipal advisor owes to a municipal entity client, nor the baseline duty of care a municipal advisor owes to a non-municipal entity obligated person client.

Rule G-42 does not impose a specific obligation to provide pricing-related advice and a municipal advisor and its client can mutually agree that pricing advice will not be part of the engagement. However, if a municipal advisor, through its conduct (or otherwise) has effectively agreed to provide pricing- related services or does perform such services, the applicable standards of care (the duty of care and, if applicable, the duty of loyalty) will apply with respect to those services. This is so even if the Relationship Documentation is silent or ambiguous as to whether such services will be performed.

~~**6. Are there conditions under which a municipal advisor must amend its Relationship Documentation?**~~

~~Yes. During the term of the municipal advisory relationship, the Relationship Documentation must be promptly amended or supplemented to reflect any material changes or additions to the engagement. For example, if a municipal advisor and its client initially agree to a more general scope of services at the outset of the relationship, but subsequently refine their expectations of the services to be performed, the Relationship Documentation must be amended or supplemented promptly to reflect any material modifications.~~

[Concept incorporated into question # 3]

**7. While WSPs are not one-size-fits-all, are there any common elements that the MSRB would expect to see in the WSPs of large and small firms alike?**

This question should be deleted, as it relates to general WSP matters, and not specifically to new issue pricing services. Further, the comment that “that the MSRB would expect to see” is irrelevant since the MSRB does not examine or review WSPs or any other municipal advisor work.

If the MSRB determines that this answer needs to be retained, we suggest that it be placed in the Overview section and not here as part of an FAQ since the information is more general in nature about WSPs.

~~A municipal advisor’s WSPs should include sufficient detail tailored to a firm’s business. In tailoring their WSPs to their business, municipal advisors may wish to consider the content in this compliance resource, including the questions for consideration below. Additionally, municipal advisors may wish to consult the [MSRB Sample Template and Checklist for Municipal Advisor WSPs](#), which sets forth one approach to developing WSPs. A municipal advisor that follows that format would include in its WSPs: (a) the individual(s) responsible for supervision; (b) the supervisory process the individual(s) take; (c) the frequency of the activities undertaken by~~

the individual(s) responsible for supervision; and (d) what document(s) the individual(s) responsible for supervision review or create to reflect that the supervisory procedure was undertaken. The MSRB believes that inclusion of these elements in a firm's WSPs will help ensure that the supervisory procedures are reasonably designed to achieve compliance with applicable rules.

#### **8. Are municipal advisors expected to have WSPs that speak to the review of new issue pricing?**

**The MSRB should be careful about answering this question so that it does not come across as though the MSRB is making a new statement that policies related to new issue pricing must be incorporated into a firm's WSP. Please see substantive edits below.**

Rule G-44 requires municipal advisors to develop a system to supervise the activities of the municipal advisor and its associated persons that is reasonably designed to achieve compliance with applicable rules. Such a supervisory system incorporates the adoption of compliance policies and WSPs that are tailored to the nature and scope of a firm's municipal advisory activities. Accordingly, the compliance policies and WSPs of a municipal advisor firm should describe the municipal advisory activities in which the municipal advisor engages and should explain how the municipal advisor firm supervises those activities to help ensure that they are in compliance with applicable rules. Municipal advisor firms should determine whether or not to include, and if they do include, the level of specificity in their WSP and supervisory procedures for all MA services, including new issue pricing. ~~Therefore, if a municipal advisor routinely provides pricing-related advice, the WSPs would speak to how a municipal advisor principal at the firm supervises such activity.~~ Importantly, Rule G-44 establishes a primarily principles-based approach to supervision and compliance, recognizing that there is no one-size-fits-all approach to supervision. Accordingly, municipal advisors' WSPs may be consistent with Rule G-44 even though they reasonably differ as to whether or not they include specificity with respect to the review of pricing-related activities and as to supervisory oversight, based on facts and circumstances in tailoring such WSPs to the firm's activities any specificity related to the supervision of new issue pricing related services.

#### **9. May a firm's supervisory methodology rely on after-the-fact oral explanations to supplement the records it otherwise is required to maintain and preserve?**

Yes. MSRB rules permit firms to adopt supervisory methodologies that afford a reasonable degree of deference and flexibility to their municipal advisory personnel. Firms do not need to document any or every aspect of the pricing process and may need to rely on oral explanations to supplement the records they otherwise maintain and preserve in accordance with MSRB rules. Given the pace, complexity, and variety of pricing activities, the MSRB understands that details beyond those found in written or electronic communications may not be readily reduced to a written record, in real time or after the fact (*e.g.*, in a closing memorandum or other similar post-closing record). Oral explanations of such pricing details may be necessary and reasonably relied upon, in accordance with the firm's policies and procedures, as reasonably sufficient for supervisory and examination purposes.

## QUESTIONS FOR CONSIDERATION

The MSRB has developed questions that municipal advisor firms may wish to consider with a view towards assessing as they assess their supervisory policies and procedures with respect to pricing-related activities. These questions are intended to help prompt MA firms to review and determine for themselves if and how to address pricing-related activities in their supervisory policies and procedures. While As noted, this resource does not address all regulatory obligations applicable to municipal advisors and one firm's approach to compliance may not necessarily be appropriate or reasonable for another firm, - Therefore, municipal advisors should consider their own business model, practices, and activities in reviewing the following questions for consideration with a view towards assessing their supervisory policies and procedures with respect to pricing-related activities. Please note that this resource does not address all regulatory obligations applicable to municipal advisors and one firm's approach to compliance may not necessarily be appropriate or reasonable for another firm.

### Scope of Engagement/Relationship Documentation

1. Does the ~~municipal advisor's~~ Relationship Documentation between the client and the municipal advisor appropriately describe the scope of municipal advisory services to be performed and/or any limitations on the scope of engagement? For example, does the Relationship Documentation indicate whether pricing-related advice with respect to a new issuance of municipal securities is included within the scope of the engagement or specifically excluded from the scope of engagement? [original question #1]
2. Does the municipal advisor firm have a process to help ensure that any necessary amendments or supplements to a municipal advisor's Relationship Documentation are made as and when required? [original question #2]

### WSPs

3. Based on the services provided and a municipal advisor firm's obligation to appropriately tailor its WSPs to the nature and scope of the firm's municipal advisory activities, would it be beneficial to have ~~compliance policies and WSPs that~~ specifically address its obligations when providing pricing-related advice with respect to a new issue? [original question #3]
4. Do the municipal advisor firm's ~~policies and~~ WSPs speak to the timing of documentation? (*E.g.*, may such information be included in a post-closing memorandum as opposed to being documented at the time of pricing?) Do the firm's WSPs address whether certain information can be provided to the supervisory principal orally upon request? [original question #7]
5. **NEW** DO these processes utilized by the municipal advisory firm's municipal advisory professionals related to pricing advice appropriately captured need to be articulated in the municipal advisor's firms processes and WSPs? [from original question #4]

### PROCESSES WHEN PROVIDING PRICING ADVICE

6. What are the processes followed by the municipal advisor firm's professionals when providing ~~pricing-related~~ advice to the firm's clients, including in connection with pricing-related advice in a new issuance? Are these processes sufficient to help the municipal advisor professional discharge his or her duty of care (and if the client is a municipal entity, duty of loyalty) obligations? [original question #4]

7. Based on the municipal advisor firm's business model and the types of services provided by the a municipal advisor professional, does the municipal advisor firm expect different processes to be followed and/or different documentation to be made and kept in connection with different types of offerings (e.g., negotiated, competitive, private placement, deals with unique attributes that may impact pricing or make pricing unusual or challenging)? [original question #5]

#### DOCUMENTATION STANDARDS FOR PRICING-RELATED ADVICE

8. To the extent a municipal advisor professional provides ~~pricing-related~~ advice, including pricing-related advice, does the municipal advisor professional retain documentation that supports the basis for such advice? (E.g., recently priced comparable transactions, industry indices, economic conditions, degree and/or nature of investor demand, number of potential investors contacted, special instructions from the issuer, special or unique features of the issuance, and other types of information deemed appropriate or necessary by the municipal advisor firm.) In what manner does the municipal advisor firm show compliance with the requirement in Rule G-42, Supplementary Material .01 that the firm had a reasonable basis for any advice provided to or on behalf of its client? [original question #6]

#### SUPERVISING PRICING-RELATED ADVICE

9. Does the municipal advisor firm have a process for reviewing and supervising advice, including pricing-related advice, such as – in the periodic review of the municipal advisor professional's pricing-related activities on deals? Do certain deals warrant having an escalation and review process, such as those with unique attributes that may make pricing unusual or challenging? [original question #8]





January 19, 2022

**VIA ELECTRONIC SUBMISSION**

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

**Re: MSRB Notice 2021-12 – Request for Comment on Draft Compliance Resources for Dealers and Municipal Advisors Concerning New Issue Pricing**

Dear Mr. Smith,

The Securities Industry and Financial Markets Association (“SIFMA”) appreciates this opportunity to comment on Municipal Securities Rulemaking Board (“MSRB”) Notice 2021-12 (the “Notice”)<sup>1</sup> requesting comment on draft companion compliance resources for brokers, dealers and municipal securities dealers (collectively, “dealers”) and municipal advisors (together with dealers, “regulated entities”). We understand that the two compliance resources were designed to enhance understanding regarding the existing regulatory standards applicable to regulated entities’ supervision of conduct when pricing a new issuance of municipal securities. SIFMA appreciates these draft compliance resources by MSRB, which we believe accurately capture the relevant rules and support the stated goals. SIFMA does, however, have some suggested changes and questions, as set forth below.

**I. Record Keeping**

SIFMA members greatly appreciated that in question 6 on page 6 of the first compliance resource, “Underwriter Considerations for Assessing Supervision of New Issue Pricing,” the MSRB states that dealers “need not document every aspect of the pricing process and may rely on oral explanations to supplement the records they otherwise maintain and preserve in accordance with MSRB rules”. It is very helpful for the MSRB to acknowledge that not everything can or needs to be documented contemporaneously. We appreciate that this language provides firms flexibility to structure their own compliance systems,

However, members point out that there is no related record keeping requirement in Rule G-8. Some SIFMA members are concerned that this language may create record keeping

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<sup>1</sup> MSRB Notice 2021-12 (Oct. 5, 2021).

requirements that are not contemplated on the face of the Rule. To that end, we request that Question 6 in the dealer compliance resource be revised to eliminate the reference to records that dealers are “required to maintain and preserve,” so that it reads as follows: “[m]ay a firm’s supervisory methodology rely on after-the-fact oral explanations to supplement the records it otherwise maintains?” We request that a similar edit be made to the response to Question 6 so that the above sentence states that dealers “need not document every aspect of the pricing process and may rely on oral explanations to supplement the records they otherwise maintain.” Likewise, in the municipal advisor compliance resource, we request that corresponding edits be made to Question 9 and the response to Question 9.<sup>2</sup> Additionally, SIFMA recommends that the compliance resources identify which Rules are being discussed with each clarifying statement.

## **II. Oversight Roles**

Questions also arose in discussing the oversight of pricing municipal securities. Many firms have supervisory practices in place that provide for spot checking deals or reviewing a sampling of transactions based on a risk assessment. SIFMA members believe that in-depth supervisory review of every transaction is neither efficient, practicable nor required.

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<sup>2</sup> Although the MSRB rules do not have any specific recordkeeping requirements regarding new issue pricing, it is unclear what documentation will satisfy examiners from the SEC Office of Examinations or FINRA.

\* \* \*

Thank you for considering SIFMA's comments. Overall, SIFMA appreciates the MSRB's proposed compliance resources, and the opportunity to set forth our additional suggestions and clarifications above. If a fuller discussion of our comments would be helpful, Leslie can be reached at (212) 313-1130 or [lnorwood@sifma.org](mailto:lnorwood@sifma.org) and Matt can be reached at (212) 313-1129 or [mroberts@sifma.org](mailto:mroberts@sifma.org).

Sincerely,



Leslie M. Norwood  
Managing Director  
and Associate General Counsel



Matthew Roberts  
Assistant Vice President

cc: ***Municipal Securities Rulemaking Board***  
Gail Marshall, Chief Regulatory Officer