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August 25, 2014

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA 22314

Re: MSRB Notice 2014-12

The National Association of Independent Public Finance Advisors ("NAIPFA") appreciates this opportunity to provide comments in connection with Municipal Securities Rulemaking Board ("MSRB") Notice 2014-12 – Request for Comment on Revised Draft MSRB Rule G-42, on Duties of Non-Solicitor Municipal Advisors (the "Revised Notice").

Comments

The Revised Notice and the proposed version of MSRB Rule G-42 set forth therein (the "Rule") are significantly more aligned with the needs of Municipal Advisors as well as municipal entities and obligated persons than the prior versions of both. We appreciate the MSRB's determinations in this regard. That being said, NAIPFA believes that those portions of the Rule that were no amended in accordance with NAIPFA prior comments still require revision. To that end, NAIPFA has attached the comments we submitted in connection with the prior notice hereto as Exhibit A and incorporate those comments herein. In addition, as described more fully below, we find the inclusion of Supplementary Paragraph .06 (the "Paragraph") both troubling and unwarranted.

NAIPFA does not believe that the Paragraph is appropriate for inclusion within the Rule. The Paragraph and the provisions contained therein are not designed for the benefit municipal entities, obligated persons, the public or Municipal Advisors as a whole. Instead, the Paragraph will benefit, to the detriment of all other market participants, only those Municipal Advisors who are also registered broker-dealers who wish to avoid being prohibited from underwriting an issuance of securities pursuant to MSRB Rule G-23. In other words, except for situations in which a broker-dealer acts as a Municipal Advisor and wishes to serve in another capacity, specifically, as an underwriter, it is unlikely that this provision will be utilized. As such, NAIPFA believes that this exemption, if it is to be created, would be more appropriately fall under MSRB Rule G-23 rather than the Rule.

That being said, this issue has already been vetted by the SEC through its preparation of Release No. 34-70462 (the "Release") and its adoption of Rule 15Ba1-1 ("Rule 15Ba1-1"). If the SEC had intended for there to be an "inadvertent advice" exception it would have included such an exemption within the Release and Rule 15Ba1-1. Illustrative of this are the numerous

exemptions that were created, including: (i) the Public Officials and Employees of Municipal Entities and Obligated Persons Exception; (ii) the Responses to Requests for Proposals or Requests for Qualifications Exception; (iii) the Municipal Entity or Obligated Person Represented by an Independent Municipal Advisor Exemption; (iv) the Broker, Dealer or Municipal Securities Dealer Serving as an Underwriter Exception; (v) the Registered Investment Advisers Exemption; (vi) the Registered Commodity Trading Advisors/Swap Dealers Exemption; (vi) the Accountants, Attorneys, Engineers and Other Professionals Exemptions; and (vii) the Banks Exemption.

The fact that the SEC determined not to create an "inadvertent advice" exception is particularly noteworthy in light of a recent commentary from SIFMA in which it pointed out that President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") into law almost four years ago.[1] Although absent from SIFMA's comments, this nearly four year delay was instigated principally by the broker-dealer community who argued that the MSRB, which had proposed numerous Municipal Advisor rules in 2011, should delay its rulemaking until the SEC adopted a final definition of the term "Municipal Advisor."[2] Importantly, while seeking to delay MSRB rulemaking, which has continued through today, broker-dealer groups have engaged in a comprehensive lobbying campaign utilizing both legislative[3] and regulatory[4] efforts that are designed to weaken the issuer and public protections put in place by the Dodd-Frank Act. All told, broker-dealer groups, and others, had nearly four years with which to have their voices heard on this very topic and in the end the SEC (and Congress) have determined not to grant an "inadvertent advice" exemption. As such, NAIPFA believes that the time has passed for creating additional exemptions from the definition of the term "Municipal Advisor," particularly when such exceptions are likely to lead to a continuation of the abusive practices that were the impetus for the enactment of the Dodd-Frank Act.

Of particular note in this regard are the statements within the SEC's Registration of Municipal Advisors Frequently Asked Questions dated January 10, 2014, as amended. Therein, the SEC states,

> If a broker-dealer acts as a municipal advisor to a municipal entity with respect to an issuance of municipal securities, it owes fiduciary duty to the municipal entity with respect to that issuance and must not take any action inconsistent with its fiduciary duty to the municipal entity. Additionally, the broker-dealer must comply with MSRB Rule G-23,

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[1] Kenneth Bentsen, Jr., "Commentary: Regulation of MAs: Bring it On", *The Bond Buyer* (July 31, 2014).
[2] SIFMA Letter to MSRB, Re: MSRB Notice 2011-28 (June 24, 2011) ("SIFMA Letter"); *See* BDA Letter to MSRB, Re: MSRB Notice 2011-28 (June 24, 2011); SIFMA Letter to MSRB, Re: MSRB Notices 2011-14 and 2011-13 (April 11, 2011); SIFMA Letter to MSRB, Re: MSRB Notice 2011-16 (April 5, 2011); SIMFA Letter to MSRB, Re: MSRB Notice 2011-04 (February 25, 2011).
[3] *See* HR 2827; *See* HR 797.
[4] From June 14, 2011 through September 16, 2013, SIFMA and BDA met with the SEC approximately twelve times specifically regarding the registration requirements for Municipal Advisors, which included the definition of the term "Municipal Advisor" that was ultimately contained within SEC Rule 15Ba1-1.

> which prohibits persons from switching from the role of financial advisor to the role of underwriter with respect to the same issuance of municipal securities.[5]

Here, the SEC's position is unequivocal, when a broker-dealer acts as a municipal advisor it cannot then serve as the underwriter in connection with the same issuance of municipal securities. Similarly, interpretive guidance to MSRB Rule G-23 notes that

> The dealer must not engage in a course of conduct that is inconsistent with an arm's-length relationship with the issuer in connection with such issue of municipal securities or the dealer will be deemed to be a financial advisor with respect to that issue and precluded from underwriting that issue by Rule G-23(d).[6]

MSRB Rule G-23 itself contains no exception for broker-dealers who may "inadvertently" engage in a course of conduct that is inconsistent with an arm's-length relationship with the issuer. Thus, NAIPFA is concerned that the Paragraph will lead to widespread abuses by broker-dealers seeking to circumvent both 15Ba1-1 and MSRB Rule G-23 notwithstanding their obligation to review their policies and procedures.

In light of the foregoing, the Paragraph is inconsistent with both Rule 15Ba1-1 and MSRB Rule G-23 and would have significant detrimental impacts on the interests of municipal entities, obligated persons and the public. Therefore, NAIPFA believes that the Paragraph should be deleted in its entirety.

However, if the MSRB determines to create an exemption from the definition of "Municipal Advisor" that goes beyond what the SEC has determined to create, NAIPFA believes that the Paragraph should be significantly revised so as to ensure the protection of municipal entities, obligated persons and the public. The Paragraph as currently written, gain, notwithstanding the requirement that Municipal Advisors review their policies and procedures, contains protocols that are significantly different, and notably less stringent, than similar MSRB rules, particularly the exemption relative to inadvertent political contributions contained within MSRB Rules G-37(i) and (j) (collectively, "G-37").

As such, NAIPFA respectfully suggest that the Paragraph be amended in a manner that will make it consistent with G-37. Absent further explanation from the MSRB, NAIPFA sees no justification for allowing the Paragraph to create a broader exemption protocol than that which is contained within G-37. This is particularly the case since the abuses that are likely to occur with respect to the provision of "inadvertent" advice are at least as great as those that would arise from the provision of impermissible political contributions. In this regard, NAIPFA recommends that the Paragraph be amended to read as follows:

> Paragraph .06:

[5] Registration of Municipal Advisors, Frequently Asked Questions, Office of Municipal Securities, Question 5.2.
[6] Guidance on the Prohibition on Underwriting Issues of Municipal Securities for which a Financial Advisory Relationship Exists Under Rule G-23 – November 27, 2011.

(i) If a municipal advisor that inadvertently engages in municipal advisory activities for or on behalf of a municipal entity or obligated person and does not intend to continue the municipal advisory activities or enter into a municipal advisory relationship, the municipal advisor is entitled to an automatic exemption, subject to (ii) and (iii) herein, and shall not be required to comply with section (b) and (c) of this rule so long as, as promptly as possible, the advisor provides a document to such municipal entity or obligated person that is dated and includes:

(A) a disclaimer that the advisor did not intend to provide advice and that, effective immediately, it has ceased engaging in municipal advisory activities;

(B) a notification that such municipal entity or obligated person should be aware that the disclosure of material conflicts of interest and other information required by section (b) of this rule has not be provided;

(C) a full identification of all advice that was inadvertently provided by the advisor within 10 business days of the date of the discovery of such advice by the advisor; and

(D) a request that the municipal entity or obligated person acknowledge receipt of such document.

(ii) An advisor is entitled to no more than two automatic exemptions per 12-month period.

(iii) An advisor may not execute more than one exemption relating to inadvertent advice by the same municipal advisor representative regardless of the time period.

(iv) Any exemption beyond those permissible under (ii) and (iii) above shall only be permissible with respect to any advisor upon application to a registered securities association or the appropriate regulatory agency, and such association or agency may exempt, conditionally or unconditionally, an advisor who is otherwise prohibited from discontinuing their municipal advisory relationship with a municipal entity or obligated person. In determining whether to grant such exemption, the registered securities association or appropriate regulatory agency shall consider, among other factors:

(A) whether such exemption is consistent with the public interest, the protection of municipal entities, obligated persons and the public, and the purposes of this rule;

(B) whether such municipal advisor (1) prior to the time of the provision of inadvertent advice was made, had developed and instituted procedures reasonably designed to ensure compliance with this rule; (2) prior to or at the time the inadvertent advice was made, had no actual knowledge that such advice would constitute engaging in municipal advisory activities; (3) has taken all available steps described in (i) of this Paragraph .06; and (4) has taken such other remedial or preventive measures, as may be appropriate under the circumstances, and the nature of such other remedial or preventive

measures directed specifically toward the provider of inadvertent advice and all employees of the advisor;

(C) the timing and amount of the inadvertent advice that resulted in the prohibition;

(D) the nature of the inadvertent advice; and

(E) the advisor's apparent intent or motive in making the inadvertent advice, as evidenced by the facts and circumstances surrounding the provision thereof.

Supportive of the above revisions is the fact that the Paragraph as currently written appears to contain internal inconsistencies. On the one hand, the Paragraph assumes that the individual who has "inadvertently" provided advice is able to identify the fact that they have done so,[7] while on the other hand requiring the individual to merely represent that it "has undertaken reasonable efforts to identify the advice that was inadvertently provided"[8] without requiring such person to actually disclose the extent, or identify the content, of the advice actually provided. Apart from the other comments contained hereinafter, NAIPFA believes that there is no reason why a person utilizing this exemption should not be obligated to clearly identify the advice that was provided inadvertently rather than simply, "in good faith," utilize "reasonable efforts to identify the advice," since it is unlikely that a person will act pursuant to this Paragraph if they have not already identify instances in which advice is given, inadvertently or otherwise.

In addition, appropriate disclosure of inadvertent advice, unlike the disclosure of an impermissible political contribution, must be made in a relatively short period of time following its discovery. As noted in the above revisions to the Paragraph, this disclosure would need to occur within 10 business days of the date of discovery. This short period is necessary with respect to the provision of inadvertent advice due to the likelihood that such advice will be given during the course of an ongoing transaction and the disclosure thereof will need to be made within a sufficient amount of time to allow the municipal entity or obligated person to make an informed decision with respect to how to proceed without causing the transaction to be unduly delayed.

These revisions would also provide flexibility in that Municipal Advisors could either utilize the automatic exemption provisions contained within subsection (i) of the proposed revisions to the Paragraph, or seek an exemption by application to the appropriate registered securities association or regulatory agency. In this regard, these revisions would appropriately balance the needs of Municipal Advisors who may inadvertently provide advice while curtailing the likelihood that persons will abuse this exemption, inadvertently or otherwise, to the detriment of municipal entities, obligated person and the public.

[7] *See* Paragraph .06 ("In the event that a municipal advisor inadvertently engages in municipal advisor activities… and does not intend to continue the municipal advisory activities or enter into a municipal advisory relationship…").
[8] Paragraph .06(C).

Conclusion

In light of the foregoing, NAIPFA urges the MSRB to remove Paragraph .06 from the Supplementary Materials; it will serve no legitimate purpose other than to allow broker-dealers to continue their pre-Dodd Frank Act practices of providing advice to municipal entities and obligated persons as their advisors without obtaining corresponding fiduciary responsibilities and will ultimately allow such advisors to serve as underwriters of the securities being issued. These are precisely the conflict of interest riddled and abusive practices that the Dodd-Frank Act, Rule 15Ba1-1 and MSRB Rule G-23 were designed to prevent.

We acknowledge that some market participants may have difficulty in understanding how to avoid being deemed Municipal Advisors. However, we do not believe that a lack of competence should be an excuse to take advantage of municipal entities, obligated person or the public, inadvertently or otherwise. That being said, since broker-dealers in particular have not previously been regulated with respect to their municipal advisory activities, we understand that they will likely make mistakes in the course of their dealings with municipal entities, and we are sensitive to that. Therefore, although we do not believe it is prudent, as an alternative to eliminating Paragraph .06 in its entirety, we would be amenable to the revision thereof in a manner that is consistent with the foregoing comments.

Notwithstanding the foregoing, we believe that there would be no need to include Paragraph .06 is broker-dealers were required to disclose to a prospective municipal entity client at the earliest possible time what their intentions are with respect to their role in the transaction. In other words, if broker-dealers were required to state at the earliest possible point in their relationship with a municipal entity whether they intended to serve as the municipal entities Municipal Advisor or underwriter, the need for Paragraph .06, or any similar provisions, would be greatly reduced since there would then be no question in the mind of any of the parties as to what role the broker-dealer was playing in the transaction.

Sincerely,

Jeanine Rodgers Caruso, CIPFA
President, National Association of Independent Public Finance Advisors

cc: The Honorable Mary Jo White, Chairman
The Honorable Kara Stein, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Michael Piwowar, Commissioner
The Honorable Daniel M. Gallagher, Commissioner
Lynnette Kelly, Executive Director, Municipal Securities Rulemaking Board

EXHIBIT A

NAIPFA Comments to MSRB Notice 2014-01

(See Attached)

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March 10, 2014

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Re: MSRB Notice 2014-01

The National Association of Independent Public Finance Advisors ("NAIPFA") appreciates this opportunity to provide comments in connection with Municipal Securities Rulemaking Board ("MSRB") Notice 2014-01 – Request for Comment on Draft MSRB Rule G-42, on Duties of Non-Solicitor Municipal Advisors (the "Notice").

Introduction

In general, because of the varied nature of the engagements entered into by Municipal Advisors as well as the composition of the firms themselves, NAIPFA believes that a principles-based rule rather than the prescriptive approach taken by the Notice would better serve the municipal market. In addition, the Notice puts in place a series of regulations which will place independent registered Municipal Advisors ("IRMAs")[1] at a significant competitive disadvantage to their broker-dealer counterparts, and will impose undue regulatory burdens upon small Municipal Advisor firms.

We note that it appears from the text of the Notice that the MSRB is focusing primarily on those non-solicitor Municipal Advisors who provide advice with respect to the issuance of municipal securities, rather than those Municipal Advisors who provide services related to the investment of bond proceeds. Therefore, for purposes of these comments, unless otherwise noted, NAIPFA's use of the term "Municipal Advisor" applies solely to persons who fall within the Securities Exchange Act of 1934 and its definition of "Municipal Advisor" because they provide advice with respect to the issuance of municipal securities and often throughout the period in which an issuance is outstanding.

By way of background, Municipal Advisors have served municipal entities and obligated persons for decades, typically referring to themselves as financial advisors. Although a federal fiduciary duty has been imposed upon Municipal Advisors as a result of the passage of the Dodd-Frank Act, NAIPFA member firms have for decades accepted and acted in accordance with a fiduciary duty with respect to their municipal entity clients. Illustrative of this is the fact that NAIPFA's

[1] The term "independent Municipal Advisor" as used herein refers to those Municipal Advisors who are not, and within the past two years have not been, associated with a broker-dealer.

bylaws, even before the enactment of the Dodd-Frank Act required, as a condition of initial and continued membership, that its member firms accept "a fundamental obligation to act solely in the best interests of the public entity and provide financial advice to the public entity that is not conflicted."

In this regard, we have long supported the imposition of fiduciary responsibilities upon Municipal Advisors and will continue to do so. However, NAIPFA cannot support proposed Rule G-42 to the extent that it seeks to, or may seek to, impose obligations that go beyond what is required to ensure that Municipal Advisors adhere to their fiduciary responsibility.

In addition, NAIPFA feels strongly that in terms of our provision of municipal securities issuance-related services, although Municipal Advisors may have things in common with both investment advisers and broker-dealers, the regulation of Municipal Advisors must ultimately reflect the distinctions that exist between underwriters and investment advisors. In many ways, the role of Municipal Advisors is unique and so should the corresponding regulations.

For example, Municipal Advisors have fiduciary duties just as investment advisors. However, unlike investment advisers who generally have standardized fees and scope of services, Municipal Advisors assess fees and undertake engagements that can vary widely from transaction to transaction, and some engagements may not even involve a transaction, *per se*. Similarly, in some ways Municipal Advisors are like underwriters, such as how both may provide advice to municipal entities and obligated persons with respect to matters such as the issuance of securities. However, in many key respects, Municipal Advisors are very different from underwriters. For example, unlike underwriters, Municipal Advisors are fiduciaries, they do not hold, transfer or otherwise handle client funds, and, with respect to IRMAs, generally are of a much smaller size, both in terms of employees and annual revenue. In light of the foregoing, we believe that the regulations should reflect the unique role played by Municipal Advisors. Therefore, any rules proposed and enacted should be borrowed from those of underwriters and investment advisers only when it is appropriate to do so based upon whether such regulation advances the MSRB's interest in ensuring Municipal Advisor adherence to their fiduciary duty.

Standards of Conduct – G-42(a)

Overall, NAIPFA supports the standards of conduct proposed in the Notice. As noted above, NAIPFA and its member firms have long adhered to similar standards. As such, we do not believe that the standards themselves impose an undue regulatory burden. In addition, the proposed standards accurately differentiate the role of Municipal Advisors from that of underwriters and support Municipal Advisors in effectively discharging their fiduciary duties.

Further, NAIPFA would be supportive, notwithstanding the legality of any such measure, of a rule imposing fiduciary duties upon Municipal Advisors with respect to the advice they provide to obligated persons. As with municipal entities, NAIPFA member firms who serve obligated person clients have long accepted and adhered to a fiduciary standard with respect to their

service to such clients. Thus, we do not believe that this would, in and of itself, impose an undue regulatory burden upon Municipal Advisors.

Disclosures of Conflicts of Interest and Other Information – G-42(b)

1. Text of Rule G-42(b)(viii)

> ***G-42(b)*****.** A municipal advisor must, at or prior to the inception of a municipal advisory relationship, provide the client with a document making full and fair disclosure of all material conflicts of interest, including disclosure of: ***(viii)*** the amount and scope of coverage of professional liability insurance that the municipal advisor carries (*e.g.*, coverage for errors and omissions, improper judgments, or negligence), deductible amounts, and any material limitations on such coverage, or a statement that the advisor does not carry any such coverage.

2. Comment

NAIPFA believes that an important aspect of supporting to fiduciary duties is requiring that any advice provided be free of material conflicts of interest which may inhibit a Municipal Advisor's ability to provide advice that is in the best interest of the client. In this regard, where a Municipal Advisor has a material conflict of interest, the Advisor should provide disclosures relating to such conflict to its client. Consequently, and as discussed more fully below, we cannot support the disclosure of those matters described within proposed Rule G-42(b)(viii) because the professional liability insurance disclosure requirement noted therein does not relate to any material conflict of interest. Moreover, and as discussed more below, this provision would place IRMAs and small Municipal Advisors at a distinct competitive disadvantage to underwriting firms and broker-dealer Municipal Advisors.

With respect to any disclosure to be mandated, the MSRB should weigh a variety of factors in determining whether a particular disclosure would be appropriate. These factors may include: whether such provision will increase Municipal Advisor adherence to fiduciary duties; the extent to which a particular provision may inhibit competition; and whether any such provision places an undue economic burden upon small Municipal Advisor firms. G-42(b)(viii) fails in all respects and should be eliminated from the MSRB's lists of mandatory disclosures. As discussed more fully below, NAIPFA would welcome a revised provision that states in effect that Municipal Advisors must truthfully disclose, upon request, information related to any professional liability insurance maintained.

NAIPFA does not believe that this disclosure furthers a Municipal Advisor's ability to adhere to its fiduciary duty. It is worth noting for comparative purposes that NAIPFA is unaware of any similar requirement imposed upon investment advisors or attorneys. As fiduciaries, Municipal Advisors must deal honestly with their clients. In addition, unlike all of the other disclosures contained within Rule G-42(b), this disclosure does not relate to any conflict of interest, material or otherwise. A Municipal Advisor's professional liability insurance policy, or lack thereof, neither creates nor eliminates any conflict of interest. However, to the extent that a client desires

to obtain information about a firm's professional liability insurance, that client should be entitled to request such information and expect that any information received will be accurate and complete. Thus, such a requirement would be appropriate in this context.

NAIPFA believes that RuleG-42(b)(viii) as written will curtail competition by, among other things, placing an undue economic burden upon small firms. Further, if firms are mandated to maintain professional liability insurance this burden will only be exacerbated. Large firms, broker-dealer and non-broker-dealer alike, will likely carry more extensive professional liability insurance policies than their smaller counterparts. Mandatory disclosures may cause municipal entities and obligated persons to focus upon this factor in selecting a Municipal Advisor, rather than relying upon the advisor's qualifications. This may, unfortunately, result in many otherwise qualified Municipal Advisors, such as the numerous solo practitioners who have been in the industry for upwards of 30 years, becoming unable to effectively compete against those firms who do possess such insurance.

In addition, because this provision may undermine the selection of potentially more qualified Municipal Advisors solely due to the larger policy limits of a competing firm's professional liability insurance, there could be an increase in litigation as the quality of advice provided declines due to this potential "brain drain;" even mandating professional liability coverage may increase litigation due to the effect that such a mandate would have on forcing otherwise qualified advisors out of the market. In either case, if litigation rates increase so too will the number of firms leaving the market, even further curtailing competition.

This provision may have a particularly significant impact on competition in certain parts of the country. After exploring a professional liability insurance pool and other options available to its members, NAIPFA discovered that there are portions of the country where professional liability insurance specific to Municipal Advisors may not be available. In these states, local Municipal Advisors may be at a significant competitive disadvantage if they are unable to obtain coverage when competing against larger, multistate companies which may be able to obtain insurance in their home state. With respect to small IRMAs, where coverage does exist, the cost can be prohibitive; the market infrastructure and understanding of the industry by insurance companies does not exist at this time in a way that will allow small Municipal Advisor firms to have a level playing field.

In light of the foregoing, and as noted previously, NAIPFA believes that a more appropriate approach to this issue would be to put in place a principles-based rule. Within the context of this provision, NAIPFA believes that it would be appropriate to require Municipal Advisors to truthfully and accurately disclose matters requested by their clients, which could include disclosures relating to the scope and extent of Municipal Advisors professional liability insurance. This would further Municipal Advisor adherence to fiduciary duties by reinforcing the notion that Municipal Advisors owe their municipal entity clients (and potentially obligated person clients) a duty of loyalty. This approach would also support the SEC's goal of placing issuers in control of their debt issuance process, and would ensure that when issuers wish to receive particular disclosures from a Municipal Advisor, that those disclosures are truthful and

accurate and complete. Finally, this approach would negate the negative competitive and economic impacts of the proposed rule.

Documentation of the Municipal Advisory Relationship – G-42(c)

1. Question Regarding The Phrase "Entered Into"

It is unclear from the Notice what the MSRB means by the phrase "entered into" with respect to the writing that a Municipal Advisor must utilize to evidence its engagement. Does this mean that the writing must be a two party agreement? In other words, must the writing be executed by both the Municipal Advisor and its client? NAIPFA respectfully requests clarification in this regard. To the extent that the MSRB intends for this writing to be executed by Municipal Advisors and their clients, NAIPFA hopes that the MSRB will consider the comments set forth below in terms of clarifying this provision.

2. Comments

In reviewing this portion of the Notice, NAIPFA again bases its analysis upon whether these provisions further Municipal Advisor adherence to their fiduciary duties or involve disclosure of material conflicts of interest, and the extent to which such provisions will inhibit competition and place an undue burden upon small Municipal Advisor firms. Overall, NAIPFA believes that the provisions of G-42(c) do not meet these criteria and should be revised accordingly.

In September, 2013, the SEC released its Final Rule on the Registration of Municipal Advisors, which contained a provision that stated, in essence, that a broker-dealers may rely upon the "Underwriter Exemption" if it is engaged by an issuer as its underwriter. In January, 2014, the SEC released its answers to a series of Frequently Asked Questions relating to the Registration of Municipal Advisors. Therein, the SEC explained the manner in which an underwriter can evidence its engagement with a municipal entity or obligated person client for purposes of availing itself of the Underwriter Exemption. In this regard, the SEC stated that a broker-dealer can demonstrate its engagement "either through a writing, such as an engagement letter […] or through other actions."

The features noted by the SEC that must be included within any such engagement letter include:

> (a) the governing body or any duly authorized official of the municipal entity responsible for municipal finance has executed, approved, or acknowledged the engagement letter in writing; (b) the engagement letter clearly related to providing underwriting services; (c) the engagement letter clearly states the role of the broker-dealer in the transaction; (d) the engagement letter relates to a particular issuance of municipal securities that the municipal entity or obligated person anticipates issuing and is not a general engagement for underwriting services that does not relate to any particular transaction; and (e) the engagement letter or a separate writing done at or before the time of the engagement provides all disclosures that are required to be made by underwriters by the time of an engagement under MSRB Rule G-17.

With the exception of (d) above, NAIPFA can find no reason why a parallel series of requirements could not be imposed upon Municipal Advisors with respect to any writing that they may be required to provide to evidence an engagement. With respect to (d) above, NAIPFA believes that because Municipal Advisors often advise on matters that are not "deal" specific, and are often engaged to provide services prior to, during and after a securities issuance, there is no reason to limit their engagement to a particular transaction. Further, unlike underwriters, nothing contained within the SEC's final Municipal Advisor registration rule or the FAQs would limit a Municipal Advisor's ability to enter into a multi-year or multi-transaction engagement. Thus, there is no reason in this instance to impose requirements on Municipal Advisors similar to those contained within (d) above. In addition, clauses (b) and (e) would need to be appropriately tailored to Municipal Advisors.

With respect to G-42(c), the currently proposed requirements do not support Municipal Advisor adherence to fiduciary duties, and G-42(c) imposes more onerous requirements upon Municipal Advisors than the SEC imposes upon broker-dealers wishing to serve as underwriters is counterintuitive. Municipal Advisors are required to act in the best interest of their clients and would breach that duty if they were to put their financial interests before their clients' interests. As a result, and because the SEC believes that it is appropriate for non-fiduciary broker-dealers to make the above-referenced disclosures, there seems to be no basis for imposing more stringent requirements upon Municipal Advisors.

The additional requirements imposed by G-42(c) on Municipal Advisors places them at a significant competitive disadvantage to their underwriting counterparts who are not, for example, required to provide an estimate of their anticipated compensation; underwriters, who have no duty to their clients other than to deal fairly, are able to determine their fee well into the course of a transaction, sometime not until they proffer a formal Bond Purchase Agreement. In addition, underwriters are not mandated to include any particular contract-related terms within their engagement letter, such as clauses relating to the termination of the relationship or their obligations relating to certain aspects of the transaction, whereas Municipal Advisors would be required to include these provisions. Conversely, Municipal Advisors will be required to provide a fee estimate early on in the transaction, well before the full scope of the engagement may be known. These disclosures like the disclosure relating to professional liability insurance will not further adherence to fiduciary duties and will simply result in a greater percentage of issuers choosing their professionals based upon cost rather than quality.

As an alternative to proposed G-42(c), NAIPFA would welcome MSRB efforts to further define the scope of a Municipal Advisor's fiduciary duty. NAIPFA would welcome a rule that states, in effect that, Municipal Advisors would be mandated to provide all of the services corresponding to their fiduciary duties absent a writing limiting the scope of the Municipal Advisor's engagement. With respect to the fee-related disclosures, NAIPFA believes that it would be appropriate to require Municipal Advisors whose compensation is transaction-based to provide a reasonable estimate of the Municipal Advisor's fee to the municipal entity (and potentially obligated person) within a reasonable time after the Advisor has been fully apprised of the scope

and nature of the transactions but in no event later than thirty (30) days prior to the initial estimated date of issuance. This would allow Municipal Advisors to fully assess the scope of their work, the amount of work required to complete the transaction, and the transaction's complexity, and would provide Municipal Advisor clients with an ample opportunity to assess the reasonableness of the Municipal Advisor's estimated fee.

Recommendations – G-42(d)

In general, we support G-42(d) as proposed. We believe that it appropriately reflects Municipal Advisor fiduciary duties. We are, however, concerned with the final portion of this provision, which states, "With respect to a client that is a municipal entity, a municipal advisor may only recommend a municipal securities transaction or municipal financial product that is in the client's best interest."

It is unclear to us how the determination of whether a particular transaction is in a client's best interest will be made. Conversely, in connection with the MSRB's mandate that Municipal Advisor recommendations be suitable, the MSRB provides guidance, such as the statement that the Municipal Advisor must have a "reasonable basis for believing, based on the information obtained through the reasonable diligence of the advisor, that the transaction or product is suitable for the client." In addition, because of the rapid pace at which the municipal market can move, without some criteria upon which the determination of what is in the client's best interest can be made, it seems difficult, if not impossible, to know whether a particular course of action will ultimately result in being what is in the "best interest" of the client.

Therefore, NAIPFA requests that additional guidance be provided that can assist Municipal Advisors in determining whether their recommendation is in the "best interest" of the client. In this regard, NAIPFA believes that a determination of what is in the Municipal Advisor's client's best interest must be based on the facts and circumstances in existence as of the time of the recommendation. We would also request that the MSRB Responses to Webinar Questions numbers 12.1 and 12.2 relating to its February 6 webinar be included in the provisions of the final version of G-42(d).

Review of Recommendations of Other Parties – G-42(e)

As currently written, proposed Rule G-42(e) appears to be inconsistent with SEC Rule 15Ba1-1(d)(3)(vi), the Independent Registered Municipal Advisor Exemption ("IRMA Exemption").

Rule G-42(e) seems to presuppose that a third party is providing advice to a municipal entity or obligated person without themselves being deemed a Municipal Advisor. In other words, such persons are relying upon an exemption from the definition of Municipal Advisor to provide this advice.

The SEC's rationale for creating the IRMA Exemption was that municipal entities would

> have the benefits associated with the regulation of municipal advisors. Such benefits include, but are not limited to, standards of conduct, training, testing for municipal advisors that may be required by the Commission or the MSRB, other requirements unique to municipal advisors that may be imposed by the MSRB, and *fiduciary duty*.[2]

Thus, the SEC's position appears to be that third parties can provide advice to municipal entities because the municipal entities will have the protections afforded to them by their engagement of an IRMA. In fact, the IRMA Exemption specifically requires that the municipal entity or obligated person provide a written representation indicating that they will rely upon the advice they receive from their Municipal Advisor. It seems inconsistent with the IRMA Exemption if G-42(e) were to allow Municipal Advisors to limit the scope of their engagement so as to not have an obligation to review any recommendation made by a third party pursuant to the exemption. In order for a third party to avail itself of the IRMA Exemption, the Municipal Advisor must be providing advice with respect to the same aspects of the municipal financial product or issuance of municipal securities as that of the third party to ensure that such party is receiving the benefits of having engaged a Municipal Advisor. It is, therefore, counterintuitive to believe that the SEC would have created the IRMA Exemption if Municipal Advisors could simply disclaim their obligations to review third-party recommendations.

Rule G-42(e) should therefore be amended to take into consideration the foregoing.

Although not stated, presumably G-42(e) would be equally applicable to advice provided in response to an RFP as well as to those parties relying on the IRMA Exemption. In this regard, Rule G-42(e)(i) through (iii) are potentially overly burdensome in terms of the scope of the obligations they impose. Financings simply would not be completed as Municipal Advisors would be required to devote an extensive amount of time to such analyses.

In light of the foregoing, a principles-based rule would be ideal. Such a rule could simply state that when requested and when such acts are within the Municipal Advisor's scope of engagement, a Municipal Advisor is to consider the recommendations of third parties and determine whether such recommendations are in the best interest of their municipal entity or obligated person client based on all the relevant facts and circumstances. This approach would strike the right balance by protecting the interests of municipal entities and allowing Municipal Advisors to view each recommendation within the context of their particular engagement, without having to go through potentially time consuming and unnecessary analyses.

Principals Transaction & Specific Prohibitions – G-42(f) and (g)

NAIPFA agrees with proposed Rule G-42(f) and (g). We believe that these rules are important measures that are needed to eliminate certain practices that often carry unmanageable conflicts of

[2] Securities and Exchange Commission, 17 CRF Parts 240 and 249 [Release No. 34-70462; File No. S7-45-10], at 156.

interest inconsistent with Municipal Advisor fiduciary duties. As proposed, NAIPFA believes these provisions are appropriately tailored and do not impose undue regulatory burdens.

Notwithstanding the foregoing, with respect to G-42(f), NAIPFA believes that additional guidance would be appropriate to clarify further the provision's use of the phrase "principal capacity." NAIPFA believes that it would be appropriate to specify that, for purposes of this section, the phrase "principal capacity" would include a party's activities as an underwriter of securities, remarketing agent, counterparty on swaps or other derivative transactions, or other similar capacity. In general, these kinds of relationships could conflict with the interests of municipal entities and obligated persons, and, therefore, such relationships should be prohibited in instances where the "principal" or an affiliate thereof also serves as the Municipal Advisor to such municipal entity or obligated person.

Comments to the Notice's General Questions

1. Fiduciary Duties to All Clients

As noted above, NAIPFA supports the imposition of a uniform fiduciary standard. Such a standard would further ensure the protection of the public interest.

2. Obligation to Review Official Statement

In general, NAIPFA believes that Municipal Advisors should be obligated to review the issuer's official statement. However, this review should be limited to determining whether appropriate disclosures have been made and must not obligate a Municipal Advisor to conduct an independent inquiry into the accuracy of such disclosures, unless the Municipal Advisor reasonably believes that any such disclosure is not materially accurate. In other words, absent information indicating that a disclosure may be materially inaccurate, Municipal Advisors should be permitted to conclusively rely upon the information provided by the issuer and, to the extent that the official statement is prepared by a third party, the information contained within the official statement.

3. Prohibition on Fee Splitting Arrangements

In general, NAIPFA is not opposed to prohibiting certain fee splitting arrangements. However, NAIPFA believes that a clear definition of "Fee Splitting Arrangement" should be developed prior to imposing any prohibitions. In so doing, NAIPFA urges the MSRB to recognize that a Municipal Advisor's utilization of independent contractors/subcontractors in connection with particular engagements should fall outside of any such definition.

4. Timing of Disclosures

Except as noted above with respect to a Municipal Advisor's reasonable estimate of its fee, NAIPFA believes that the timing of the provision of disclosures under the Notice is appropriate.

5. Required Acknowledgement of Conflicts

NAIPFA believes that it is appropriate to require Municipal Advisors, like underwriters and professionals possessing fiduciary duties, to obtain an acknowledgment from their clients. In this regard, we believe it would also be appropriate for such obligations to mirror those currently in place for broker-dealers under MSRB Rule G-17.

6. Disciplinary Events

To the extent that disciplinary events will be noted on any Form MA-I filed by the Municipal Advisor firm, additional disclosures seem superfluous and will place additional regulatory burdens on small Municipal Advisor firms in particular. Notably, there is no similar requirement imposed on underwriters, even though they do not possess fiduciary duties and arguably such disclosures would be more pertinent in such a case. As such, NAIPFA believes these disclosures will place Municipal Advisors at a significant competitive disadvantage.

7. Professional Liability Requirements

As discussed above, NAIPFA believes that both mandatory disclosures and mandatory professional liability insurance coverage will place IRMAs at a significant competitive disadvantage to broker-dealer firms. Such requirements will adversely impact the ability of small Municipal Advisor firms to compete for municipal advisory business. These requirements would also pose significant barriers to entry with respect to individuals and small groups of individuals wishing to form Municipal Advisor firms. In total, this will result in less competition and higher costs of issuance resulting not only from higher Municipal Advisor fees, but also from a simple lack of available advisors. In addition, municipal entities and obligated persons will be forced to rely more heavily on advice from underwriters, who do not possess fiduciary duties, thereby further increasing the costs borne by tax and rate payers.

Furthermore, it is important to note, again, that there are no similar disclosure or insurance coverage requirements in place for investment advisors or attorneys who also possess fiduciary duties. With respect to these aspects of G-42, the MSRB has determined to treat Municipal Advisors more like broker-dealers, who, for good reason, have capital requirements, than other parties who possess fiduciary duties. NAIPFA can find no rational basis for this. Therefore, neither the proposed rule's disclosure requirements nor the prospective imposition of mandatory professional liability insurance coverage are appropriate.

Finally, we anticipate that organizations representing broker-dealers will fully support the proposed rule. We also anticipate that these groups will support the imposition of mandatory liability insurance coverage. The imposition by the MSRB of mandatory professional liability insurance as discussed more fully below, or even insurance-related disclosures, may effectively eliminate small Municipal Advisor firms from the market, and we are concerned that the

underwriter community will support these requirements merely as a means of putting Municipal Advisors at a competitive disadvantage, if not out of business entirely.

8. Feasibility Study Reviews

MSRB Question #11 asks: "Should an advisor be required to review any feasibility study as a part of the information considered in its evaluation of whether a transaction it recommends is suitable for the client?"

NAIPFA believes it would be appropriate to enact a provision that requires Municipal Advisors to disclose to any client whether the scope of their engagement includes an obligation to review any feasibility study. Municipal Advisors who are engaged to review feasibility studies would have to conduct a reasonable review of any such feasibility study and make an assessment of whether the conclusions reached are in accordance with the best interests of their client. Municipal Advisors should not, however, be obligated to assess the assumptions made by a third party with respect to any conclusion made, unless such services are requested of and agreed to by the Municipal Advisor.

Comments to the Notice's Economic Analysis Questions

1. Should the MSRB Articulate the Duties or Measures to Prevent Breaches of a Municipal Advisor's Fiduciary Duty? If so, Does the Rule Address This?

NAIPFA strongly believes that the MSRB should articulate duties and prescribe means of preventing breaches of Municipal Advisor fiduciary duties. However, any duty articulated or means prescribed must be designed to prevent such breaches. As discussed above with respect to the liability insurance coverage, any disclosure that is not reasonably likely to cause Municipal Advisors to better adhere to their fiduciary duties or which relates to material conflict of interest should not be required. Where the disclosure does not reasonably relate to a Municipal Advisor's fiduciary duty, municipal entities and, if appropriate, obligated persons are not likely to receive any appreciable benefit from such disclosures. Rather, the increased burden and expense caused on Municipal Advisors by such disclosures as well as the barriers to competition erected will likely increase costs of issuance. Therefore, we would encourage the MSRB to look at any disclosure related rules primarily with respect to whether any such proposed rule will benefit municipal entities and obligated persons in terms of the quality of advice provided and whether such rule is appropriately tailored to minimize any potential increases in issuance costs resulting from such rules.

2. Questions #2 through #8

NAIPFA respectfully requests that Questions #2 through #8 be revised and resubmitted for response. We are simply not sure how to answer the questions posed. In particular, we ask that the MSRB articulate what it means by the term "baseline" within the various questions.

In general, however, NAIPFA believes that from an economic standpoint our member firms will judge the economic impacts of proposed regulations based on the two plus decades that many of these firms have been in existence. Again, during this time, our member firms have acted with fiduciary responsibilities towards their clients. The cost of their adherence to this duty has, until now, been minimal. Conversely, every regulation put in place costs Municipal Advisors money and increase costs of issuance. As such, we urge the MSRB to strongly consider this when imposing regulations.

Notwithstanding our economic concerns, we believe that appropriately tailored regulations are important. Therefore, NAIPFA proposes that rather than establish "baselines" for its economic analysis, the MSRB attempt to quantify its proposed rules in terms of dollars. The MSRB should then conduct a cost benefit analysis to determine if the potential benefits of any particular regulation outweigh the financial burden that such regulations would place upon Municipal Advisor firms, particularly, small firms, municipal issuers and obligated persons, and tax and rate payers.

3. Lower-Cost Alternatives to Requiring Disclosures of the Amount of Professional Liability Coverage

NAIPFA does not believe that this question is able to be answered effectively because it presupposes that a disclosure relating to professional liability insurance is appropriate. Notwithstanding this, NAIPFA believes that a lower cost alternative would be to require municipal advisors to provide such information as part of their annual MSRB renewal filing or upon their client's request. This would lower the overall compliance costs by decreasing the quantity of disclosures that a Municipal Advisor would otherwise be required to make on a per transaction basis. Requiring this disclosure in connection with Municipal Advisor annual MSRB renewals would also be consistent with the MSRB's goal of transitioning EMMA towards becoming a more non-industry centric platform for municipal securities related matters, including disclosure.

4. Will the New Standards Change the Quality of Advice Offered by Municipal Advisors?

These new standards will likely cause Municipal Advisors to incur additional costs due to compliance. This additional time and cost will put some strain upon small Municipal Advisor firms in particular, which could reduce competition. With respect to those firms who may be less impacted financially by these standards, NAIPFA does not anticipate that these regulations will have any appreciable benefit upon the quality of advice provided. Regardless, NAIPFA does not believe that this should be the goal of G-42. We believe that G-42 should be designed to protect the interests of Municipal Advisor clients. That being said, the advice Municipal Advisor clients have received has, for the most part, served them well. Therefore, NAIPFA believes that the MSRB should focus on ways to ensure that Municipal Advisors adhere to their fiduciary duties and to do so in as minimally burdensome of a manner as possible and not, within the context of G-42, necessarily focus on improving the quality of the advice provided but,

rather, ensuring that municipal issuers and obligated persons have access to and can accurately identify professionals who can provide high quality advice.

5. Will G-42 Affect the Willingness of Market Participants to Use Municipal Advisors?

Our member firms, as well as other Municipal Advisor firms, have acted with and advertised themselves as having fiduciary duties to their clients for many years. Municipal Advisors have also been required to act pursuant to a federal fiduciary duty to municipal entity clients since 2010. In addition, since the enactment of Dodd-Frank, NAIPFA is not aware of any law suits or regulatory actions that have been initiated relative to a breach of a Municipal Advisor's fiduciary duty. In light of the foregoing, we believe that if an increase in the use of Municipal Advisors arising from their fiduciary duties was to occur, that such an increase has likely already begun and will likely continue regardless of these rules. Therefore, we do not believe that proposed Rule G-42 will appreciably increase the use of Municipal Advisors.

6. Will G-42 Reduce Issuance Costs, Lead to Better Financing Terms, and Improve Capital Formation?

NAIPFA does not believe that these rules will achieve any of these objectives. The increased regulatory burden upon Municipal Advisors will likely lead to increased issuance costs. NAIPFA finds no reason to believe that proposed Rule G-42 will lead to better financing terms for issuers; again, Municipal Advisors have acted with a federal imposed fiduciary duty since 2010, at least with respect to municipal entity clients. Thus, capital formation, to the extent that it would have been impacted by a federal fiduciary standard, has likely already improved and will continue to improve with or without the imposition of proposed G-42, although this may be difficult to measure due to ongoing changes in market conditions.

7. Would the requirements of draft rule G-42 assist market participants in Municipal Advisor hiring decisions?

As discussed above, we believe that the disclosures that relate to material conflicts of interest will benefit municipal entity and obligated person decision making. Nonetheless, and as discussed above, some of the disclosures and other measures described within the proposed rule will not assist such decision making because such disclosures do not relate to the discharge of fiduciary duties. If municipal entities and obligated persons wish to receive information that goes beyond what is mandated by the MSRB, those municipal entities and obligated persons should be free to inquire into such other matters, and the MSRB should support this by requiring Municipal Advisors to truthfully provide such other information upon a client's request. The MSRB should be similarly supportive of contractual provisions between municipal entities and obligated person and their Municipal Advisors which extend beyond the requirements of G-42 and other MSRB rules. Again, this would strike the right balance in terms of creating effective regulation, minimizing regulatory burdens, and supporting client control over the issuance process.

8. Additional Costs Associated with Making and Preserving Books & Records

An analysis, economic-related or otherwise, with respect to any MSRB rule derived from a SEC Municipal Advisor rule is only necessary where the MSRB rule modifies the corresponding SEC rule, or where the MSRB rule relates to a matter that has not been addressed by the SEC. In all other instances, because the MSRB will be unable to vary the terms of any such rule, any exercise in an economic analysis of such rule's impact would seem to be of little value.

9. Effects on Competition, Efficiency and Capital Formation

If G-42 places a significant burden on Municipal Advisors, small Municipal Advisor firms could merge with other firms, retire or simply exist the market.[3] This will reduce competition, increase costs of issuance, and hurt capital formation, particularly in the small rural areas most in need of advice.

10. Barriers to Entry

We believe that a significant barrier to entry will be created as a result of the insurance-related disclosures. This barrier will only be exacerbated if the MSRB imposes professional liability insurance requirements upon Municipal Advisor firms. Currently, there is a lack of available insurance providers nationally who are willing/able to provide coverage for Municipal Advisors and, as of today, insurance is not readily available that will sufficiently cover the activities of Municipal Advisors. We have begun the process of identifying insurance companies which may be willing/able to cover Municipal Advisors; however, they are few in number. We have as of the date of this letter received an estimate of what this coverage may cost, which is as follows:

For a $1,000,000 aggregate claims policy for a firm of 1 to 4 professionals that carries both civil and regulatory coverage, the premium is estimated at $19,000 to $24,000 per year with a minimum deductible of $75,000; provided, however, that these terms can vary (presumably upward) depending on the risk attributed to the Municipal Advisor firm by the insurer. For small firms the premium alone may represent upwards of 10 to 15% of their annual gross revenue. Thus, if new firms were to try to enter the market, we believe coverage may be very difficult to afford or even acquire since such firms will have no operating history upon which the insurance provider could assess risk and may not have sufficient funds available.

11. Costs of Training & Compliance

The cost of training and compliance will depend upon the number of Municipal Advisor representatives each firm employs, but as the number of employees increases, so do the costs of

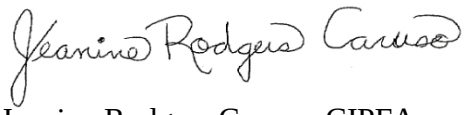
[3] Notwithstanding, NAIPFA is unaware of any discussions among firms regarding potential consolidations resulting from regulation. We find that it is more likely that firms, certain employees, and sole proprietors will predominantly choose to retire or not provide services as Municipal Advisors rather than attempting to carry on their work in an overly burdensome regulatory environment.

training and compliance. That being said, we believe on average that the cost of training and compliance will be approximately $2,500 to $4,500 per person, or, depending upon the firm, the equivalent of 5% to 20% of firm revenue annually.

Conclusion

NAIPFA believes that much of the Notice is acceptable. However, we also believe that revisions should be made in order to adequately regulate Municipal Advisors. Currently the proposed rules are overly broad in several key respects as noted above. The unnecessary provisions identified will place significant burdens on current and future Municipal Advisors, particularly IRMAs and even more so with respect to small firms, and will increase costs of issuance without achieving any appreciable benefit. Therefore, NAIPFA strongly urges the MSRB to consider revising G-42 in accordance with the foregoing comments.

Sincerely,



Jeanine Rodgers Caruso, CIPFA
President, National Association of Independent Public Finance Advisors

cc: The Honorable Mary Jo White, Chairman
The Honorable Kara Stein, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Michael Piwowar, Commissioner
The Honorable Daniel M. Gallagher, Commissioner
Lynnette Kelly, Executive Director, Municipal Securities Rulemaking Board