Dave A. Sanchez, Attorney at Law

August 25, 2014

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

Re: MSRB Notice 2014-12 Relating to Standards of Conduct for Municipal Advisors

Dear Mr. Smith:

I appreciate the opportunity to provide comments to the Municipal Securities Rulemaking Board (MSRB) on the revised version of proposed Rule G-42, which would govern standards of conduct for non-solicitor municipal advisors.

These comments are informed by a background that includes, amongst other relevant experience, advising registered municipal advisors with respect to their compliance obligations and serving as general counsel to a municipal broker-dealer that was also registered as a municipal advisor.

This proposed rule covers a wide range of potential activity and the MSRB appears to have done a very good job of incorporating comments from various perspectives into this revised proposal. However, it does appear that several of the provisions in the revised proposal appear to be overly prescriptive or not clearly targeted to achieve the MSRB's regulatory mandate with respect to the core statutory standard of conduct for municipal advisors which is their fiduciary duty to their municipal entity clients. Although in the revised proposal the MSRB cites broad statutory authority to develop standards of conduct for municipal advisors, the only specific statutory authority afforded to the MSRB with respect to the fiduciary duty of municipal advisors is found in Section 15B(b)(2)(L)(i) of the Exchange Act. That Section of the Exchange Act directs the MSRB to "prescribe means reasonably designed to *prevent* acts, practices, and courses of business as are not consistent with a municipal advisor's fiduciary duty to its clients." (emphasis added). Notably, the Exchange Act does not contain a specific direction to the MSRB to define "fiduciary duty" or to prescribe means designed to effectuate the performance of that duty. Although it is true that the MSRB has broader authority under the Exchange Act to adopt rules (with respect to municipal advisory activities) designed to prevent fraudulent and manipulative acts and practices, and, in general, to protect municipal entities, obligated persons, and the public interest, the MSRB should consider the view that in the exercise of such authority they should, as some prior commenters suggested, identify the fraudulent and manipulative acts and practices they are addressing in the exercise of such authority.

My specific comments on the proposed rule are set forth below.

Rule G-42(a)(i) and Supplementary Material .01 Duty of Care

Please see comments below regarding Supplementary Material .01.

Rule G-42(b)(i)(A) and Rule G-42(b)(i)(G) [with respect to obligated person clients]

Although the MSRB does not believe that the Draft Rule G-42 implicitly and inappropriately imposed fiduciary duty obligations on municipal advisors whose clients are obligated persons, the language in proposed Rules G-42(b)(i)(A) and G-42(b)(i)(G) appear to import the duty of loyalty and duty of care into the representations of obligated persons by using the phrase "unbiased and competent advice" with respect to advice provided to or on behalf of obligated persons. These provisions may generate fewer objections if they were worded to say "impair its ability to render advice to or on behalf of the obligated person in accordance with the standards of conduct required in clause (a)" in lieu of the offending phrase referencing "unbiased and competent advice."

Rule G-42 (b)(i)

The last sentence of this section requires a municipal advisor to provide "written documentation" of its conclusion that is has no material conflicts of interest. The MSRB should consider why a "written statement" to that effect is not sufficient. It is difficult to imagine what level of documentation is required to demonstrate a negative conclusion.

Rule G-42 (b)(ii)

This requirement appears to be overly burdensome particularly because it applies to every engagement. It is undoubtedly important that municipal entities, in particular, are aware of any legal or disciplinary event that is "material to the client's evaluation of the municipal advisor or the integrity of its management or advisory personnel" but it should be sufficient for purposes of this rule that a municipal advisor be required to direct clients to their EDGAR filings by providing clients with sufficiently specific information to locate their EDGAR filings. In this revised proposal, the municipal advisor now has to potentially make two separate written disclosures (see also Rule G-42 (c) below) to describe to clients information that is already publicly available on EDGAR and which is also routinely requested by municipal entities as part of their RFP/RFQ processes.

The MSRB should also consider the question of how this additional written disclosure of publicly available information "prevents" acts inconsistent with fiduciary duty or what specific fraudulent and manipulative acts and practices it prevents. In any event, in conjunction with its determinations with respect to this

proposed rule, the MSRB should concurrently consider whether such additional written disclosure regarding publicly available information should also be required of brokers, dealers and municipal securities dealers in connection with their standards of conduct.

Rule G-42(c)

The requirements of clauses (iii) and (iv) in proposed Rule G-42 (c) certainly appear overly prescriptive and not reasonably designed to *prevent* acts, practices, and courses of business as are not consistent with a municipal advisor's fiduciary duty to its clients. As noted above, it would appear to be a legitimate requirement for purposes of protecting municipal entities and obligated persons for a municipal advisor to provide information identifying where their client may electronically access their specific Form MA and Forms MA-I but all of the other information required by these two clauses is duplicative and especially burdensome to have to be included in <u>every</u> contract. This level of disclosure regarding legal events and disciplinary history is certainly not required of other regulated entities. In addition, many municipal entities routinely require disclosure of this type of information in conjunction with their RFP and RFQ processes. This would mean that a municipal advisor, in addition to being required to make disciplinary information freely and publicly available on EDGAR and in conjunction with an RFP or RFQ, would also have to possibly provide the same information to a client two more times in order to satisfy the requirements of proposed Rules G-42(b) and (c).

As noted in the prior sentence, the MSRB should also consider whether the wording of clause (ii) in proposed Rule G-42(c), in conjunction with the requirements of proposed Rule G-42(b) appears to require the same disclosures to be made in writing to the client twice in certain circumstances.

Rule G-42 (e)

Rule G-42(e)(i)(E) should also allow for reasonable fees paid to affiliates because soliciting on behalf of affiliates does not trigger a requirement for a person to register as a municipal advisor.

Definition of "engaging in a principal transaction"

It would be helpful for purposes of clarity to include a non-exhaustive list of specific common roles (such as underwriter) in addition to the general description.

Supplementary Material

.01 Duty of Care

The MSRB should consider whether the information for which "a municipal advisor must have a reasonable basis for" incorporated in clauses (a) through (c) is not already addressed in the standards of conduct required of municipal advisors by MSRB Rule G-17 and general antifraud rules related to municipal securities disclosure. While it seems consistent with appropriate standards of conduct to require in clause (a) a municipal advisor to have a reasonable basis for any advice provided to or on behalf of a client that requirement appears to already be embodied in the previous text of this Supplementary Material. The requirements of clauses (b) and (c) create obligations with respect to third parties and/or investors that are already addressed in MSRB Rule G-17 and the antifraud rules applicable to municipal securities disclosure. The MSRB should delete all text after "Among other matters . . . " from this Supplementary Material in order to avoid unnecessarily duplicative regulatory requirements.

.05 Conflicts of Interest

It appears overly broad for the MSRB to require that conflict disclosures include an explanation of how the advisor addresses or intends to manage or mitigate each conflict. This requirement is not imposed on municipal broker-dealers and the MSRB has not articulated why such additional requirement with respect to conflict disclosure is warranted in this circumstance. The MSRB should consider requiring such explanation of a municipal advisor to be delivered only if requested by their client.

.06 Inadvertent Advice

While it appears reasonably clear at the moment that Supplementary Material .06 is only intended to provide relief from subsections (b) and (c) of proposed Rule G-42, it would probably be useful for the MSRB to also include an affirmative statement that even inadvertent advice is subject all other rules and requirements applicable to municipal advisory activities and financial advisory relationships entered into by broker-dealers under MSRB Rule G-23. This would provide additional clarity and avoid the possibility that this provision would result in a dangerous loophole that could be exploited in the future with the argument that complying with these procedures resulted in a finding that no advice was provided.

.07 Applicability of State or Other Laws and Rules

This Supplementary Material provides that it is not a violation of proposed Rule G-42(e)(ii) for a broker, dealer or municipal securities dealer to act as an underwriter

with respect to an issuance of municipal securities for which they also act as a municipal advisor as long as they comply with all of the provisions of MSRB Rule G-23. The plain text of MSRB Rule G-23, and in particular the last sentence of MSRB Rule G-23(b) provides that "For purposes of this rule, a financial advisory relationship shall not be deemed to exist when, in the course of acting as an underwriter and not as a financial advisor, a broker, dealer or municipal securities dealer renders advice to an issuer, including advice with respect to the structure, timing, terms and other similar matters concerning the issuance of municipal securities."

A plain text reading of this provision (substituting "municipal advisor" for "financial advisor") would appear to be consistent with the Exchange Act. However, the MSRB's interpretive notice of November 27, 2011 of this provision and Rule G-23(d) contain guidance that is at odds with the Exchange Act as subsequently interpreted by the SEC in the Commission's final municipal advisor rule. For example, this November 2011 guidance states that "a dealer that clearly identifies itself in writing as an underwriter and not as a financial advisor from the earliest stages of its relationship with the issuer with respect to that issue (e.g., in a response to a request for proposals or in promotional materials provided to an issuer) will be considered to be "acting as an underwriter" under Rule G-23(b) with respect to that issue." This guidance would allow a dealer to comply with proposed Rule G-42 simply by making a G-23 disclosure and then acting as both an underwriter and municipal advisor (using the SEC interpretation of both of those terms) for the same issuance of municipal securities. This guidance would appear to be directly at odds with SEC' staff guidance in its FAQs with respect to the municipal advisor rule that specifically said a broker-dealer could not serve "as the municipal advisor to a municipal entity in the early stages of a financing transaction involving the issuance of municipal securities and then switch roles to serve as the underwriter when the municipal entity decides to proceed with that issuance of municipal securities." That November 2011 guidance on G-23 further provides that "it shall not be a violation of Rule G-23(d) for a dealer that states that it is acting as an underwriter with respect to the issuance of municipal securities to provide advice with respect to the investment of the proceeds of the issue, municipal derivatives integrally related to the issue, or other similar matters concerning the issue." This guidance would presumably allow a broker-dealer to provide all manner of municipal advice to a municipal entity at the same time that it is serving as an underwriter even though the SEC has specifically identified advice with respect to municipal derivatives and advice with respect to the investment of proceeds as being outside the scope of an underwriting. Had the SEC approved this guidance subsequent to the Commission's adoption of the final municipal advisor rule, it might make sense to allow for its incorporation in proposed Rule G-42 but any SEC determination that such guidance was consistent with the Exchange Act in 2011 would probably not survive its subsequent interpretation of key Exchange Act provisions in its final municipal advisor rule.

It appears that this November 2011 guidance on Rule G-23 is not consistent with the Exchange Act as subsequently interpreted by the SEC and the MSRB should consider retracting and revising this guidance if it wants to allow G-23 "conflicts" compliance to stand in for G-42 standards of conduct compliance for municipal broker-dealers as contemplated by Supplementary Material .07. In addition to being developed prior to the adoption of the final municipal advisor rule, that November 2011 guidance was not developed with a municipal advisor's fiduciary duty in mind but was solely a "conflicts rule" and not a standard of conduct rule. That November 2011 guidance explicitly states that "Rule G-23 is solely a conflicts rule" and that "this [G-23 interpretive] notice does not address whether provision of the advice permitted by Rule G-23 would cause the dealer to be considered a "municipal advisor" under the Exchange Act and the rules promulgated thereunder." It seems odd for the MSRB to incorporate that conflicts guidance whole cloth into standards of conduct for municipal advisors when the guidance was developed prior to the SEC's interpretation of core provisions of the Exchange Act and without consideration of the fiduciary duty of a municipal advisor particularly when the MSRB has not discussed why it believes that the November 2011 guidance is still consistent with the Exchange Act.

.08 Disclosure to Investors and Rule G-8(h)(iv)(B)

It is unclear why these provisions are included in this standard of conduct rule. These provisions presume that a conflict of interest that is material to a client is also material to investors in a particular issuance of municipal securities. And, even if that were the case, antifraud rules already govern the requirement to make this disclosure. These provisions should be eliminated.

I appreciate the opportunity to provide these comments. If you have any questions regarding these comments please feel free to contact me by phone at (415-717-6588).

Sincerely,

/s/

Dave A. Sanchez