OMB APPROVAL	
OMB Number:	3235-0045
Expires:	August 31, 2011
Estimated average burden hours per response	38

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 183

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No.* SR - 2011 - * 12

Amendment No. (req. for Amendments *)

Proposed Rule Change by Municipal Securities Rulemaking Board

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial *	Amendment *	Withdrawal
☒	☐	☐

Section 19(b)(2) *	Section 19(b)(3)(A) *	Section 19(b)(3)(B) *
☒	☐	☐

Pilot ☐

Extension of Time Period for Commission Action * ☐

Date Expires *

Rule

- ☐ 19b-4(f)(1)
- ☐ 19b-4(f)(2)
- ☐ 19b-4(f)(3)
- ☐ 19b-4(f)(4)
- ☐ 19b-4(f)(5)
- ☐ 19b-4(f)(6)

Exhibit 2 Sent As Paper Document ☐

Exhibit 3 Sent As Paper Document ☐

Description

Provide a brief description of the proposed rule change (limit 250 characters, required when Initial is checked *).

Proposed rule change to establish "pay to play" and related rules for municipal advisors and to make certain conforming changes to the existing pay to play rules for brokers, dealers and municipal securities dealers.

Contact Information

Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name * Peg Last Name * Henry

Title * General Counsel, Market Regulation

E-mail * phenry@msrb.org

Telephone * (703) 797-6600 Fax (703) 797-6700

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

Municipal Securities Rulemaking Board

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized officer.

Date 08/19/2011

By Ronald W. Smith

(Name *)

Corporate Secretary

(Title *)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Ronald Smith, rsmith@msrb.org

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

Form 19b-4 Information (required)

Add Remove View

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change (required)

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

Add Remove View

Exhibit Sent As Paper Document ☐

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit 3 - Form, Report, or Questionnaire

Add Remove View

Exhibit Sent As Paper Document ☐

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit 4 - Marked Copies

Add Remove View

The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

Add Remove View

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

Add Remove View

If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of Proposed Rule Change

(a) The Municipal Securities Rulemaking Board (the "MSRB" or "Board") is hereby filing with the Securities and Exchange Commission (the "SEC" or "Commission") a proposed rule change to establish "pay to play" and related rules for municipal advisors and to make certain conforming changes to the existing pay to play rules for brokers, dealers, and municipal securities dealers ("dealers"). The proposed rule change consists of (i) proposed MSRB Rule G-42 (on political contributions and prohibitions on municipal advisory activities); (ii) proposed amendments that would make conforming changes to MSRB Rules G-8 (on books and records), G-9 (on preservation of records), and G-37 (on political contributions and prohibitions on municipal securities business); (iii) proposed Form G-37/G-42 and Form G-37x/G-42x; and (iv) a proposed restatement of a Rule G-37 interpretive notice issued by the MSRB in 1997 ("Rule G-37 Interpretive Notice").[1]

The MSRB requests that, if approved by the Commission, the proposed rule change be made effective six months after the date on which the Commission first approves rules defining the term "municipal advisor" under the Exchange Act or such later date as the Commission approves the proposed rule change; provided, however, that the MSRB requests that no contribution made prior to the effective date of proposed Rule G-42 would result in a ban pursuant to proposed Rule G-42(b)(i);[2] and, provided that any ban on municipal securities business under Rule G-37(b)(i) in existence prior to the effective date of proposed Rule G-42 would continue until it otherwise would have terminated under Rule G-37(b)(i), as in effect prior to the effective date of proposed Rule G-42.

The text of the proposed rule change is set forth below:[3]

* * *

Rule G-42 Political Contributions and Prohibitions on Municipal Advisory Activities

(a) *Purpose*. The purpose and intent of this rule are to ensure that the high standards and integrity of the municipal advisory industry are maintained, to prevent fraudulent and manipulative acts and practices, to promote just and

---

1 Interpretation of Prohibition on Municipal Securities Business Pursuant to Rule G-37 (February 21, 1997), reprinted in MSRB Rule Book.

2 As described in more detail below, under proposed Rule G-42(b)(i) certain contributions could result in a ban on municipal advisory business for compensation, a ban on solicitations of third-party business for compensation, and a ban on the receipt of compensation for the solicitation of third-party business.

3 Underlining indicates additions; brackets indicate deletions.

equitable principles of trade, to perfect a free and open market, and to protect investors, municipal entities, and the public interest by: (i) prohibiting municipal advisors from engaging in municipal advisory business with municipal entities for compensation, soliciting third-party business from municipal entities for compensation, and receiving compensation for the solicitation of third-party business, if certain political contributions have been made to officials of municipal entities; and (ii) requiring municipal advisors to disclose certain political contributions, as well as other information, to allow public scrutiny of political contributions and the municipal advisory business and solicitations of a municipal advisor.

(b) *Ban on Municipal Advisory Business and Certain Solicitations*.

(i) No municipal advisor shall engage in municipal advisory business with a municipal entity for compensation, solicit third-party business from a municipal entity for compensation, or receive compensation for the solicitation of third-party business from a municipal entity, within two years after any contribution to an official of such municipal entity made by:

(A) the municipal advisor;

(B) any municipal advisor professional of such municipal advisor (other than a *de minimis* contribution); or

(C) any political action committee controlled by such municipal advisor or by a municipal advisor professional.

(ii) For an individual designated as a municipal advisor professional solely pursuant to subparagraph (B) of paragraph (g)(iv) of this rule, the provisions of paragraph (b)(i) shall apply to contributions made by such individual to officials of a municipal entity prior to becoming a municipal advisor professional only if such individual solicits municipal advisory business from such municipal entity.

(iii) For an individual designated as a municipal advisor professional solely pursuant to subparagraph (C), (D), or (E) of paragraph (g)(iv) of this rule, the provisions of paragraph (b)(i) shall apply only to contributions made during the period beginning six months prior to the individual becoming a municipal advisor professional.

(iv) Notwithstanding paragraph (i) of this section, in the case of a municipal advisor engaged in municipal advisory business with a municipal entity, the prohibition on engaging in municipal advisory business for compensation provided for in paragraph (i) of this section shall begin on the date of the contribution described in such paragraph (i) and end two years after the date on which all of its municipal advisory business with the municipal entity has been terminated.

(c) *Prohibition on Soliciting and Coordinating Contributions*.

(i) No municipal advisor or any municipal advisor professional of such municipal advisor shall solicit any person, including, but not limited to, any affiliated company of the municipal advisor, or political action committee to make any contribution, or shall coordinate any contributions, to an official of a municipal entity with which the municipal advisor is engaging or is seeking to engage in municipal advisory business or is soliciting third-party business.

(ii) No municipal advisor or any individual designated as a municipal advisor professional of the municipal advisor shall solicit any person, including. but not limited to, any affiliated company of the municipal advisor, or political action committee, to make any payment, or shall coordinate any payments, to a political party of a state or locality where the municipal advisor is engaging or is seeking to engage in municipal advisory business with a municipal entity or is soliciting third-party business; provided, however, that the provisions of this paragraph (ii) shall not apply to any individual designated as a municipal advisor professional of a municipal advisor pursuant to subparagraph (D) or (E) of paragraph (g)(iv) of this rule, if the municipal advisory activities in which such municipal advisor engages consist solely of municipal advisory business.

(d) *Circumvention of Rule*. No municipal advisor or any municipal advisor professional of such municipal advisor shall, directly or indirectly, through or by any other person or means, do any act that would result in a violation of section (b) or (c) of this rule.

(e) *Required Disclosure to Board.*

(i) Except as otherwise provided in paragraph (e)(ii), each municipal advisor shall, by the last day of the month following the end of each calendar quarter (these dates correspond to January 31, April 30, July 31 and October 31) send to the Board Form G-37/G-42 setting forth, in the prescribed format, the following information:

(A) for contributions to officials of municipal entities (other than a contribution made by a municipal advisor professional or a non-MAP executive officer to an official of a municipal entity if all contributions by such person to such official of a municipal entity, in total, are *de minimis*) and payments to political parties of states and political subdivisions (other than a payment made by a municipal advisor professional or a non-MAP executive officer to a political party if all payments by such person to such political party, in total are *de minimis*) made by the persons described in clause (2) of this subparagraph (A):

(1) the name and title (including any city/county/state or political subdivision) of each official of a municipal entity and political

party receiving contributions or payments during such calendar quarter, listed by state;

(2) the contribution or payment amount made and the contributor category of each of the following persons making such contributions or payments during such calendar quarter:

(a) the municipal advisor;

(b) each municipal advisor professional;

(c) each non-MAP executive officer; and

(d) each political action committee controlled by the municipal advisor or by any municipal advisor professional;

(B) for contributions to bond ballot campaigns (other than a contribution made by a municipal advisor professional or a non-MAP executive officer if all contributions by such person to such bond ballot campaign, in total, are *de minimis*) made by the persons described in clause (2) of this subparagraph (B):

(1) the official name of each bond ballot campaign receiving contributions during such calendar quarter, and the jurisdiction (including city/county/state or political subdivision) by or for which municipal securities, if approved, would be issued, listed by state;

(2) the contribution amount made and the contributor category of each of the following persons making such contributions during such calendar quarter:

(a) the municipal advisor;

(b) each municipal advisor professional;

(c) each non-MAP executive officer; and

(d) each political action committee controlled by the municipal advisor or by any municipal advisor professional;

(C) (1) in the case of municipal advisory business engaged in by the municipal advisor with or on behalf of municipal entities, a list of municipal entities with which or on behalf of which the municipal advisor has engaged in municipal advisory business during such calendar quarter, listed by state; and (2) in the case of third-party business that was the subject of a

solicitation, a list of the third-party business awarded during the calendar quarter by state, along with the names of persons on behalf of which such third-party business was solicited and the nature of such third-party business;

(D) any information required to be included on Form G-37/G-42 for such calendar quarter pursuant to paragraph (e)(iii);

(E) such other identifying information required by Form G-37/G-42; and

(F) whether any contribution listed in this paragraph (e)(i) is the subject of an automatic exemption pursuant to section (j) of this rule, and the date of such automatic exemption.

The Board shall make public a copy of each Form G-37/G-42 received from any municipal advisor.

(ii) No municipal advisor shall be required to send Form G-37/G-42 to the Board for any calendar quarter in which either:

(A) such municipal advisor has no information that is required to be reported pursuant to subparagraphs (A) through (D) of paragraph (e)(i) for such calendar quarter; or

(B) such municipal advisor has not engaged in municipal advisory business with a municipal entity or made any solicitations described in subparagraph (g)(ix)(B), but only if such municipal advisor:

(1) had not engaged in municipal advisory business with a municipal entity or made any solicitations described in subparagraph (g)(ix)(B) during the seven consecutive calendar quarters immediately preceding such calendar quarter; and

(2) has sent to the Board completed Form G-37x/G-42x setting forth, in the prescribed format, (a) a certification to the effect that such municipal advisor did not engage in municipal advisory business with a municipal entity or make any solicitations described in subparagraph (g)(ix)(B) during the eight consecutive calendar quarters immediately preceding the date of such certification, (b) certain acknowledgments as are set forth in said Form G-37x/G-42x regarding the obligations of such municipal advisor in connection with Forms G-37/G-42 and G-37x/G-42x under this paragraph (e)(ii) and Rule G-8(h)(i), and (c) such other identifying information required by Form G-37x/G-42x; provided that, if a municipal advisor has engaged in municipal advisory business with a municipal entity or

made any solicitations described in subparagraph (g)(ix)(B) subsequent to the submission of Form G-37x/G-42x to the Board, such municipal advisor shall be required to submit a new Form G-37x/G-42x to the Board in order to again qualify for an exemption under this subparagraph (B). The Board shall make public a copy of each Form G-37x/G-42x received from any municipal advisor.

(iii) If a municipal advisor engages in municipal advisory business with a municipal entity or makes any solicitations described in subparagraph (g)(ix)(B) during any calendar quarter after not having reported on Form G-37/G-42 the information described in subparagraph (A) of paragraph (e)(i) for one or more contributions or payments made during the two-year period preceding such calendar quarter solely as a result of subparagraph (B) of paragraph (e)(ii), such municipal advisor shall include on Form G-37/G-42 for such calendar quarter all such information (including year and calendar quarter of such contributions or payments) not so reported during such two-year period.

(iv) A municipal advisor that submits Form G-37/G-42 or Form G-37x/G-42x to the Board shall submit an electronic version of such form to the Board in such format and manner specified in the current *Instructions for Forms G-37/G-42 and G-37x/G-42x*.

(f) *Voluntary Disclosure to Board*. The Board will accept additional information related to contributions made to officials of municipal entities and payments to political parties of states and political subdivisions voluntarily submitted by municipal advisors or others provided that such information is submitted in accordance with section (e) of this rule.

(g) *Definitions*.

(i) The term "contribution" means any gift, subscription, loan, advance, or deposit of money or anything of value made: (A) for the purpose of influencing any election for federal, state, or local office; (B) for payment of debt incurred in connection with any such election; or (C) for transition or inaugural expenses incurred by the successful candidate for state or local office.

(ii) The term "*de minimis*," when used in connection with contributions made by a municipal advisor professional or a non-MAP executive officer, refers to contributions made: (A) to bond ballot campaigns for a ballot initiative for which such municipal advisor professional or non-MAP executive officer was entitled to vote at the time of the contribution and which contributions, in total, were not in excess of $250 per ballot initiative, or (B) to officials of a municipal entity for whom the municipal advisor professional or non-MAP executive officer was entitled to vote at the time of the contribution and which contributions, in total, were not in excess of $250 to each official of such municipal entity, per election. The term "*de minimis*" when used in connection with payments made by a municipal advisor

professional or a non-MAP executive officer, refers to payments to political parties of states and political subdivisions in which such municipal advisor professional or non-MAP executive officer was entitled to vote at the time of the payment and which payments, in total, do not exceed $250 per year.

(iii) The term "municipal advisor" used in this rule does not include its associated persons.

(iv) The term "municipal advisor professional" means:

(A) any associated person engaged in municipal advisory business with a municipal entity;

(B) any associated person (including, but not limited to, any affiliated person of the municipal advisor) who solicits municipal advisory business with a municipal entity on its own behalf or solicits third-party business;

(C) any associated person who is a supervisor of the municipal advisory activities of any persons described in subparagraphs (A) or (B);

(D) any associated person who is a supervisor of the municipal advisory activities of any person described in subparagraph (C) up through and including the Chief Executive Officer or similarly situated official; or

(E) any associated person who is a member of the municipal advisor's executive or management committee or similarly situated officials, if any.

Each person designated by the municipal advisor as a municipal advisor professional pursuant to Rule G-8(h)(i) is deemed to be a municipal advisor professional. Each person designated as a municipal advisor professional shall retain this designation for one year after the last activity or position that gave rise to the designation.

(v) The term "non-MAP executive officer" means an associated person in charge of a principal business unit, division or function or any other person who performs similar policy making functions for the municipal advisor, but does not include any municipal advisor professional, as defined in paragraph (iv) of this section (g).

Each person designated by the municipal advisor as a non-MAP executive officer pursuant to Rule G-8(h)(i) is deemed to be a non-MAP executive officer.

(vi) The term "official of a municipal entity" means any person (including any election committee for such person) who was, at the time of the contribution, an

incumbent, candidate or successful candidate: (A) for elective office of the municipal entity which office is directly or indirectly responsible for, or can influence the outcome of, the hiring of a municipal advisor by the municipal entity or the hiring of any person on behalf of which the municipal advisor is soliciting third-party business; or (B) for any elective office of a municipal entity, which office has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of a municipal advisor by a municipal entity or the hiring of any person on behalf of which the municipal advisor is soliciting third-party business.

(vii) The term "municipal advisory business" means the provision of advice to or on behalf of a municipal entity or an obligated person with respect to municipal financial products or the issuance of municipal securities.

(viii) The term "payment" means any gift, subscription, loan, advance, or deposit of money or anything of value.

(ix) The term "solicit" means, except as used in section (c) of this rule, the taking of any action that would constitute a solicitation, and the term "solicitation" means a direct or indirect communication by any person with a municipal entity for the purpose of obtaining or retaining (A) municipal advisory business with a municipal entity or (B) third-party business. For purposes of section (c) of this rule, the term "solicit" means to communicate, directly or indirectly, for the purpose of obtaining or arranging a contribution or payment. For purposes of this paragraph, an investment adviser to a covered investment pool in which a municipal entity is solicited to invest shall be treated as though that investment adviser were providing or seeking to provide investment advisory services directly to the municipal entity.

(x) The term "affiliated person of the municipal advisor" means any person who is a partner, director, officer, or employee of the municipal advisor or of an affiliated company of the municipal advisor.

(xi) The term "affiliated company of the municipal advisor" means any entity directly or indirectly controlling, controlled by, or under common control with the municipal advisor.

(xii) The term "bond ballot campaign" means any fund, organization or committee that solicits or receives contributions to be used to support ballot initiatives seeking authorization for the issuance of municipal securities through public approval obtained by popular vote.

(xiii) The term "covered investment pool" means:

(A) An investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a) that is an investment option of a plan

or program of a government entity (as defined in Rule 206(4)-5 under the Investment Advisers Act of 1940); or

(B) Any company that would be an investment company under section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–3(a)), but for the exclusion provided from that definition by either section 3(c)(1), section 3(c)(7) or section 3(c)(11) of that Act (15 U.S.C. 80a–3(c)(1), (c)(7) or (c)(11)).

(xiv) The term "third-party business" means an engagement by a municipal entity of a broker, dealer, municipal securities dealer, or municipal advisor (other than the municipal advisor that is soliciting the municipal entity) that does not control, is not controlled by, or is not under common control with, the person soliciting such third-party business for or in connection with municipal financial products or the issuance of municipal securities, or of an investment adviser (as defined in section 202(a)(11) of the Investment Advisers Act of 1940) to provide investment advisory services to or on behalf of a municipal entity.

(h) *Application for Exemption*. The Commission may, upon application, exempt a municipal advisor, conditionally or unconditionally, from the prohibition under section (b) of this rule of engaging in municipal advisory business with a municipal entity for compensation, soliciting third-party business from a municipal entity for compensation, or receiving compensation for the solicitation of third-party business from a municipal entity. In determining whether to grant such exemption, the Commission may consider, among other factors that it may deem relevant:

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

(ii) whether such municipal advisor (A) prior to the time the contribution(s) that resulted in such prohibition was made, had developed and instituted procedures reasonably designed to ensure compliance with this rule; (B) prior to or at the time the contribution(s) that resulted in such prohibition was made, had no actual knowledge of the contribution(s); (C) has taken all available steps to cause the contributor involved in making the contribution(s) that resulted in such prohibition to obtain a return of the contribution(s); and (D) 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 contributor who made the relevant contribution and all employees of the municipal advisor;

(iii) whether, at the time of the contribution, the contributor was a municipal advisor professional or otherwise an employee of the municipal advisor, or was seeking such employment;

(iv) the timing and amount of the contribution that resulted in the prohibition;

(v) the nature of the election (*e.g*, federal, state or local); and

(vi) the contributor's apparent intent or motive in making the contribution that resulted in the prohibition, as evidenced by the facts and circumstances surrounding such contribution.

(i) *Automatic Exemptions*.

(i) A municipal advisor that is prohibited from engaging in municipal advisory business with a municipal entity for compensation, soliciting third-party business from a municipal entity for compensation, or receiving compensation for the solicitation of third-party business from a municipal entity pursuant to section (b) of this rule as a result of a contribution made by a municipal advisor professional may exempt itself from such prohibition, subject to paragraphs (ii) and (iii) of this section, upon satisfaction of the following requirements: (A) the municipal advisor must have discovered the contribution that resulted in the prohibition on business, for compensation, within four months of the date of such contribution; (B) such contribution must not have exceeded $250; and (C) the contributor must obtain a return of the contribution within 60 calendar days of the date of discovery of such contribution by the municipal advisor.

(ii) A municipal advisor is entitled to no more than two automatic exemptions during any 12-month period.

(iii) A municipal advisor may not execute more than one automatic exemption relating to contributions by the same municipal advisor professional regardless of the time period.

***** ***** *****

Rule G-8 Books and Records to be Made by Brokers, Dealers, Municipal Securities Dealers, and Municipal Advisors

(a)(i) - (xv) No change.

(a)(xvi) *Records Concerning Political Contributions and Prohibitions on Municipal Securities Business Pursuant to Rule G-37.* Records reflecting:

(A) - (I) No change.

(J) Brokers, dealers and municipal securities dealers shall maintain copies of the Forms G-37**/G-42** and G-37x**/G-42x** sent to the Board **[**along with

the certified or registered mail receipt or other record of sending such forms to the Board**]**.

(K) - (L) No change.

(M) No broker, dealer or municipal securities dealer shall be subject to the requirements of this paragraph (a)(xvi) during any period that such broker, dealer or municipal securities dealer has qualified for and invoked the exemption set forth in clause (B) of paragraph (e)(ii) of rule G-37; provided, however, that such broker, dealer or municipal securities dealer shall remain obligated to comply with clause (H) of this paragraph (a)(xvi) during such period of exemption. At such time as a broker, dealer or municipal securities dealer that has been exempted by this clause (**[**K**]**__**M**__) from the requirements of this paragraph (a)(xvi) engages in any municipal securities business, all requirements of this paragraph (a)(xvi) covering the periods of time set forth herein (beginning with the then current calendar year and the two preceding calendar years) shall become applicable to such broker, dealer or municipal securities dealer.

(a)(xvii) - (xxiv) No change.

(b) – (g) No change.

(h) Municipal Advisor Records. Each municipal advisor shall maintain:

__(i) *Records Concerning Political Contributions and Prohibitions on Municipal Advisory Activities Pursuant to Rule G-42.* Records reflecting:__

__(A) a listing of the names, titles, city/county and state of residence of all municipal advisor professionals;__

__(B) a listing of the names, titles, city/county and state of residence of all non-MAP executive officers;__

__(C) the states in which the municipal advisor is engaging or is seeking to engage in municipal advisory business with municipal entities or soliciting third-party business (as defined in Rule G-42(g)(xiv)) from a municipal entity;__

__(D) in the case of municipal advisory business engaged in by the municipal advisor with or on behalf of municipal entities, a list of municipal entities with which the municipal advisor has engaged in municipal advisory business, along with the type of municipal advisory business with municipal entities engaged in, during the current year and separate listings for each of the previous two calendar years; and (2) in the case of third-party business, a list of the third-party business awarded, along with the names of the persons on behalf of which such business was solicited and the nature of such third-__

party business, during the current year and separate listings for each of the previous two calendar years;

(E) the contributions, direct or indirect, to officials of a municipal entity and payments, direct or indirect, made to political parties of states and political subdivisions, by the municipal advisor and each political action committee controlled by the municipal advisor for the current year and separate listings for each of the previous two calendar years, which records shall include: (i) the identity of the contributors, (ii) the names and titles (including any city/county/state or other political subdivision) of the recipients of such contributions and payments, and (iii) the amounts and dates of such contributions and payments;

(F) the contributions, direct or indirect, to officials of a municipal entity made by each municipal advisor professional, any political action committee controlled by a municipal advisor professional, and non-MAP executive officer for the current year, which records shall include: (i) the names, titles, city/county and state of residence of contributors, (ii) the names and titles (including any city/county/state or other political subdivision) of the recipients of such contributions, (iii) the amounts and dates of such contributions; and (iv) whether any such contribution was the subject of an automatic exemption, pursuant to Rule G-42(i), including the amount of the contribution, the date the municipal advisor discovered the contribution, the name of the contributor, and the date the contributor obtained a return of the contribution; provided, however, that such records need not reflect any *de minimis* contribution made by a municipal advisor professional or non-MAP executive officer. In addition, municipal advisors shall maintain separate listings for each of the previous two calendar years containing the information required pursuant to this subparagraph (F) for those individuals meeting the definition of municipal advisor professional pursuant to subparagraphs (A) and (B) of Rule G-42(g)(iv) and for any political action committee controlled by such individuals, and separate listings for the previous six months containing the information required pursuant to this subparagraph (F) for those individuals meeting the definition of municipal advisor professional pursuant to subparagraphs (C), (D) and (E) of Rule G-42(g)(iv) and for any political action committee controlled by such individuals and for any non-MAP executive officers; and

(G) the payments, direct or indirect, to political parties of states and political subdivisions made by all municipal advisor professionals, any political action committee controlled by a municipal advisor professional, and non-MAP executive officers for the current year, which records shall include: (i) the names, titles, city/county and state of residence of contributors, (ii) the names, and titles (including any city/county/state or other political subdivision) of the recipients of such payments and (iii) the amounts and dates of such payments; provided, however, that such records need not reflect those payments made by any municipal advisor professional

or non-MAP executive officer that are *de minimis*. In addition, municipal advisors shall maintain separate listings for each of the previous two calendar years containing the information required pursuant to this subparagraph (G) for those individuals meeting the definition of municipal advisor professional pursuant to subparagraphs (A) and (B) of Rule G-42(g)(iv) and for any political action committee controlled by such individuals, and separate listings for the previous six months containing the information required pursuant to this subparagraph (G) for those individuals meeting the definition of municipal advisor professional pursuant to subparagraphs (C), (D) and (E) of Rule G-42(g)(iv) and for any political action committee controlled by such individuals and for any non-MAP executive officers.

(H) the contributions, direct or indirect, to bond ballot campaigns made by the municipal advisor and each political action committee controlled by the municipal advisor for the current year, which records shall include: (i) the identity of the contributors, (ii) the official name of each bond ballot campaign receiving such contributions, and the jurisdiction (including city/county/state or political subdivision) by or for which municipal securities, if approved, would be issued, and (iii) the amounts and dates of such contributions;

(I) the contributions, direct or indirect, to bond ballot campaigns made by each municipal advisor professional, any political action committee controlled by a municipal advisor professional, and non-MAP executive officer for the current year, which records shall include: (i) the names, titles, city/county and state of residence of contributors, (ii) the official name of each bond ballot campaign receiving such contributions, and the jurisdiction (including city/county/state or political subdivision) by or for which municipal securities, if approved, would be issued, and (iii) the amounts and dates of such contributions; provided, however, that such records need not reflect any contribution made by a municipal advisor professional or non-MAP executive officer to a bond ballot campaign for a ballot initiative that is *de minimis*.

(J) Municipal advisors shall maintain copies of the Forms G-37/G-42 and G-37x/G-42x sent to the Board.

(K) Terms used in this paragraph (i) have the same meaning as in Rule G-42.

(L) No municipal advisor shall be subject to the requirements of this paragraph (i) during any period that such municipal advisor has qualified for and invoked the exemption set forth in subparagraph (B) of paragraph (e)(ii) of Rule G-42; provided, however, that such municipal advisor shall remain obligated to comply with subparagraph (H) of this paragraph (i) during such period of exemption. At such time as a municipal

advisor that has been exempted by this subparagraph (L) from the requirements of this paragraph (i) engages in any municipal advisory business with municipal entities, all requirements of this paragraph (i) covering the periods of time set forth herein (beginning with the then current calendar year and the two preceding calendar years) shall become applicable to such municipal advisor.

(ii) Reserved.

(iii) Reserved.

(i) Reserved.

* * *

Rule G-9: Preservation of Records

(a) - (g) No change.

(h) *Municipal Advisor Records*. Every municipal advisor shall preserve for no less than six years:

(i) the records to be maintained pursuant to Rule G-8(h)(i); provided, however, that copies of Forms G-37x/G-42x shall be preserved for the period during which such Forms G-37x/G-42x are effective and for at least six years following the end of such effectiveness.

* * *

Rule G-37 Political Contributions and Prohibitions on Municipal Securities Business

(a) No change.

(b) *Ban on Municipal Securities Business*.

(i) (A) No change.

(B) any municipal finance professional **of [**associated with**]** such broker, dealer or municipal securities dealer; or

(C) No change.

provided, however, that this section shall not prohibit the broker, dealer or municipal securities dealer from engaging in municipal securities business with an issuer if the only contributions made by the persons and entities noted above to officials of such issuer within the previous two years were made by municipal finance professionals to officials of such issuer for whom the municipal finance professionals were entitled to vote **at the**

time of the contribution and which contributions, in total, were not in excess of $250 by any municipal finance professional to each official of such issuer, per election.

(ii) - (iii) No change.

(c) *Prohibition on Soliciting and Coordinating Contributions*.

(i) No broker, dealer or municipal securities dealer or any municipal finance professional of **such [**the**]** broker, dealer or municipal securities dealer shall solicit any person, including, but not limited to, any affiliated **company [**entity**]** of the broker, dealer or municipal securities dealer, or political action committee to make any contribution, or shall coordinate any contributions, to an official of an issuer with which the broker, dealer or municipal securities dealer is engaging or is seeking to engage in municipal securities business.

(ii) No broker, dealer or municipal securities dealer or any individual designated as a municipal finance professional of the broker, dealer or municipal securities dealer pursuant to subparagraphs (A), (B), or (C) of paragraph (g)(iv) of this rule shall solicit any person, including, but not limited to, any affiliated **company [**entity**]** of the broker, dealer or municipal securities dealer, or political action committee to make any payment, or shall coordinate any payments, to a political party of a state or locality where the broker, dealer or municipal securities dealer is engaging or is seeking to engage in municipal securities business.

(d) No change.

(e) *Required Disclosure to Board.*

(i) Except as otherwise provided in paragraph (e)(ii), each broker, dealer or municipal securities dealer shall, by the last day of the month following the end of each calendar quarter (these dates correspond to January 31, April 30, July 31 and October 31) send to the Board Form G-37**/G-42** setting forth, in the prescribed format, the following information:

(A) for contributions to officials of issuers (other than a contribution made by a municipal finance professional or a non-MFP executive officer to an official of an issuer for whom such person is entitled to vote **at the time of the contribution,** if all contributions by such person to such official of an issuer, in total, do not exceed $250 per election) and payments to political parties of states and political subdivisions (other than a payment made by a municipal finance professional or a non-MFP executive officer to a political party of a state or a political subdivision in which such person is entitled to vote **at the time of the contribution,** if all payments by such person to such political party, in total, do not exceed $250 per year) made by the persons and entities described in subclause (2) of this clause (A):

(1) - (2) No change.

(B) for contributions to bond ballot campaigns (other than a contribution made by a municipal finance professional or a non-MFP executive officer to a bond ballot campaign for a ballot initiative **for [**with respect to**]** which such person is entitled to vote **at the time of the contribution,** if all contributions by such person to such bond ballot campaign, in total, do not exceed $250 per ballot initiative) made by the persons and entities described in subclause (2) of this clause (B):

(1) – (2) No change.

(C) No change.

(D) any information required to be included on Form G-37/**G-42** for such calendar quarter pursuant to paragraph (e)(iii);

(E) such other identifying information required by Form G-37/**G-42**; and

(F) No change.

The Board shall make public a copy of each Form G-37/**G-42** received from any broker, dealer or municipal securities dealer.

(ii) No broker, dealer or municipal securities dealer shall be required to send Form G-37/G-42 to the Board for any calendar quarter in which either:

(A) No change.

(B) such broker, dealer or municipal securities dealer has not engaged in municipal securities business, but only if such broker, dealer or municipal securities dealer:

(1) No change.

(2) has sent to the Board completed Form G-37x/**G-42x** setting forth, in the prescribed format, (a) a certification to the effect that such broker, dealer or municipal securities dealer did not engage in municipal securities business during the eight consecutive calendar quarters immediately preceding the date of such certification, (b) certain acknowledgments as are set forth in said Form G-37x/**G-42x** regarding the obligations of such broker, dealer or municipal securities dealer in connection with Forms G-37/**G-42** and G-37x/**G-42x** under this paragraph (e)(ii) and rule G-8(a)(xvi), and (c) such other identifying information required by Form G-37x/**G-42x**; provided that, if a broker, dealer or

municipal securities dealer has engaged in municipal securities business subsequent to the submission of Form G-37x/**G-42x** to the Board, such broker, dealer or municipal securities dealer shall be required to submit a new Form G-37x/**G-42x** to the Board in order to again qualify for an exemption under this clause (B). The Board shall make public a copy of each Form G-37x/**G-42x** received from any broker, dealer or municipal securities dealer.

(iii) If a broker, dealer or municipal securities dealer engages in municipal securities business during any calendar quarter after not having reported on Form G-37/**G-42** the information described in clause (A) of paragraph (e)(i) for one or more contributions or payments made during the two-year period preceding such calendar quarter solely as a result of clause (B) of paragraph (e)(ii), such broker, dealer or municipal securities dealer shall include on Form G-37/**G-42** for such calendar quarter all such information (including year and calendar quarter of such contributions or payments) not so reported during such two-year period.

(iv) A broker, dealer or municipal securities dealer that submits Form G-37/**G-42** or Form G-37x/**G-42x** to the Board shall **[**either:**]**

[(A) send two copies of such form to the Board by certified or registered mail, or some other equally prompt means that provides a record of sending; or**]**

[(B)] submit an electronic version of such form to the Board in such format and manner specified in the current *Instructions for Forms G-37/**G-42** and G-37x/**G-42x***.

(f) No change.

(g) *Definitions*.

(i) - (iii) No change.

(iv) The term "municipal finance professional" means:

(A) any associated person primarily engaged in municipal securities representative activities, as defined in rule G-3(a)(i) **without regard to subparagraph (B) thereof**, provided, however, that sales activities with natural persons shall not be considered to be municipal securities representative activities for purposes of this subparagraph (A);

(B) any associated person (including, but not limited to, any affiliated person of the broker, dealer or municipal securities dealer **[**,as defined in rule G-38)**]** who solicits municipal securities business;

(C) - (E) No change.

(v) - (vi) No change.

(vii) The term "municipal securities business" means:

(A) - (B) No change.

[(C) the provision of financial advisory or consultant services to or on behalf of an issuer with respect to a primary offering of municipal securities in which the dealer was chosen to provide such services on other than a competitive bid basis; or**]**

(**C[**D**]**) the provision of remarketing agent services to or on behalf of an issuer with respect to a primary offering of municipal securities in which the dealer was chosen to provide such services on other than a competitive bid basis.

(viii) No change.

(ix) Except as used in section (c) **of this rule**, the term "solicit" means **[**the taking of any action that would constitute a solicitation as defined in rule G-38(b)(i)**] to communicate directly or indirectly with an issuer for the purpose of obtaining or retaining municipal securities business. For purposes of section (c) of this rule, the term "solicit" means to communicate, directly or indirectly, for the purpose of obtaining or arranging a contribution or payment.**

(x) No change.

(xi) The term "affiliated person of the broker, dealer or municipal securities dealer" means any person who is a partner, director, officer, or employee of the broker, dealer or municipal securities dealer or of an affiliated company of the broker, dealer or municipal securities dealer.

(xii) The term "affiliated company of the broker, dealer or municipal securities dealer" means any entity directly or indirectly controlling, controlled by, or under common control with the broker, dealer or municipal securities dealer.

(h) - (i) No change.

(j) *Automatic Exemptions*.

(i) No change.

(ii) A broker, dealer or municipal securities dealer is entitled to no more than two automatic exemptions **during any [**per**]** 12-month period.

(iii) No change.

* * *

TEXT OF DRAFT RESTATED G-37 INTERPRETIVE NOTICE

INTERPRETATION OF PROHIBITION ON MUNICIPAL SECURITIES BUSINESS PURSUANT TO RULE G-37 - February 21, 1997, **RESTATED**

Recently, dealers have raised questions regarding how the prohibition on municipal securities business in Rule G-37, on political contributions and prohibitions on municipal securities business, applies to certain situations. Rule G-37 prohibits any dealer from engaging in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by: (i) the dealer; (ii) any municipal finance professional associated with such dealer; or (iii) any political action committee controlled by the dealer or any municipal finance professional.[1] If a municipal finance professional makes a political contribution to an issuer official for whom he is not entitled to vote **at the time of the contribution**, the dealer is prohibited from engaging in municipal securities business with that issuer for two years. The Board has been asked whether the prohibition on municipal securities business extends to certain services provided under contractual agreements with an issuer that pre-date the contribution. The Board is issuing the following interpretation of the prohibition on municipal securities business pursuant to Rule G-37.

"New" Municipal Securities Business

A dealer subject to a prohibition on municipal securities business with an issuer may not enter into any new contractual obligations with that issuer for municipal securities business.[2] The Board adopted Rule G-37 in an effort to sever any connection between the making of political contributions and the awarding of municipal securities business. The Board believes that the problems associated with political contributions—including the practice known as "pay-to-play"—undermine investor confidence in the municipal securities market, which confidence is crucial to the long-term health of the market, both in terms of liquidity and capital-raising ability.

Pre-Existing Issue-Specific Contractual Undertakings

The Board believes that it is consistent with the intent of Rule G-37 that a dealer subject to a prohibition on municipal securities business with an issuer be allowed to continue to execute certain issue-specific contractual obligations in effect prior to the date of the contribution that caused the prohibition. For example, if a bond purchase agreement was signed prior to the date of the contribution, a dealer may continue to perform its services as an underwriter on the issue. **[**Also, if an issue-specific agreement for financial advisory services was in effect prior to the date of the contribution, the dealer may continue in its role as financial advisor for that issue.**]** In the same manner, a dealer may act as remarketing agent or placement agent[3] for an issue and also may continue to underwrite a

commercial paper program as long as the contract to perform these services was in effect prior to the date of the contribution. Subject to the limitations noted below, these activities are not considered new municipal securities business and thus can be performed by dealers under a prohibition on municipal securities business with the issuer.

Dealers also have asked questions regarding certain terms in contracts to provide on-going municipal securities business that allow for additional services or compensation. For example, a dealer may have an agreement to provide remarketing services for a municipal securities issue, the terms of which allow the issuer to change the "mode" of the outstanding bonds from variable to a fixed rate of interest or from Rule 2a-7 eligible to non-Rule 2a-7 eligible.[3]**4** Generally, the per bond fee increases if the dealer sells fixed rate municipal securities or non-money market fund securities. Also, an agreement to underwrite a commercial paper program may include terms for increasing the size of the program. While the per bond fee probably does not increase if more commercial paper is underwritten, the amount of money paid to the dealer does increase. The Board views the provisions in existing contracts that allow for changes in the services provided by the dealer or compensation paid by the issuer as new municipal securities business and, therefore, Rule G-37 precludes a dealer subject to a prohibition on municipal securities business from performing such additional functions or receiving additional compensation.

[Non-Issue Specific Contractual Undertakings

Dealers also at times enter into long-term contracts with issuers for municipal securities business, *e.g.*, a five-year financial advisory agreement. If a contribution is given after such a non-issue-specific contract is entered into that results in a prohibition on municipal securities business, the Board believes the dealer should not be allowed to continue with the municipal securities business, subject to an orderly transition to another entity to perform such business. This transition should be as short a period of time as possible and is intended to give the issuer the opportunity to receive the benefit of the work already provided by the dealer and to find a replacement to complete the work, as needed.**]**

*** * ***

The Board recognizes that there is a great variety in the terms of agreements regarding municipal securities business and that the interpretation noted above may not adequately deal with all such agreements. Thus, the Board is seeking comment on how a prohibition on municipal securities business pursuant to Rule G-37 affects contracts for municipal securities business entered into with issuers prior to the date of the contribution triggering the prohibition on business. In particular, the Board is seeking comment on other examples whereby a dealer may be contractually obligated to perform certain activities after the date of the triggering contribution. If other examples are provided, the Board would like comments on how these situations should be addressed pursuant to Rule G-37.

Based upon the comments received on this notice, the Board may issue additional interpretations or amend the language of Rule G-37.

[1] The only exception to Rule G-37's absolute prohibition on municipal securities business is for certain contributions made to issuer officials by municipal finance professionals. Contributions by such persons to officials of issuers do not invoke application of the prohibition on business if (i) the municipal finance professional is entitled to vote for such official **at the time of the contribution** and (ii) contributions by such municipal finance professional do not exceed, in total, $250 to each official, per election.

[2] The term "municipal securities business" is defined in the rule to encompass certain activities of dealers, such as acting as negotiated underwriters (as managing underwriter or as syndicate member), **[**financial advisors,**]** placement agents and negotiated remarketing agents. The rule does not prohibit dealers from engaging in business awarded on a competitive bid basis.

[3] **For purposes of this notice, a placement agent is a person that offers or sells a primary offering of municipal securities on behalf of an issuer (e.g., private placement). See Rule G-37(g)(vii).**

4 SEC Rule 2a-7 under the Investment Company Act of 1940 defines eligible securities for inclusion in money market funds.

* * *

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was adopted by the MSRB at its April 14-15, 2011 and July 27-29, 2011 meetings. Questions concerning this filing may be directed to Peg Henry, General Counsel, Market Regulation, or Leslie Carey, Associate General Counsel, at 703-797-6600.

3. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act")[4] authorized the MSRB to establish a comprehensive body of regulation for municipal advisors and provided that municipal advisors to municipal entities have a

[4] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

federal fiduciary duty.[5] The Dodd-Frank Act required the MSRB to adopt rules for municipal advisors that, in addition to implementing the federal fiduciary duty, are designed to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade.[6] It also expanded the mission of the MSRB to include the protection of municipal entities[7] and obligated persons, in addition to the protection of investors and the public interest.

Municipal advisors that seek to influence the award of business by government officials by making or soliciting political contributions to those officials distort and undermine the fairness of the process by which government business is awarded. These practices can harm municipal entities and their citizens by resulting in inferior services and higher fees, as well as contributing to the violation of the public trust of elected officials that might allow political contributions to influence their decisions regarding public contracting.

Similarly, Rule G-37 was adopted by the MSRB in 1994 due to concerns about the opportunity for abuses and the problems associated with political contributions by dealers in connection with the award of municipal securities business.[8] When it filed proposed Rule G-37 with the Commission,[9] the MSRB stated that it believed that there had been numerous instances in which dealers had been awarded municipal securities business because of their political contributions. Even when such improprieties had not occurred, the MSRB believed that political contributions created a potential conflict of interest for issuers, or at the very least the appearance of a conflict, when dealers made

---

5 See 15B(c)(1) of the Exchange Act.

6 See Section 15B(b)(2)(C) of the Exchange Act.

7 "Municipal entity" is defined in Section 15B(e)(8) of the Exchange Act as

> any State, political subdivision of a State, or municipal corporate instrumentality of a State, including – (A) any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality; (B) any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof; and (C) any other issuer of municipal securities.

8 Municipal securities business generally consists of negotiated underwritings, private placements, and serving as remarketing agent or financial advisor on a new issue of municipal securities. See Rule G-37(g)(vii).

9 See File No. SR-MSRB-94-2 (January 12, 1994); "Political Contributions and Prohibitions on Municipal Securities Business: Proposed Rule G-37," MSRB Reports, Vol. 14, No. 1 (January 1994).

contributions to officials responsible for, or capable of influencing the outcome of, the award of municipal securities business and then were awarded business by issuers associated with such officials. The MSRB said:

> The problems associated with political contributions undermine investor confidence in the municipal securities market, which is crucial to the long-term health of the market, both in terms of liquidity and capital-raising ability . . . . The payment of such contributions to obtain business creates artificial barriers to those dealers not willing or able to make such payments, thereby harming investors and the public interest by stifling competition and increasing market costs associated with doing municipal securities business. Accordingly, . . . regulatory action is necessary to protect investors and maintain the integrity of the market.

PROPOSED NEW MSRB RULE G-42

Proposed Rule G-42 concerns political contributions made by all municipal advisors, both those that are dealers and those that are not. Like Rule G-37, the proposed rule would not ban political contributions. Instead, proposed Rule G-42 would:

- prohibit a municipal advisor from engaging in "municipal advisory business" with a municipal entity for compensation for a period of time beginning on the date of a non-de minimis[10] political contribution to an "official of the municipal entity" by the municipal advisor, any of its municipal advisor professionals ("MAPs"), or a political action committee controlled by the municipal advisor or a MAP, and ending two years after all municipal advisory business with the municipal entity has been terminated;[11]
- prohibit a municipal advisor from soliciting third-party business[12] from a municipal entity for compensation, or receiving compensation for the solicitation

---

[10] Proposed Rule G-42(g)(ii) would provide in pertinent part:

> The term "de minimis," when used in connection with contributions made by a municipal advisor professional or a non-MAP executive officer, refers to contributions made . . . to officials of a municipal entity for whom the municipal advisor professional or non-MAP executive officer was entitled to vote at the time of the contribution and which contributions, in total, were not in excess of $250 to each official of such municipal entity, per election.

[11] See proposed Rule G-42(b)(i).

[12] Proposed Rule G-42(g)(xiv) would provide that:

of third-party business from a municipal entity, for two years after a non-de minimis political contribution to an "official of the municipal entity;"[13]

- prohibit municipal advisors and MAPs from soliciting contributions, or coordinating contributions, to officials of municipal entities with which the municipal advisor is engaging or seeking to engage in municipal advisory business or from which the municipal advisor is soliciting third-party business;[14]
- prohibit municipal advisors and MAPs from soliciting payments, or coordinating payments, to political parties of states or localities with which the municipal advisor is engaging in, or seeking to engage in, municipal advisory business or from which the municipal advisor is soliciting third-party business;[15]
- prohibit municipal advisors and MAPs from committing indirect violations of proposed Rule G-42;[16]
- require quarterly disclosures to the MSRB of certain contributions and related information;[17] and
- permit certain exemptions from the ban on business for compensation, either by the SEC, upon application,[18] or automatically. [19]

"third-party business" means an engagement by a municipal entity of a broker, dealer, municipal securities dealer, or municipal advisor (other than the municipal advisor that is soliciting the municipal entity) that does not control, is not controlled by, or is not under common control with, the person soliciting such third-party business for or in connection with municipal financial products or the issuance of municipal securities, or of an investment adviser (as defined in section 202(a)(11) of the Investment Advisers Act of 1940) to provide investment advisory services to or on behalf of a municipal entity.

13 See proposed Rule G-42(b)(i).

14 See proposed Rule G-42(c)(i).

15 See proposed Rule G-42(c)(ii). An exception from this prohibition would be provided for certain supervisors and executives of municipal advisors that are only municipal advisors because they provide advice to municipal entities or obligated persons and do not solicit any third-party business from municipal entities.

16 See proposed Rule G-42(d).

17 See proposed Rule G-42(e).

18 See proposed Rule G-42(h).

19 See proposed Rule G-42(i).

PROPOSED AMENDMENTS TO EXISTING MSRB RULES

MSRB Rule G-37. The proposed amendments to Rule G-37 would remove any references to "financial advisory and consulting services," because those activities would be covered by proposed Rule G-42. The definitions of "solicit," "affiliated company," and "affiliated person of the broker, dealer, or municipal securities dealer" would be conformed to those in proposed Rule G-42. The reference in Rule G-37(b)(1)(B) to "any municipal finance professional associated with such broker, dealer or municipal securities dealer" has been changed to "any municipal finance professional of such broker, dealer, or municipal securities dealer," because, by definition, all municipal finance professionals are associated persons of brokers, dealers, or municipal securities dealers. Clarifications to Rule G-37 would provide that, in order for certain contributions not to result in a ban on municipal securities business or required reporting to the MSRB, they must be made to officials of issuers for whom the municipal finance professionals may vote at the time of the contribution. References to Forms G-37 and G-37x would be changed to Forms G-37/G-42 and G-37x/G-42x, which would be the combined "macroforms" used by both dealers and municipal advisors to make reports to the MSRB under Rule G-37(e) and proposed Rule G-42(e), respectively. Such forms would be required to be submitted electronically.

MSRB Rules G-8 and G-9. Proposed Rule G-42 would necessitate amendments to Rule G-8 (on books and records) and Rule G-9 (on preservation of records). The proposed amendments to Rule G-8 would require municipal advisors to create and maintain records necessary for the enforcement of the proposed rule, including, but not limited to, political contributions and payments; lists of MAPs and non-MAP executive officers; the states in which the municipal advisor is engaging or is seeking to engage in municipal advisory business with municipal entities or soliciting third-party business; a list of municipal entities with which the municipal advisor has engaged in municipal advisory business and the type of municipal advisory business; a list of the third-party business awarded; and Forms G-37/G-42 and G-37x/G-42x. The proposed amendments to Rule G-9 generally would require municipal advisors to preserve records required to be made pursuant to the proposed amendments to Rule G-8 for six years. The proposed amendments to Rules G-8 and G-9 would subject municipal advisors to recordkeeping and record retention requirements related to proposed Rule G-42 that are substantially similar to those to which dealers are already subject under Rule G-37. The provisions of Rule G-8 and G-9 concerning Rule G-37 recordkeeping and preservation would change references to Forms G-37 and 37x to Forms G-37/G-42 and G-37x/G-42x. References to receipts of mailing the forms would also be removed, because the forms would only be submitted electronically.

RESTATED RULE G-37 INTERPRETIVE NOTICE

The Rule G-37 Interpretive Notice was drafted before municipal advisors to municipal entities were subject to a federal fiduciary duty and includes language providing guidance on the application of the ban on municipal securities business in circumstances where a non-de minimis contribution occurs during the course of an

existing financial advisory relationship. Proposed Rule G-42 is inconsistent with the Rule G-37 Interpretive Notice, which would permit financial advisors to complete certain financial advisory engagements while continuing to receive compensation. Accordingly, the MSRB is proposing to restate the Rule G-37 Interpretive Notice to remove references to financial advisory services, which would instead be covered by proposed Rule G-42. A conforming change would also reference contributions made to officials of issuers to whom municipal finance professionals could vote at the time of the contribution.

(b) The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2) of the Exchange Act, which provides that:

> The Board shall propose and adopt rules to effect the purposes of this title with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers and advice provided to or on behalf of municipal entities or obligated persons by brokers, dealers, municipal securities dealers, and municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors.

Section 15B(b)(2)(C) of the Exchange Act, provides that the rules of the MSRB shall:

> be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.

The proposed rule change is consistent with Section 15(b)(2) of the Exchange Act because it would help to prevent municipal advisors from seeking to influence the award of business by government officials by making or soliciting political contributions to those officials, which contributions distort and undermine the fairness of the process by which government business is awarded. The proposed rule change would help protect municipal entities and help to perfect the mechanism of a free and open market in municipal securities. Just as pay to play activities by some dealers had the potential to undermine the integrity of the municipal securities market and were addressed by Rule G-37, pay to play activities by some municipal advisors could similarly damage the public's confidence in the municipal marketplace. The proposed amendments to Rules G-8 and G-9 would assist in the enforcement of Rule G-42. The proposed amendments to Rule G-37 would make conforming changes. The new Forms G-37/G-42 and G-37x/G-42x would eliminate the need for duplicative filings for dealers that engage in both municipal securities business and municipal advisory activities. The proposed

restatement of the Rule G-37 Interpretive Notice would remove provisions that would be otherwise inconsistent with proposed Rule G-42.

Section 15B(b)(2)(L)(iv) of the Exchange Act requires that rules adopted by the Board:

> not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud.

While the proposed rule change would affect all municipal advisors, it would be a necessary regulatory burden because it would hamper practices that can harm municipal entities and their citizens by resulting in inferior services and higher fees to investors and the public, as well as contributing to the violation of the public trust of elected officials that might allow political contributions to influence their decisions regarding public contracting. While the proposed rule change might burden some small municipal advisors, any such burden would be outweighed by the need to protect their issuer clients.

4. Self-Regulatory Organization's Statement on Burden on Competition

The MSRB does not believe that the proposed rule change would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act, since the proposed amendments to Rule G-37, the associated amendments to Rule G-8, and the proposed restatement of the Rule G-37 Interpretive Notice would apply equally to all dealers and proposed Rule G-42 and the associated amendments to Rules G-8 and G-9 would apply equally to all municipal advisors. Proposed Forms G-37/G-42 and G-37x/G-42x would apply equally to all dealers and municipal advisors.

5. Self-Regulatory Organization's Statement on Comments Received on the Proposed Rule Change by Members, Participants, or Others.

On January 14, 2011, the MSRB requested comment on a draft of the proposed rule change ("draft Rule G-42").[20] The MSRB received comment letters from (1) Acacia Financial Group, Inc.; (2) the American Bankers Association; (3) AGFS; (4) BMO Capital Markets GKST Inc. ("BMO"); (5) Mr. W. Hardy Callcott; (6) Mr. Robert Fisher; (7) G.L. Hicks Financial LLC; (8) H.J. Umbaugh & Associates; (9) the National Association of Independent Public Finance Advisors; (10) Repex & Co., Inc.; (11) the Securities Industry and Financial Markets Association; (12) the State of Texas (Texas Comptroller of Public Accounts); (13) the State of Texas (Office of Attorney General); (14) T. Rowe Price; (15) The PFM Group; and (16) WM Financial Strategies.[21] The comments are summarized by topic as follows:

---

[20] See Exhibit 2.

[21] See Exhibit 2.

Harmonization of Draft Rule G-42 and MSRB Rule G-37 with the Securities and Exchange Commission Investment Adviser Act Rule 206(4)-5 (the "SEC Pay to Play Rule").

Acacia Financial Group, Inc. ("Acacia Financial"), the American Bankers Association ("ABA"), Mr. W. Hardy Callcott ("Mr. Callcott"), the Securities Industry and Financial Markets Association ("SIFMA"), and T. Rowe Price called for draft Rule G-42 and, in some cases Rule G-37, to be consistent with the SEC pay to play rule and for conforming changes to Rule G-37, arguing that such consistency is necessary because many municipal advisors will be subject to both the SEC rules and the MSRB rules. Specifically, the ABA said that, "imposing two overlapping but inconsistent sets of rules on the same conduct would be inconsistent with the spirit of President Obama's January 18, 2011 Executive Order, "Improving Regulation and Regulatory Review," which provides, in part: "Our regulatory system . . . must identify and use the best, most innovative and least burdensome tools for achieving regulatory ends."

Definition of "De Minimis" Political Contribution.

Comment: Each of these commenters said that the MSRB should harmonize draft Rule G-42 and Rule G-37 with the SEC pay to play rule by defining a "de minimis" political contribution as one not exceeding $350 per election for an issuer official for whom a municipal advisor professional ("MAP") may vote at the time of the contribution and $150 per election for other issuer officials. The ABA said that the Rule G-37 definition of de minimis political contribution has not been amended since the rule's adoption in 1994 and that the SEC, "which has most recently reviewed the current economic and political environment in the context of its deliberations on its adviser rule, determined that increased thresholds were warranted to account for inflation since 1994."

MSRB Response: The MSRB has determined to apply the current Rule G-37 "de minimis" political contribution limit to municipal advisors under proposed Rule G-42. Even though the Board is sensitive to differing regulations on the same topic, the Board is very concerned that allowing contributions of $150 per election to officials for whom municipal advisors cannot vote (as permitted by the SEC rule) is likely to result in the bundling of political contributions by large municipal advisor firms, despite the prohibition on such activity under proposed Rule G-42(c)(i). The Board has similar concerns about making a comparable amendment to Rule G-37. The MSRB has also clarified that, in order for a contribution or payment to be considered de minimis, it must be made to an official of a municipal entity or a bond ballot campaign the MAP or non-MAP executive officer could vote for at the time of the contribution, or to a political party of a state or political subdivision in which the MAP or a non-MAP executive officer could vote at the time of the contribution. Comparable clarifying changes have been made to Rule G-37. This clarification is consistent with the way in which Rule G-37 has previously been interpreted.

Look-Back Provision.

Comment: The ABA also suggested that the MSRB conform the look-back provision of draft Rule G-42 to the SEC pay to play rule, which provides that, in the case of employees who do not solicit investment advisory business, a two-year "time out" from compensation for investment advisory services will be triggered by non-de minimis political contributions made by new "covered associates" within the six months prior to their employment. A two-year look-back provision covers employees who do solicit investment advisory business. The ABA said that the draft Rule G-42 look-back provisions generally[22] would trigger a ban on business for compensation if an employee had made a contribution within two years before becoming an MAP. The ABA also said that such a restriction, "would require municipal advisor employers to rely on the accurate disclosures of new hires and may preclude an employer from hiring an otherwise qualified candidate because of his or her legal and legitimate political contributions."

MSRB Response: The look-back period for individuals who solicit municipal advisory business or third-party business would be two years, which is the same as the look-back period for solicitors in the SEC pay to play rule. Under both rules, employers would need to adopt means designed to elicit information about contributions made by prospective employees during the two years preceding their employment. Unlike the SEC pay to play rule, proposed Rule G-42 would include within the definition of MAP those associated persons of a municipal advisor who are engaged in municipal advisory business with a municipal entity. The MSRB believes that these individuals have the greatest interest in obtaining municipal advisory business and, therefore, their political contributions present the most significant potential for abuse. The look-back period for those individuals would also be two years, which is the same as the look-back period under Rule G-37 for those individuals who are primarily engaged in municipal securities business. The two-year look-back provision of Rule G-37 for most new employees has worked well over the many years it has been in effect, and the MSRB has determined not to change it for either Rule G-37 or proposed Rule G-42.

Other.

Comment: Acacia Financial also requested that the provisions of draft Rule G-42 related to who is subject to the rule and the contribution recipients be made the same as those of the SEC pay to play rule.

MSRB Response: Unlike the SEC pay to play rule, proposed Rule G-42 would include within the definition of MAP all those associated persons of a municipal advisor who are engaged in municipal advisory business with a municipal entity. This provision is consistent with how the term "municipal finance professional" ("MFP") is defined under current Rule G-37. As said above, the MSRB believes that these individuals have the greatest interest in obtaining municipal advisory business and, therefore, their political contributions present the most significant potential for abuse. Therefore, the

---

[22] A six-month look-back provision applies to individuals who are only MAPs because they supervise the municipal advisory activities of other MAPs.

MSRB has determined not to change this aspect of proposed Rule G-42. As to the recipients of political contributions, proposed Rule G-42 pertains to contributions made to certain officials of municipal entities, while the SEC pay to play rule pertains to contributions made to certain officials of government entities. The definition of "official of a municipal entity" in proposed Rule G-42 is based both on the statutory definition of "municipal entity" and on the definition of "official of an issuer" in Rule G-37. The definitions of the contribution recipients in proposed Rule G-42 and the SEC pay to play rule are effectively the same. The MSRB perceives no administrative burden associated with any slight differences and has determined not to make any changes.

Harmonization of Draft Rule G-42 with Rule G-37.

Comment: SIFMA said that the MSRB should also harmonize draft Rule G-42 with Rule G-37 by:

(1) allowing dealer municipal advisors to report their non-de minimis political contributions and municipal advisory activities either on Form G-42 or on a "macroform" Form G-37/G-42;[23]

(2) narrowing the definition of "supervisors" that are MAPs by limiting it to those individuals who supervise the municipal advisory activities of others and not including those individuals who supervise other activities of MAPs;

(3) requiring reporting of solicitations only if they are successful;[24]

(4) requiring reporting of municipal advisory business only in the quarter in which it is obtained; and

(5) using a "primarily engaged in municipal advisory business" standard, rather than an "engaged in municipal advisory business" standard in the definition of MAP.[25] Alternatively, SIFMA said that the MSRB should clarify that only "advice" within the meaning of the statute is covered. SIFMA also recommended that the MSRB adopt a de minimis exception to the definition of "municipal advisor professional."

MSRB Response: (1) The MSRB agrees with SIFMA's comment on the use of a "macroform" (Form G-37/G-42) and has revised proposed Rule G-42(e) accordingly.

(2) The MSRB agrees with SIFMA's comment on the types of supervisors that should be considered MAPs and has revised proposed Rule G-42(g)(iv)(D) accordingly.

---

23 See also comments of BMO.

24 See also comments of BMO.

25 Proposed Rule G-42(g)(iv)(A) includes within the definition of MAP "any associated person engaged in municipal advisory business with a municipal entity."

(3) The MSRB agrees with SIFMA's comment on the reporting of solicitations and has amended proposed Rule G-42(e)(i)(C)(2) to require the reporting of a list of the third-party business awarded during the calendar quarter by state, rather than all solicitations.

(4) As to the required reporting of municipal advisory business engaged in during a calendar quarter, the wording of proposed Rule G-42(e)(i)(C)(1) would not differ from the wording of Rule G-37(e)(i)(C). The instructions for Form G-37 (pp. 14-15) clarify that reporting of financial advisory business must occur two times: first, when a financial advisory engagement is entered into and second, when a transaction that is the subject of the engagement closes. The instructions for Form G-37/G-42 would contain similar instructions.

(5) SIFMA's proposal that the MSRB use a "primarily engaged in municipal advisory business" standard in the definition of MAP would create a loophole by allowing individuals who are only occasionally financial advisors to escape the coverage of both Rule G-37 and proposed Rule G-42. The use of a "primarily engaged" standard in Rule G-37 was appropriate because Rule G-37(g)(iv)(A) defines as MFPs those associated persons who are "primarily engaged in municipal securities representative activities, as defined in Rule G-3(a)(i)." The term "municipal securities representative activities" includes a number of activities, such as sales and trading, that do not involve contact with officials of issuers. Had the MSRB not used a "primarily engaged" standard in Rule G-37, a broker's occasional sales activities could have subjected the broker to Rule G-37, even if the broker had no contact whatsoever with issuer officials. Under proposed Rule G-42, a person could be a MAP when engaged in municipal advisory business, which is defined only with reference to activities that involve contact with issuer officials. In this respect, proposed Rule G-42 is distinguishable from Rule G-37 and this difference in the definition of MAP and MFP is appropriate. Therefore, the MSRB has not made this change. For the same reasons, the MSRB does not consider it appropriate to adopt a de minimis exception to the definition of MAP. The MSRB also notes that SIFMA's arguments on the definitions of "advice" are more appropriately directed to the SEC.

Ban on Receipt of Compensation.

Comment: The ABA said that the MSRB should prohibit only compensation for new municipal advisory services, consistent with Rule G-37. The ABA also said that the prohibitions of draft Rule G-42 should only apply to the municipal advisor and those employees of the municipal advisor that are actually engaged in the solicitation or provision of municipal advisory business and not to those individuals who are only MAPs as a result of their supervisory or management activities.

MSRB Response: Proposed Rule G-42's ban on business for compensation follows the structure of the SEC pay to play rule, as recommended previously by the ABA. The MSRB considers a mere ban on future municipal advisory business to be

inadequate and believes that such ban also should apply to existing engagements. Supervisors of MAPs who are either engaged in municipal advisory business or solicit business also have a significant interest in whether such business is obtained. Particularly given that the MSRB has determined to narrow the types of supervisors who would be considered MAPs, the MSRB considers it appropriate for their contributions to have the potential to trigger a ban on business for compensation.

Comment: SIFMA said that the two-year ban on receipt of compensation for municipal advisory business should run from the date of the non-de minimis contribution and end two years later, rather than ending two years after all municipal advisory business with the municipal entity has been terminated. SIFMA also said that solicitors should be able to receive compensation for solicitations completed before the making of a non-de minimis contribution.

MSRB Response: The MSRB does not agree with SIFMA's comment regarding a flat two-year ban and has determined not to revise the proposed rule. Making SIFMA's suggested change would permit municipal advisors to remain in place with the understanding that they would receive their compensation at the end of two years. Many municipal advisory engagements concern transactions that might not close for at least two years, with payment contingent on the transaction closing, so SIFMA's suggested change would mean that the ban would have little practical effect in many cases. Furthermore, the MSRB does not agree with SIFMA's proposal concerning the receipt of compensation for solicitations already successfully completed at the time of a non-de minimis contribution. Under the SEC pay to play rule, an investment adviser may not compensate an intermediary that is an investment adviser if the intermediary has made a non-de minimis contribution within two years. The SEC rule does not distinguish between solicitations that have already been completed and new solicitations. SIFMA has presented no argument as to why broker-dealer intermediaries and investment adviser intermediaries should be treated differently.

Comment: H. J. Umbaugh & Associates ("Umbaugh") supported a longer ban, recommending that the term of the ban should be identical to the term of the related office to which the non-de minimis political contribution relates, which could be as long as four years.

MSRB Response: While the MSRB is sensitive to the concern expressed by Umbaugh about the continuing influence of political contributions, it has determined that certain boundaries on the consequences of a non-de minimis political contribution must be established in view of First Amendment concerns. The two-year ban in proposed Rule G-42 is based on Rule G-37, which has survived constitutional challenge.[26]

---

[26] Blount v. SEC, 61 F.3d 938 (D.C. Cir. 1995), cert. denied, 517 U.S. 1119 (1996). In Blount, the court determined that Rule G-37 was constitutional under a strict scrutiny analysis by finding that the rule was narrowly tailored to serve a compelling government interest. The court found the SEC's interests in protecting

Comment: The National Association of Independent Public Finance Advisors ("NAIPFA") said that draft Rule G-42 and Rule G-37 should both provide that non-de minimis political contributions to an official of a municipal entity by non-MAP and non-MFP executive officers, respectively, should trigger a two-year ban on their respective business because the "allowance of such contributions provides large firms an opportunity to make significant 'indirect' contributions that directly benefit the municipal business of such firms."

MSRB Response: As is the case with Rule G-37, proposed Rule G-42 is narrowly tailored to address the potential for quid pro quo behavior in the selection of businesses performing key municipal services, while at the same time recognizing the First Amendment rights of citizens to support candidates for public office. While non-de minimis contributions by non-MFP executive officers (in the case of Rule G-37) and non-MAP executive officers (in the case of proposed Rule G-42) will not necessarily trigger a ban on business, they must be reported to the MSRB. If they represent an attempt to circumvent the prescriptions of either rule, they may trigger a ban on business under either Rule G-37(d) or proposed Rule G-42(d), respectively.

Recordkeeping and Reporting Requirements.

Comment: NAIPFA supported the draft changes to Rules G-8 and G-9 related to the recordkeeping provisions of draft Rule G-42, as well as mandatory electronic reporting to the MSRB. However, some commenters said that certain of the reporting and recordkeeping provisions of the rule would be difficult and expensive to manage. The ABA said that the reporting and recordkeeping provisions of the draft rule were overly broad and would yield little benefit in return, particularly the provision that requires reporting of all solicitations, whether successful or not. The ABA also stated that the MSRB and the SEC would force market participants to adopt unnecessarily complex and burdensome compliance systems. BMO objected to the need to file separate Forms G-37 and G-42.

MSRB Response: As previously said, the MSRB has determined to require reporting of a list of the third-party business awarded during the calendar quarter by state, rather than all solicitations. The MSRB has also determined to allow reporting of required information under proposed Rule G-42 on a combined "macroform" (Form G-37/G-42). The MSRB does not believe that the recordkeeping and reporting requirements of the proposed rule change would be complex or burdensome. Dealers are already subject to the same requirements. The MSRB believes that the proposed rule change is a necessary regulatory burden that will assist in the enforcement of the proposed rule. Any potential burden would be outweighed by the need to protect municipal entities and their constituents.

---

investors from fraud and protecting underwriters from unfair, corrupt practices to be compelling.

Comment: Mr. Robert Fisher ("Mr. Fisher") said that draft Rule G-42 should provide an exemption from reporting for municipal advisors that do not make political contributions and whose MAPs and PACs do not make political contributions. However, Mr. Fisher suggested that such an exemption would have to incorporate an "aggressive" look-back provision in order to capture any contribution that could disqualify the municipal advisor from engaging in a municipal advisory activity under the rule.

MSRB Response: While the MSRB is sensitive to the concerns expressed by Mr. Fisher, it has determined that, in order to ensure effective enforcement of the rule, all municipal advisors should be required to file Form G-37/G-42 as long as they are engaged in municipal advisory business or the solicitation of third-party business. Political contributions made in one quarter do not necessarily result in municipal advisory business in the same quarter. Sometimes municipal advisory business may be obtained based on an understanding that a non-de minimis political contribution will be made in a subsequent quarter. Requiring the reporting of municipal advisory business only after a non-de minimis political contribution has been made by a MAP would not provide enforcement officials with the information they need to enforce compliance with the rule. Reporting of municipal advisory business need only be made in the calendar quarter in which the engagement has commenced and in the calendar quarter in which a transaction closes.

Comment: Repex & Co., Inc. ("Repex") said that "[i]f any forms are to be filed they should be filed only by those firms that do business with those municipalities, state pensions etc." and that "[t]he little firms are suffocating."

MSRB Response: Only municipal advisors engaged in municipal advisory business with municipal entities or that solicit third-party business from municipal entities would be subject to the reporting requirements of proposed Rule G-42(e). A municipal advisor that is only engaged in municipal advisory activities with an obligated person need not file reports with the MSRB.

Scope of Draft Rule G-42.

Comment: Some commenters said that pending SEC rulemaking concerning the definition of "municipal advisor" should be completed before the MSRB filed proposed Rule G-42 with the SEC and that an additional MSRB comment period might be warranted. For example, the Attorney General of the State of Texas said such [SEC] rulemaking, ". . . is likely to have a significant impact on the substance, interpretation and enforcement of MSRB rules" and requested the opportunity to provide comments as necessary pending the outcome of the SEC's rulemaking process.[27] SIFMA said that the MSRB should use a two-stage rulemaking process and move forward with rulemaking on those municipal advisors that are clearly covered by the statute and delay rulemaking on those who are only municipal advisors within the expansive definition of the term proposed by the SEC.

---

[27] See also State of Texas/Comptroller of Public Accounts.

MSRB Response: The MSRB is sensitive to the concerns expressed by these commenters and has requested that the proposed rule change be made effective six months after the SEC has adopted a final rule defining the term "municipal advisor." Contributions made prior to the effective date would not result in a ban under proposed Rule G-42(b), provided that any ban under Rule G-37(b)(i) in existence prior to the effective date of proposed Rule G-42 would continue until it otherwise would have terminated under Rule G-37(b)(i) as in effect prior to the effective date of proposed Rule G-42.

Comment: SIFMA said that the definition of "municipal advisor" in the Exchange Act does not cover private placement agents that solicit municipal entities to make investments in private equity funds, because such solicitations are not the "solicitation of investment advisory services." Therefore, SIFMA said that the MSRB does not have jurisdiction to write rules for such private placement agents, including draft Rule G-42.

However, SIFMA said that the SEC pay to play rule for investment advisers prohibits investment advisers from paying intermediaries that solicit governmental entities on their behalf after September 13, 2011, unless they are subject to a pay to play rule at least as stringent as the SEC rule. Therefore, SIFMA said that the MSRB should work with the SEC to help ensure that such private placement agents may continue to be compensated after September 13, 2011, by adopting an interim final rule for such private placement agents, which would apply pending resolution of whether such private placement agents are municipal advisors or pending the adoption by FINRA of a pay to play rule for such private placement agents. SIFMA also previously commented to the SEC that private placement agents should be given the option to comply with a FINRA pay to play rule.

MSRB Response: The September 13, 2011 date referred to by SIFMA has been revised to June 13, 2012. The MSRB has jurisdiction to write rules concerning municipal advisors. Proposed Rule G-42 contains provisions that would apply to such private placements if they are determined by the SEC to be municipal advisors. It is the goal of the MSRB to have proposed Rule G-42 effective before June 13, 2012.

Comment: T. Rowe Price said that draft Rule G-42's coverage of solicitations on behalf of affiliated investment advisers is premature, because the SEC has not yet resolved whether to treat such affiliates as "covered associates" of the investment adviser and, therefore, not subject to the ban on payments to intermediaries.

MSRB Response: The MSRB has revised the definition of "third-party business" so that it does not apply to solicitations of business on behalf of affiliated firms.

First Amendment Considerations.

Comments: Several commenters raised First Amendment concerns regarding draft Rule G-42. SIFMA argued that a number of the provisions of draft Rule G-42 to which it objected could violate the First Amendment: (1) the $250 de minimis political contribution definition; (2) requiring reporting of all solicitations, whether or not successful; and (3) the definition of "supervisor." Its rationale differed depending upon the provision. Although the $250 limit in Rule G-37 was upheld by the D.C. Circuit in the Blount case, SIFMA argued that it is inconsistent with Supreme Court cases decided after Blount. SIFMA also stated that the MSRB could no longer rely on the Blount case to sustain the $250 limit, although SIFMA stopped short of arguing that Rule G-37 is unconstitutional.

SIFMA referred to statements by the SEC when it adopted its pay to play rule, noting that the SEC pointed to inflation as the reason for using $350, rather than the $250 it originally proposed. It noted that the SEC also said that the $150 limit for contributions to issuer officials for whom the investment adviser could not vote was justified because non-residents might have legitimate interests in those elections, such as a resident of a metropolitan area's interests in the city in which the person worked. The required reporting of all solicitations to the MSRB, regardless of whether they are successful, was characterized by SIFMA as impinging upon commercial speech. SIFMA also argued that the provisions of draft Rule G-42 that would prohibit MAPs from soliciting others to make political contributions and prohibit indirect violations of the rule are sufficient to prevent abuse of the proposed $150 limit.

Mr. Callcott said that, in order for draft Rule G-42 to survive a constitutional challenge, the MSRB would have to: (1) adopt the SEC pay to play rule definition of de minimis political contribution; (2) allow contributions to political parties as long as such contributions are not earmarked for certain issuer officials; and (3) clarify that independent expenditures in support of issuer officials are permitted under draft Rule G-42. He argued that, without such conforming changes, Rule G-37 would be at risk as well.

BMO expressed First Amendment concerns related to the reporting requirements of draft Rule G-42. BMO said, "Since we are dealing with first amendment considerations, we urge the MSRB to adopt the least intrusive program which will elicit relevant information."

MSRB Response: The MSRB considers SIFMA's and Mr. Callcott's references to recent Supreme Court decisions to be misplaced, because those cases addressed substantially different facts. First, unlike the Vermont statute considered by the Court in Randall v. Sorrell,[28] proposed Rule G-42 would not apply to a group of individuals that is large enough for their contributions to influence the results of elections in any state. Therefore, the Court's concern that limitations on political contributions would make it difficult for challengers to be elected is not applicable. Second, in Citizens United v.

[28] 548 U.S. 230, 247 (2006).

FEC,[29] the Supreme Court distinguished restrictions on "independent expenditures" from restrictions on "direct contributions" and left restrictions on direct contributions untouched while striking down a restriction on independent expenditures as unconstitutional.[30]

As stated above, the MSRB is concerned that defining the term "de minimis" as including contributions by municipal advisor professionals to issuer officials for whom they cannot vote will lead to the bundling of political contributions. Additionally, the change made by the MSRB to the types of supervisors who would be considered municipal advisor professionals has more narrowly tailored the proposed rule to those individuals who are most likely to benefit from business awarded as a result of political contributions.

The MSRB notes that, contrary to Mr. Callcott's reading, proposed Rule G-42(c)(ii) would not prohibit payments to political parties. Instead, it would prohibit the solicitation of such payments from others. The MSRB also does not agree with Mr. Callcott that the definition of "contribution" in Rule G-37 and proposed Rule G-42 precludes the making of independent expenditures in support of issuer officials in violation of Citizens United.

Comment: SIFMA also said that the MSRB should clarify that recordkeeping requirements of draft Rule G-42 are not retroactive. It said that only engagements obtained after the rule's operative date should be required to be reported.

MSRB Response: The recordkeeping provisions of proposed Rule G-42 would not become effective until the rest of the proposed rule change becomes effective and would not be retroactive.

Bond Ballot Campaign Contributions.

Comments: Some commenters said that draft Rule G-42 should prohibit certain contributions to bond ballot campaigns by underwriters and municipal advisors. AGFS expressed support for draft Rule G-42[31] but said that bond ballot contributions by underwriters and municipal advisors, "distort the democratic process" and that "[m]unicipal advisors violate their fiduciary duty when they encourage, and participate with, their public entity clients and officials of the clients in actions that are undemocratic at best and illegal at worst."

---

29 130 S. Ct. 876 (2010).

30 The MSRB notes that proposed Rule G-42 would not restrict political campaign contributions. Rather, it would limit certain business activities as a result of such contributions.

31 G.L. Hicks Financial LLC also expressed support for draft Rule G-42.

NAIPFA said, "All too often, we see funds and/or campaign services being contributed to bond campaigns by underwriters [and] financial advisors . . . who end up providing services for the bond transaction work once the election is successful." NAIPFA recommended that draft Rule G-42 should broaden the standards of ethical behavior to include a ban on municipal advisory business in the event of abusive bond ballot contributions. WM Financial Strategies also said that "bond ballot campaign contributions, when made outside of an individual's voting jurisdiction, are a form of [pay]-to-play that taint the integrity of the municipal market."

MSRB Response: The MSRB does not believe that a ban on business as a result of non-de minimis contributions to bond ballot campaigns is warranted at this time. As the MSRB said when it filed with the SEC a comparable amendment to Rule G-37 requiring the reporting of such contributions, "The MSRB believes, . . . that the proposed amendments would create a uniform disclosure regime to track and make available to public scrutiny bond ballot campaign contributions by dealers in the municipal securities market, thereby increasing available information to municipal securities market participants and the general public. The MSRB does not believe that a ban on municipal securities business as a result of a contribution to a bond ballot campaign is warranted at this time but notes that the disclosures provided for under the proposed rule change will assist in determining, in the future, whether it would be appropriate to consider further action in this area."[32] The MSRB notes that contributions made to bond ballot initiatives for which a municipal advisor professional cannot vote are not considered de minimis for purposes of the reporting requirements of Rule G-42(e).

Miscellaneous Comments.

Transition Expenses.

Comment: Umbaugh said that draft Rule G-42 is not clear as to the types of transition expenses that might be considered contributions in violation of the rule.

MSRB Response: When it requested comment on draft Rule G-42, the MSRB said that it expected to propose interpretations of draft Rule G-42 similar to those applicable to Rule G-37 and that remains the MSRB's intent, subject to SEC approval. On November 29, 2001, the MSRB issued an interpretation of Rule G-37 concerning "Activities by Dealers and Municipal Finance Professionals During Transition Periods for Elected Issuer Officials." Municipal advisors may look to that interpretation for guidance under proposed Rule G-42.

Definition of "Seeking to Engage".

Comment: The PFM Group ("PFM") requested that the MSRB clarify when a municipal advisor will be considered to be "seeking to engage" in municipal advisory

---

[36] See Securities Exchange Act Release No. 61381 (January 20, 2010); File No. SR-MSRB-2009-18 (December 4, 2010).

business. It suggested that draft Rule G-42(c)(i) and (ii) not apply to any activity occurring more than six months after the advisor's latest contact with the municipal entity looking toward an engagement or, in the case of an RFP response, between the time that the municipal entity has contracted with another party and the municipal advisor's next contact with the municipal entity.

MSRB Response: As under Rule G-37, whether a municipal advisor is seeking to engage in municipal advisory business is a facts and circumstances analysis, and the MSRB does not consider a bright line test appropriate.

Payments to Political Parties.

Comment: PFM requested clarification that the prohibitions on payments to political parties would only apply to the political party organization at the level of government with which the municipal advisor is engaged in business or is seeking to engage in business.

MSRB Response: Proposed Rule G-42(c)(ii) would not prohibit payments to political parties. It would prohibit the solicitation of such payments from others. As with Rule G-37, this prohibition under proposed Rule G-42 would apply to solicitations of payments to all political party organizations, state and local, operating within the jurisdiction in which the municipal advisor is engaging or seeking to engage in municipal advisory business or in which the municipal advisor is soliciting third-party business.

Definition of "Payment."

Comment: PFM suggested that the definition of "payment" be modified to include the concept of an amount in excess of the fair value of goods or services provided by the political party to make it clear that commercial transactions with a political party are not prohibited.

MSRB Response: As explained above, proposed Rule G-42 does not prohibit payments to political parties.

Contributions by MAPs to Their Own Campaigns.

Comment: Umbaugh requested clarification that a non-de minimis contribution by a MAP of money, property, or services to his or her own election campaign would not trigger a ban on business for compensation with the government to which the MAP is elected for a two-year period.

MSRB Response: When it requested comment on draft Rule G-42, the MSRB said that it expected to propose interpretations of Rule G-42 similar to those applicable to Rule G-37 and that remains the MSRB's intent, subject to SEC approval. Q&A II. 10 issued under Rule G-37 provides that an MFP who is an incumbent or candidate for office is not limited to contributing the de minimis amount to his or her own campaign

and that such contributions by the candidate or incumbent will not trigger a ban on business. Municipal advisors may look to that Q&A, and other Rule G-37 Qs&As, for guidance under proposed Rule G-42.

Rule G-38.

Comment: In its request for comment on draft Rule G-42, the MSRB asked whether Rule G-38 (on solicitation of municipal securities business) should be revised or eliminated now that firms and individuals that solicit municipal securities business on behalf of dealers are regulated as municipal advisors. Both T. Rowe Price and PFM said that Rule G-38 should not be eliminated. PFM also noted other issues related to third-party business should Rule G-38 be eliminated.

MSRB Response: The MSRB has determined not to propose that Rule G-38 be revised or eliminated at this time.

6. Extension of Time Period of Commission Action

The MSRB declines to consent to an extension of the time period specified in Section 19(b)(2) of the Act.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2).

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Exhibits

1. Federal Register Notice

2. Notice Requesting Comment and Comment Letters

3. Form G-37/G-42 and Form G-37x/G-42x

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(RELEASE NO. 34- ; File No. SR-MSRB-2011-12)

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Proposed New Rule G-42, on Political Contributions and Prohibitions on Municipal Advisory Activities; Proposed Amendments to Rules G-8, on Books and Records, G-9, on Preservation of Records, and G-37, on Political Contributions and Prohibitions on Municipal Securities Business; Proposed Form G-37/G-42 and Form G-37x/G-42x; and a Proposed Restatement of a Rule G-37 Interpretive Notice

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("the Exchange Act")[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on August 19, 2011, the Municipal Securities Rulemaking Board ("Board" or "MSRB") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The MSRB is filing with the SEC a proposed rule change consisting of (i) proposed MSRB Rule G-42 (on political contributions and prohibitions on municipal advisory activities); (ii) proposed amendments that would make conforming changes to MSRB Rules G-8 (on books and records), G-9 (on preservation of records), and G-37 (on political contributions and prohibitions on municipal securities business); (iii) proposed Form G-37/G-42 and Form G-

1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

37x/G-42x; and (iv) a proposed restatement of a Rule G-37 interpretive notice issued by the MSRB in 1997 ("Rule G-37 Interpretive Notice").[3]

The MSRB requests that, if approved by the Commission, the proposed rule change be made effective six months after the date on which the Commission first approves rules defining the term "municipal advisor" under the Exchange Act or such later date as the Commission approves the proposed rule change; provided, however, that the MSRB requests that no contribution made prior to the effective date of proposed Rule G-42 would result in a ban pursuant to proposed Rule G-42(b)(i);[4] and, provided that any ban on municipal securities business under Rule G-37(b)(i) in existence prior to the effective date of proposed Rule G-42 would continue until it otherwise would have terminated under Rule G-37(b)(i), as in effect prior to the effective date of proposed Rule G-42.

The text of the proposed rule change is available on the MSRB's website at www.msrb.org/Rules-and-Interpretations/SEC-Filings/2011-Filings.aspx, at the MSRB's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the MSRB included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in

---

3 Interpretation of Prohibition on Municipal Securities Business Pursuant to Rule G-37 (February 21, 1997), reprinted in MSRB Rule Book.

4 As described in more detail below, under proposed Rule G-42(b)(i) certain contributions could result in a ban on municipal advisory business for compensation, a ban on solicitations of third-party business for compensation, and a ban on the receipt of compensation for the solicitation of third-party business.

Item IV below. The Board has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act")[5] authorized the MSRB to establish a comprehensive body of regulation for municipal advisors and provided that municipal advisors to municipal entities have a federal fiduciary duty.[6] The Dodd-Frank Act required the MSRB to adopt rules for municipal advisors that, in addition to implementing the federal fiduciary duty, are designed to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade.[7] It also expanded the mission of the MSRB to include the protection of municipal entities[8] and obligated persons, in addition to the protection of investors and the public interest.

Municipal advisors that seek to influence the award of business by government officials by making or soliciting political contributions to those officials distort and undermine the

---

5 Pub. L. No. 111-203, 124 Stat. 1376 (2010).

6 See 15B(c)(1) of the Exchange Act.

7 See Section 15B(b)(2)(C) of the Exchange Act.

8 "Municipal entity" is defined in Section 15B(e)(8) of the Exchange Act as

> any State, political subdivision of a State, or municipal corporate instrumentality of a State, including – (A) any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality; (B) any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof; and (C) any other issuer of municipal securities.

fairness of the process by which government business is awarded. These practices can harm municipal entities and their citizens by resulting in inferior services and higher fees, as well as contributing to the violation of the public trust of elected officials that might allow political contributions to influence their decisions regarding public contracting.

Similarly, Rule G-37 was adopted by the MSRB in 1994 due to concerns about the opportunity for abuses and the problems associated with political contributions by dealers in connection with the award of municipal securities business.[9] When it filed proposed Rule G-37 with the Commission,[10] the MSRB stated that it believed that there had been numerous instances in which dealers had been awarded municipal securities business because of their political contributions. Even when such improprieties had not occurred, the MSRB believed that political contributions created a potential conflict of interest for issuers, or at the very least the appearance of a conflict, when dealers made contributions to officials responsible for, or capable of influencing the outcome of, the award of municipal securities business and then were awarded business by issuers associated with such officials. The MSRB said:

> The problems associated with political contributions undermine investor confidence in the municipal securities market, which is crucial to the long-term health of the market, both in terms of liquidity and capital-raising ability . . . . The payment of such contributions to obtain business creates artificial barriers to those dealers not willing or able to make such payments, thereby harming investors and the public interest by stifling competition and increasing market costs associated with doing municipal securities business. Accordingly, . . .

---

9 Municipal securities business generally consists of negotiated underwritings, private placements, and serving as remarketing agent or financial advisor on a new issue of municipal securities. See Rule G-37(g)(vii).

10 See File No. SR-MSRB-94-2 (January 12, 1994); "Political Contributions and Prohibitions on Municipal Securities Business: Proposed Rule G-37," MSRB Reports, Vol. 14, No. 1 (January 1994).

regulatory action is necessary to protect investors and maintain the integrity of the market.

PROPOSED NEW MSRB RULE G-42

Proposed Rule G-42 concerns political contributions made by all municipal advisors, both those that are dealers and those that are not. Like Rule G-37, the proposed rule would not ban political contributions. Instead, proposed Rule G-42 would:

- prohibit a municipal advisor from engaging in "municipal advisory business" with a municipal entity for compensation for a period of time beginning on the date of a non-de minimis[11] political contribution to an "official of the municipal entity" by the municipal advisor, any of its municipal advisor professionals ("MAPs"), or a political action committee controlled by the municipal advisor or a MAP, and ending two years after all municipal advisory business with the municipal entity has been terminated;[12]
- prohibit a municipal advisor from soliciting third-party business[13] from a municipal entity for compensation, or receiving compensation for the solicitation of third-party

---

[11] Proposed Rule G-42(g)(ii) would provide in pertinent part:

> The term "de minimis," when used in connection with contributions made by a municipal advisor professional or a non-MAP executive officer, refers to contributions made . . . to officials of a municipal entity for whom the municipal advisor professional or non-MAP executive officer was entitled to vote at the time of the contribution and which contributions, in total, were not in excess of $250 to each official of such municipal entity, per election.

[12] See proposed Rule G-42(b)(i).

[13] Proposed Rule G-42(g)(xiv) would provide that:

> "third-party business" means an engagement by a municipal entity of a broker, dealer, municipal securities dealer, or municipal advisor (other than the municipal advisor that is soliciting the municipal entity) that does not control, is not controlled by, or is not under common control with, the

business from a municipal entity, for two years after a non-de minimis political contribution to an "official of the municipal entity;"[14]

- prohibit municipal advisors and MAPs from soliciting contributions, or coordinating contributions, to officials of municipal entities with which the municipal advisor is engaging or seeking to engage in municipal advisory business or from which the municipal advisor is soliciting third-party business;[15]
- prohibit municipal advisors and MAPs from soliciting payments, or coordinating payments, to political parties of states or localities with which the municipal advisor is engaging in, or seeking to engage in, municipal advisory business or from which the municipal advisor is soliciting third-party business;[16]
- prohibit municipal advisors and MAPs from committing indirect violations of proposed Rule G-42;[17]
- require quarterly disclosures to the MSRB of certain contributions and related information;[18] and

---

person soliciting such third-party business for or in connection with municipal financial products or the issuance of municipal securities, or of an investment adviser (as defined in section 202(a)(11) of the Investment Advisers Act of 1940) to provide investment advisory services to or on behalf of a municipal entity.

14 See proposed Rule G-42(b)(i).

15 See proposed Rule G-42(c)(i).

16 See proposed Rule G-42(c)(ii). An exception from this prohibition would be provided for certain supervisors and executives of municipal advisors that are only municipal advisors because they provide advice to municipal entities or obligated persons and do not solicit any third-party business from municipal entities.

17 See proposed Rule G-42(d).

- permit certain exemptions from the ban on business for compensation, either by the SEC, upon application,[19] or automatically.[20]

PROPOSED AMENDMENTS TO EXISTING MSRB RULES

MSRB Rule G-37. The proposed amendments to Rule G-37 would remove any references to "financial advisory and consulting services," because those activities would be covered by proposed Rule G-42. The definitions of "solicit," "affiliated company," and "affiliated person of the broker, dealer, or municipal securities dealer" would be conformed to those in proposed Rule G-42. The reference in Rule G-37(b)(1)(B) to "any municipal finance professional associated with such broker, dealer or municipal securities dealer" has been changed to "any municipal finance professional of such broker, dealer, or municipal securities dealer," because, by definition, all municipal finance professionals are associated persons of brokers, dealers, or municipal securities dealers. Clarifications to Rule G-37 would provide that, in order for certain contributions not to result in a ban on municipal securities business or required reporting to the MSRB, they must be made to officials of issuers for whom the municipal finance professionals may vote at the time of the contribution. References to Forms G-37 and G-37x would be changed to Forms G-37/G-42 and G-37x/G-42x, which would be the combined "macroforms" used by both dealers and municipal advisors to make reports to the MSRB under Rule G-37(e) and proposed Rule G-42(e), respectively. Such forms would be required to be submitted electronically.

---

18 See proposed Rule G-42(e).

19 See proposed Rule G-42(h).

20 See proposed Rule G-42(i).

MSRB Rules G-8 and G-9. Proposed Rule G-42 would necessitate amendments to Rule G-8 (on books and records) and Rule G-9 (on preservation of records). The proposed amendments to Rule G-8 would require municipal advisors to create and maintain records necessary for the enforcement of the proposed rule, including, but not limited to, political contributions and payments; lists of MAPs and non-MAP executive officers; the states in which the municipal advisor is engaging or is seeking to engage in municipal advisory business with municipal entities or soliciting third-party business; a list of municipal entities with which the municipal advisor has engaged in municipal advisory business and the type of municipal advisory business; a list of the third-party business awarded; and Forms G-37/G-42 and G-37x/G-42x. The proposed amendments to Rule G-9 generally would require municipal advisors to preserve records required to be made pursuant to the proposed amendments to Rule G-8 for six years. The proposed amendments to Rules G-8 and G-9 would subject municipal advisors to recordkeeping and record retention requirements related to proposed Rule G-42 that are substantially similar to those to which dealers are already subject under Rule G-37. The provisions of Rule G-8 and G-9 concerning Rule G-37 recordkeeping and preservation would change references to Forms G-37 and 37x to Forms G-37/G-42 and G-37x/G-42x. References to receipts of mailing the forms would also be removed, because the forms would only be submitted electronically.

RESTATED RULE G-37 INTERPRETIVE NOTICE

The Rule G-37 Interpretive Notice was drafted before municipal advisors to municipal entities were subject to a federal fiduciary duty and includes language providing guidance on the application of the ban on municipal securities business in circumstances where a non-de minimis contribution occurs during the course of an existing financial advisory relationship. Proposed

Rule G-42 is inconsistent with the Rule G-37 Interpretive Notice, which would permit financial advisors to complete certain financial advisory engagements while continuing to receive compensation. Accordingly, the MSRB is proposing to restate the Rule G-37 Interpretive Notice to remove references to financial advisory services, which would instead be covered by proposed Rule G-42. A conforming change would also reference contributions made to officials of issuers to whom municipal finance professionals could vote at the time of the contribution.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2) of the Exchange Act, which provides that:

> The Board shall propose and adopt rules to effect the purposes of this title with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers and advice provided to or on behalf of municipal entities or obligated persons by brokers, dealers, municipal securities dealers, and municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors.

Section 15B(b)(2)(C) of the Exchange Act, provides that the rules of the MSRB shall:

> be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.

The proposed rule change is consistent with Section 15(b)(2) of the Exchange Act because it would help to prevent municipal advisors from seeking to influence the award of business by government officials by making or soliciting political contributions to those officials, which contributions distort and undermine the fairness of the process by which government

business is awarded. The proposed rule change would help protect municipal entities and help to perfect the mechanism of a free and open market in municipal securities. Just as pay to play activities by some dealers had the potential to undermine the integrity of the municipal securities market and were addressed by Rule G-37, pay to play activities by some municipal advisors could similarly damage the public's confidence in the municipal marketplace. The proposed amendments to Rules G-8 and G-9 would assist in the enforcement of Rule G-42. The proposed amendments to Rule G-37 would make conforming changes. The new Forms G-37/G-42 and G-37x/G-42x would eliminate the need for duplicative filings for dealers that engage in both municipal securities business and municipal advisory activities. The proposed restatement of the Rule G-37 Interpretive Notice would remove provisions that would be otherwise inconsistent with proposed Rule G-42.

Section 15B(b)(2)(L)(iv) of the Exchange Act requires that rules adopted by the Board:

> not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud.

While the proposed rule change would affect all municipal advisors, it would be a necessary regulatory burden because it would hamper practices that can harm municipal entities and their citizens by resulting in inferior services and higher fees to investors and the public, as well as contributing to the violation of the public trust of elected officials that might allow political contributions to influence their decisions regarding public contracting. While the proposed rule change might burden some small municipal advisors, any such burden would be outweighed by the need to protect their issuer clients.

B. Self-Regulatory Organization's Statement on Burden on Competition

The MSRB does not believe that the proposed rule change would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act, since the proposed amendments to Rule G-37, the associated amendments to Rule G-8, and the proposed restatement of the Rule G-37 Interpretive Notice would apply equally to all dealers and proposed Rule G-42 and the associated amendments to Rules G-8 and G-9 would apply equally to all municipal advisors. Proposed Forms G-37/G-42 and G-37x/G-42x would apply equally to all dealers and municipal advisors.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

On January 14, 2011, the MSRB requested comment on a draft of the proposed rule change ("draft Rule G-42").[21] The MSRB received comment letters from (1) Acacia Financial Group, Inc.; (2) the American Bankers Association; (3) AGFS; (4) BMO Capital Markets GKST Inc. ("BMO"); (5) Mr. W. Hardy Callcott; (6) Mr. Robert Fisher; (7) G.L. Hicks Financial LLC; (8) H.J. Umbaugh & Associates; (9) the National Association of Independent Public Finance Advisors; (10) Repex & Co., Inc.; (11) the Securities Industry and Financial Markets Association; (12) the State of Texas (Texas Comptroller of Public Accounts); (13) the State of Texas (Office of Attorney General); (14) T. Rowe Price; (15) The PFM Group; and (16) WM Financial Strategies.[22] The comments are summarized by topic as follows:

Harmonization of Draft Rule G-42 and MSRB Rule G-37 with the Securities and Exchange Commission Investment Adviser Act Rule 206(4)-5 (the "SEC Pay to Play Rule").

---

21 See Exhibit 2.

22 See Exhibit 2.

Acacia Financial Group, Inc. ("Acacia Financial"), the American Bankers Association ("ABA"), Mr. W. Hardy Callcott ("Mr. Callcott"), the Securities Industry and Financial Markets Association ("SIFMA"), and T. Rowe Price called for draft Rule G-42 and, in some cases Rule G-37, to be consistent with the SEC pay to play rule and for conforming changes to Rule G-37, arguing that such consistency is necessary because many municipal advisors will be subject to both the SEC rules and the MSRB rules. Specifically, the ABA said that, "imposing two overlapping but inconsistent sets of rules on the same conduct would be inconsistent with the spirit of President Obama's January 18, 2011 Executive Order, "Improving Regulation and Regulatory Review," which provides, in part: "Our regulatory system . . . must identify and use the best, most innovative and least burdensome tools for achieving regulatory ends."

Definition of "De Minimis" Political Contribution.

Comment: Each of these commenters said that the MSRB should harmonize draft Rule G-42 and Rule G-37 with the SEC pay to play rule by defining a "de minimis" political contribution as one not exceeding $350 per election for an issuer official for whom a municipal advisor professional ("MAP") may vote at the time of the contribution and $150 per election for other issuer officials. The ABA said that the Rule G-37 definition of de minimis political contribution has not been amended since the rule's adoption in 1994 and that the SEC, "which has most recently reviewed the current economic and political environment in the context of its deliberations on its adviser rule, determined that increased thresholds were warranted to account for inflation since 1994."

MSRB Response: The MSRB has determined to apply the current Rule G-37 "de minimis" political contribution limit to municipal advisors under proposed Rule G-42. Even though the Board is sensitive to differing regulations on the same topic, the Board is very

concerned that allowing contributions of $150 per election to officials for whom municipal advisors cannot vote (as permitted by the SEC rule) is likely to result in the bundling of political contributions by large municipal advisor firms, despite the prohibition on such activity under proposed Rule G-42(c)(i). The Board has similar concerns about making a comparable amendment to Rule G-37. The MSRB has also clarified that, in order for a contribution or payment to be considered de minimis, it must be made to an official of a municipal entity or a bond ballot campaign the MAP or non-MAP executive officer could vote for at the time of the contribution, or to a political party of a state or political subdivision in which the MAP or a non-MAP executive officer could vote at the time of the contribution. Comparable clarifying changes have been made to Rule G-37. This clarification is consistent with the way in which Rule G-37 has previously been interpreted.

Look-Back Provision.

Comment: The ABA also suggested that the MSRB conform the look-back provision of draft Rule G-42 to the SEC pay to play rule, which provides that, in the case of employees who do not solicit investment advisory business, a two-year "time out" from compensation for investment advisory services will be triggered by non-de minimis political contributions made by new "covered associates" within the six months prior to their employment. A two-year look-back provision covers employees who do solicit investment advisory business. The ABA said that the draft Rule G-42 look-back provisions generally[23] would trigger a ban on business for compensation if an employee had made a contribution within two years before becoming an MAP. The ABA also said that such a restriction, "would require municipal advisor employers to

[23] A six-month look-back provision applies to individuals who are only MAPs because they supervise the municipal advisory activities of other MAPs.

rely on the accurate disclosures of new hires and may preclude an employer from hiring an otherwise qualified candidate because of his or her legal and legitimate political contributions."

MSRB Response: The look-back period for individuals who solicit municipal advisory business or third-party business would be two years, which is the same as the look-back period for solicitors in the SEC pay to play rule. Under both rules, employers would need to adopt means designed to elicit information about contributions made by prospective employees during the two years preceding their employment. Unlike the SEC pay to play rule, proposed Rule G-42 would include within the definition of MAP those associated persons of a municipal advisor who are engaged in municipal advisory business with a municipal entity. The MSRB believes that these individuals have the greatest interest in obtaining municipal advisory business and, therefore, their political contributions present the most significant potential for abuse. The look-back period for those individuals would also be two years, which is the same as the look-back period under Rule G-37 for those individuals who are primarily engaged in municipal securities business. The two-year look-back provision of Rule G-37 for most new employees has worked well over the many years it has been in effect, and the MSRB has determined not to change it for either Rule G-37 or proposed Rule G-42.

Other.

Comment: Acacia Financial also requested that the provisions of draft Rule G-42 related to who is subject to the rule and the contribution recipients be made the same as those of the SEC pay to play rule.

MSRB Response: Unlike the SEC pay to play rule, proposed Rule G-42 would include within the definition of MAP all those associated persons of a municipal advisor who are engaged in municipal advisory business with a municipal entity. This provision is consistent

with how the term "municipal finance professional" ("MFP") is defined under current Rule G-37. As said above, the MSRB believes that these individuals have the greatest interest in obtaining municipal advisory business and, therefore, their political contributions present the most significant potential for abuse. Therefore, the MSRB has determined not to change this aspect of proposed Rule G-42. As to the recipients of political contributions, proposed Rule G-42 pertains to contributions made to certain officials of municipal entities, while the SEC pay to play rule pertains to contributions made to certain officials of government entities. The definition of "official of a municipal entity" in proposed Rule G-42 is based both on the statutory definition of "municipal entity" and on the definition of "official of an issuer" in Rule G-37. The definitions of the contribution recipients in proposed Rule G-42 and the SEC pay to play rule are effectively the same. The MSRB perceives no administrative burden associated with any slight differences and has determined not to make any changes.

Harmonization of Draft Rule G-42 with Rule G-37.

Comment: SIFMA said that the MSRB should also harmonize draft Rule G-42 with Rule G-37 by:

(1) allowing dealer municipal advisors to report their non-de minimis political contributions and municipal advisory activities either on Form G-42 or on a "macroform" Form G-37/G-42;[24]

(2) narrowing the definition of "supervisors" that are MAPs by limiting it to those individuals who supervise the municipal advisory activities of others and not including those individuals who supervise other activities of MAPs;

(3) requiring reporting of solicitations only if they are successful;[25]

---

[24] See also comments of BMO.

(4) requiring reporting of municipal advisory business only in the quarter in which it is obtained; and

(5) using a "primarily engaged in municipal advisory business" standard, rather than an "engaged in municipal advisory business" standard in the definition of MAP.[26] Alternatively, SIFMA said that the MSRB should clarify that only "advice" within the meaning of the statute is covered. SIFMA also recommended that the MSRB adopt a de minimis exception to the definition of "municipal advisor professional."

MSRB Response: (1) The MSRB agrees with SIFMA's comment on the use of a "macroform" (Form G-37/G-42) and has revised proposed Rule G-42(e) accordingly.

(2) The MSRB agrees with SIFMA's comment on the types of supervisors that should be considered MAPs and has revised proposed Rule G-42(g)(iv)(D) accordingly.

(3) The MSRB agrees with SIFMA's comment on the reporting of solicitations and has amended proposed Rule G-42(e)(i)(C)(2) to require the reporting of a list of the third-party business awarded during the calendar quarter by state, rather than all solicitations.

(4) As to the required reporting of municipal advisory business engaged in during a calendar quarter, the wording of proposed Rule G-42(e)(i)(C)(1) would not differ from the wording of Rule G-37(e)(i)(C). The instructions for Form G-37 (pp. 14-15) clarify that reporting of financial advisory business must occur two times: first, when a financial advisory engagement is entered into and second, when a transaction that is the subject of the engagement closes. The instructions for Form G-37/G-42 would contain similar instructions.

---

25 See also comments of BMO.

26 Proposed Rule G-42(g)(iv)(A) includes within the definition of MAP "any associated person engaged in municipal advisory business with a municipal entity."

(5) SIFMA's proposal that the MSRB use a "primarily engaged in municipal advisory business" standard in the definition of MAP would create a loophole by allowing individuals who are only occasionally financial advisors to escape the coverage of both Rule G-37 and proposed Rule G-42. The use of a "primarily engaged" standard in Rule G-37 was appropriate because Rule G-37(g)(iv)(A) defines as MFPs those associated persons who are "primarily engaged in municipal securities representative activities, as defined in Rule G-3(a)(i)." The term "municipal securities representative activities" includes a number of activities, such as sales and trading, that do not involve contact with officials of issuers. Had the MSRB not used a "primarily engaged" standard in Rule G-37, a broker's occasional sales activities could have subjected the broker to Rule G-37, even if the broker had no contact whatsoever with issuer officials. Under proposed Rule G-42, a person could be a MAP when engaged in municipal advisory business, which is defined only with reference to activities that involve contact with issuer officials. In this respect, proposed Rule G-42 is distinguishable from Rule G-37 and this difference in the definition of MAP and MFP is appropriate. Therefore, the MSRB has not made this change. For the same reasons, the MSRB does not consider it appropriate to adopt a de minimis exception to the definition of MAP. The MSRB also notes that SIFMA's arguments on the definitions of "advice" are more appropriately directed to the SEC.

Ban on Receipt of Compensation.

Comment: The ABA said that the MSRB should prohibit only compensation for new municipal advisory services, consistent with Rule G-37. The ABA also said that the prohibitions of draft Rule G-42 should only apply to the municipal advisor and those employees of the municipal advisor that are actually engaged in the solicitation or provision of municipal advisory

business and not to those individuals who are only MAPs as a result of their supervisory or management activities.

MSRB Response: Proposed Rule G-42's ban on business for compensation follows the structure of the SEC pay to play rule, as recommended previously by the ABA. The MSRB considers a mere ban on future municipal advisory business to be inadequate and believes that such ban also should apply to existing engagements. Supervisors of MAPs who are either engaged in municipal advisory business or solicit business also have a significant interest in whether such business is obtained. Particularly given that the MSRB has determined to narrow the types of supervisors who would be considered MAPs, the MSRB considers it appropriate for their contributions to have the potential to trigger a ban on business for compensation.

Comment: SIFMA said that the two-year ban on receipt of compensation for municipal advisory business should run from the date of the non-de minimis contribution and end two years later, rather than ending two years after all municipal advisory business with the municipal entity has been terminated. SIFMA also said that solicitors should be able to receive compensation for solicitations completed before the making of a non-de minimis contribution.

MSRB Response: The MSRB does not agree with SIFMA's comment regarding a flat two-year ban and has determined not to revise the proposed rule. Making SIFMA's suggested change would permit municipal advisors to remain in place with the understanding that they would receive their compensation at the end of two years. Many municipal advisory engagements concern transactions that might not close for at least two years, with payment contingent on the transaction closing, so SIFMA's suggested change would mean that the ban would have little practical effect in many cases. Furthermore, the MSRB does not agree with SIFMA's proposal concerning the receipt of compensation for solicitations already successfully

completed at the time of a non-de minimis contribution. Under the SEC pay to play rule, an investment adviser may not compensate an intermediary that is an investment adviser if the intermediary has made a non-de minimis contribution within two years. The SEC rule does not distinguish between solicitations that have already been completed and new solicitations. SIFMA has presented no argument as to why broker-dealer intermediaries and investment adviser intermediaries should be treated differently.

Comment: H. J. Umbaugh & Associates ("Umbaugh") supported a longer ban, recommending that the term of the ban should be identical to the term of the related office to which the non-de minimis political contribution relates, which could be as long as four years.

MSRB Response: While the MSRB is sensitive to the concern expressed by Umbaugh about the continuing influence of political contributions, it has determined that certain boundaries on the consequences of a non-de minimis political contribution must be established in view of First Amendment concerns. The two-year ban in proposed Rule G-42 is based on Rule G-37, which has survived constitutional challenge.[27]

Comment: The National Association of Independent Public Finance Advisors ("NAIPFA") said that draft Rule G-42 and Rule G-37 should both provide that non-de minimis political contributions to an official of a municipal entity by non-MAP and non-MFP executive officers, respectively, should trigger a two-year ban on their respective business because the "allowance of such contributions provides large firms an opportunity to make significant 'indirect' contributions that directly benefit the municipal business of such firms."

---

[27] Blount v. SEC, 61 F.3d 938 (D.C. Cir. 1995), cert. denied, 517 U.S. 1119 (1996). In Blount, the court determined that Rule G-37 was constitutional under a strict scrutiny analysis by finding that the rule was narrowly tailored to serve a compelling government interest. The court found the SEC's interests in protecting investors from fraud and protecting underwriters from unfair, corrupt practices to be compelling.

MSRB Response: As is the case with Rule G-37, proposed Rule G-42 is narrowly tailored to address the potential for quid pro quo behavior in the selection of businesses performing key municipal services, while at the same time recognizing the First Amendment rights of citizens to support candidates for public office. While non-de minimis contributions by non-MFP executive officers (in the case of Rule G-37) and non-MAP executive officers (in the case of proposed Rule G-42) will not necessarily trigger a ban on business, they must be reported to the MSRB. If they represent an attempt to circumvent the prescriptions of either rule, they may trigger a ban on business under either Rule G-37(d) or proposed Rule G-42(d), respectively.

Recordkeeping and Reporting Requirements.

Comment: NAIPFA supported the draft changes to Rules G-8 and G-9 related to the recordkeeping provisions of draft Rule G-42, as well as mandatory electronic reporting to the MSRB. However, some commenters said that certain of the reporting and recordkeeping provisions of the rule would be difficult and expensive to manage. The ABA said that the reporting and recordkeeping provisions of the draft rule were overly broad and would yield little benefit in return, particularly the provision that requires reporting of all solicitations, whether successful or not. The ABA also stated that the MSRB and the SEC would force market participants to adopt unnecessarily complex and burdensome compliance systems. BMO objected to the need to file separate Forms G-37 and G-42.

MSRB Response: As previously said, the MSRB has determined to require reporting of a list of the third-party business awarded during the calendar quarter by state, rather than all solicitations. The MSRB has also determined to allow reporting of required information under proposed Rule G-42 on a combined "macroform" (Form G-37/G-42). The MSRB does not believe that the recordkeeping and reporting requirements of the proposed rule change would be

complex or burdensome. Dealers are already subject to the same requirements. The MSRB believes that the proposed rule change is a necessary regulatory burden that will assist in the enforcement of the proposed rule. Any potential burden would be outweighed by the need to protect municipal entities and their constituents.

Comment: Mr. Robert Fisher ("Mr. Fisher") said that draft Rule G-42 should provide an exemption from reporting for municipal advisors that do not make political contributions and whose MAPs and PACs do not make political contributions. However, Mr. Fisher suggested that such an exemption would have to incorporate an "aggressive" look-back provision in order to capture any contribution that could disqualify the municipal advisor from engaging in a municipal advisory activity under the rule.

MSRB Response: While the MSRB is sensitive to the concerns expressed by Mr. Fisher, it has determined that, in order to ensure effective enforcement of the rule, all municipal advisors should be required to file Form G-37/G-42 as long as they are engaged in municipal advisory business or the solicitation of third-party business. Political contributions made in one quarter do not necessarily result in municipal advisory business in the same quarter. Sometimes municipal advisory business may be obtained based on an understanding that a non-de minimis political contribution will be made in a subsequent quarter. Requiring the reporting of municipal advisory business only after a non-de minimis political contribution has been made by a MAP would not provide enforcement officials with the information they need to enforce compliance with the rule. Reporting of municipal advisory business need only be made in the calendar quarter in which the engagement has commenced and in the calendar quarter in which a transaction closes.

Comment: Repex & Co., Inc. ("Repex") said that "[i]f any forms are to be filed they should be filed only by those firms that do business with those municipalities, state pensions etc." and that "[t]he little firms are suffocating."

MSRB Response: Only municipal advisors engaged in municipal advisory business with municipal entities or that solicit third-party business from municipal entities would be subject to the reporting requirements of proposed Rule G-42(e). A municipal advisor that is only engaged in municipal advisory activities with an obligated person need not file reports with the MSRB.

Scope of Draft Rule G-42.

Comment: Some commenters said that pending SEC rulemaking concerning the definition of "municipal advisor" should be completed before the MSRB filed proposed Rule G-42 with the SEC and that an additional MSRB comment period might be warranted. For example, the Attorney General of the State of Texas said such [SEC] rulemaking, ". . . is likely to have a significant impact on the substance, interpretation and enforcement of MSRB rules" and requested the opportunity to provide comments as necessary pending the outcome of the SEC's rulemaking process.[28] SIFMA said that the MSRB should use a two-stage rulemaking process and move forward with rulemaking on those municipal advisors that are clearly covered by the statute and delay rulemaking on those who are only municipal advisors within the expansive definition of the term proposed by the SEC.

MSRB Response: The MSRB is sensitive to the concerns expressed by these commenters and has requested that the proposed rule change be made effective six months after the SEC has adopted a final rule defining the term "municipal advisor." Contributions made prior to the effective date would not result in a ban under proposed Rule G-42(b), provided that

---

[28] See also State of Texas/Comptroller of Public Accounts.

any ban under Rule G-37(b)(i) in existence prior to the effective date of proposed Rule G-42 would continue until it otherwise would have terminated under Rule G-37(b)(i) as in effect prior to the effective date of proposed Rule G-42.

Comment: SIFMA said that the definition of "municipal advisor" in the Exchange Act does not cover private placement agents that solicit municipal entities to make investments in private equity funds, because such solicitations are not the "solicitation of investment advisory services." Therefore, SIFMA said that the MSRB does not have jurisdiction to write rules for such private placement agents, including draft Rule G-42.

However, SIFMA said that the SEC pay to play rule for investment advisers prohibits investment advisers from paying intermediaries that solicit governmental entities on their behalf after September 13, 2011, unless they are subject to a pay to play rule at least as stringent as the SEC rule. Therefore, SIFMA said that the MSRB should work with the SEC to help ensure that such private placement agents may continue to be compensated after September 13, 2011, by adopting an interim final rule for such private placement agents, which would apply pending resolution of whether such private placement agents are municipal advisors or pending the adoption by FINRA of a pay to play rule for such private placement agents. SIFMA also previously commented to the SEC that private placement agents should be given the option to comply with a FINRA pay to play rule.

MSRB Response: The September 13, 2011 date referred to by SIFMA has been revised to June 13, 2012. The MSRB has jurisdiction to write rules concerning municipal advisors. Proposed Rule G-42 contains provisions that would apply to such private placements if they are determined by the SEC to be municipal advisors. It is the goal of the MSRB to have proposed Rule G-42 effective before June 13, 2012.

Comment: T. Rowe Price said that draft Rule G-42's coverage of solicitations on behalf of affiliated investment advisers is premature, because the SEC has not yet resolved whether to treat such affiliates as "covered associates" of the investment adviser and, therefore, not subject to the ban on payments to intermediaries.

MSRB Response: The MSRB has revised the definition of "third-party business" so that it does not apply to solicitations of business on behalf of affiliated firms.

First Amendment Considerations.

Comments: Several commenters raised First Amendment concerns regarding draft Rule G-42. SIFMA argued that a number of the provisions of draft Rule G-42 to which it objected could violate the First Amendment: (1) the $250 de minimis political contribution definition; (2) requiring reporting of all solicitations, whether or not successful; and (3) the definition of "supervisor." Its rationale differed depending upon the provision. Although the $250 limit in Rule G-37 was upheld by the D.C. Circuit in the Blount case, SIFMA argued that it is inconsistent with Supreme Court cases decided after Blount. SIFMA also stated that the MSRB could no longer rely on the Blount case to sustain the $250 limit, although SIFMA stopped short of arguing that Rule G-37 is unconstitutional.

SIFMA referred to statements by the SEC when it adopted its pay to play rule, noting that the SEC pointed to inflation as the reason for using $350, rather than the $250 it originally proposed. It noted that the SEC also said that the $150 limit for contributions to issuer officials for whom the investment adviser could not vote was justified because non-residents might have legitimate interests in those elections, such as a resident of a metropolitan area's interests in the city in which the person worked. The required reporting of all solicitations to the MSRB, regardless of whether they are successful, was characterized by SIFMA as impinging upon

commercial speech. SIFMA also argued that the provisions of draft Rule G-42 that would prohibit MAPs from soliciting others to make political contributions and prohibit indirect violations of the rule are sufficient to prevent abuse of the proposed $150 limit.

Mr. Callcott said that, in order for draft Rule G-42 to survive a constitutional challenge, the MSRB would have to: (1) adopt the SEC pay to play rule definition of de minimis political contribution; (2) allow contributions to political parties as long as such contributions are not earmarked for certain issuer officials; and (3) clarify that independent expenditures in support of issuer officials are permitted under draft Rule G-42. He argued that, without such conforming changes, Rule G-37 would be at risk as well.

BMO expressed First Amendment concerns related to the reporting requirements of draft Rule G-42. BMO said, "Since we are dealing with first amendment considerations, we urge the MSRB to adopt the least intrusive program which will elicit relevant information."

MSRB Response: The MSRB considers SIFMA's and Mr. Callcott's references to recent Supreme Court decisions to be misplaced, because those cases addressed substantially different facts. First, unlike the Vermont statute considered by the Court in Randall v. Sorrell,[29] proposed Rule G-42 would not apply to a group of individuals that is large enough for their contributions to influence the results of elections in any state. Therefore, the Court's concern that limitations on political contributions would make it difficult for challengers to be elected is not applicable. Second, in Citizens United v. FEC,[30] the Supreme Court distinguished restrictions on "independent expenditures" from restrictions on "direct contributions" and left restrictions on

---

29 548 U.S. 230, 247 (2006).

30 130 S. Ct. 876 (2010).

direct contributions untouched while striking down a restriction on independent expenditures as unconstitutional.[31]

As stated above, the MSRB is concerned that defining the term "de minimis" as including contributions by municipal advisor professionals to issuer officials for whom they cannot vote will lead to the bundling of political contributions. Additionally, the change made by the MSRB to the types of supervisors who would be considered municipal advisor professionals has more narrowly tailored the proposed rule to those individuals who are most likely to benefit from business awarded as a result of political contributions.

The MSRB notes that, contrary to Mr. Callcott's reading, proposed Rule G-42(c)(ii) would not prohibit payments to political parties. Instead, it would prohibit the solicitation of such payments from others. The MSRB also does not agree with Mr. Callcott that the definition of "contribution" in Rule G-37 and proposed Rule G-42 precludes the making of independent expenditures in support of issuer officials in violation of Citizens United.

Comment: SIFMA also said that the MSRB should clarify that recordkeeping requirements of draft Rule G-42 are not retroactive. It said that only engagements obtained after the rule's operative date should be required to be reported.

MSRB Response: The recordkeeping provisions of proposed Rule G-42 would not become effective until the rest of the proposed rule change becomes effective and would not be retroactive.

Bond Ballot Campaign Contributions.

---

[31] The MSRB notes that proposed Rule G-42 would not restrict political campaign contributions. Rather, it would limit certain business activities as a result of such contributions.

Comments: Some commenters said that draft Rule G-42 should prohibit certain contributions to bond ballot campaigns by underwriters and municipal advisors. AGFS expressed support for draft Rule G-42[32] but said that bond ballot contributions by underwriters and municipal advisors, "distort the democratic process" and that "[m]unicipal advisors violate their fiduciary duty when they encourage, and participate with, their public entity clients and officials of the clients in actions that are undemocratic at best and illegal at worst."

NAIPFA said, "All too often, we see funds and/or campaign services being contributed to bond campaigns by underwriters [and] financial advisors . . . who end up providing services for the bond transaction work once the election is successful." NAIPFA recommended that draft Rule G-42 should broaden the standards of ethical behavior to include a ban on municipal advisory business in the event of abusive bond ballot contributions. WM Financial Strategies also said that "bond ballot campaign contributions, when made outside of an individual's voting jurisdiction, are a form of [pay]-to-play that taint the integrity of the municipal market."

MSRB Response: The MSRB does not believe that a ban on business as a result of non-de minimis contributions to bond ballot campaigns is warranted at this time. As the MSRB said when it filed with the SEC a comparable amendment to Rule G-37 requiring the reporting of such contributions, "The MSRB believes, . . . that the proposed amendments would create a uniform disclosure regime to track and make available to public scrutiny bond ballot campaign contributions by dealers in the municipal securities market, thereby increasing available information to municipal securities market participants and the general public. The MSRB does not believe that a ban on municipal securities business as a result of a contribution to a bond ballot campaign is warranted at this time but notes that the disclosures provided for under the

[32] G.L. Hicks Financial LLC also expressed support for draft Rule G-42.

proposed rule change will assist in determining, in the future, whether it would be appropriate to consider further action in this area."[33] The MSRB notes that contributions made to bond ballot initiatives for which a municipal advisor professional cannot vote are not considered de minimis for purposes of the reporting requirements of Rule G-42(e).

Miscellaneous Comments.

Transition Expenses.

Comment: Umbaugh said that draft Rule G-42 is not clear as to the types of transition expenses that might be considered contributions in violation of the rule.

MSRB Response: When it requested comment on draft Rule G-42, the MSRB said that it expected to propose interpretations of draft Rule G-42 similar to those applicable to Rule G-37 and that remains the MSRB's intent, subject to SEC approval. On November 29, 2001, the MSRB issued an interpretation of Rule G-37 concerning "Activities by Dealers and Municipal Finance Professionals During Transition Periods for Elected Issuer Officials." Municipal advisors may look to that interpretation for guidance under proposed Rule G-42.

Definition of "Seeking to Engage".

Comment: The PFM Group ("PFM") requested that the MSRB clarify when a municipal advisor will be considered to be "seeking to engage" in municipal advisory business. It suggested that draft Rule G-42(c)(i) and (ii) not apply to any activity occurring more than six months after the advisor's latest contact with the municipal entity looking toward an engagement or, in the case of an RFP response, between the time that the municipal entity has contracted with another party and the municipal advisor's next contact with the municipal entity.

---

[36] See Securities Exchange Act Release No. 61381 (January 20, 2010); File No. SR-MSRB-2009-18 (December 4, 2010).

MSRB Response: As under Rule G-37, whether a municipal advisor is seeking to engage in municipal advisory business is a facts and circumstances analysis, and the MSRB does not consider a bright line test appropriate.

Payments to Political Parties.

Comment: PFM requested clarification that the prohibitions on payments to political parties would only apply to the political party organization at the level of government with which the municipal advisor is engaged in business or is seeking to engage in business.

MSRB Response: Proposed Rule G-42(c)(ii) would not prohibit payments to political parties. It would prohibit the solicitation of such payments from others. As with Rule G-37, this prohibition under proposed Rule G-42 would apply to solicitations of payments to all political party organizations, state and local, operating within the jurisdiction in which the municipal advisor is engaging or seeking to engage in municipal advisory business or in which the municipal advisor is soliciting third-party business.

Definition of "Payment."

Comment: PFM suggested that the definition of "payment" be modified to include the concept of an amount in excess of the fair value of goods or services provided by the political party to make it clear that commercial transactions with a political party are not prohibited.

MSRB Response: As explained above, proposed Rule G-42 does not prohibit payments to political parties.

Contributions by MAPs to Their Own Campaigns.

Comment: Umbaugh requested clarification that a non-de minimis contribution by a MAP of money, property, or services to his or her own election campaign would not trigger a

ban on business for compensation with the government to which the MAP is elected for a two-year period.

MSRB Response: When it requested comment on draft Rule G-42, the MSRB said that it expected to propose interpretations of Rule G-42 similar to those applicable to Rule G-37 and that remains the MSRB's intent, subject to SEC approval. Q&A II. 10 issued under Rule G-37 provides that an MFP who is an incumbent or candidate for office is not limited to contributing the de minimis amount to his or her own campaign and that such contributions by the candidate or incumbent will not trigger a ban on business. Municipal advisors may look to that Q&A, and other Rule G-37 Qs&As, for guidance under proposed Rule G-42.

Rule G-38.

Comment: In its request for comment on draft Rule G-42, the MSRB asked whether Rule G-38 (on solicitation of municipal securities business) should be revised or eliminated now that firms and individuals that solicit municipal securities business on behalf of dealers are regulated as municipal advisors. Both T. Rowe Price and PFM said that Rule G-38 should not be eliminated. PFM also noted other issues related to third-party business should Rule G-38 be eliminated.

MSRB Response: The MSRB has determined not to propose that Rule G-38 be revised or eliminated at this time.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-MSRB-2011-12 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-MSRB-2011-12. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE,

Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. Copies of such filing also will be available for inspection and copying at the MSRB's offices. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MSRB-2011-12 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[34]

Elizabeth M. Murphy
Secretary

---

[34] 17 CFR 200.30-3(a)(12).

EXHIBIT 2

MSRB Municipal Securities Rulemaking Board

MSRB NOTICE 2011-04 (JANUARY 14, 2011)

REQUEST FOR COMMENT ON PAY TO PLAY RULE FOR MUNICIPAL ADVISORS

The Municipal Securities Rulemaking Board ("MSRB") is requesting comment on a draft proposal to establish "pay to play" and related rules relating to municipal advisors and to make certain conforming changes to existing pay to play rules for brokers, dealers, and municipal securities dealers ("dealers"). Specifically, the draft proposal consists of (i) draft MSRB Rule G-42 (on political contributions and prohibitions on municipal advisory business and certain solicitations); (ii) draft amendments that would make conforming changes to MSRB Rules G-8 (on books and records), G-9 (on records preservation), and G-37 (on political contributions and prohibitions on municipal securities business); and (iii) a draft restatement of a MSRB Rule G-37 interpretive notice issued by the MSRB in 1997 ("Rule G-37 Interpretive Notice").[1] The text of the draft proposal is set forth below. The MSRB is also requesting comment on: (i) whether Rule G-38 (on the solicitation of municipal securities business) should be eliminated or amended if draft Rule G-42 becomes effective and (ii) whether the electronic filing of Forms G-42 and G-37 should be required.

Comments should be submitted no later than February 25, 2011. Comments should be sent via e-mail to CommentLetters@msrb.org. Please indicate the notice number in the subject line of the e-mail. To submit comments via regular mail, please send them to Ronald W. Smith, Corporate Secretary, MSRB 1900 Duke Street, Alexandria, VA 22134. Written comments will be available for public inspection on the MSRB's web site. The MSRB will hold an informational webinar on the draft Rule G-42 on February 3, 2011 at 2:00 p.m. Register for the webinar.

Questions about this notice should be directed to Peg Henry, Deputy General Counsel, or Leslie Carey, Associate General Counsel, at (703) 797-6600.

BACKGROUND

Existing MSRB Rule G-37. Rule G-37 was adopted by the MSRB in 1994 due to concerns about the opportunity for abuses and the problems associated with political contributions by dealers in connection with the award of municipal securities business.[2] When it filed proposed Rule G-37 with the Securities and Exchange Commission ("SEC"),[3] the MSRB stated that it believed that there had been numerous instances in which dealers had been awarded municipal securities business because of their political contributions. Even when such improprieties had not occurred, the MSRB believed that political contributions created a potential conflict of interest for issuers, or at the very least the appearance of a conflict, when dealers made contributions to officials responsible for, or capable of influencing the outcome of, the award of municipal securities business and then were awarded business by issuers associated with such officials. The MSRB said:

> The problems associated with political contributions undermine investor confidence in the municipal securities market, which is crucial to the long-term health of the market, both in terms of liquidity and capital-raising ability . . . . The payment of such contributions to obtain business creates artificial barriers to those dealers not willing or able to make such payments, thereby harming investors and the public interest by stifling competition and increasing market costs associated with doing municipal securities business.

> Accordingly, . . . regulatory action is necessary, among other things, to protect investors and maintain the integrity of the market.

Dodd-Frank Act. The Dodd-Frank Act[4] authorized the MSRB to establish a comprehensive body of regulation for all municipal advisors[5] and provides that municipal advisors have a federal fiduciary duty[6] to their municipal entity clients. The Dodd-Frank Act requires the MSRB to adopt rules for municipal advisors that, in addition to implementing the federal fiduciary duty, are designed to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade.[7] It also expands the mission of the MSRB to include the protection of municipal entities[8] and obligated persons in addition to the protection of investors and the public interest.

DRAFT NEW MSRB RULE G-42

Pursuant to the authority granted to it by the Dodd-Frank Act, the MSRB is requesting comment on draft Rule G-42 (on political contributions and prohibitions on municipal advisory business and certain solicitations). Just as pay to play activities by some dealers had the potential to undermine the integrity of the municipal securities market and were addressed by Rule G-37, pay to play activities by some municipal advisors could similarly damage the public's confidence in the municipal marketplace.

Municipal advisors that seek to influence the award of business by government officials by making or soliciting political contributions to those officials distort and undermine the fairness of the process by which government business is awarded. These practices can harm municipal entities and their citizens by resulting in inferior services and higher fees, as well as contributing to the violation of the public trust of elected officials that might allow political contributions to influence their decisions regarding public contracting. These same concerns led the SEC to promulgate a rule governing pay to play by investment advisers.[9]

Draft Rule G-42 concerns political contributions made by all municipal advisors, both dealer and non-dealer. Like Rule G-37, which has withstood constitutional scrutiny,[10] the draft rule would not ban political contributions, and the MSRB does not believe the rule would impinge upon the First Amendment activities of municipal advisors. Instead, draft Rule G-42 would:

- prohibit a municipal advisor from engaging in "municipal advisory business" with a municipal entity for compensation for a period of time beginning on the date of a non-*de minimis*[11] political contribution to an "official of the municipal entity" and ending two years after all municipal advisory business with the municipal entity has been terminated;[12]
- prohibit a municipal advisor from soliciting third-party business[13] from a municipal entity for compensation, or receiving compensation for the solicitation of third-party business from a municipal entity, for two years after a non-*de minimis* political contribution to an "official of the municipal entity;"[14]
- prohibit municipal advisors and municipal advisor professionals ("MAPs") from soliciting contributions, or coordinating contributions, to officials of municipal entities with which the municipal advisor is engaging or seeking to engage in municipal advisory business or from which the municipal advisor is soliciting third-party business;[15]
- prohibit municipal advisors and MAPs from soliciting payments, or coordinating payments, to political parties of states or localities with which the municipal advisor is engaging in, or seeking to engage in, municipal advisory business or from which the municipal advisor is soliciting third-party business;[16]

prohibit municipal advisors and MAPs from committing indirect violations of Rule G-42;[17] and
- require quarterly disclosures to the MSRB of certain contributions and related information.[18]

Look-Back Provision. In general, contributions made within two years[19] before an individual's employment as a municipal advisor could trigger a ban on municipal advisory business for compensation, a ban on the solicitation of third-party business from a municipal entity for compensation, and a ban on receipt of compensation for the solicitation of third-party business from a municipal entity (the "look-back provision"); however, no contributions made before the effective date of draft Rule G-42 would trigger such a ban, with the exception of contributions made prior to the effective date of the rule by dealer financial advisors already subject to Rule G-37.

Key Terms. Two key terms used in draft Rule G-42 are "municipal advisor professional" and "official of a municipal entity." "Municipal advisor professional" would be defined[20] to mean any associated person of a municipal advisor[21] that:

- is engaged in municipal advisory business with a municipal entity;
- solicits municipal advisory business from a municipal entity on its own behalf or solicits third-party business;
- is a supervisor of any person who is a municipal advisor professional;
- is, in turn, part of the supervisory chain up through and including the Chief Executive Officer or similarly situated official; or
- is a member of the municipal advisor's executive or management committee or similarly situated officials.

"Official of a municipal entity" would be defined[22] to mean any person (including any election committee for such person) who was, at the time of the contribution, an incumbent, candidate or successful candidate:

- for elective office of the municipal entity, which office is directly or indirectly responsible for, or can influence the outcome of, the hiring of a municipal advisor by the municipal entity or the hiring of a person on behalf of which the municipal advisor is soliciting third-party business; or
- for any elective office of a municipal entity, which office has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of a municipal advisor by a municipal entity or the hiring of a person on behalf of which the municipal advisor is soliciting third-party business.

Relationship of Draft Rule G-42 to SEC Pay to Play Rule for Investment Advisers. Rule 206(4)-5 under the Investment Advisers Act of 1940[23] imposes pay to play restrictions upon investment advisers. Under an SEC proposal to amend that rule,[24] subparagraph (a)(2)(i) of the rule would provide that it is unlawful for investment advisers subject to the rule "to provide or agree to provide, directly or indirectly, payment to any person to solicit a government entity for investment advisory services on behalf of such investment adviser unless such person is: (A) a regulated municipal advisor; or (B) an executive officer, general partner, managing member (or, in each case, a person with similar status or function), or employee of the investment adviser."

Under the SEC proposed amendment, the term "regulated municipal advisor" would be defined as "a municipal advisor registered with the [SEC] under Section 15B of the [Exchange Act] and subject to the rules of the Municipal Securities Rulemaking Board that: (i) prohibit municipal advisors from engaging in distribution or solicitation activities if certain political contributions have been made; and (ii) the Commission, by order,

finds: (A) impose substantially equivalent or more stringent restrictions on municipal advisors than this section imposes on investment advisers; and (iii) are consistent with the objectives of this section."

Many of the solicitors covered by the SEC proposed amendment are required by Section 15B(a)(1) of the Exchange Act to register with the SEC, because they are "municipal advisors" within the meaning of Section 15B(e)(4) of the Exchange Act, which term includes persons who solicit investment advisory business from municipal entities on behalf of unrelated investment advisers. However, persons who solicit investment advisory business from municipal entities on behalf of their affiliates are not within the statutory definition of "municipal advisor." The release accompanying the SEC's proposed permanent registration rule for municipal advisors contemplates that persons who are not within the statutory definition of "municipal advisor," but seek to be considered "regulated municipal advisors," may voluntarily register with the SEC as municipal advisors and subject themselves to MSRB rules, including draft Rule G-42.[25] The provisions of draft Rule G-42 concerning persons who solicit third-party business from municipal entities are intended to be at least as stringent as Rule 206(4)-5. Those provisions are highlighted in this request for comment.

Draft Rule G-42 Distinguished from Rule G-37. Draft Rule G-42 differs from Rule G-37 in the following substantive respects.

First, rather than create a ban on new municipal advisory business with municipal entities, in a manner comparable to Rule G-37,[26] Rule G-42(b) would ban municipal advisory business with municipal entities for compensation and solicitations of third-party business from municipal entities for compensation.[27]

Second, the term "municipal advisor professional" would include associated persons who are engaged in municipal advisory business, rather than associated persons who are primarily engaged (as per Rule G-37) in municipal advisory business. The proposed changes to Rule G-37 that would become effective on the effective date of draft Rule G-42 would remove all references to "financial advisory services" from Rule G-37. Were the term "primarily engaged" to be used in draft Rule G-42, persons performing some financial advisory services, but not primarily engaged in municipal advisory business, would not be considered municipal advisor professionals, and their financial advisory activities would, therefore, be subject to neither Rule G-37, nor draft Rule G-42.[28]

Third, the term "municipal advisor professional" also includes any associated person who is a member of the municipal advisor's executive or management committee or similarly situated officials, regardless of whether there are any other municipal advisor professionals in the municipal advisory firm.[29]

Fourth, the types of supervisors that are included within the definition of "municipal advisor professional" would be different from the types of supervisors that are included in the definition of "municipal finance professional" found in Rule G-37(g)(iv). If an individual who is a municipal advisor professional engages in municipal advisory business or solicits third-party business, as well as other activities (*e.g.*, municipal securities activities), the individual's supervisors for both types of activities would be considered municipal advisor professionals.

Ban on Business for Compensation. Two types of persons are municipal advisors within the meaning of Section 15B(e)(4) of the Exchange Act. Some provide advice to or on behalf of municipal entities or obligated persons. Others solicit third-party business from municipal entities.

Draft Rule G-42 distinguishes between the two types of municipal advisors in two ways. First, the definition of "municipal advisory business" only covers the activities of the first type of municipal advisor. It does not cover the solicitation activities of the second type of municipal advisor, which are addressed separately.

Second, the duration of the ban on business for compensation differs for the two types of advisors. The first type of municipal advisor is subject to a fiduciary duty to the municipal entity with which it is engaging in municipal advisory business. Accordingly, such a municipal advisor may not be able to cease its municipal advisory business for that municipal entity immediately upon making a non-*de minimis* political contribution. Instead, it may be necessary for such a municipal advisor to continue providing advisory services to the municipal entity for a reasonable transition period. Accordingly, the ban on municipal advisory business with that municipal entity for compensation for such a municipal advisor does not end until two years after it has terminated all of its municipal advisory business with the municipal entity. The other type of municipal advisor does not have a municipal entity as its client and, accordingly, has no fiduciary duty to the municipal entity. Such a municipal advisor, therefore, has no such need for a transition period before it ceases its solicitation activities. As a result, the ban on solicitation of third-party business from a municipal entity for compensation, and the receipt of compensation for the solicitation of third-party business from a municipal entity, applicable to such a municipal advisor begins immediately upon the making of the non-*de minimis* political contribution that results in the ban and ends two years after such contribution is made.

Compensation. For purposes of draft Rule G-42, the MSRB would consider compensation to include any economic benefit to the municipal advisor, whether in the form of an advisory fee or some other fee relating to the total services rendered, reimbursements for costs,[30] commissions, or some combination of the foregoing. A municipal advisor would not be permitted to accept a new engagement to provide non-advisory services to the municipal entity in return for the provision of otherwise uncompensated municipal advisory services to the municipal entity, nor could it accept increased compensation for the provision of other services designed to replace the compensation that draft Rule G-42 prohibits it from receiving. For example, a dealer that could not receive compensation for its financial advisory services as a result of a non-*de minimis* political contribution could not receive increased underwriting compensation attributable to its financial advisory services. Similarly, a municipal advisor that could not be compensated for soliciting investment advisory business from a public pension fund as a result of a non-*de minimis* contribution could not receive increased compensation for soliciting business from another potential investor to replace the prohibited compensation.

Reasonable Transition Period. Many municipal advisors have long-term contracts or engagements with municipal entities. Such municipal advisors might not be able to immediately resign from such contract or engagement, after a non-*de minimis* contribution had been made to an official of a municipal entity, without violating their fiduciary obligations to their municipal entity clients. However, the MSRB does not intend for a municipal advisor to engage in municipal advisory business with a municipal entity on an uncompensated basis indefinitely. Instead, a municipal advisor would only need to continue to engage in such business with a municipal entity on an uncompensated basis for a reasonable period of time. This would allow the municipal advisor to fulfill its fiduciary duty to the municipal entity and create an orderly transition period during which the municipal entity could obtain successor advisory services. This transition period should be as short a period of time as possible and is intended to give the municipal entity client the opportunity to receive the benefit of the work already provided by the municipal advisor and to find a replacement to complete the

work, as needed. Accordingly, draft Rule G-42 would provide that the ban on municipal advisory business for a municipal entity for compensation would not end until two years after all municipal advisory business with the municipal entity had been terminated.

Disclosure Requirements. Draft Rule G-42 would establish disclosure requirements to facilitate enforcement of "pay to play" restrictions and function as a public disclosure mechanism to enhance the integrity of the municipal market. Draft Rule G-42 would require municipal advisors to publicly disclose on Form G-42[31] all non-*de minimis* contributions to officials of a municipal entity, payments to political parties of states and political subdivisions, and contributions to bond ballot campaigns made by municipal advisors, MAPs, their political action committees, and non-MAP executive officers, as well as information on the municipal advisory business with municipal entities and solicitations of third-party business from municipal entities.[32] The Board believes that public access to this information would facilitate public scrutiny of political contributions in the context of the municipal advisory business and solicitations of municipal advisors to help assure citizens, investors, municipal entities, and other industry participants that municipal advisors, and those persons on whose behalf they solicit, are awarded business based on merit, not political contributions.

Future Interpretive Guidance. The MSRB has issued a great deal of interpretive guidance under Rule G-37, some of which is in the form of questions and answers. Much of that guidance is equally applicable to draft Rule G-42, and the MSRB expects to adopt similar guidance under Rule G-42. Such interpretive guidance will be subject to review and comment prior to its approval.

DRAFT AMENDMENTS TO EXISTING MSRB RULES

MSRB Rule G-37. The proposed draft amendments to Rule G-37 would remove any references to "financial advisory and consulting services," because those activities would be covered by draft Rule G-42. The definitions of "solicit," "affiliated company," and "affiliated person of the broker, dealer, or municipal securities dealer" would be conformed to those in draft Rule G-42.

MSRB Rules G-8 and G-9. Draft Rule G-42 would necessitate amendments to Rule G-8 (on books and records) and Rule G-9 (on preservation of records). The proposed draft amendments to Rule G-8 would require municipal advisors to create and maintain records of political contributions and payments. The proposed draft amendments to Rule G-9 would require municipal advisors to preserve records required to be made pursuant to the proposed amendments to Rule G-8. The proposed draft amendments to Rules G-8 and G-9 would subject municipal advisors to recordkeeping and record retention requirements related to draft Rule G-42 that are substantially similar to those to which dealers are already subject under Rule G-37.

RESTATED RULE G-37 INTERPRETIVE NOTICE

The Rule G-37 Interpretive Notice was drafted before municipal advisors to municipal entities were subject to a federal fiduciary duty and includes language providing guidance on the application of the ban on municipal securities business in circumstances where a non
existing financial advisory relationship. The MSRB recognizes that draft Rule G-42 is inconsistent with the Rule G-37 Interpretive Notice. Accordingly, the MSRB is proposing to restate the Rule G-37 Interpretive Notice to remove references to financial advisory services, which would instead be covered by Rule G-42.

REQUEST FOR COMMENT

The MSRB requests comments on (i) draft Rule G-42, (ii) the draft amendments to Rules G-8, G-9, and G-37, and (iii) the draft restated Rule G-37 Interpretive Notice. In addition, the MSRB requests comments on the following topics:

MSRB Rule G-38 (on solicitation of municipal securities business). Existing Rule G-38 prohibits a dealer from making payments to any person that is not an affiliated person of the dealer for the solicitation of municipal securities business on the dealer's behalf. The MSRB decided to ban such payments because it was concerned that dealers were using solicitors not subject to MSRB rules as a way to avoid the limitations of Rule G-37. The Dodd-Frank Act provides for the regulation by the MSRB of municipal advisors that solicit certain types of business from municipal entities on behalf of a third party, such as a dealer. Accordingly, the MSRB requests comment on whether Rule G-38 should be eliminated. Alternatively, should the MSRB expand Rule G-38 to include a prohibition on payments by non-dealer municipal advisors to other municipal advisors for the solicitation of municipal advisory business, just as Rule G-38 currently prohibits dealers from paying others to solicit dealer financial advisory business?

Look-Back Provision. Under Rule G-37(b)(i), a dealer will generally be banned from engaging in municipal securities business with an issuer for two years after non-*de minimis* political contributions have been made by its MFPs, even if the contributions were made before the MFPs were employed by the dealer.[33] This is known as the "look-back provision." The MSRB included the "look-back" rule in Rule G-37, in part, because of concern that dealers might hire large contributors who could assist the dealers with obtaining municipal securities business from issuer officials that had received contributions. The two-year look-back provision of Rule G-37(b) applies to those MFPs that are primarily engaged in municipal securities representative activities and those MFPs who solicit municipal securities business. Draft Rule G-42 also incorporates a look-back provision.[34] The MSRB requests comment on whether there are any differences in the way that municipal advisors are hired or conduct their business that might warrant not including a look-back provision in draft Rule G-42 or having the look-back provision in draft Rule G-42 differ from the look-back provision in Rule G-37.

Electronic Filings. Rule G-37 and draft Rule G-42 provide that certain forms may be submitted either in paper or electronically. The MSRB requests comment on whether it should require that Forms G-42, G-42x, G-37, and G-37x be submitted in electronic format only. The Board believes that the electronic filing of political contribution information would assist with processing and dissemination of required disclosure information as quickly and efficiently as possible.

January 14, 2011

* * * * *

TEXT OF DRAFT RULE G-42

Rule G-42 Political Contributions and Prohibitions on Municipal Advisory Activities

(a) *Purpose*. The purpose and intent of this rule are to ensure that the high standards and integrity of the municipal advisory industry are maintained, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to perfect a free and open market, and to protect investors, municipal entities, obligated persons, and the public interest by: (i)

prohibiting municipal advisors from engaging in municipal advisory business with municipal entities for compensation, soliciting third-party business from municipal entities for compensation, and receiving compensation for the solicitation of third-party business, if certain political contributions have been made to officials of municipal entities; and (ii) requiring municipal advisors to disclose certain political contributions, as well as other information, to allow public scrutiny of political contributions and the municipal advisory business and solicitations of a municipal advisor.

(b) *Ban on Municipal Advisory Business and Certain Solicitations*

(i) No municipal advisor shall engage in municipal advisory business with a municipal entity for compensation, solicit third-party business from a municipal entity for compensation, or receive compensation for the solicitation of third-party business from a municipal entity, within two years after any contribution to an official of such municipal entity made by:

(A) the municipal advisor;

(B) any municipal advisor professional associated with such municipal advisor (other than a *de minimis* contribution); or

(C) any political action committee controlled by such municipal advisor or by a municipal advisor professional.

(ii) For an individual designated as a municipal advisor professional solely pursuant to subparagraph (B) of paragraph (g)(iv) of this rule, the provisions of paragraph (b)(i) shall apply to contributions made by such individual to officials of a municipal entity prior to becoming a municipal advisor professional only if such individual solicits municipal advisory business from such municipal entity.

(iii) For an individual designated as a municipal advisor professional solely pursuant to subparagraph (C), (D), or (E) of paragraph (g)(iv) of this rule, the provisions of paragraph (b)(i) shall apply only to contributions made during the period beginning six months prior to the individual becoming a municipal advisor professional.

(iv) Notwithstanding paragraph (i) of this section, in the case of a municipal advisor engaged in municipal advisory business with a municipal entity, the prohibition on engaging in municipal advisory business for compensation provided for in paragraph (i) of this section shall begin on the date of the contribution described in such paragraph (i) and end two years after the date on which all of its municipal advisory business with the municipal entity has been terminated.

(c) *Prohibition on Soliciting and Coordinating Contributions*.

(i) No municipal advisor or any municipal advisor professional of the municipal advisor shall solicit any person, including but not limited to any affiliated company of the municipal advisor, or political action committee to make any contribution, or shall coordinate any contributions, to an official of a municipal entity with which the municipal advisor is engaging or is seeking to engage in municipal advisory business or is soliciting third-party business.

(ii) No municipal advisor or any individual designated as a municipal advisor professional of the municipal advisor shall solicit any person, including but not limited to any affiliated company of the municipal advisor, or political action committee, to make any payment, or shall coordinate any payments, to a political party of a state or locality where the municipal advisor is engaging or is seeking to engage in municipal advisory business with a municipal entity or is soliciting third-party business; provided, however, that the provisions of this paragraph (ii) shall not apply to any individual designated as a municipal advisor professional of a municipal advisor pursuant to subparagraph (D) or (E) of paragraph (g)(iv) of this rule, if such municipal advisor engages solely in municipal advisory business.

(d) *Circumvention of Rule*. No municipal advisor or any municipal advisor professional shall, directly or indirectly, through or by any other person or means, do any act that would result in a violation of section (b) or (c) of this rule.

(e) *Required Disclosure to Board.*

(i) Except as otherwise provided in paragraph (e)(ii), each municipal advisor shall, by the last day of the month following the end of each calendar quarter (these dates correspond to January 31, April 30, July 31 and October 31) send to the Board Form G-42 setting forth, in the prescribed format, the following information:

(A) for contributions to officials of municipal entities (other than a contribution made by a municipal advisor professional or a non-MAP executive officer to an official of a municipal entity if all contributions by such person to such official of a municipal entity, in total, are *de minimis*) and payments to political parties of states and political subdivisions (other than a payment made by a municipal advisor professional or a non-MAP executive officer to a political party if all payments by such person to such political party, in total are *de minimis*) made by the persons described in clause (2) of this subparagraph (A):

(1) the name and title (including any city/county/state or political subdivision) of each official of a municipal entity and political party receiving contributions or payments during such calendar quarter, listed by state;

(2) the contribution or payment amount made and the contributor category of each of the following persons making such contributions or payments during such calendar quarter:

(a) the municipal advisor;

(b) each municipal advisor professional;

(c) each non-MAP executive officer; and

(d) each political action committee

controlled by the municipal advisor or by any municipal advisor professional;

(B) for contributions to bond ballot campaigns (other than a contribution made by a municipal advisor professional or a non-MAP executive officer if all contributions by such person to such bond ballot campaign, in total, are *de minimis*) made by the persons described in clause (2) of this subparagraph (B):

(1) the official name of each bond ballot campaign receiving contributions during such calendar quarter, and the jurisdiction (including city/county/state or political subdivision) by or for which municipal securities, if approved, would be issued, listed by state;

(2) the contribution amount made and the contributor category of each of the following persons making such contributions during such calendar quarter:

(a) the municipal advisor;

(b) each municipal advisor professional;

(c) each non-MAP executive officer; and

(d) each political action committee controlled by the municipal advisor or by any municipal advisor professional;

(C)(1) in the case of municipal advisory business engaged in by the municipal advisor with or on behalf of municipal entities, a list of municipal entities with which or on behalf of which the municipal advisor has engaged in municipal advisory business during such calendar quarter, listed by state; and (2) in the case of the third-party business solicited, a list of each municipal entity solicited during the calendar quarter by state, along with the names of persons on behalf of which third-party business was solicited and the nature of the third-party business solicited;

(D) any information required to be included on Form G-42 for such calendar quarter pursuant to paragraph (e)(iii);

(E) such other identifying information required by Form G-42; and

(F) whether any contribution listed in this paragraph (e)(i) is the subject of an automatic exemption pursuant to section (j) of this rule, and the date of such automatic exemption.

The Board shall make public a copy of each Form G-42 received from any municipal advisor.

(ii) No municipal advisor shall be required to send Form G-42 to the

Board for any calendar quarter in which either:

(A) such municipal advisor has no information that is required to be reported pursuant to subparagraphs (A) through (D) of paragraph (e)(i) for such calendar quarter; or

(B) such municipal advisor has not engaged in municipal advisory business with a municipal entity or made any solicitations described in subparagraph (g)(ix)(B), but only if such municipal advisor:

(1) had not engaged in municipal advisory business with a municipal entity or made any solicitations described in subparagraph (g)(ix)(B) during the seven consecutive calendar quarters immediately preceding such calendar quarter; and

(2) has sent to the Board completed Form G-42x setting forth, in the prescribed format, (a) a certification to the effect that such municipal advisor did not engage in municipal advisory business with a municipal entity or make any solicitations described in subparagraph (g)(ix)(B) during the eight consecutive calendar quarters immediately preceding the date of such certification, (b) certain acknowledgments as are set forth in said Form G-42x regarding the obligations of such municipal advisor in connection with Forms G-42 and G-42x under this paragraph (e)(ii) and Rule G-8(h)(i), and (c) such other identifying information required by Form G-42x; provided that, if a municipal advisor has engaged in municipal advisory business with a municipal entity or made any solicitations described in subparagraph (g)(ix)(B) subsequent to the submission of Form G-42x to the Board, such municipal advisor shall be required to submit a new Form G-42x to the Board in order to again qualify for an exemption under this subparagraph (B). The Board shall make public a copy of each Form G-42x received from any municipal advisor.

(iii) If a municipal advisor engages in municipal advisory business with a municipal entity or makes any solicitations described in subparagraph (g)(ix)(B) during any calendar quarter after not having reported on Form G-42 the information described in subparagraph (A) of paragraph (e)(i) for one or more contributions or payments made during the two-year period preceding such calendar quarter solely as a result of subparagraph (B) of paragraph (e)(ii), such municipal advisor shall include on Form G-42 for such calendar quarter all such information (including year and calendar quarter of such contributions or payments) not so reported during such two-year period.

(iv) A municipal advisor that submits Form G-42 or Form G-42x to

the Board shall either:

(A) send two copies of such form to the Board by certified or registered mail, or some other equally prompt means that provides a record of sending; or

(B) submit an electronic version of such form to the Board in such format and manner specified in the current Instructions for Forms G-42 and G-42x.

(f) *Voluntary Disclosure to Board*. The Board will accept additional information related to contributions made to officials of municipal entities and payments to political parties of states and political subdivisions voluntarily submitted by municipal advisors or others provided that such information is submitted in accordance with section (e) of this rule.

(g) *Definitions*.

(i) The term "contribution" means any gift, subscription, loan, advance, or deposit of money or anything of value made: (A) for the purpose of influencing any election for federal, state or local office; (B) for payment of debt incurred in connection with any such election; or (C) for transition or inaugural expenses incurred by the successful candidate for state or local office.

(ii) The term "*de minimis*," when used in connection with contributions made by a municipal advisor professional or a non-MAP executive officer, refers to contributions made: (A) to bond ballot campaigns for a ballot initiative for which such municipal advisor professional or non-MAP executive officer was entitled to vote and which contributions, in total, were not in excess of $250 per ballot initiative, or (B) to officials of a municipal entity for whom the municipal advisor professional or non-MAP executive officer was entitled to vote and which contributions, in total, were not in excess of $250 to each official of such municipal entity, per election.

(iii) The term "municipal advisor" used in this rule does not include its associated persons.

(iv) The term "municipal advisor professional" means:

(A) any associated person engaged in municipal advisory business with a municipal entity;

(B) any associated person (including but not limited to any affiliated person of the municipal advisor) who solicits municipal advisory business with a municipal entity on its own behalf or solicits third-party business;

(C) any associated person who is a supervisor of any persons described in subparagraphs (A) or (B);

(D) any associated person who is a supervisor of any person described in subparagraph (C) up through and including the Chief Executive Officer or similarly situated official; or

(E) any associated person who is a member of the municipal advisor's executive or management committee or similarly situated officials, if any.

Each person designated by the municipal advisor as a municipal advisor professional pursuant to Rule G-8(h)(i) is deemed to be a municipal advisor professional. Each person designated a municipal advisor professional shall retain this designation for one year after the last activity or position that gave rise to the designation.

(v) The term "non-MAP executive officer" means an associated person in charge of a principal business unit, division or function or any other person who performs similar policy making functions for the municipal advisor, but does not include any municipal advisor professional, as defined in paragraph (iv) of this section (g).

Each person designated by the municipal advisor as a non-MAP executive officer pursuant to Rule G-8(h)(i) is deemed to be a non-MAP executive officer.

(vi) The term "official of a municipal entity" means any person (including any election committee for such person) who was, at the time of the contribution, an incumbent, candidate or successful candidate: (A) for elective office of the municipal entity which office is directly or indirectly responsible for, or can influence the outcome of, the hiring of a municipal advisor by the municipal entity or the hiring of any person on behalf of which the municipal advisor is soliciting third-party business; or (B) for any elective office of a municipal entity, which office has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of a municipal advisor by a municipal entity or the hiring of any person on behalf of which the municipal advisor is soliciting third-party business.

(vii) The term "municipal advisory business" means the provision of advice to or on behalf of a municipal entity or an obligated person with respect to municipal financial products or the issuance of municipal securities.

(viii) The term "payment" means any gift, subscription, loan, advance, or deposit of money or anything of value.

(ix) The term "solicit" means, except as used in section (c) of this rule, the taking of any action that would constitute a solicitation, and the term "solicitation" means a direct or indirect communication by any person with a municipal entity for the purpose of obtaining or retaining (A) municipal advisory business with a municipal entity or (B) third-party business. For purposes of this paragraph, an investment adviser to a covered investment pool in which a municipal entity is solicited to invest shall be treated as though that investment adviser were providing or seeking to provide investment advisory services directly to the municipal entity.

(x) The term "affiliated person of the municipal advisor" means any person who is a partner, director, officer, or employee of the

municipal advisor or of an affiliated company of the municipal advisor.

(xi) The term "affiliated company of the municipal advisor" means any entity directly or indirectly controlling, controlled by, or under common control with the municipal advisor.

(xii) The term "bond ballot campaign" means any fund, organization or committee that solicits or receives contributions to be used to support ballot initiatives seeking authorization for the issuance of municipal securities through public approval obtained by popular vote.

(xiii) The term “covered investment pool” means:

(A) An investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a) that is an investment option of a plan or program of a government entity (as defined in Rule 206(4)-5 under the Investment Advisers Act of 1940); or

(B) Any company that would be an investment company under section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–3(a)), but for the exclusion provided from that definition by either section 3(c)(1), section 3(c)(7) or section 3(c)(11) of that Act (15 U.S.C. 80a–3(c)(1), (c)(7) or (c)(11)).

(xiv) The term “third-party business” means an engagement by a municipal entity of a broker, dealer, municipal securities dealer, or municipal advisor (other than the municipal advisor who is soliciting the municipal entity) for or in connection with municipal financial products or the issuance of municipal securities, or of an investment adviser (as defined in section 202 of the Investment Advisers Act of 1940) to provide investment advisory services to or on behalf of a municipal entity.

(h) *Operative Date*. Except as provided in this section, the prohibition on engaging in municipal advisory business with a municipal entity for compensation, solicitation of third-party business from a municipal entity for compensation, and receipt of compensation for the solicitation of third-party business from a municipal entity or , as described in section (b) of this rule, arises only from contributions made on or after _____, 2011. In the case of a broker, dealer, or municipal securities dealer that is a municipal advisor (“dealer municipal advisor”), any political contribution that would have triggered a ban on financial advisory or consultant services by such dealer municipal advisor under Rule G-37(b) as in effect prior to [the effective date of this rule] shall also trigger a ban on municipal advisory business with a municipal entity under section (b) of this rule.

(i) *Application for Exemption*. The Commission may exempt a municipal advisor, conditionally or unconditionally, from the prohibition under section (b) of this rule of engaging in municipal advisory business with a municipal entity for compensation, soliciting third-party business from a municipal entity for compensation, or receiving compensation for the solicitation of third-party business from a municipal entity. In determining whether to grant such

exemption, the Commission may consider, among other factors that it may deem relevant:

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

(ii) whether such municipal advisor (A) prior to the time the contribution(s) that resulted in such prohibition was made, had developed and instituted procedures reasonably designed to ensure compliance with this rule; (B) prior to or at the time the contribution(s) that resulted in such prohibition was made, had no actual knowledge of the contribution(s); (C) has taken all available steps to cause the contributor involved in making the contribution(s) that resulted in such prohibition to obtain a return of the contribution(s); and (D) 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 contributor who made the relevant contribution and all employees of the municipal advisor;

(iii) whether, at the time of the contribution, the contributor was a municipal advisor professional or otherwise an employee of the municipal advisor, or was seeking such employment;

(iv) the timing and amount of the contribution that resulted in the prohibition;

(v) the nature of the election (e.g, federal, state or local); and

(vi) the contributor's apparent intent or motive in making the contribution that resulted in the prohibition, as evidenced by the facts and circumstances surrounding such contribution.

(j) *Automatic Exemptions*.

(i) A municipal advisor that is prohibited from engaging in municipal advisory business with a municipal entity for compensation, soliciting third-party business from a municipal entity for compensation, or receiving compensation for the solicitation of third-party business from a municipal entity pursuant to section (b) of this rule as a result of a contribution made by a municipal advisor professional may exempt itself from such prohibition, subject to paragraphs (ii) and (iii) of this section, upon satisfaction of the following requirements: (A) the municipal advisor must have discovered the contribution that resulted in the prohibition on business within four months of the date of such contribution; (B) such contribution must not have exceeded $250; and (C) the contributor must obtain a return of the contribution within 60 calendar days of the date of discovery of such contribution by the municipal advisor.

(ii) A municipal advisor is entitled to no more than two automatic exemptions during any 12-month period.

(iii) A municipal advisor may not execute more than one automatic exemption relating to contributions by the same municipal advisor professional regardless of the time period.

TEXT OF DRAFT AMENDMENTS TO RULES G-8, G-9, AND G-37[35]

Rule G-8 Books and Records to be Made by Brokers, Dealers~~, and~~ Municipal Securities Dealers**, and Municipal Advisors**

(a)-(g) No change.

(h) *Municipal Advisor Records.* Each municipal advisor shall maintain:

(i) *Records Concerning Political Contributions and Prohibitions on Municipal Advisory Activities Pursuant to Rule G-42.* Records reflecting:

(A) a listing of the names, titles, city/county and state of residence of all municipal advisor professionals;

(B) a listing of the names, titles, city/county and state of residence of all non-MAP executive officers;

(C) the states in which the municipal advisor is engaging or is seeking to engage in municipal advisory business with municipal entities or soliciting third-party business (as defined in Rule G-42(g)(xiv)) from a municipal entity ;

(D) in the case of municipal advisory business engaged in by the municipal advisor with or on behalf of municipal entities, a list of municipal entities with which the municipal advisor has engaged in municipal advisory business , along with the type of municipal advisory business with municipal entities engaged in, during the current year and separate listings for each of the previous two calendar years ; and (2) in the case of third-party business solicited from a municipal entity, a list of each municipal entity solicited , along with the names of the persons on behalf of which business was solicited and the nature of the business solicited , during the current year and separate listings for each of the previous two calendar years ;

(E) the contributions, direct or indirect, to officials of a municipal entity and payments, direct or indirect, made to political parties of states and political subdivisions, by the municipal advisor and each political action committee controlled by the municipal advisor for the current year and separate listings for each of the previous two calendar years, which records shall include: (i) the identity of the contributors, (ii) the names and titles (including any city/county/state or other political subdivision) of the recipients of such contributions and payments, and (iii) the amounts and dates of such contributions and payments;

(F) the contributions, direct or indirect, to officials of a municipal entity made by each municipal advisor professional, any political action committee controlled

by a municipal advisor professional, and non-MAP executive officer for the current year, which records shall include: (i) the names, titles, city/county and state of residence of contributors, (ii) the names and titles (including any city/county/state or other political subdivision) of the recipients of such contributions, (iii) the amounts and dates of such contributions; and (iv) whether any such contribution was the subject of an automatic exemption, pursuant to Rule G-42(j), including the amount of the contribution, the date the municipal advisor discovered the contribution, the name of the contributor, and the date the contributor obtained a return of the contribution; provided, however, that such records need not reflect any *de minimis* contribution made by a municipal advisor professional or non-MAP executive officer. In addition, municipal advisors shall maintain separate listings for each of the previous two calendar years containing the information required pursuant to this subparagraph (F) for those individuals meeting the definition of municipal advisor professional pursuant to subparagraphs (A) and (B) of Rule G-42(g)(iv) and for any political action committee controlled by such individuals, and separate listings for the previous six months containing the information required pursuant to this subparagraph (F) for those individuals meeting the definition of municipal advisor professional pursuant to subparagraphs (C), (D) and (E) of Rule G-42(g)(iv) and for any political action committee controlled by such individuals and for any non-MAP executive officers; and

(G) the payments, direct or indirect, to political parties of states and political subdivisions made by all municipal advisor professionals, any political action committee controlled by a municipal advisor professional, and non-MAP executive officers for the current year, which records shall include: (i) the names, titles, city/county and state of residence of contributors, (ii) the names, and titles (including any city/county/state or other political subdivision) of the recipients of such payments and (iii) the amounts and dates of such payments; provided, however, that such records need not reflect those payments made by any municipal advisor professional or non-MAP executive officer that are *de minimis*. In addition, municipal advisors shall maintain separate listings for each of the previous two calendar years containing the information required pursuant to this subparagraph (G) for those individuals meeting the definition of municipal advisor professional pursuant to subparagraphs (A) and (B) of Rule G-42(g)(iv) and for any political action committee controlled by such individuals, and separate listings for the previous six months containing the information required pursuant to this subparagraph (G) for those

individuals meeting the definition of municipal advisor professional pursuant to subparagraphs (C), (D) and (E) of Rule G-42(g)(iv) and for any political action committee controlled by such individuals and for any non-MAP executive officers.

(H) the contributions, direct or indirect, to bond ballot campaigns made by the municipal advisor and each political action committee controlled by the municipal advisor for the current year, which records shall include: (i) the identity of the contributors, (ii) the official name of each bond ballot campaign receiving such contributions, and the jurisdiction (including city/county/state or political subdivision) by or for which municipal securities, if approved, would be issued, and (iii) the amounts and dates of such contributions;

(I) the contributions, direct or indirect, to bond ballot campaigns made by each municipal advisor professional, any political action committee controlled by a municipal advisor professional, and non-MAP executive officer for the current year, which records shall include: (i) the names, titles, city/county and state of residence of contributors, (ii) the official name of each bond ballot campaign receiving such contributions, and the jurisdiction (including city/county/state or political subdivision) by or for which municipal securities, if approved, would be issued, and (iii) the amounts and dates of such contributions; provided, however, that such records need not reflect any contribution made by a municipal advisor professional or non-MAP executive officer to a bond ballot campaign for a ballot initiative that is *de minimis*.

(J) Municipal advisors shall maintain copies of the Forms G-42 and G-42x sent to the Board along with the certified or registered mail receipt or other record of sending such forms to the Board.

(K) Terms used in this paragraph (i) have the same meaning as in Rule G-42.

(L) No record is required by this paragraph (i) of (1) any municipal advisory business, or solicitations of third-party business, engaged in, or (2) contributions to officials of municipal entities or payments to political parties of states or political subdivisions, made prior to _____.

(M) No municipal advisor shall be subject to the requirements of this paragraph (i) during any period that such municipal advisor has qualified for and invoked the exemption set forth in subparagraph (B) of

paragraph (e)(ii) of Rule G-42; provided, however, that such municipal advisor shall remain obligated to comply with subparagraph (H) of this paragraph (i) during such period of exemption. At such time as a municipal advisor that has been exempted by this subparagraph (M) from the requirements of this paragraph (i) engages in any municipal advisory business with municipal entities, all requirements of this paragraph (i) covering the periods of time set forth herein (beginning with the then current calendar year and the two preceding calendar years) shall become applicable to such municipal advisor.

(ii) The records required by section (h) of this rule shall be maintained in the manner described in section (b) of this rule.

* * * * * *

Rule G-9: Preservation of Records

(a)-(g) No change.

(h) *Municipal Advisor Records*. Every municipal advisor shall preserve for no less than six years the records to be maintained pursuant to rule G-8(h)(i); provided, however, that copies of Forms G-42x shall be preserved for the period during which such Forms G-42x are effective and for at least six years following the end of such effectiveness. Such records shall be accessible and available as required by section (d) of this rule and retained in the manner required by section (e) of this rule.

* * * * * *

Rule G-37 Political Contributions and Prohibitions on Municipal Securities Business

(a)-(b) No change.

(c) *Prohibition on Soliciting and Coordinating Contributions*.

(i) No broker, dealer or municipal securities dealer or any municipal finance professional of the broker, dealer or municipal securities dealer shall solicit any person, including but not limited to any affiliated **company** ~~**entity**~~ of the broker, dealer or municipal securities dealer, or political action committee to make any contribution, or shall coordinate any contributions, to an official of an issuer with which the broker, dealer or municipal securities dealer is engaging or is seeking to engage in municipal securities business.

(ii) No broker, dealer or municipal securities dealer or any individual designated as a municipal finance professional of the broker, dealer or municipal securities dealer pursuant to subparagraphs (A), (B), or (C) of paragraph (g)(iv) of this rule shall solicit any person, including but not limited to any affiliated **company** ~~**entity**~~ of the broker, dealer or municipal securities dealer, or political action committee to make any payment, or shall coordinate any payments, to a political party of a state or locality where the broker, dealer or municipal securities dealer is engaging or is seeking to engage in municipal securities

business.

(d)-(f) No change.

(g) *Definitions*.

(i)-(iii) No change.

(iv) The term "municipal finance professional" means:

(A) any associated person primarily engaged in municipal securities representative activities, as defined in rule G-3(a)(i) **without regard to subparagraph (B) thereof**, provided, however, that sales activities with natural persons shall not be considered to be municipal securities representative activities for purposes of this subparagraph (A);

(B) any associated person (including but not limited to any affiliated person of the broker, dealer or municipal securities dealer**, as defined in rule G-38)** who solicits municipal securities business;[*]

(C)-(E) No change.

(v)-(vi) No change.

(vii) The term "municipal securities business" means:

(A)-(B) No change.

(C) the provision of financial advisory or consultant services to or on behalf of an issuer with respect to a primary offering of municipal securities in which the dealer was chosen to provide such services on other than a competitive bid basis; or

(**C**~~D~~) the provision of remarketing agent services to or on behalf of an issuer with respect to a primary offering of municipal securities in which the dealer was chosen to provide such services on other than a competitive bid basis.

(viii) No change.

(ix) Except as used in section (c) **of this rule**, the term “solicit” means **the taking of any action that would constitute a solicitation as defined in rule G-38(b)(i)** **to communicate directly or indirectly with an issuer for the purpose of obtaining or retaining municipal securities business**.

(x) No change.

(xi) The term "affiliated person of the broker, dealer or municipal securities dealer” means any person who is a partner, director, officer, or employee of the broker, dealer or municipal securities dealer or of an affiliated company of the broker, dealer or municipal securities dealer.

(xii) The term "affiliated company of the broker, dealer or municipal securities dealer" means any entity directly or indirectly controlling, controlled by, or under common control with the broker, dealer or municipal securities dealer.

(h)-(i) No change.

(j)(i) No change.

(ii) A broker, dealer or municipal securities dealer is entitled to no more than two automatic exemptions **during any** ~~per~~ 12-month period.

(iii) No change.

TEXT OF DRAFT RESTATED G-37 INTERPRETIVE NOTICE

INTERPRETATION OF PROHIBITION ON MUNICIPAL SECURITIES BUSINESS PURSUANT TO RULE G-37 - February 21, 1997 [RESTATED]

Recently, dealers have raised questions regarding how the prohibition on municipal securities business in rule G-37, on political contributions and prohibitions on municipal securities business, applies to certain situations. Rule G-37 prohibits any dealer from engaging in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by: (i) the dealer; (ii) any municipal finance professional associated with such dealer; or (iii) any political action committee controlled by the dealer or any municipal finance professional.[1] If a municipal finance professional makes a political contribution to an issuer official for whom he is not entitled to vote, the dealer is prohibited from engaging in municipal securities business with that issuer for two years. The Board has been asked whether the prohibition on municipal securities business extends to certain services provided under contractual agreements with an issuer that pre-date the contribution. The Board is issuing the following interpretation of the prohibition on municipal securities business pursuant to rule G-37.

"New" Municipal Securities Business

A dealer subject to a prohibition on municipal securities business with an issuer may not enter into any new contractual obligations with that issuer for municipal securities business.[2] The Board adopted rule G-37 in an effort to sever any connection between the making of political contributions and the awarding of municipal securities business. The Board believes that the problems associated with political contributions—including the practice known as "pay-to-play"—undermine investor confidence in the municipal securities market, which confidence is crucial to the long-term health of the market, both in terms of liquidity and capital-raising ability.

Pre-Existing Issue-Specific Contractual Undertakings

The Board believes that it is consistent with the intent of rule G-37 that a dealer subject to a prohibition on municipal securities business with an issuer be allowed to continue to execute certain issue-specific contractual obligations in effect prior to the date of the contribution that caused the prohibition. For example, if a bond purchase agreement was signed prior to the date of the contribution, a dealer may continue to perform its services as an underwriter on the issue. ~~**Also, if an issue-specific agreement for**~~

~~financial advisory services was in effect prior to the date of the contribution, the dealer may continue in its role as financial advisor for that issue.~~ In the same manner, a dealer may act as remarketing agent or placement agent for an issue and also may continue to underwrite a commercial paper program as long as the contract to perform these services was in effect prior to the date of the contribution. Subject to the limitations noted below, these activities are not considered new municipal securities business and thus can be performed by dealers under a prohibition on municipal securities business with the issuer.

Dealers also have asked questions regarding certain terms in contracts to provide on-going municipal securities business that allow for additional services or compensation. For example, a dealer may have an agreement to provide remarketing services for a municipal securities issue, the terms of which allow the issuer to change the "mode" of the outstanding bonds from variable to a fixed rate of interest or from Rule 2a-7 eligible to non-Rule 2a-7 eligible. [3] Generally, the per bond fee increases if the dealer sells fixed rate municipal securities or non-money market fund securities. Also, an agreement to underwrite a commercial paper program may include terms for increasing the size of the program. While the per bond fee probably does not increase if more commercial paper is underwritten, the amount of money paid to the dealer does increase. The Board views the provisions in existing contracts that allow for changes in the services provided by the dealer or compensation paid by the issuer as new municipal securities business and, therefore, rule G-37 precludes a dealer subject to a prohibition on municipal securities business from performing such additional functions or receiving additional compensation.

~~**Non-Issue Specific Contractual Undertakings**~~

~~**Dealers also at times enter into long-term contracts with issuers for municipal securities business, *e.g.*, a five-year financial advisory agreement. If a contribution is given after such a non-issue-specific contract is entered into that results in a prohibition on municipal securities business, the Board believes the dealer should not be allowed to continue with the municipal securities business, subject to an orderly transition to another entity to perform such business. This transition should be as short a period of time as possible and is intended to give the issuer the opportunity to receive the benefit of the work already provided by the dealer and to find a replacement to complete the work, as needed.**~~

*** * ***

The Board recognizes that there is a great variety in the terms of agreements regarding municipal securities business and that the interpretation noted above may not adequately deal with all such agreements. Thus, the Board is seeking comment on how a prohibition on municipal securities business pursuant to rule G-37 affects contracts for municipal securities business entered into with issuers prior to the date of the contribution triggering the prohibition on business. In particular, the Board is seeking comment on other examples whereby a dealer may be contractually obligated to perform certain activities after the date of the triggering contribution. If other examples are provided, the Board would like comments on how these situations should be addressed pursuant to rule G-37.

Based upon the comments received on this notice, the Board may issue additional interpretations or amend the language of rule G-37.

---

[1] The only exception to rule G-37's absolute prohibition on municipal securities business is for certain contributions made to issuer officials by municipal finance professionals. Contributions by such persons to officials of issuers do not invoke application of the prohibition on business if (i) the municipal finance professional is entitled to vote for such official and (ii) contributions by such municipal finance professional do not exceed, in total, $250 to each official, per election.

[2] The term "municipal securities business" is defined in the rule to encompass certain activities of dealers, such as acting as negotiated underwriters (as managing underwriter or as syndicate member), ~~**financial advisors,**~~ placement agents and negotiated remarketing agents. The rule does not prohibit dealers from engaging in business awarded on a competitive bid basis.

[3] SEC Rule 2a-7 under the Investment Company Act of 1940 defines eligible securities for inclusion in money market funds.

[*] This proposed rule language was modified after the publication of the notice to retain original language.

---

[1] Interpretation of Prohibition on Municipal Securities Business Pursuant to Rule G-37 (February 21, 1997), reprinted in MSRB Rule Book.

[2] Municipal securities business generally consists of negotiated underwritings, private placements, and serving as remarketing agent or financial advisor on a new issue of municipal securities.

[3] *See* File No. SR-MSRB-94-2 (January 12, 1994); "Political Contributions and Prohibitions on Municipal Securities Business: Proposed Rule G-37," MSRB Reports, Vol. 14, No. 1 (January 1994).

[4] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[5] "Municipal advisor" is defined in Section 15B(e)(4) of the Securities Exchange Act of 1934, as amended by the Dodd-Frank Act (the "Exchange Act"), as "a person (who is not a municipal entity or an employee of a municipal entity) that: (i) provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or (ii) undertakes a solicitation of a municipal entity.

[6] *See* 15B(c)(1) of the Exchange Act.

[7] *See* Section 15B(b)(2)(C) of the Exchange Act.

[8] "Municipal entity" is defined in Section 15B(e)(8) of the Exchange Act as "any State, political subdivision of a State, or municipal corporate instrumentality of a State, including (A) any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality; (B) any plan, program, or pool of assets

sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof; and (C) any other issuer of municipal securities."

[9] *See* "Relationship of Draft Rule G-42 to SEC Pay to Play Rule for Investment Advisers" herein.

[10] *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1119 (1996). In *Blount*, the court determined that Rule G-37 was constitutional under a strict scrutiny analysis by finding that the rule was narrowly tailored to serve a compelling government interest. The court found the SEC's interests in protecting investors from fraud and protecting underwriters from unfair, corrupt practices to be compelling.

[11] Draft Rule G-42(g)(ii) would provide in pertinent part: "The term "*de minimis*," when used in connection with contributions made by a municipal advisor professional or a non-MAP executive officer, refers to contributions made . . . to officials of a municipal entity for whom the municipal advisor professional or non-MAP executive officer was entitled to vote and which contributions, in total, were not in excess of $250 to each official of such municipal entity, per election."

[12] *See* draft Rule G-42(b)(i).

[13] Draft Rule G-42(g)(xiv) would provide that "third-party business" means "an engagement by a municipal entity of a broker, dealer, municipal securities dealer, or municipal advisor (other than the municipal advisor who is soliciting the municipal entity) for or in connection with municipal financial products or the issuance of municipal securities, or of an investment adviser (as defined in section 202 of the Investment Advisers Act of 1940) to provide investment advisory services to or on behalf of a municipal entity." The MSRB notes that the effect of this definition of "third-party business" would be to include solicitations on behalf of affiliated persons, as well as solicitations on behalf of unrelated third parties, within the scope of draft Rule G-42. This is necessary to allow persons soliciting investment advisory business on behalf of affiliates to voluntarily subject themselves to draft Rule G-42. *See* "Relationship of Draft Rule G-42 to SEC Pay to Play Rule for Investment Advisers" herein.

[14] *See* draft Rule G-42(b)(i).

[15] *See* draft Rule G-42(c)(i).

[16] *See* draft Rule G-42(c)(ii). An exception from this prohibition would be provided for certain supervisors and executives of municipal advisors that are only municipal advisors because they provide advice to municipal entities or obligated persons and do not solicit any third-party business from municipal entities.

[17] *See* draft Rule G-42(d).

[18] *See* draft Rule G-42(e).

[19] *See* draft Rule G-42(b)(i). Limitations on the look-back provision would apply to persons who are municipal advisor professionals only due to: (i) their solicitation of municipal advisory business (only contributions to officials of municipal entities solicited would count) or (ii) their supervisory activities (only six-month look back). *See* draft Rule G-42(b)(ii) and (iii), respectively. The limitation on the look-back provision for persons who are only municipal advisor professionals as a result of solicitation activities would only apply to persons who solicit municipal advisory business on their own behalf. It would not apply to persons who solicit third-party business, who would

be subject to the regular two-year look-back provision. This distinction was drawn to ensure that draft Rule G-42 is at least as stringent with respect to such solicitors as SEC Rule 206(4)-5 under the Investment Advisers Act. *See* "Relationship of Draft Rule G-42 to SEC Pay to Play Rule for Investment Advisers" herein.

[20] *See* draft Rule G-42(g)(iv).

[21] Section 15B(e)(7) of the Exchange Act defines the term "associated person of a municipal advisor" to mean: "(A) any partner, officer, director, or branch manager of such municipal advisor (or any person occupying a similar status or performing similar functions); (B) any other employee of such municipal advisor who is engaged in the management, direction, supervision, or performance of any activities relating to the provision of advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities; and (C) any person directly or indirectly controlling, controlled by, or under common control with such municipal advisor."

[22] *See* draft Rule G-42(g)(vi).

[23] Release No. IA-3043 (July 1, 2010); File No. S7-18-09.

[24] Release No. IA-3110 (November 19, 2010); File No. S7-36-10.

[25] Exchange Act Release No. 63576 (*see* text accompanying note 104).

[26] Rule G-37(b)(i) provides for a ban on municipal securities business. The MSRB interpreted the ban to be a ban on new municipal securities business in the Rule G-37 Interpretive Notice.

[27] The draft rule would also ban the receipt of compensation for the solicitation of third-party business from a municipal entity within two years after a non-*de minimis* contribution to address those situations in which the solicitation might have been made at the time of the contribution.

[28] This change from Rule G-37 also was made to ensure that draft Rule G-42 is at least as stringent as SEC Rule 206(4)-5 for investment advisers.

[29] Under Rule G-37, members of a dealer's executive or management committee or similarly situated officials are not municipal finance professionals (or "MFPs") if the dealer has no other MFPs. This change from Rule G-37 was made to ensure that draft Rule G-42 is at least as stringent as SEC Rule 206(4)-5.

[30] Reimbursements for costs would be considered compensation whether for out-of-pocket costs or internal costs.

[31] Form G-42 would require the submission of the information described in draft Rule G-42(e) and would be submitted by municipal advisors through the existing MSRB Political Contribution Submission Service, which is the service that would accept the submissions of Form G-42. Submitted Forms G-42 would be made publicly available through the MSRB website. Under the draft rule, Form G-42x would be filed by a municipal advisor that is no longer engaged in municipal advisory business for municipal entities or the solicitation activities covered by the rule (*e.g.*, a municipal advisor that is no longer providing advice to, or soliciting, municipal entities but is still engaged in providing advice to obligated persons).

[32] Draft Rule G-42 would not require municipal advisors to disclose the names of individual MAPs and executive officers. Further, proposed Draft Rule G-42 would not

require municipal advisors to maintain a list of contributions or payments by other employees, affiliated companies, and their employees, spouses of MAPs, or any other person unless the contributions or payments were directed by persons subject to draft Rule G-42.

[33] Limitations on the Rule G-37 look-back provision apply to persons who are municipal finance professionals only due to: (i) their solicitation of municipal securities business (only contributions to officials of issuers solicited count) or (ii) their supervisory activities (only six-month look back). *See* Rule G-37(b)(ii) and (iii), respectively.

[34] *See* the text accompanying note 19, *infra*.

[35] Underlining indicates additions; strikethrough indicates deletions.

Alphabetical List of Comment Letters on MSRB NOTICE 2011-04 (January 14, 2011)

1. Acacia Financial Group, Inc.: Letter from Kim M. Whelan, Co-President, dated February 25, 2011

2. American Bankers Association: Letter from Cristeena G. Naser, Senior Counsel, dated February 25, 2011

3. AGFS: E-mail from Robert Doty, dated March 1, 2011

4. BMO Capital Markets GKST Inc.: Letter from Robert J. Stracks, Counsel, dated February 25, 2011

5. Callcott, W. Hardy: Letter dated February 8, 2011

6. Fisher, Robert: E-mail dated February 25, 2011

7. G.L. Hicks Financial LLC: E-mail from Dareth Goulding, dated January 14, 2011

8. H.J. Umbaugh & Associates: Letter from Gerald G. Malone, dated February 24, 2011

9. National Association of Independent Public Finance Advisors: Letter from Colette Irwin-Knott, President, dated February 24, 2011

10. Repex & Co., Inc.: E-mail from Erich Sokolower, dated January 14, 2011

11. Securities Industry and Financial Markets Association: Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, dated February 25, 2011

12. State of Texas: Letter from Susan Combs, Texas Comptroller of Public Accounts, dated February 25, 2011

13. State of Texas: Letter from Charles B. McDonald, Assistant Attorney General, dated February 25, 2011

14. T. Rowe Price Investment Services, Inc.: Letter from David Oestreicher, Chief Legal Counsel, dated February 25, 2011

15. The PFM Group: Letter from Joseph J. Connolly, General Counsel, dated February 23, 2011

16. WM Financial Strategies: Letter from Joy A. Howard, Principal, dated February 21, 2011

ACACIA
FINANCIAL GROUP, INC.

Four Greentree Centre, Suite 206
13000 Lincoln Drive West
Marlton, NJ 08053
(856) 234-2266 Phone
(856) 234-6697 Fax

February 25, 2011

Via Electronic Mail

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

Re: MSRB Notice 2011-04
Request for Comments on Pay to Play Rule (Rule G-42) for Municipal Advisors

Dear Mr. Smith:

Please consider this letter as a request to the MSRB to consider modifying proposed Rule G-42 to be wholly consistent with the requirements of the Investment Adviser Act Rule 206(4)-5 (the investment adviser pay-to-play rule adopted by the SEC last year).

Many financial advisory firms who will be subject to the new SEC and MSRB requirements regarding Municipal Advisors have affiliated investment advisory firms. The provisions regarding who is subject to contribution limitations, the threshold limit for "non-de minimis" contributions, and the parties to whom contributions would effect the two-year prohibition on providing services for compensation should be made consistent for Municipal Advisors and Investment Advisers.

Your attention in this matter is appreciated.

Sincerely,

Kim M. Whelan
Co-President
Acacia Financial Group, Inc.

American Bankers Association
Building Success. Together.

Cristeena Naser
Senior Counsel
Center for Securities, Trust and Investments
202-663-5332
cnaser@aba.com

BY ELECTRONIC MAIL

February 25, 2011

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street
Alexandria, VA 22134

Re: Request for Comment on Pay to Play Rule for Municipal Advisors
MSRB Notice 2011-04, January 14, 2011

Dear Mr. Smith:

The American Bankers Association (ABA)[1] appreciates this opportunity to comment on the Municipal Securities Rulemaking Board (MSRB) proposal to establish "pay to play" and related rules affecting municipal advisors. The proposal would create a new Rule G-42 that would apply to "municipal advisors" as defined by the Securities and Exchange Commission (Commission) in rulemaking[2] pursuant to Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (DFA).[3] Section 975 establishes a system of dual registration with the Commission and the MSRB that will require covered municipal advisors to comply with rules of business conduct, ongoing education requirements, and a fiduciary duty to their municipal entity clients.

Proposed Rule G-42 generally would prohibit a municipal advisor from "engaging in advisory business" or soliciting third-party business for compensation from a municipal entity for two years after making a non-*de minimis* political contribution to certain municipal officials. In addition, the proposal would prohibit municipal advisors and "municipal advisor professionals" from soliciting or coordinating contributions to municipal officials or state or local political parties if engaged or seeking to be engaged in municipal advisory business with the municipal entity. Lastly, the proposal would require municipal advisors to disclose quarterly to the MSRB certain contributions and related information.

ABA supports efforts to ensure that political contributions do not influence the awarding of municipal financial contracts. However, the rule as proposed would impose obligations that are inconsistent with those established by the Commission, thereby creating needless confusion and adding burdens that outweigh the rule's benefits.

---

[1] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its 2 million employees. ABA's extensive resources enhance the success of the nation's banks and strengthen America's economy and communities. Learn more at www.aba.com.

[2] The Commission's proposed rule seeks to establish a registration system for municipal advisors that may capture banks providing traditional banking products and services to state and local governmental bodies, including deposit taking, cash management, lending, credit facilities, employee benefit, trust, securities processing and agency services, advisory services, and capital market services. ABA strongly opposes this expansive approach to the registration of municipal advisors. *See* ABA Letter to Commission (Feb. 22, 2010), *available at* http://www.sec.gov/comments/s7-45-10/s74510.shtml.

[3] Pub. L.111-203 (2010).

MSRB and Commission Rules on Political Contributions

ABA and its members support the adoption of measured and targeted efforts to address the use of political contributions to influence the awarding of municipal financial contracts, whether for underwriting or advisory contracts. Nonetheless, it is imperative that the MSRB coordinate its existing Rule G-37 and proposed Rule G-42 with the Commission's registered investment advisor pay to play Rule 206(4)-5 to achieve a uniform system of regulations governing political contributions across all affected municipal market participants. Otherwise, the MSRB and Commission will force market participants to adopt unnecessarily complex and burdensome compliance systems to avoid the draconian penalties for even inadvertent violations of the pay to play rules.

Most critically, the MSRB should adopt in Rule G-42 the thresholds for permissible political contributions established by the Commission in Rule 206(4)-5 and amend the Rule G-37 thresholds accordingly. The political contribution thresholds for Rule G-37 have not been amended since the rule's adoption in 1994. The Commission, which has most recently reviewed the current economic and political environment in the context of its deliberations on its adviser rule, determined that increased thresholds were warranted to account for inflation since 1994. Accordingly, the Commission in its adviser rule increased to $350 per election the threshold for permissible contributions to officials for whom a covered associate may vote – an increase of $100 over the MSRB's current threshold of $250. Furthermore, the Commission, acknowledging that many individuals have a legitimate interest in contributing to other campaigns, expanded the scope of the *de minimis* exception to allow contributions to officials for whom the covered associate may not vote.[4]

Accordingly, ABA strongly urges the MSRB to amend the definition of *de minimis* contributions in proposed Rule G-42 to parallel the thresholds under the SEC rule: $350 to an official, per election, for whom the covered associate was entitled to vote at the time of the contribution and $150 to any other official, per election.[5] Furthermore, the comparable thresholds in G-37 should be similarly and promptly amended. We recognize that there may be costs to the MSRB attendant to the systems changes necessary to achieve a uniform result. However, any such costs would pale in comparison to the enormous – and wholly unnecessary – costs and burdens that would be imposed on municipal market participants as a result of the MSRB and the Commission imposing two different pay to play regimes that are intended to accomplish exactly the same result.

Moreover, imposing two overlapping but inconsistent sets of rules on the same conduct would be inconsistent with the spirit of President Obama's January 18, 2011, Executive Order, Improving Regulation and Regulatory Review.[6] As stated in that Order –

> Our regulatory system … must identify and use the best, most innovative and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand.

The MSRB's proposed Rule G-42 and existing Rule G-37, if unchanged, would result in needless burden and inconsistencies. This situation is precisely what the Executive Order was intended to prevent.

---

[4] 75 Federal Register 41018, 41035 (July 14, 2010).
[5] 17 CFR 275.206(4)-5 (b)(1).
[6] Available at: http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order.

Overly Broad Recordkeeping and Reporting

Under proposed G-42, the MSRB would require municipal advisors to report and keep records not only on business that they have obtained with municipalities but also on business that was sought but never obtained. Such a broad reporting and recordkeeping obligation would be difficult and expensive to manage and would yield little benefit in return. The Commission in its final rule limited recordkeeping requirements to business obtained, because of concerns that expanded recordkeeping would be "unnecessarily intrusive to employees and burdensome on advisers."[7] The MSRB should do the same.

Overly Broad Prohibition on Receiving Compensation

ABA believes the scope of the MSRB proposal's prohibition on contributions is overly broad, burdensome, and not flexible enough to allow for inadvertent violations. We believe that the prohibition should only apply to the municipal advisor and those employees of the municipal advisor that are actually engaged in the solicitation or provision of municipal advisory business. Narrowing the scope of "municipal advisor professional" would more effectively tailor the regulation to the issue and avoid unnecessary burdens.

The need to apply a narrow scope is all the more compelling given the severe consequence of the two-year ban on receiving compensation. Sometimes it is difficult to unwind a business relationship with a municipality, especially if there is an investment in a fund that has a lock-up period. Furthermore, if the municipal advisor has a fiduciary duty to the client, it may not be able to sever the relationship in a timely manner due to its fiduciary duties of loyalty and care. In those cases, the municipal advisor may feel compelled to provide its services without compensation for some time before being able to hand off the business to another advisor that is not banned from receiving compensation. Thus, we strongly urge the MSRB to amend the rule to prohibit only compensation for new services provided, as Rule G-37 allows.

Look-Back Provision

The MSRB proposal would trigger a prohibition on compensation if an employee had made a contribution within two years of becoming a municipal advisor. This restriction would require municipal advisor employers to rely on the accurate disclosures of new hires and may preclude an employer from hiring an otherwise qualified candidate because of his or her *legal* and *legitimate* political contributions. We strongly urge the MSRB to conform its rule to the Commission's Rule 206(4)-5 which only requires employers to "look back" six months for newly designated "covered associates."

Conclusion

ABA appreciates this opportunity to comment on the proposal. We strongly urge the MSRB to consider regulations that are consistent with what the Commission has done in Rule 206(4)-5. If you wish to discuss the comments in this letter, please contact the undersigned.

Sincerely,

Cristeena G. Naser

[7] 75 Federal Register 41018, 41050 (July 14, 2010).

From: Robert Doty [robert.doty@agfs.com]
Sent: Tuesday, March 01, 2011 5:43 PM
To: Comment Letters
Subject: Comment on Proposed Rule G-42 on pay-to-play

I support the thrust of the MSRB's proposal regarding Rule G-42. I also support the comment by the National Association of Independent Public Finance Advisors that contributions to bond elections should be prohibited for both underwriters and financial advisors, other than *de minimus* contributions relating to bond elections in which the contributors are eligible to vote.

By affecting the impact of elections for the purpose of gaining employment, such contributions distort the democratic process. Moreover, in some states, such as California, it is illegal for public entities to contribute for or against such ballot measures. When underwriters or financial advisors contribute to elections in order to gain employment, and then charge questionable compensation, I submit that it is equivalent to money laundering.

I submit respectfully that underwriters do not engage in fair dealing under Rule G-17 when they make such contributions. Municipal advisors violate their fiduciary duty when they encourage, and participate with, their public entity clients and officials of the clients in actions that are undemocratic at best and illegal at worst.

I am hopeful that the Board will declare an end to such actions in the municipal market.

Robert Doty

AGFS CONTACT INFORMATION:
Email: *robert.doty@agfs.com*
Telephone: (916) 483-7378
Fax: (916) 483-7565
Website: *www.agfs.com*

1721 Eastern Avenue, Suite 4
Sacramento, CA 95864-1745

BMO Capital Markets

BMO Capital Markets GKST Inc.
115 South LaSalle Street
37th Floor
Chicago, IL 60603

Tel.: 312 845-2000

February 25, 2011

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street
Alexandria, VA 22134

Re: MSRB Notice 2011-04

Dear Mr. Smith:

We participated in the formulation of the extensive comment letter submitted to you today by the Securities Industry and Financial Markets Association ("SIFMA"). We fully support the suggestions and proposals set forth therein.

We would especially like to reiterate our support for the concept of providing for one reporting mechanism under Rule G-37 and proposed Rule G-42. We were quite surprised that separate mechanisms would even be considered. After all, we like many long-time MSRB broker-dealers, have undertaken currently regulated financial advisory activities with all the attendant reporting requirements. Perhaps, we were naïve in believing that the main purpose of the Dodd-Frank municipal securities provisions was to require registration and regulation of those financial advisory entities that until now have been unregulated and that firms like ours would be unburdened. We don't believe the law's purpose was to make our life more complicated and complex. Since we have been reporting municipal securities business and political contribution activity (or the lack thereof) for the last 15+ years, we find it quite objectionable to possibly be subject to a duplicative regime to replace a relatively straightforward one. As the SIFMA letter indicates, municipal finance professionals and municipal advisory professionals are generally the same people, interacting with the same issuers. We believe that the MSRB can find a way to make sure relevant and appropriate information is disclosed without requiring duplicative reporting.

We also believe that reporting of municipal advisory business should be triggered by actual business transactions as is currently the case under Rule G-37. Why would anybody care about contributions to officials when no business has been obtained? Reporting any and all contacts would be a burdensome recordkeeping and compliance nightmare. Since we are dealing with first amendment considerations, we urge the MSRB to adopt the least intrusive program which will elicit relevant information.

Thank you for the opportunity to comment.

Robert J. Stracks
Counsel

RJS/ays

W. Hardy Callcott
Direct Phone: (415) 393-2310
Direct Fax: (415) 393-2286
hardy.callcott@bingham.com

February 8, 2011

By Email to CommentLetters @msrb.org

Municipal Securities Rulemaking Board
1900 Duke St.
Suite 600
Alexandria, VA 22314

Re: Comments on MSRB Notice 2011-04, Pay to Play Rule for Municipal Advisors

Dear Board Members:

I submit this comment letter in response to the Board's proposed Rule G-42 concerning campaign contributions by municipal advisors.[1] As explained below, my primary comment is that in light of Investment Adviser Act Rule 206(4)-5, the investment adviser pay-to-play rule adopted by the SEC last year, the MSRB's proposed Rule G-42 cannot meet the required constitutional test that it be "narrowly tailored" to serve a "compelling governmental interest."

With a handful of exceptions, proposed Rule G-42 is modeled on existing Rule G-37, which generally forbids political contributions by brokers, dealers, municipal securities dealers and municipal finance professionals to an official of a municipal securities issuer. An exception to the rule allows municipal finance professionals (MFPs) to make contributions not in excess of $250 to issuer officials for whom an MFP is eligible to vote, although they may not make such contributions to political parties. In 1995, the U.S. Court of Appeals for D.C. Circuit held that Rule G-37 constitutes "government action of the purest sort" and thus is subject to the First Amendment of the U.S. Constitution. *Blount v. SEC*, 61 F.3d 938, 941 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1119 (1996). On the merits, the Court held that compelling interests justified the Rule, and that (in its view) the Rule was narrowly tailored to advance those interests, and thus that the Rule did not violate the First Amendment. *Id.* at 944-48. The *Blount* court's

[1] I am a partner in the broker-dealer group at the law firm of Bingham McCutchen LLP, where I advise municipal advisors and other financial services firms on compliance with the federal securities laws and rules and SRO rules, including MSRB rules. I was formerly General Counsel of Charles Schwab & Co., Inc., a firm which was subject to MSRB rules, and previously was Assistant General Counsel for Market Regulation at the SEC. I am currently chair of the ABA Business Law Section's Subcommittee on Trading & Markets. I submit this petition solely in my personal capacity.

holding that Rule G-37 constitutes government action subject to the First Amendment remains good law and is binding on the MSRB (which intervened as a party in *Blount*).

However, the "narrow tailoring" conclusion of *Blount* cannot survive the SEC's adoption of Rule 206(4)-5. As the MSRB is no doubt aware, when the SEC originally proposed this rule, in Advisers Act Rel. No. 2910 (Aug. 3, 2009), the SEC proposed contribution limits that were substantively identical to those in MSRB Rule G-37. The SEC explained that keeping these contribution limits identical would ease compliance for dual-registrant firms that were subject both to Rule 206(4)-5 and Rule G-37. However, commenters on the SEC proposal (including myself) argued that intervening U.S. Supreme Court decisions since *Blount*, particularly *Randall v. Sorrell,* 548 U.S. 230 (2006), and *Citizens United v. FEC*, 558 U.S. ___,130 S. Ct. 876 (2010), had undercut many of the conclusions of *Blount.* [2]

As a result of the notice and comment process, the SEC substantially revised the final Rule 206(4)-5. Rather than the *de minimis* contribution limit of $250 per a candidate for whom a "covered associate" is entitled to vote, the SEC adopted a $350 contribution limit. And rather than forbidding "covered associates" from contributing at all to candidates for whom they are not entitled to vote, the SEC adopted a $150 contribution limit for these individuals.[3] These decisions were dictated by the Supreme Court's decision in *Randall v. Sorrell*, 548 U.S. 230, 249 (2006), which held that "contribution limits that are too low . . . harm the electoral process" in violation of the First Amendment. The Court applied this holding to invalidate a Vermont statute that limited

---

[2] My comment letters to the SEC on proposed Rule 206(4)-5, addressing *Randall v. Sorrell,* and *Citizens United v. FEC* respectively, are available at http://www.sec.gov/comments/s7-18-09/s71809-2.pdf and http://www.sec.gov/comments/s7-18-09/s71809-255.pdf.

[3] The complete bar on contributions for whom a municipal advisor professional is not entitled to vote is particularly vulnerable to First Amendment challenge. The "symbolic expression of support evidenced by a contribution," *Randall,* 548 U.S. at 247 (*quoting Buckley v. Valeo,* 424 U.S. 1, 21 (1975)) has long been deemed to be constitutionally protected free speech, and *Randall* specifically reaffirmed the importance of that right. No court has ever held that a citizen's core associational First Amendment rights could be restricted merely to candidates for whom the citizen is entitled to vote. Whatever the merits of the parallel provision in MSRB Rule G-37 before *Randall* (the *Blount* court did not even discuss this issue), it cannot survive as constitutional today. Nor can it survive as "narrowly tailored" in light of the SEC's decision to allow contributions of up to $150 in Rule 206(4)-5.

state campaign contributions to $200.[4] As applied here, the MSRB cannot prevail in arguing that the $250/$0 contribution limits in Rule G-37 are "narrowly tailored," when the SEC, only last year, proposed exactly the same contribution limits, but then decided that $350/$150 contribution limits were sufficient to prevent *quid pro quo* corruption.

Moreover, the SEC's adopting release for Rule 206(4)-5 specifically states that the contribution limits in the rule do not apply at all to independent expenditures in support of a candidate.[5] By contrast, the MSRB's proposed Rule G-42 defines "contribution" as "any gift, subscription, loan, advance, or deposit of money or anything of value made . . . for the purpose of influencing any election for federal, state or local office" and thus does not distinguish between independent expenditures in support of a candidate and contributions directly to that candidate.[6] As the SEC recognized, the U.S. Supreme Court has held that independent expenditures are protected political speech not only by individuals, but even by corporations, and no governmental interest in preventing fraud or corruption is sufficient to overcome that interest.[7] Again, the MSRB cannot support a ban on independent expenditures in support of candidates in the face of an SEC conclusion that such a ban is unnecessary.

Finally, the SEC specifically permits contributions to political parties in Rule 206(4)-5, so long as those contributions are not earmarked for particular issuer officials.[8] A bar on such contributions "threatens harm to a particularly important political right, the right to

---

[4] *See* 548 U.S. at 249-53. These cites are to the controlling plurality opinion of Justices Breyer, Alito and Roberts. Justices Kennedy, Scalia and Thomas concurred separately -- each of them would have held that all campaign contribution limits are unconstitutional in all circumstances.

[5] Investment Advisers Act Rel. No. 3013 (July 2010), text accompanying n.71.

[6] The MSRB has interpreted its parallel language in Rule G-37 to apply, at a minimum, to contributions to non-political housekeeping, conference and overhead accounts of political organizations. See MSRB, Interpretative Letters to Rule G-37 (available at http://www.msrb.org/msrb1/rules/interpg37.htm). The MSRB has not specifically addressed independent expenditures. If the MSRB does not mean for its ban to apply to independent expenditures despite the broad wording of its rule, it should so state.

[7] Investment Advisers Act Rel. No. 3013 (July 2010), at n.71 (*citing Citizens United v. FEC,* 130 S. Ct. 876 (2010)).

[8] *Id.* at n.154.

associate in a political party." *Randall,* 548 U.S. at 256.[9] By contrast, proposed Rule G-42(c)(ii) would entirely forbid contributions to political parties. Once again, the SEC's original proposal would have mirrored the flat ban on contributions to political parties contained in Rule G-37 and proposed Rule G-42, and the SEC in its final rule concluded such a ban was not necessary to effect the governmental interests at issue. The MSRB cannot succeed in argument that such a complete ban on contributions to political parties is "narrowly tailored" when the SEC, only last year, concluded it was not necessary.

The MSRB cannot distinguish *Randall* and *Citizens United* on the ground that the statutes at issue in those cases applied to all individuals or corporations, but proposed Rule G-42 applies only to municipal advisors and municipal advisor professionals. The Supreme Court has held that the government may not require the waiver of an individual's First Amendment rights to free speech and association as a condition of engaging in that individual's chosen profession.[10] It has also been suggested that proposed Rule G-42 could be defended on the ground that it does not absolutely bar campaign contributions; it merely bars seeking municipal advisory work from state or local governments after having made those contributions. But this argument cannot survive *Citizens United.* Similarly, in that case, the government argued that the corporation could speak by organizing a political action committee, or by speaking at times other than the 30 days prior to an election. The Court majority rejected these arguments, stating that "As a 'restriction on the amount of money a person or group can spend on political communication during a campaign,' that statute 'necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.'" *Slip op.* at 22 (*quoting Buckley* v. *Valeo*, 424 U. S. 1, 19 (1976) (*per curiam*)). As the Court went on to hold, "For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Id.* at 23. In short, the fact that proposed rule discourages and burdens political speech by imposing onerous consequences upon the exercise of the free speech right, rather than outright banning political speech, does not change the First Amendment

---

[9] Moreover, as one of the *Citizens United* concurrences points out, "the individual person's right to speak includes the right to speak *in association with other individual persons*" (Scalia, J., concurring, *slip op*. at 7, emphasis in original), and specifically cites political parties as the paradigmatic example of that right. *Id.* at 8. The bar in proposed Rule G-42 on contributions to political parties (either by municipal advisors, or municipal advisor professionals), cannot survive *Citizens United.* The ban in MSRB Rule G-37(c)(ii) on contributions to political parties had not yet been adopted at the time *Blount* was argued, and thus the D.C. Circuit did not address, and did not approve, that ban.

[10] *See, e.g., Elrod v. Burns,* 427 U.S. 347, 357-61 (1976); *Perry v. Sindermann,* 405 U.S. 593, 597-98 (1972); *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968).

analysis. After *Citizens United,* imposing a burden on political free speech triggers First Amendment scrutiny.

Rule G-42 as currently proposed written plainly violates the First Amendment. To survive as "narrowly tailored" in light of the SEC's Rule 206(4)-5, the MSRB would have to: (1) allow a municipal advisor professional to make contributions of up to $350 to candidates for whom the professional is entitled to vote, (2) allow a municipal advisor professional to make contributions of up to $150 to candidates for whom the professional is not entitled to vote, (3) allow both municipal advisors and municipal advisor professionals to make contributions to political parties so long as those contributions are not earmarked for particular issuer officials, and (4) clarify that independent expenditures in support of issuer officials are permitted under the rule. The MRSB, which has also proposed changes to Rule G-37 to conform to its proposed Rule G-42, should make these conforming changes to Rule G-37 as well. With the changes I have outlined above, it is possible that a revised Rule G-42 could survive constitutional scrutiny. Without those changes, not only will Rule G-42 be found to violate the First Amendment, but Rule G-37 will be at risk as well.

I would be happy to discuss this issue with the Board or its Staff.

Sincerely yours,

W. Hardy Callcott

cc: Michael G. Bartolotta, *Chair*
John W. Young II, *Vice Chair*
Milroy A. Alexander, *Board Member*
Sheryl D. Bailey, *Board Member*
Robert A. Fippinger, *Board Member*
Jay M. Goldstone, *Board Member*
Frank Thomas Howard, *Board Member*
David J. Madigan, *Board Member*
Kathleen A. McDonough, *Board Member*
Mark G. Muller, *Board Member*
John E. Petersen, *Board Member*
Benjamin S. Thompson, *Board Member*
C. Christopher Trower, *Board Member*
Martin H. Vogtsberger, *Board Member*
Kevin L. Willens, *Board Member*
Adela Cepeda, *Board Member*
Robert A. Lamb, *Board Member*
Noreen P. White, *Board Member*
Stanley E. Grayson, *Board Member*

Stephen E. Heaney, *Board Member*
Alan D. Polsky, *Board Member*
Lynette Kelly Hotchkiss, *Executive Director*
Ernesto A. Lanza, *General Counsel*
Peg Henry, *Deputy General Counsel*

From: Robert Fisher

Sent: Friday, February 25, 2011 1:40 PM

To: Comment Letters

Subject: COMMENT ON PAY TO PLAY RULE FOR MUNICIPAL ADVISORS - MSRB NOTICE 2011-04 (JANUARY 14, 2011)

Ladies and Gentlemen:

To reduce the burden of complying with the reporting requirements of MSRB Rule G-42 on municipal advisors who (and whose associated municipal advisor professionals and executive officers) simply do not make political contributions of any kind in any amount (and who control no PACs), I would like to see Rule G-42 provide an exemption for such municipal advisors to its quarterly Form G-42 filing requirement, one that is essentially equivalent in nature to the exemption provided in paragraph (e)(ii) of the proposed rule for those municipal advisors who are not engaging in any municipal advisory activity. In other words: if the rule is to provide an exemption for those who do not "play", perhaps it should also do so for those who do not "pay".

Such an exemption would have to incorporate a sufficiently aggressive lookback provision to capture any contribution that could possibly disqualify the municipal advisor from engaging in a municipal advisory activity under the rule; and would tend to be claimed by smaller municipal advisors, who with fewer (or no) employees would find it easier to establish that no such contributions have been made. I therefore believe that such an exemption would avoid the imposition of a regulatory burden on small municipal advisors that is not necessary to the intended purpose of Rule G-42.

Yours, sincerely

Robert Fisher

Registered Municipal Advisor
239 4th Ave Ste 1301
Pittsburgh, Pa. 15222
(412) 564-4585

From: Dareth Goulding [dareth@glhicks.com]
Sent: Friday, January 14, 2011 6:13 PM
To: Comment Letters
Subject: Comments on MSRB Notice 2011-04

We think that the MSRB Rule G-42 is a necessary rule to have in place so as not to allow the possibility of creating favoritism.

Thank you,

Dareth Goulding
G.L. Hicks Financial LLC
5033 Riverpark Way
Provo, Utah 84604
(801) 225-0731
(866) 225-1909 FAX
dareth@glhicks.com

UMBAUGH
It's all about experience.
H. J. Umbaugh & Associates
Certified Public Accountants, LLP
8365 Keystone Crossing
Suite 200
P.O. Box 40498
Indianapolis, IN 46240-0498
Phone: 317 465 1500
Fax: 317 465 1550
www.umbaugh.com

February 24, 2011

Mr. Ronald W. Smith, Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street
Alexandria, VA 22134

Re: MSRB Rule G-42

Dear Mr. Smith:

Please consider these comments to draft Rule G-42. Our firm of certified public accountants has been advising cities, counties, school corporations, towns and other governmental units in Indiana for more than sixty years. We have established internal policies which prohibit our firm, our partners and our employees from making political campaign (including ballot referenda) contributions to elected officials and candidates for elected office of current and potential clients. We support many of the proposed provisions of draft Rule G-42. However, we do have concerns in the following areas.

Draft Rule G-42 is not clear as to the types of transition expenses that may be considered contributions in violation of the rule. For example, our firm is often asked to participate in educational programs, many organized by associations of governments, to assist in training newly elected officials or their appointees prior to the date that they officially take office or assume an appointment. Recent topics have included budgeting, debt issuance and disclosure, financial planning, government oversight, investments and pension issues, and revenues and expenditures. In addition, we are sometimes asked directly by the newly elected officials or their transition staffs or other advisors, including other clients, to provide such training. In either case, we are not compensated for our time or firm resources expended (for example, costs of presentation materials and travel). Although these *pro bono* programs are intended to be educational in nature, we are concerned draft Rule G-42 would result in their treatment as a contribution in violation of the rule.

Another concern relates to municipal advisors who serve in an elected office or determine to seek an elected office. We are concerned that if a municipal advisor professional were to make a *non de minimis* contribution of money, property or services to his or her own election campaign, the municipal advisor professional and the municipal advisor would be banned under draft Rule G-42 from providing services for compensation to the government to which the municipal advisor professional is elected for a two year period.

We have one final observation regarding the proposed two year ban on providing services for compensation: fundraising for municipal campaigns often begins a year or more in advance of the date the successful candidate takes office, and the first year of most new administrations is often devoted to evaluating community needs and priorities. As a result, many projects and project financings will not be undertaken until the administration begins its second year in office. As a result, if a municipal advisor or a municipal advisor professional were to make a *non de minimis* contribution at the beginning of the election campaign cycle, neither the municipal advisor nor the professional will truly bear the economic consequences of draft Rule G-42's ban on providing services for compensation as no compensated services will be required until after the two year ban has effectively run. If Rule G-42 is to be truly effective in curbing pay-to-play activities, we believe the term of the ban should be identical to the term of the related office to which the *non de minimis* contribution relates. For instance, if the contribution were made to a mayor who was elected to a four year term, the ban would be extended to four years.

Thank you for this opportunity to comment on proposed Rule G-42. If you have questions about our comments, please let us know.

Very truly yours,

UMBAUGH

Gary Malone

Gerald G. Malone

GGM/jmg

National Association of Independent Public Finance Advisors
P.O. Box 304
Montgomery, Illinois 60538.0304
630.896.1292 • 209.633.6265 Fax
www.naipfa.com

February 24, 2011

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

RE: MSRB Notice 2011-04
Request for Comments on Pay to Play Rule (Rule G-42) for Municipal Advisors

Dear Mr. Smith:

The National Association of Independent Public Financial Advisors (NAIPFA) appreciates this opportunity to provide comments to the Municipal Securities Rulemaking Board (MSRB) on the proposed Pay to Play Rule (Rule G-42) for Municipal Advisors.

NAIPFA, founded 21 years ago, is a professional organization of independent public finance advisory firms that provide public finance advice to municipal and non-profit entities. NAIPFA comprises thirty-two member firms serving all fifty states from locations in twenty–six states. Independent public finance advisors offer a wide variety of consulting services to issuers and obligated persons. In 2009, NAIPFA members represented clients on over 2,800 separate bond issues with approximately $75 billion in par amount.

Our association denounces political contributions that are intended to influence the awarding of municipal finance business. In fact, NAIPFA's professional standards of conduct include bans on making political contributions at the state and local levels and on soliciting or coordinating political contributions, provided that a municipal finance professional may contribute up to a $250 *de minimus* amount to officials of an issuer for whom the contributor is entitled to vote.

Unlike Rule G-37 and the proposed Rule G-42 that allow contributions (both direct and in-kind) to bond ballot campaigns, NAIPFA believes such contributions to be "political contributions" and lead to the very same abuses attributable to political contributions to individuals. After all, the governing board that approves the placement of a bond authorization on an election ballot is the same governing board that later approves the financing team for the bonds issued under that authorization should it be approved by voters. Thus, contributions to a bond ballot campaign can directly affect the awarding of business by said governing board and should consequently be banned.

Bond election campaigns are fundamentally intended to be grass roots campaigns at the local level. An agency seeking voter approval of a bond measure typically needs to conduct fundraising

activities to pay for election planning, political consultants, pollsters and campaign events and materials. All too often, we see funds and/or campaign services being contributed to bond campaigns by underwriters, financial advisors, and municipal bond attorneys who end up providing services for the bond transaction work once the election is successful. In addition, we have seen underwriters and/or financial advisors "bundle" campaign services with the campaign's political strategist and/or pollster at no charge to the municipal entity but are later compensated for such services from a bond transaction once the election is successful. While these bond ballot contributions may be an easy source of campaign financing to the agency, the motivation behind the contributions has little if anything to do with the grass roots goals of the agency; rather, they have everything to do with securing an advantage over non-contributors when the bond transaction team is selected. They may also corrupt the public purchasing process and result in non-transparent fee arrangements.[1] NAIPFA believes that the proposed Rule G-42 does not go far enough in this regard. Instead, the proposed Rule G-42 should broaden the standards of ethical behavior to include a ban on municipal advisory business in the event of abusive bond ballot contributions.

NAIPFA also believes that *non de minimus* political contributions to an official of a municipal entity by non-MAP executive officers should trigger a two-year ban on business. We believe that allowance of such contributions provides large firms an opportunity to make significant "indirect" contributions that directly benefit the municipal business of such firms. Specifically, an official of a municipal entity who receives such a contribution may learn that the individual making the contribution works as "Firm X" and thus be influenced to award business to the municipal unit of Firm X that employs the non-MAP executive officer.

NAIPFA has the following specific comments on proposed Rule G-42 and the related changes to Rules G-8 and G-9:

1. NAIPFA sees no benefit in allowing underwriters and financial advisors an "end run" around the nominal "banning of influence peddling" intent of the proposed Rule G-42 by permitting contributions to bond ballot campaigns. Therefore, we propose that *de minimus* contributions to bond ballot campaigns by MAPs and non-MAP executive officers eligible to vote on said campaign measure be permitted, but that all other contributions to bond ballot campaigns trigger a two year ban on municipal advisory business with the associated municipal entity. Rule G-37 should concurrently be conformed to contain the same bond ballot campaign contribution provisions for MFPs and non-MFP executive officers that we propose for Rule G-42 for MAPs and non-MAP executive officers.

---

[1] The Legislative Counsel in California goes even further by concluding that contribution of campaign services by underwriters is illegal in its opinion issued on June 28, 2010 that "...a school district or other local agency may not condition the award of an agreement to provide bond underwriting services on the underwriter also providing campaign services in support of that bond measure or another bond measure proposed by the school district or other local agency."

2. NAIPFA sees no benefit in allowing underwriters and financial advisors an "end run" around the nominal "banning of influence peddling" intent of the proposed Rule G-42 by permitting non-MAPs to make *non-de-minimus* political contributions to an official of a municipal entity. Therefore, we propose that *de minimus* contributions to an official of a municipal entity by non-MAP executive officers eligible to vote for such official be permitted but that all other political contributions trigger a two year ban on municipal advisory business with the associated municipal entity. Rule G-37 should concurrently be conformed to contain the same contribution provisions for non-MFP executive officers that we propose for Rule G-42 for non-MAP executive officers.

3. NAIPFA is supportive of mandatory electronic filing of forms related to the proposed Rule G-42.

4. With respect to the conforming changes to Rules G-8 and G-9 regarding recordkeeping requirements, NAIPFA believes the proposed changes are reasonable.

Sincerely,

Colette Irwin-Knott

Colette Irwin-Knott, CIPFA
President
National Association of Independent Public Finance Advisors

cc Martha Haines, S.E.C.
Michael Coe, S.E.C.

From: RepexInvestments

Sent: Friday, January 14, 2011 3:14 PM

To: MSRB

Subject: Re: MSRB Notice 2011-04: Request for Comment on Pay to Play Rule for Municipa...

If any forms are to be filed they should be filed only
by those firms that do business with those municipalities,
state pensions etc..

Enough with new form filings that do not apply
to most of us. The little firms are suffocating.
I hope you get the message.
Erich Sokolower
Repex & Co., Inc/

sifma
Invested in America

February 25, 2011

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street
Alexandria, VA 22134

Re: MSRB Notice 2011-04

Dear Mr. Smith:

The Securities Industry and Financial Markets Association (**"SIFMA"** or **"we"**)[1] welcomes this opportunity to comment on Proposed Rule G-42 (**"Proposed Rule G-42"** or the **"Proposed Rule"**), the proposed pay-to-play rule for municipal advisors, which the Municipal Securities Rulemaking Board (**"MSRB"**) issued for comment on January 14, 2011.[2] SIFMA strongly supports the MSRB's goal of eliminating "pay-to-play" practices from the business of municipal advisors with state and local government entities. We write, however, to address certain concerns regarding the scope, timing, and operation of the Proposed Rule.

EXECUTIVE SUMMARY

Proposed Rule G-42 bans "municipal advisors," a category created by Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act

[1] SIFMA brings together the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

[2] MSRB Notice 2011-04, Request for Comment on Pay to Play Rule for Municipal Advisors (Jan. 14, 2011) (**"MSRB Notice 2011-04"**).

(**"Dodd-Frank"** or **"the Dodd-Frank Act"**),[3] from advising or soliciting a municipal entity within two years of a non-*de minimis* contribution by the municipal advisor to an official of that entity (**"covered political contribution"**).[4] But there are conflicts between the definition of "municipal advisor" in the Dodd-Frank Act and the SEC's notice of proposed rulemaking on the "Registration of Municipal Advisors" (**"Municipal Advisors NPRM"**).[5] In our letter submitted on February 22, 2011 commenting on the SEC's Municipal Advisors NPRM, we provided extensive comments to the SEC addressing these inconsistencies.[6] We therefore incorporate these comments by reference, and only repeat them as necessary in this letter for context and clarity.

Given the inconsistencies between the text of Dodd-Frank and the proposed definitions in the Municipal Advisors NPRM, SIFMA encourages the MSRB to split this rulemaking into two stages—as it has effectively done with other recent rulemakings[7]—moving forward with respect to those parties who are clearly covered under the statutory definition of "municipal advisor," while delaying action for those entities who may not qualify until the SEC's definition of "municipal advisor" is finalized. Relatedly, because Proposed Rule G-42's definition of "solicitation" is in part inconsistent with the statutory definition of "municipal advisor" in Dodd-Frank, we recommend that the MSRB revise the "solicitation" definition accordingly, delaying any consideration of an expanded definition until the scope of the term "municipal advisor" is settled. The two-stage approach we propose would necessitate coordination with the SEC to ensure that broker-dealer placement agents who currently solicit government entities on behalf of investment advisers are not effectively barred from continuing to provide such services by the "**SEC's Pay-to-Play Rule**,"[8] which prohibits investment advisers from paying registered broker-dealers to solicit government

---

[3] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). Section 975 has been codified in relevant part at 15 U.S.C. § 78o-4.

[4] Proposed Rule G-42(b).

[5] Registration of Municipal Advisors, 76 Fed. Reg. 824, 831-32 (Jan. 6, 2011).

[6] Ltr. from SIFMA to Elizabeth M. Murphy, Sec'y, SEC (Feb. 22, 2011) (**"SIFMA Municipal Advisors NPRM Letter"**).

[7] *See* MSRB Notice 2011-16: Request for Comment on Gifts and Gratuities Rule for Municipal Advisors (Feb. 22, 2011) (**"MSRB Notice 2011-16"**), *available at* http://msrb.org/Rules-and-Interpretations/Regulatory-Notices/2011/2011-16.aspx; MSRB Notice 2011-14: Request for Comment on Draft MSRB Rule G-36 (On Fiduciary Duty of Municipal Advisors) and Draft Interpretive Notice (Feb. 14, 2011) (**"MSRB Notice 2011-14"**), *available at* http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2011/2011-14.aspx?n=1; & MSRB Notice 2011-13: Request for Comment on Draft Interpretive Notice Concerning the Application of MSRB Rule G-17 to Municipal Advisors (Feb. 14, 2011) (**"MSRB Notice 2011-13"**), *available at* http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2011/2011-13.aspx?n=1.

[8] *See* Political Contributions by Certain Investment Advisers; Final Rule, 75 Fed. Reg. 41,018 (July 14, 2010) (**"SEC's Pay-to-Play Rule"**) (codified at 17 C.F.R § 275.206(4)-5).

entities after September 13, 2011, unless such broker-dealers are subject to a pay-to-play regime (**"the September problem"**).[9]

For those persons who are clearly covered municipal advisors, and regardless of the outcome of the SEC's Municipal Advisors NPRM, we recommend that the MSRB revise its proposal to harmonize Proposed Rule G-42 with MSRB Rules G-37 and G-38 and the SEC's Pay-to-Play Rule. As proposed, Rule G-42 and the amended Rule G-37 would create duplicative and potentially costly recordkeeping and reporting requirements with respect to associated persons who would qualify as both municipal advisor professionals (**"MAPs"**) and municipal finance professionals (**"MFPs"**). We provide the MSRB with suggested targeted revisions to Proposed Rule G-42 and Rule G-37 to reconcile the two schemes while allowing the MSRB to monitor all activities covered by Rule G-37 and the municipal advisor category in Section 975 of Dodd-Frank. We also recommend an amendment to Rule G-38 that would, in conjunction with Rule G-42, permit municipal dealers to use any regulated solicitor subject to a pay-to-play regime regardless of affiliate or non-affiliate status. Moreover, although we believe that the MSRB has rightly concluded that the *de minimis* contribution limits in Proposed Rule G-42 should parallel those in Rule G-37, we believe the limits for both Rule G-37 and G-42 should be the same as the limits contained in the SEC's Pay-to-Play Rule.

In addition, we propose that the MSRB adopt a more narrowly tailored ban on compensation in Proposed Rule G-42 to allow solicitors to receive compensation for solicitations completed prior to a covered political contribution. This more narrowly tailored rule should also be harmonized with the SEC's Pay-to-Play Rule so that the two-year ban on compensation runs from the date of the covered political contribution, rather than from the date of the end of the advisory relationship, in cases where the municipal advisor owes a fiduciary duty to a municipal entity and therefore must wind down its advisory business before terminating it.

Finally, SIFMA recommends that the MSRB identify an operative date that gives covered municipal advisors an adequate opportunity to alter their compliance structures to conform to the new requirements of Proposed Rule G-42. At the same time, if necessary, we recommend the MSRB permit voluntary compliance prior to the operative date in order to allow municipal advisors with sufficient compliance structures to subject themselves to a pay-to-play regime in order to meet the September 13, 2011 deadline in the SEC's Pay-to-Play Rule.

[9] *See* discussion of this "September problem" *infra* Section I.B.

I. PROPOSED RULE G-42 IS PREMATURE, NECESSITATING A TWO-STAGE APPROACH

Proposed Rule G-42 rests on the assumption that the definition of "municipal advisor" is relatively clear. But that is not the case—to the contrary, substantial differences between the statutory definition of "municipal advisor" in the Dodd-Frank Act and the SEC's definition of "municipal advisor" in its Municipal Advisors NPRM are causing significant confusion over the scope of the proposed rule.[10] The uncertainty of the definition of "municipal advisor" is important because Proposed Rule G-42 is unlikely to be an effective pay-to-play regime if it is designed and tailored to regulate numerous entities ultimately not subject to the Rule's provisions. Therefore, we respectfully submit the following two-stage approach for consideration.

A. Proposed Two-Stage Approach

There are three general categories of individuals and entities potentially affected by Proposed Rule G-42. For ease of reference, we have categorized the parties in Appendix A. One category encompasses those parties clearly covered by the definition of "municipal advisor" in both the Dodd-Frank Act and the SEC's Municipal Advisors NPRM (**"Category A"**). A second, "disputed" category is made up of those parties not covered by Dodd-Frank's definition of "municipal advisor," but who are included in the SEC's definition of "municipal advisor" in its Municipal Advisors NPRM (**"Category B"**). A third category consists of those parties clearly outside the scope of both Dodd-Frank and the SEC's Municipal Advisors NPRM (**"Category C"**), but who the SEC and MSRB suggest may "voluntarily" register as municipal advisors so as to remain eligible to be retained by investment advisers to solicit government entities under the SEC's Pay-to-Play Rule.

SIFMA proposes the MSRB split the proposed rulemaking into two stages by proceeding with the Proposed Rule G-42 for previously unregulated persons (Category A) while delaying promulgation of a rule for entities that may—or may not—ultimately be covered by the SEC's final definition of "municipal advisor" (Category B).[11] While the parties in Category C do not qualify as municipal

[10] We have discussed these differences and problems they raise at length in our Companion Letter to the SEC, attached hereto as Exhibit 1 and filed on February 25, 2011, as well as in our January 24, 2011 letter to the SEC on the proposed amendments to the Pay-to-Play Rule, Ltr. from SIFMA to Elizabeth M. Murphy, Sec'y, SEC, *available at* http://www.sec.gov/comments/s7-36-10/s73610-34.pdf.

[11] For example, it is unclear whether and to what extent banks are subject to regulation as municipal advisors. As SIFMA has commented in its letter to the SEC on the Municipal Advisors NPRM, the SEC's proposed definition of "investment strategies" is broad enough to potentially capture banks holding funds of a municipal entity that may be used for investment. SIFMA Municipal Advisors NPRM Letter at 14-15.

advisors, both the SEC and the MSRB have suggested that some of Category C's parties may "voluntarily" register as municipal advisors. As discussed below, *see infra* page 8, and in our **"Companion Letter"** filed today with the SEC, (attached here as Exhibit 1), "voluntary" registration raises significant legal and practical issues.

We commend the MSRB for adopting a two-stage approach in other recent rulemakings involving municipal advisors and believe it should use the same approach here. For example, recognizing the dispute over whether certain brokers are covered "municipal advisors" under the Dodd-Frank Act, the MSRB adopted a two-stage approach in its *Request for Comment on Draft MSRB Rule G-36*, which addresses the fiduciary duties of municipal advisors.[12] The MSRB explained that "should certain brokerage activities be construed [by the SEC in its final rule on municipal advisors] to be the provision of advice on investment strategies, and, therefore, make the brokers municipal advisors, the Board would reconsider" the interpretive notice accompanying Rule G-36 as necessary.[13] Similarly, the MSRB decided to issue a draft interpretive notice on the application of Rule G-17 to municipal advisors "without regard to any interpretation of that term proposed by" the SEC in its Municipal Advisors NPRM, thus reserving for further MSRB rulemaking any issues arising from the SEC's final municipal advisors rule.[14] Given the substantial uncertainty regarding the Municipal Advisors NPRM, we believe that the MSRB should adopt an analogous two-stage approach in the present rulemaking.

B. Proposed Rule G-42's Interplay With The SEC's Pay-To-Play Rule—The "September Problem"

As discussed in our Companion Letter to the SEC, broker-dealer placement agents registered with the SEC who are engaged in the solicitation of municipal entities for investments in funds ("**BD placement agents**") must be subject to a pay-to-play rule at least as stringent as the SEC's Pay-to-Play Rule by September 13, 2011. Third-party BD placement agents are among the disputed group of Category B solicitors, and affiliated BD placement agents are clearly not municipal advisors (Category C). Both third-party and affiliated BD placement agents, however, are currently permitted solicitors under the SEC's Pay-to-Play Rule.[15] Assuming third-party BD placement agents are ultimately determined not to be municipal advisors (and therefore not subject to G-42), investment advisers may not continue engaging and compensating them (or affiliated BD placement agents) to solicit government entities after September 13, 2011 unless (i) BD

[12] MSRB Notice 2011-14, *supra* note 7.

[13] *Id.*

[14] MSRB Notice 2011-13, *supra* note 7. Rule G-17 prohibits municipal dealers from engaging in deceptive, dishonest, or unfair practices.

[15] *See* SEC's Pay-to-Play Rule, 75 Fed. Reg. at 41,018.

placement agents voluntarily subject themselves to municipal advisor registration (where they would then fall under G-42), or (ii) the SEC alone (or together with an appropriate self-regulatory organization) adopts a separate pay-to-play regime for BD placement agents. We explain in our Companion Letter to the SEC that requiring BD placement agents to "voluntarily" register as municipal advisors is not an appropriate solution to this problem and ask that the SEC work with the MSRB and FINRA to create a single, non-duplicative and jurisdictionally sound pay-to-play regime for BD placement agents. *See also infra* page 7.

Based on the foregoing, we request that the MSRB coordinate with the SEC to ensure that, whatever the outcome of the SEC's Municipal Advisors NPRM, BD placement agents are not inadvertently dropped from the pool of solicitors currently available to advisers. The SEC received many comments on its pay-to-play rule underscoring the benefits that placement agents provide to government entities, particularly their access to and the benefits they provide to small and mid-size advisers.[16] As part of the coordination process with the SEC, we also request that the MSRB clarify whether, assuming BD placement agents are not ultimately determined to be "municipal advisors," the MSRB has jurisdiction to simply add them to G-42 or whether the SEC (or FINRA) would have to create an analogous rule. SIFMA has always taken the position, and indeed, has been asking for, BD placement agents to be covered by a pay-to-play regime.[17] *See* Companion Letter, Ex. 1.

We have requested in our Companion Letter that the SEC work with the MSRB and FINRA to ensure that all BD placement agents are covered by a single, non-duplicative, and jurisdictionally sound pay-to-play regime by the September 13, 2011 deadline. We recognize the MSRB's jurisdiction is limited to municipal advisors, including those BD placement agents who have voluntarily registered as municipal advisors and therefore are presumably subject to Proposed Rule G-42. While we expect that a solution to the September problem will be forthcoming, in the event that BD placement agents are not determined to be municipal advisors, we request that the MSRB monitor the situation and take any actions within its authority to ensure that at least those BD placement agents who have voluntarily registered are covered by the deadline. Such stop-gap measures potentially could include the promulgation of a interim final rule to bridge any

---

[16] *See* SEC's Pay-to-Play Rule, 75 Fed. Reg. at 41,021, 41,038. *See, e.g.*, Ltr. from SIFMA to Elizabeth W. Murphy, Sec'y, SEC 13 (Oct. 5, 2009), *available at* http://www.sec.gov/comments/s7-18-09/s71809-166.pdf (commenting on the SEC's pay-to-play proposal) ("As the Chief Investment Officer of the Missouri State Employees Retirement System stated, 'limiting the role of placement agents would reduce our ability to access some of the best managers throughout the world and ultimately result in lower investment returns for our members'") & Ltr. from Lazard Freres & Co., LLC to Elizabeth M. Murphy, Sec'y, SEC (Oct. 5, 2009), *available at* http://www.sec.gov/comments/s7-18-09/s71809-168.pdf.

[17] Ltr. from SIFMA to Elizabeth Murphy, Sec'y, SEC (Oct. 5, 2009), *available at* http://sec.gov/comments/s7-18-09/s71809-166.pdf.

gap in coverage, allowing covered BD placement agents to continue their solicitation business pending an ultimate decision by the SEC on a final pay-to-play regime for BD placement agents.

C. The Definition Of "Solicitation"

SIFMA also urges the MSRB to follow the two-stage process with respect to Proposed Rule G-42's definition of "solicitation," as the scope of the definition also is linked to the municipal advisor rulemaking. Proposed Rule G-42 defines solicitation in relevant part as "a direct or indirect communication by any person with a municipal entity for the purpose of obtaining or retaining (A) municipal advisory business with a municipal entity or (B) third-party business."[18] The proposed rule further provides that "an investment adviser to a covered investment pool in which a municipal entity is solicited to invest shall be treated as though that investment adviser were providing or seeking to provide investment advisory services directly to the municipal entity" ("**covered investment pool clause**"), and defines "covered investment pool"[19] to encompass private funds and other types of pooled investment vehicles, including those that are investment options in government-sponsored plans such as 529 plans.[20] Thus, the proposed rule defines "solicitation" to include solicitations of municipal entities by BD placement agents to invest in private funds and pooled investment vehicles.

It is unclear, however, whether the MSRB has the authority to regulate such solicitations. On its face, Section 975 of the Dodd-Frank Act does not delegate to the MSRB the authority to regulate BD placement agents engaged by an investment adviser to solicit investments in funds managed by the adviser.[21] And beyond Section 975, we do not know of any other statute which provides the MSRB with the authority to regulate such activity. Thus, the only potential basis for the MSRB's jurisdiction over this of solicitation activity would be pursuant to

---

[18] Proposed Rule G-42(g)(ix).

[19] Both the SEC Pay-to-Play Rule and Proposed Rule G-42 define "covered investment pool" as:

> (A) An investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a) that is an investment option of a plan or program of a government entity [the Proposed Rule defines "government entity" by reference to the SEC's Pay-to-Play Rule]; or
>
> (B) Any company that would be an investment company under section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–3(a)), but for the exclusion provided from that definition by either section 3(c)(1), section 3(c)(7) or section 3(c)(11) of that Act (15 U.S.C. 80a–3(c)(1), (c)(7) or (c)(11)). Proposed Rule G-42(g)(xiii).

[20] SEC's Pay-to-Play Rule, 75 Fed. Reg. at 41,044.

[21] SIFMA Municipal Advisors NPRM Letter at 19 (citing *Goldstein v. SEC*, 451 F.3d 873, 879-80 (D.C. Cir. 2006) ("An investor in a private fund may benefit from the adviser's advice (or he may suffer from it) but he does not receive the advice directly.")).

the SEC's proposed definition of "municipal advisor," which extends beyond the text of Section 975. And, as discussed above, whether the SEC ultimately adopts a definition of "municipal advisor" broader than what is provided in the text of Section 975 will not be known until the conclusion of the Municipal Advisors NPRM.

Accordingly, we recommend that the MSRB eliminate the covered investment pool clause in the definition of "solicitation" pending completion of the SEC's promulgation of a final definition of "municipal advisor."[22] Until such time, the MSRB should not attempt to regulate solicitation activities that do not clearly fall within Section 975's coverage.[23]

D. The "Voluntary" Option

While it is unclear which parties and activities will eventually be covered by the definition of "municipal advisor," effectively requiring parties in an ambiguous status, such as third-party BD placement agents, or even those clearly not covered by the definition, such as affiliated solicitors, to "voluntarily" register as municipal advisors only leads to further confusion.[24] SIFMA supports pay-to-play regulation to protect against corruption in public investment, and in particular has requested and supported developing a pay-to-play regime for BD placement agents. Although at present the SEC has indicated that "voluntary" registration is a potential solution to the September problem, we do not believe that an approach which requires parties to subject themselves to municipal advisor status—and to incur potentially onerous regulatory, registration, and reporting requirements—merely to ensure that they are subject to pay-to-play regulation represents an appropriate long-term solution.[25] We recognize that some entities may continue in their present temporary registration status or register as a municipal advisor for the first time in order to avoid the September problem.

---

[22] There is therefore no statutory authority for the MSRB to treat solicitation of a municipal entity for investments in a covered investment pool as an attempt to sell advisory services to the municipal entity. If the SEC determines that BD placement agents are not municipal advisors, then the MSRB would need to amend the definition of "solicitation" in Proposed Rule G-42.

[23] Several states have already enacted significant and varying regulation of placement agent activity. As discussed *supra* page 5, SIFMA has consistently supported a pay-to-play rule for regulated BD placement agents, and believes a consistent federal regulatory scheme is preferable to piecemeal regulation by the states.

[24] MSRB Notice 2011-04, at n. 13.

[25] Indeed, it is not clear that the MSRB has the authority to regulate those parties that do not statutorily qualify as municipal advisors, even if they voluntarily register. For example, Congress expressly concluded that affiliated solicitors are not municipal advisors and thus not within in the MSRB's jurisdiction. Given Congress's choice, neither the SEC nor the MSRB has the authority to effectively require affiliated solicitors to register as municipal advisors in order to continue their business activities. *See, e.g.*, *Mich. v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) ("if there is no statute conferring authority, a federal agency has none"). *See also* Companion Letter, Ex. 1.

Such a solution, however, means subjecting already-regulated solicitors to another large body of regulation that is not, and never was, intended to cover sales of limited fund interests (*i.e.*, not municipal securities), and is less preferable than a tailored pay-to-play regime designed by FINRA or the SEC.[26]

* * *

In our view, the MSRB should instead tailor Proposed Rule G-42 to cover persons clearly within the definition of "municipal advisor" under Dodd-Frank and the SEC's Municipal Advisors NPRM (*i.e.*, Category A). We ask that it do so while keeping in mind the September problem for BD placement agents. In light of the present dispute over the scope of the "municipal advisor" definition—and, accordingly, the MSRB's jurisdiction—it is particularly difficult for us to comment meaningfully on the scope and operation of Proposed Rule G-42 as it applies to the disputed categories.[27] Proceeding with Proposed Rule G-42 with respect to the disputed categories would thus deprive potentially affected parties of an opportunity to comment on the proposal.

II. FOR ALL COVERED MUNICIPAL ADVISORS, THE MSRB SHOULD RECONCILE PROPOSED RULE G-42 WITH MSRB RULES G-37 AND G-38 AND THE SEC'S PAY-TO-PLAY RULE

Below we discuss issues that arise from the interplay between Proposed Rule G-42, MSRB Rules G-37 and G-38, and the SEC's Pay-to-Play Rule, for municipal advisors covered by Rule G-42.

First, we are concerned that, as proposed, Rule G-42 would impose unnecessary, duplicative, and potentially costly requirements on municipal dealers already subject to Rule G-37's recordkeeping and reporting requirements. We believe that the MSRB should minimize these burdens by standardizing recordkeeping and reporting requirements across both rules and by clarifying key definitional terms in Proposed Rule G-42.

Second, we believe that Proposed Rule G-42 and Rule G-38 should be coordinated to provide a comprehensive regime that allows municipal dealers to use either affiliated or non-affiliated persons to solicit municipal securities business, as long such persons are subject to comprehensive pay-to-play regulation. This can be accomplished by preserving Rule G-38 while amending it to permit the use of non-affiliated, regulated solicitors, much as the SEC decided

[26] SIFMA Municipal Advisors NPRM Letter at 25-26.

[27] *See, e.g.*, *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274-75 (D.C. Cir. 1994) (agencies must "provide[] sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully") (internal quotation and citation omitted); *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991) (affected parties cannot be "expected to divine the [agency's] unspoken thoughts").

to permit the use of non-affiliated, regulated solicitors by investment advisers under the SEC's Pay-to-Play Rule. Similarly, municipal advisors should not be prohibited from using non-affiliated municipal advisors to solicit on their behalf. Elimination of Rule G-38 is premature and should not be considered until the municipal advisor definition is settled.

Third, while we agree with the MSRB that the *de minimis* contribution limit should be uniform across Rule G-37 and Proposed Rule G-42, we recommend that the MSRB set the limit for both rules to match the approach taken in the SEC's Pay-to-Play Rule, which permits covered individuals to contribute up to $350 per election for candidates for whom they can vote and up to $150 per election for candidates for whom they cannot vote. We believe the SEC's approach reflects the reality of inflation since the MSRB adopted the $250 *de minimis* limit for Rule G-37 in 1994 as well as the Supreme Court's recent campaign finance decisions, which have significantly increased the First Amendment protection for political contributions.

A. The MSRB Should Adopt A Clear And Standardized Set Of Recordkeeping And Reporting Requirements Across Proposed Rule G-42 And Rule G-37

The MSRB has proposed to remove the category of "financial advisory services" from the definition of covered "municipal securities business" in Rule G-37,[28] and to cover such activity solely in Proposed Rule G-42,[29] presumably in light of the coverage of such services within the definition of "municipal advisor" in Section 975 of Dodd-Frank. Although SIFMA does not dispute that "financial advisory services" as encompassed by Rule G-37 fall within the ambit of covered municipal advisory services under Dodd-Frank, we believe that the proposed change does not adequately address the unnecessary burdens and duplication that result from the interplay between Rule G-37 and Proposed Rule G-42. Therefore, the MSRB should take additional steps to standardize the recordkeeping and reporting requirements across Proposed Rule G-42 and Rule G-37 and clarify the scope of key terms in Proposed Rule G-42. Our proposed revisions should reduce the burden of complying with the recordkeeping and reporting requirements in the two rules.

[28] *See* Rule G-37(g)(iv).

[29] MSRB Notice 2011-04, at "Draft New MSRB Rule G-42: Draft Rule G-42 Distinguished from Rule G-37."

1. Taken Together, Proposed Rule G-42 And Rule G-37 Would Create Unnecessary, Costly, And Potentially Inconsistent Recordkeeping And Reporting Requirements

Because Proposed Rule G-42 covers "financial advisory and consulting services," the MSRB proposes to eliminate a similar category of activities currently conducted by MFPs from Rule G-37.[30] The proposed shift fails to address fully, however, the potential cause for duplicative and burdensome recordkeeping and reporting requirements under the two rules: many MFPs engage in a sufficiently broad range of activities—including financial advisory services to municipal issuers—such that, notwithstanding the proposed shift, they will be subject to both Rule G-37 and Proposed Rule G-42. Specifically, many MFPs engage in various business activities and thus are covered under multiple prongs of the definition of "municipal finance professional" and "municipal securities business" in Rule G-37.[31] Accordingly, such professionals will continue to be subject to Rule G-37's recordkeeping and reporting requirements notwithstanding the proposed deletion of the "financial advisory and consulting services" category from the rule. If Rule G-42 is promulgated as proposed, the contributions of these same professionals will trigger recordkeeping and reporting requirements under that rule. Therefore, many individuals engaged in multiple forms of municipal securities representative activities will now need to comply with two pay-to-play regimes that, although similar in many ways, differ in several important respects.

For example, Proposed Rule G-42 would require far more burdensome recordkeeping and reporting requirements than Rule G-37 with respect to solicitation activities. Proposed Rule G-42(e)(i)(C)(2), unlike Rule G-37, requires the reporting of all solicitation activities, which significantly increases the reporting burden on affected entities. (See discussion *infra* page 14.) As a practical matter, this and other differences will result in confusing and potentially conflicting reporting requirements with respect to the activities of a single associated person.[32]

---

[30] MSRB Notice 2011-04, at "Draft Amendments to Existing MSRB Rules: MSRB Rule G-37." More specifically, Rule G-37 requires recordkeeping and reporting of the political contributions of any MFP, which is defined in part by reference to "municipal securities business," a term that currently includes "the provision of financial advisory or consultant services to or on behalf of an issuer with respect to a primary offering of municipal securities in which the dealer was chosen to provide such services on other than a competitive bid basis." Rule G-37(g)(iv) & (vii).

[31] *See* Rule G-37(g)(vii).

[32] There are other examples as well. Rule G-37(e)(i)(A) requires reports of "contributions to officials of issuers," which must include, among other things, disclosure of contributions to any elected official who "is directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer, or municipal securities dealer for municipal securities business," Rule G-37(e)(vi). Proposed Rule G-42(g)(vi) requires reports of contributions to a different set of

The dual reporting and enforcement regimes create an extraordinary compliance burden on municipal dealers because the activities of an associated person engaged in municipal securities business will need to be carefully evaluated to determine whether the individual must comply with G-37, Proposed Rule G-42, or both. For these reasons, simply moving coverage of "financial advisory and consulting services" to Proposed Rule G-42 will not adequately eliminate the confusing and costly overlap between the two recordkeeping and reporting regimes.

2. The MSRB Should Adopt Standardized, Clear Recordkeeping And Reporting Requirements Across Proposed Rule G-42 And Rule G-37

We therefore propose five modifications to Rule G-37 and Proposed Rule G-42 that would reduce the unnecessary confusion and overlap between the recordkeeping and reporting requirements of Proposed Rule G-42 and Rule G-37. These modifications would allow the MSRB to continue to require recordkeeping and reporting for all activities currently covered by Rule G-37 as well as those contemplated by the municipal advisor category in Section 975 of Dodd-Frank. These reforms therefore would represent a more narrowly tailored, less costly, and thus more reasonable regulatory regime than one in which the proposed regulatory shift occurs without further changes.[33]

a. The MSRB Should Permit Entities To Fulfill Their Rule G-37 And Rule G-42 Reporting Requirements On A Single Form

Under the current proposal, entities that employ persons who are both MFPs and MAPs would need to file on a quarterly basis both a Form G-37 (with respect to MFP activity) and a Form G-42 (with respect to MAP activity).[34] We believe that the MSRB could achieve significant regulatory benefits by providing a standardized macroform that would permit entities to file a single report covering the disclosure requirements for both Rules G-37 and G-42. A standardized form would provide regulated entities with clearer guidance regarding the scope and relationship of their Rule G-37 and G-42 recordkeeping and reporting requirements, and also likely would assist the MSRB in reviewing required disclosures. In our view, entities should be permitted to elect whether to report their covered Rule G-37 and G-42 activities on the standardized macroform

---

public officials, namely, those who, among other things, are "directly or indirectly responsible for, or can influence the outcome of, the hiring of a municipal advisor."

[33] *Nat'l Tel. Coop. Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009) (agency rules must be both "reasonable and reasonably explained").

[34] MSRB Notice 2011-04, at "Request for Comment: Electronic Filings" (discussing Forms G-37 and G-42).

or on separate forms. This would provide entities with dual MFPs/MAPs the flexibility to adapt their compliance systems to both Rules G-37 and G-42.

b. The MSRB Should Adopt A Consistent Definition Of Covered Supervisors Across Proposed Rule G-42 And Rule G-37

Proposed Rule G-42 would require reporting of contributions of persons who supervise a MAP for non-municipal business or solicitation activities. As the MSRB has explained, "[i]f an individual who is a [MAP] engages in municipal advisory business or solicits third-party business, as well as other activities (*e.g.*, municipal securities activities), the individual's supervisors for both types of activities would be considered municipal advisor professionals."[35] Rule G-37 does not sweep so broadly as to encompass supervisors who supervise municipal finance professionals for activities that do not involve "municipal securities business."[36] This reflects the MSRB's recognition that supervisors that have no nexus with covered municipal securities business do not present a significant pay-to-play risk. We see no policy or other reason for the different treatment in the two rules, which is not necessary to make Proposed Rule G-42 as stringent as the SEC's Pay-to-Play Rule. This proposed definition creates regulatory uncertainty and expands the reporting and recordkeeping requirements under Proposed Rule G-42 beyond what are required to address the risk of pay-to-play corruption. Indeed, to the extent there is no justification for burdening the political contributions of supervisors with little or no nexus to municipal advisory business, the First Amendment may prohibit the MSRB from regulating that activity.[37]

We therefore request that the MSRB follow the model of Rule G-37 and employ a standardized approach to supervisory personnel in both Rule G-42 and Rule G-37. The term "municipal advisory professional" should be defined to include only those supervisors who supervise municipal advisory or related solicitation activities, just as the definition of "municipal finance professional" in Rule G-37 reaches only supervisors who supervise municipal securities business.

---

[35] MSRB Notice 2011-04, at "Draft New MSRB Rule G-42: Draft Rule G-42 Distinguished from Rule G-37"; *see* Proposed Rule G-42(g)(iv)(C).

[36] MSRB Notice 2011-04, at *id.* ("the types of supervisors that are included within the definition of 'municipal advisor professional' would be different from the types of supervisors that are included in the definition of 'municipal finance professional' found in Rule G-37(g)(iv)"). "Municipal securities business" is defined at Rule G-37(g)(vii).

[37] *See Citizens United v. FEC*, 130 S. Ct. 876, 897 (2010); *see also infra* notes 46-49 and accompanying text.

c. The MSRB Should Preserve Uniform *De Minimis* Contribution Limits Across Rule G-37 And Proposed Rule G-42

As proposed, Rule G-42's definition of permissible *de minimis* political contributions will parallel the definition in Rule G-37: $250 per election for candidates for whom the contributor is entitled to vote. Like the MSRB, we believe that a uniform definition of permissible *de minimis* contributions will greatly facilitate the ability of regulated entities to design comprehensive compliance systems to track and report covered contributions. Although we recommend that the MSRB consider whether to modify the *de minimis* limit in both Rule G-37 and Rule G-42, *see infra* page 18-22, we support retaining the same limit for both rules.

d. The MSRB Should Adopt Consistent Recordkeeping Requirements Across Rule G-37 And Proposed Rule G-42

The creation of a standardized macroform, a consistent definition of covered supervisors, and uniform *de minimis* contribution limits would go far towards reconciling the recordkeeping and reporting requirements of Proposed Rule G-42 and Rule G-37. But there remains a substantial difference between the two rules: unlike Rule G-37 (not to mention the SEC's Pay-to-Play Rule), Proposed Rule G-42 requires entities to keep records of every single solicitation of third-party business. We believe the MSRB should reconcile Rule G-37 and Proposed Rule G-42 by requiring recordkeeping and reporting only with respect to solicitation activities that actually secure municipal advisory business. Requiring reports of unsuccessful solicitations adds a layer of unwarranted complexity on existing compliance requirements.

Proposed Rule G-42 requires municipal advisors to make quarterly filings to the Board.[38] As a part of these filings, municipal advisors must report not only (i) municipal advisory business with or on behalf of municipal entities, but also (ii) "in the case of third-party business solicited, a list of each municipal entity solicited during the calendar quarter by state, along with the names of persons on behalf of which third-party business was solicited and the nature of the third-party business solicited."[39] As a result, under the Proposed Rule, municipal advisors would be required to report business that they have not actually obtained and may

[38] Proposed Rule G-42(e)(i).

[39] Proposed Rule G-42(e)(i)(C)(2).

never bring in. Under the corresponding proposed changes to Rule G-8, municipal advisors would also be required to keep records of such solicitations for two years.[40]

Requiring municipal advisors to comply with Rule G-42 as proposed would force them to design systems capable of tracking every single communication that could be construed as an attempt to solicit municipal business. Such a system is not only impracticable but also unnecessary to satisfy the goal of preventing pay-to-play activity. This is clear from a comparison of Proposed Rule G-42 with Rule G-37, which requires each broker, dealer and municipal securities dealer to file "a list of issuers with which the broker, dealer or municipal securities dealer has engaged in municipal securities business during such calendar quarter, listed by state, along with the type of municipal securities business."[41] Put simply, for nearly two decades the MSRB successfully addressed pay-to-play concerns with respect to municipal securities business through a policy requiring only the reporting and recording of business actually obtained.

Moreover, the SEC *rejected* a recordkeeping and disclosure requirement similar to Proposed Rule G-42's requirement in its recent pay-to-play rulemaking. As initially proposed, SEC Rule 204-2(a)(18)(i)(B) would have required a list of all government entities that the adviser solicited for advisory business.[42] In response to comments from SIFMA and others, the SEC abandoned that proposal. Among the reasons[43] cited by the SEC in rejecting a requirement to track and report unsuccessful solicitations were that the potential scope of the requirement[44] was vague and that "requiring advisers . . . to make and keep these records could be unnecessarily intrusive to employees and burdensome on advisers."[45]

Proposed Rule G-42's approach is not needed to satisfy the goal of preventing pay-to-play activity, as shown by the effectiveness of G-37. The putative state interest justifying Rule G-42 is preventing pay-to-play corruption. But such a concern is inapplicable to unsuccessful solicitation activity, which

---

[40] Proposed Rule G-8(h)(i)(D)(2).

[41] G-37(e)(i)(C).

[42] *See* Proposed Rule 204-2(a)(18)(i)(B). *See also* SEC's Pay-to-Play Rule, 75 Fed. Reg. at 41,050.

[43] *See* SEC's Pay-to-Play Rule, 75 Fed. Reg. at 41,050 ("We are not requiring, as proposed, a list of government entities the adviser solicited for advisory business. Some commenters expressed concerns about the potential scope of this requirement and noted that solicitation does not trigger rule 206(4)-5's two-year time out, rather it is providing advice for compensation that does so. In light of these concerns, and the record before us today, we are not requiring advisers to maintain lists of government entities solicited that do not become clients." (internal citations omitted)).

[44] *See id.*

[45] *Id.*

involves neither a *quid-pro-quo* exchange nor the risk of actual corruption.[46] And that distinction matters: *Citizens United v. FEC* indicates that political contributions can be burdened only to prevent actual corruption or a substantial risk of such corruption.[47] Moreover, the proposed recordkeeping and reporting requirements burden the solicitation activity, which involves protected petitioning of government[48] and commercial speech in its own right.[49] Only actual transactions involve actual or potential corruption and are thus capable of justifying the substantial burdens on speech involved in Proposed Rule G-42's recordkeeping and reporting requirements.

In addition, we recommend that the MSRB clarify the quarterly reporting requirement regarding ongoing advisory relationships. Under Rule G-37, advisory assignments are only reported in the quarter during which the municipal dealer and municipal entity enter into the engagement letter for the advisory assignment. Specifically, Rule G-37 requires reporting of "a list of issuers with which the broker, dealer or municipal securities dealer *has engaged in* municipal securities business during [each] calendar quarter."[50] Municipal dealers thus do not report each quarter the existence of an ongoing advisory assignment. We suggest that Rule G-42 be similarly limited to reporting only those engagements that are obtained during a particular quarter.[51]

In sum, we believe that the MSRB should adopt a uniform recordkeeping and reporting rule for Rule G-37 and Rule G-42, under which only actual transactions engaged in during a quarter will be subject to recordkeeping and

---

[46] *Citizens United*, 130 S. Ct. at 897. Although the case involved limits on expenditures, the Court's reasoning regarding the state interests that will justify burdening political speech is applicable to limits on contributions as well. *See Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (plurality opinion) ("contribution limits might sometimes work more harm to protected First Amendment interests than their anticorruption objectives could justify") (citation omitted).

[47] *Citizens United*, 130 S. Ct. at 897.

[48] *See, e.g.*, *Mills v. Ala.*, 384 U.S. 214, 218-19 (1966) ("a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs"). *See also E. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961) ("The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.").

[49] *See, e.g.*, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 776 (1976) (speech that "does no more than propose a commercial transaction" is protected by the First Amendment).

[50] Rule G-37(e)(i)(C) (emphases added).

[51] We also request that the MSRB clarify that recordkeeping is not retroactive. Municipal advisors should not be required by Rule G-42 to report relationships that were entered into prior to promulgation of the rule, but should only be required to report engagements obtained after the rule's operative date.

reporting requirements.[52] By aligning the recordkeeping and reporting requirements between Rule G-37 and Rule G-42, the MSRB will reduce unnecessary compliance costs on regulated entities, many of whom will be able to build upon existing Rule G-37 compliance protocols. Just as the SEC abandoned a proposal to require reporting of all solicitation communications in response to the comments from SIFMA and others, so too should the Board narrow the scope of its proposed rule to exclude unsuccessful solicitations while requiring the tracking and disclosure of actual transactions.

e. The MSRB Should Modify The Definition Of "Municipal Advisor Professional" To Cover Only Those Associated Persons Primarily Engaged In Municipal Advisory Business

We believe one additional change is necessary to standardize and clarify the reach of Proposed Rule G-42 as compared to Rule G-37. Proposed Rule G-42 defines a covered "municipal advisor professional" to include "any person engaged in municipal advisory business with a municipal entity."[53] Recognizing that Rule G-37, by contrast, defines "municipal finance professional" to include only associated persons who are "*primarily* engaged" in municipal securities representative activities,[54] the MSRB explains that the difference is necessary to make Proposed Rule G-42 "at least as stringent as" the SEC's Pay-to-Play Rule.[55] SIFMA respectfully submits that this change is not necessary to accomplish that goal, and that Rule G-37 provides an appropriate model for Proposed Rule G-42's definition of "municipal advisor professional."

Rule G-37 and Proposed Rule G-42 both define covered associated persons in relevant part by reference to their activities as municipal advisors or solicitors of municipal business. Rule G-37 defines "municipal finance professional" to include "any associated person primarily engaged in municipal securities representative activities,"[56] which is defined in Rule G-3(a)(i) to include persons in advisory relationships with municipal entities.[57] Proposed Rule G-42

[52] We note that if the SEC adopts a broad definition of "municipal advisor," complying with even this reporting requirement will require entities to develop sophisticated tracking systems. If, for example, the SEC extends "municipal advisory" to cover broker and banking accounts, we request that the MSRB give affected parties the opportunity to comment on reporting and recordkeeping requirements applicable to brokers and banks.

[53] Proposed Rule G-42(g)(iv)(A).

[54] Rule G-37(g)(iv) (emphasis added).

[55] MSRB Notice 2011-04, at "Draft New MSRB Rule G-42: Draft Rule G-42 Distinguished from Rule G-37" n.28.

[56] Rule G-37(g)(iv)(A).

[57] Specifically, Rule G-3(a)(i) defines "municipal securities representative" to include any "natural person associated with a broker, dealer or municipal securities dealer, other than a person whose

defines "municipal advisor professional" to include associated persons in advisory relationships with municipal entities, but reaches more broadly than Rule G-37 to cover any such person "engaged in municipal advisory business."[58] By contrast, Rule G-37's "municipal finance professional" definition includes any associated person "who solicits municipal securities business," without a limitation that such person be primarily engaged in soliciting such business.[59] In this respect, Proposed Rule G-42 follows the model of Rule G-37, defining "municipal advisor professional" to include any associated person "who solicits municipal advisory business . . . or solicits third-party business."[60] In other words, Rule G-37 and Proposed Rule G-42 are *consistent* with respect to coverage of associated persons who solicit municipal entities, but *inconsistent* with respect to associated persons who advise municipal entities.

As noted above, the MSRB states that this divergence is necessary for Proposed Rule G-42 to be as "at least as stringent" as the SEC's Pay-to-Play Rule. Following the model of Rule G-37, however, will also result in a rule that is consistent with Dodd-Frank[61] and "substantially equivalent" to the SEC's Pay-to-Play Rule with respect to the requirements imposed upon municipal advisors.[62] As the SEC made clear in its pay-to-play rulemaking for investment advisers, it believes that Rule G-37 is an appropriately stringent model for pay-to-play regulation, which indicates that it is not necessary to drop the "primarily engaged" threshold from Rule G-37 to make Proposed Rule G-42 consistent with the SEC's Pay-to-Play Rule.[63]

---

functions are solely clerical or ministerial, whose activities include one or more of the following: (A) underwriting, trading or sales of municipal securities; (B) *financial advisory or consultant services for issuers in connection with the issuance of municipal securities*; (C) *research or investment advice with respect to municipal securities*; or (D) any other activities which involve communication, directly or indirectly, with public investors in municipal securities." (Emphases added.)

[58] Proposed Rule G-42(g)(iv)(A).

[59] Proposed Rule G-37(g)(iv)(B); Rule G-37 FAQs, question IV.8, *available at* http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G37-Frequently-Asked-Questions.aspx.

[60] Proposed Rule G-42(g)(iv)(B).

[61] Nothing in Dodd-Frank requires the proposed departure from the appropriately stringent definitions in Rule G-37. Although Section 975 defines which entities will be covered municipal advisors, it does not prescribe a definition of covered MAPs associated with those entities. 15 U.S.C. § 78o-4(e)(4)(A).

[62] Rule 206-4(5) requires that investment advisers use solicitors subject to the SEC's Pay-to-Play Rule or one that is "substantially equivalent" to that rule.

[63] SEC's Pay-to-Play Rule, 75 Fed. Reg. at 41,010 ("We modeled our proposed rule on those adopted by the . . . MSRB, which since 1994 has prohibited municipal securities dealers from participating in pay to play practices. We believe these rules have significantly curbed pay to play practices in the municipal securities market").

Moreover, Proposed Rule G-42 will be substantially equivalent to the SEC's Pay-to-Play Rule's requirements for investment adviser entities as long as it imposes substantially similar restrictions on municipal advisor entities. The SEC's Pay-to-Play Rule has a category of covered associates who *solicit* municipal business, and in this respect, Proposed Rule G-42 and the Pay-to-Play Rule (as well as Rule G-37) are consistent.[64] But the definition of a "covered associate" in the SEC's Pay-to-Play Rule is based solely on solicitation, not advice.[65] Rule G-37, by contrast, does provide a model on point. In our view, the MSRB should follow the example of Rule G-37 by limiting the coverage of associated persons who advise municipal entities to those primarily engaged in such advisory business.

Without this change, Proposed Rule G-42 will impose unnecessary and onerous recordkeeping and reporting burdens on municipal advisors, who will be forced to alter their compliance structures constantly to track the communications of their associated persons to determine if any could be construed as offering even minimal financial advice to a municipal entity. Such an onerous and unnecessary burden on commercial speech could present significant constitutional issues.[66] Therefore, we recommend revising Proposed Rule G-42 to define "municipal advisor professional" to include only those associated persons primarily engaged in municipal advisory business, while retaining the current definition with respect to associated persons that "solicit" municipal entities.[67]

Although we believe the appropriate approach is to harmonize Proposed Rule G-42 and Rule G-37 with respect to the coverage of associated advisory professionals, in the alternative we propose that the MSRB clarify that the term "engaged in municipal advisory business" reaches no further than Section 975(e)(4)(A)(i) of Dodd-Frank. Moreover, SIFMA has proposed that the SEC adopt a *de minimis* exception to the definition of "municipal advisor,"[68] and we believe that at a minimum a similar approach is warranted with respect to the definition of "municipal advisor professional" in Proposed Rule G-42.

---

[64] *Compare* Rule 206(4)-5(f)(2)(ii), 17 C.F.R. § 275.206(4)-5(f)(2)(ii), *with* Proposed Rule G-42(g)(iv)(B).

[65] Rule 206(4)-5(f)(2).

[66] *See supra* note 49.

[67] Of course, if the SEC and MSRB coordinate their rulemakings to reflect the statutory definition of "municipal advisor"—which, among other things, excludes BD placement agents and affiliated entities—it may be necessary for the MSRB to revise its proposed approach to solicitation activity. For example, the current definition of "third-party business" was devised to permit "voluntary" registration, *see* MSRB Notice 2011-04, at 4 n.13, and it may be necessary to change that definition if the SEC alters its proposed amendments to the Pay-to-Play Rule for investment advisers.

[68] SIFMA Municipal Advisors NPRM Letter at 12.

B. The MSRB Should Preserve Rule G-38 While Amending It To Permit The Use Of Affiliated Solicitors

Currently, MSRB Rule G-38 prohibits broker-dealers or municipal securities dealers from paying non-affiliated persons to solicit municipal securities business on the dealer's behalf.[69] Broker-dealers or municipal securities dealers can, however, pay any employee or "registered person"—any associated person of the dealer qualified under MSRB Rule G-3 or under the rules of a registered securities association[70]—of the dealer or an affiliated company of the dealer to solicit on the dealer's behalf. Thus, Rule G-38 contains an absolute prohibition on dealers paying third parties to solicit on its behalf, even if the third-party solicitor is also registered and subject to Rule G-37.

The MSRB has requested comment on whether MSRB Rule G-38 should be eliminated, because Proposed Rule G-42 would create a pay-to-play regime for third-party municipal advisors. In the alternative, the MSRB is considering whether G-38 should be expanded, so as to ban payments by non-dealer municipal advisors to other municipal advisors for the solicitation of municipal advisory business.[71] SIFMA recommends that Rule G-38 not be eliminated, because doing so would create a potential coverage gap in the MSRB's regulatory regime, particularly given that, at present, the scope of covered municipal advisors is not certain. At the same time, there is no reason to expand Rule G-38's prohibition against paying non-affiliates to solicit to ensure adequate deterrence of pay-to-play corruption. Instead, we recommend that Rule G-38 be amended to remove the distinction between affiliated and non-affiliated solicitors, replacing it with a distinction between regulated and non-regulated solicitors, as the SEC did in its recent Pay-to-Play Rule. Such an approach would allow municipal dealers maximum flexibility in structuring their solicitation arrangements, while still ensuring parties who solicit municipal securities business are subject to robust pay-to-play regulation.

1. Rule G-38 Should Be Amended, Not Eliminated

In Proposed Rule G-42, the MSRB explains that it banned payments to third-party solicitors in Proposed Rule G-38 "because it was concerned that dealers were using solicitors not subject to MSRB rules as a way to avoid the limitations of Rule G-37."[72] In other words, the purpose of Rule G-38 was to

---

[69] Rule G-38(a).

[70] Rule G-38(b)(iv).

[71] MSRB Notice 2011-04, at "Request for Comment: MSRB Rule G-38 (on solicitation of municipal securities business)."

[72] *Id*. The original Rule G-38 required only disclosure of the use of third-party consultants and their campaign contributions, but the MSRB replaced it with the current Rule G-38, because of concerns about "questionable practices by some consultants" and the MSRB's judgment that the whole process of soliciting municipal securities business should be subject to the MSRB's rules.

ensure that parties who solicit municipal securities business were subject to a comprehensive pay-to-play regime. SIFMA supports this objective, but eliminating Rule G-38 could frustrate rather than further that goal, particularly in light of the substantial uncertainty that exists over the outcome of the SEC's Municipal Advisors NPRM.

At the same time, however, we believe that Rule G-38's complete ban on paying non-affiliated persons to solicit for municipal securities business is broader than necessary to accomplish the MSRB's goal of avoiding of the circumvention of Rule G-37. Current Rule G-38 prohibits non-affiliated parties from sharing fees when they co-market or solicit on behalf of each other for municipal securities business. This is the case even with non-affiliates who are registered and subject to Rule G-37. This prohibition has, in practice, resulted in unnecessary restructuring of transactions, resulting in higher fees for municipal entities without any discernable regulatory benefits.

The SEC's recent Pay-to-Play Rule demonstrates how a more tightly-focused regime can reduce the risk of pay-to-play corruption while allowing firms flexibility in choosing who solicits government entities on their behalf. The SEC's Pay-to-Play Rule allows affiliated and non-affiliated persons, as long as they are employees, covered associates, or "regulated persons," to solicit a government entity on behalf of an investment adviser for investment advisory services.[73] In promulgating the Pay-to-Play Rule, the SEC reversed course from its notice of proposed rulemaking on the subject, which had included a complete ban on third-party solicitors resembling MSRB Rule G-38.[74] The SEC's Pay-to-Play Rule now allows investment advisers to compensate third-party "regulated persons" to solicit government entities, provided the "regulated persons" are themselves (i) registered with the SEC as an investment adviser or broker-dealer and (ii) subject either to the SEC's Pay-to-Play Rule, or to an equivalent pay-to-play regime.[75]

We encourage the MSRB to consider eliminating the distinction between affiliated and non-affiliated parties, in favor of a distinction between regulated and unregulated parties. We recommend Rule G-38 be amended to allow municipal securities dealers to use non-affiliated entities who are subject to Rule G-37, Rule G-42, or another comparable pay-to-play regime to solicit municipal securities business on the dealer's behalf.

Ltr. of Peter T. Clarke, Chair, MSRB, to Elizabeth M. Murphy, Secretary, SEC 2 (Oct. 23, 2009), *available at* http://sec.gov/comments/s7-18-09/s71809-247.pdf.

[73] *See* Rule 206(4)-5, 17 C.F.R. § 275.206(4)-5.

[74] SEC's Pay-to-Play Rule, 75 Fed. Reg. at 41,036-41,041.

[75] Rule 206(4)-5, 17 C.F.R. § 275.206(4)-5.

2. Rule G-38 Should Not Be Expanded To Cover Payments By Municipal Advisors To Other Municipal Advisors

The MSRB has also asked whether it should expand Rule G-38 so as to ban payments by non-dealer municipal advisors to other municipal advisors that assist them in soliciting municipal advisory business. For the reasons set forth above, SIFMA believes that payments should be permitted to any solicitor that is both regulated and subject to an adequate pay-to-play regime.

C. The MSRB Should Modify The *De Minimis* Contribution Limits In Proposed Rule G-42 And Rule G-37

After careful consideration, the SEC decided in promulgating its Pay-to-Play Rule to define a permissible *de minimis* contribution as (i) any contribution up to $350 per election for candidates for whom the contributor is entitled to vote and (ii) any contribution up to $150 per election for candidates for whom the contributor is not entitled to vote.[76] The SEC explicitly rejected the $250 *de minimis* exception in MSRB Rule G-37, concluding that it did not account for present inflation, and that an exception for contributions to candidates for whom the contributor is not entitled to vote was necessary to protect a person's "legitimate interest in contributing to campaigns."[77]

We believe the same regime should apply uniformly to both Proposed Rule G-42 and Rule G-37, particularly in light of the constitutional concerns involved. The *de minimis* exception in both rules permits a contribution up to only $250 per election, and only for candidates for whom the contributor is entitled to vote.[78] Although this approach may be driven by concerns about circumvention of the pay-to-play regime, it is unnecessary to accomplish that result and unconstitutional under present First Amendment doctrine, which has shifted since the constitutionality of Rule G-37 was considered in *Blount v. SEC*.[79] Put simply, *Blount* is no longer a reliable guide to First Amendment doctrine, and inflation has reduced the significance of a $250 contribution.

As the SEC has recognized, a $250 *de minimis* limit does not "reflect the effects of inflation since the MSRB first established its $250 *de minimis* amount in 1994."[80] In the present day, contributions of $250 do not reflect a significant pay-to-play concern. Indeed, federal contribution limits—for example, $2,500

---

[76] SEC's Pay-to-Play Rule, 75 Fed. Reg. at 41,035.

[77] *Id.*

[78] Proposed Rule G-42(g)(ii).

[79] *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995).

[80] SEC's Pay-to-Play Rule, 75 Fed. Reg. at 41,035.

per election per candidate for individuals—are much greater and reflect a reasonable distinction between small contributions and those that could have a meaningful effect on a candidate's estimation of the contributor. The present federal contribution limits represent a significant increase from those in place when Rule G-37 was promulgated, and are indexed to inflation.[81] The MSRB has presented no evidence that a $250 *de minimis* limit, set in 1994, is appropriate to address concerns about undue influence or circumvention in 2011. And, as the SEC noted, it may be necessary to "considering increasing" the set amount "in the future if, for example, the value of it decreases materially as a result of further inflation."[82]

Moreover, flatly prohibiting contributions by MAPs to candidates for whom they cannot vote is unduly burdensome. As the SEC has recognized, "persons can have a legitimate interest in contributing to campaigns of people for whom they are unable to vote."[83] Persons who live in metropolitan areas that straddle multiple jurisdictions have perfectly legitimate interests in contributing to campaigns of candidates who, if elected, will be able to alter metropolitan policy. For example, many persons work in Washington, D.C., but live in jurisdictions outside the District. They have legitimate civic interests in contributing to candidates in D.C. elections. It is not clear to us a flat ban on such contributions is necessary. Indeed, the SEC expressly rejected such a flat ban in its Pay-to-Play Rule. Furthermore, the provisions of Proposed Rule G-42, which ban the solicitation or coordination of contributions, and the anti-circumvention provision eliminate any risk of contributions to candidates for whom municipal advisory professionals cannot vote being bundled in such a way to create corruption.[84]

Contributions are a form of protected political speech, and laws restricting contributions must be "closely drawn" to match a "sufficiently important interest."[85] Contribution limits are not closely drawn when they limit more speech than is necessary to advance the state's interest.[86] Therefore, as explained by a plurality of the Supreme Court in *Randall v. Sorrell*, contribution limits can "work more harm to protected First Amendment interests than their anti-corruption objectives [would] justify" and must be struck down when they do so.[87] Preventing corruption is an important state interest, but it will rarely justify

---

[81] *See, e.g.*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 307(a), 116 Stat. 81, 103 (2002); 2 U.S.C. § 441a(c).

[82] SEC's Pay-to-Play Rule, 75 Fed. Reg. at 41,035.

[83] SEC's Pay-to-Play Rule, 75 Fed. Reg. at 41,035.

[84] *See* Proposed Rule G-42(c) & (d).

[85] *Randall*, 548 U.S. at 247 (plurality opinion) (internal quotation and citation omitted).

[86] *Id.*

[87] *Id.* at 247-48.

a flat ban on political speech, as made clear by the Court in *Citizens United*.[88] Taken together, *Randall*, which involved unduly restrictive contribution limits, and *Citizens United*, which involved expenditure limits but which discussed the First Amendment limits on contribution restrictions, make clear that the MSRB can no longer rely upon the D.C. Circuit's decision in *Blount* to sustain either a $250 *de minimis* limit on contributions to candidates for whom covered persons can vote or flat ban on contributions to candidates for whom covered persons cannot vote. Moreover, Congress has not directed the MSRB to adopt such restrictions.

The strict limits in Proposed Rule G-42 cannot be justified based upon the risk of circumvention. The MSRB need not be concerned about the possibility of the rule being circumvented through multiple *de minimis* contributions being donated to a candidate. The solicitation prohibition in the rule will prevent a dealer or its MAPs from soliciting contributions to covered officials. And the anti-circumvention provision of Proposed Rule G-42 will also be available to address this concern. The SEC's Pay-to-Play Rule addresses the risk of circumvention through similar mechanisms, and the MSRB could adopt the same approach.

Based on the foregoing, we believe the MSRB's approach should be modified in favor of a limit that reflects present inflation and permits persons to exercise their constitutionally protected right to political speech. We recommend that the MSRB adopt the *de minimis* limits contained in the SEC's Pay-to-Play Rule for both Proposed Rule G-42 and Rule G-37. In all events, however, we strongly recommend that the MSRB keep a uniform definition of a *de minimis* contribution under both rules. *See supra* page 11.

III. THE PROPOSED BAN ON COMPENSATION SHOULD BE MORE NARROWLY TAILORED

Proposed Rule G-42 prohibits municipal advisors from "engag[ing] in municipal advisory business with a municipal entity for compensation, solicit[ing] third-party business from a municipal entity for compensation, or receiv[ing] compensation for the solicitation of third-party business from a municipal entity, within two years" of a covered political contribution.[89] With respect to municipal advisors that provide advisory services, the ban on compensation begins when the covered political contribution is made, but ends two years after the advisor has wound down and terminated its business with the municipal entity.[90] Thus, the proposed rule (i) prohibits a solicitor from receiving compensation for work completed prior to the covered political contribution and (ii) potentially bans

[88] 130 S. Ct. at 897.

[89] Proposed Rule G-42(b)(i).

[90] *See* Proposed Rule G-42(b)(i), (iv).

compensation for advisory services for a period greater than two years from the covered political contribution.

We believe that this approach (i) unnecessarily deprives solicitors of compensation with respect to work that is completed prior to a covered political contribution and (ii) unjustifiably extends the compensation ban for advisory services. With respect to the former, we recommend an alternative approach that imposes a ban on future business (similar to the ban in Rule G-37) for municipal advisors engaged in solicitation activities at the time of the covered contribution. This approach would be tailored to the nature of solicitation activities, which like Rule G-37, are transactional in nature and do not require any winding down following a covered contribution. With respect to the latter issue, we recommend the MSRB follow the example of the SEC's Pay-to-Play Rule and measure the two-year time period from the date of the covered political contribution, not from the termination of the advisory relationship.

A. The Proposed Ban On Compensation Should Be Modified To Permit A Solicitor To Receive Compensation For Already-Completed Solicitation Activities

We believe that a ban on compensation that draws on the model of Rule G-37 and permits solicitors to receive compensation for already-completed solicitation activities is appropriately tailored to reflect the transactional nature of solicitation activities.

1. Advisory Relationships And Solicitation Activities Should Be Addressed Differently

Advisors have a fundamentally different relationship with their municipal clients than solicitors, who generally have episodic contacts with potential investors. Advisors have long-term ongoing client relationships, create tailored investment advice to help their clients meet long-term goals, and owe them traditional fiduciary duties. If a municipal advisor is forced to resign, for whatever reason, it may still be required "to fulfill its fiduciary duty to the municipal entity and create an orderly transition period during which the municipal entity [can] obtain successor advisory services."[91] Given these fiduciary duties, we agree that the regulation of advisory services must be sufficiently flexible to allow the continuation of long-term relationships during a winding down period. By contrast, solicitation activity is transactional in nature; in essence, it consists of nothing more than the sale of a security or a service. The risk of pay-to-play corruption with respect to discrete transactions can be addressed differently than the risk of pay-to-play corruption associated with ongoing advisory services.

[91] MSRB Notice 2011-04, at "Draft New MSRB Rule G-42: Reasonable Transition Period."

These differences are reflected in the contrasting approaches of the SEC's Pay-to-Play Rule and MSRB Rule G-37. The SEC's Pay-to-Play Rule imposes a two-year ban on compensation for investment advisers who make a covered political contribution to a municipal official, and directs advisors to discharge their fiduciary duties by winding down their municipal advisory business within a reasonable time.[92] Rule G-37, by contrast, provides a ban on new municipal securities business for two years following a covered political contribution by a municipal dealer (including new business from existing clients).[93] But Rule G-37 does not prohibit compensation for already completed municipal securities transactions and in fact permits a municipal dealer to maintain pre-existing business after a triggering contribution, provided the business was obtained prior to the contribution. There is no evidence that this approach has failed to address pay-to-play practices adequately. Instead, the MSRB has repeatedly reaffirmed the effectiveness of Rule G-37, including in explaining the need for Proposed Rule G-42.[94]

2. Solicitors Should Be Permitted To Receive Compensation For Already-Completed Solicitation Activity

By contrast, Proposed Rule G-42 is not so narrowly tailored. With respect to ongoing advisory business, Proposed Rule G-42 imposes a two-year ban on compensation following "the date on which [the municipal advisor's] . . . municipal advisory business with the municipal entity has been terminated."[95] Municipal advisors providing municipal advisory services, however, would *not* be prohibited for receiving compensation due for work completed *prior to* the covered political contribution; instead, the prohibition on "*engaging* in municipal advisory business for compensation" would "begin on the date of the contribution."[96]

With respect to transactional solicitation activities, however, Proposed Rule G-42 bans the solicitor from "receiv[ing] compensation for the solicitation of third-party business[] within two years after any" covered contribution.[97] As a consequence of the proposed approach, it appears that solicitors would be unable to receive compensation for a completed solicitation in any case in which the solicitation activity was done before both (i) the receipt of compensation and (ii) the covered political contribution. This approach appears designed to reduce the

[92] Rule 206(4)-5, 17 C.F.R. § 206(4)-5.

[93] Rule G-37(b)(i); Rule G-37 Interpretive Notice.

[94] MSRB Notice 2011-04, at "Background: Existing MSRB Rule G-37."

[95] Proposed Rule G-42(b)(iv).

[96] Proposed Rule G-42(b)(iv) (emphasis added).

[97] Proposed Rule G-42(b)(i).

risk of circumvention. As the MSRB has explained, the "draft rule would . . . ban the receipt of compensation for the solicitation of third-party business from a municipal entity within two years after a non-*de minimis* contribution to address those situations in which the solicitation might have been made at the time of the contribution."[98] But the effect of the proposed rule will be not only to prevent contemporaneous *quid pro quo* transactions, but also to prohibit a solicitor from receiving compensation for work that was already completed before the covered political contribution took place.

We therefore request that Proposed Rule G-42 be modified to permit solicitors to receive compensation for work completed prior to a covered political contribution. In our view, the most straightforward solution would be to create two separate bans that mirror the bans in the SEC's Pay-to-Play Rule and MSRB Rule G-37, respectively. Following a covered political contribution, municipal advisors would be prohibited from engaging in municipal advisory business with a municipal entity for compensation within two years after they have ended the advisory relationship—just as investment advisers are subject to a similar ban in the SEC's Pay-to-Play Rule. Solicitors, however, would be subject to a flat ban on soliciting any new business for two years after a covered political contribution, including new business from an existing relationship, but would be permitted to receive compensation for work completed prior to the contribution—just as municipal dealers are subject to a two-year ban on new business under Rule G-37, but are permitted to receive compensation for pre-existing business. Enforcement under Rule G-37 demonstrates that our proposed approach is feasible, manageable, and appropriately tailored to transactional settings.

In sum, we recommend the MSRB tailor its pay-to-play rule to fit the differences between advisory and solicitation relationships while deterring pay-to-play corruption.[99]

B. The Proposed Ban On Compensation Should Not Be Greater Than Two Years From The Date Of The Contribution For Municipal Advisors

Under Rule G-42 as proposed, "in the case of a municipal advisor engaged in municipal advisory business with a municipal entity, the [two-year] prohibition on engaging in municipal advisory business for compensation . . . shall begin on the date of the [covered political] contribution . . . and end two years after the date on which all of its municipal advisory business with the municipal entity has been

[98] MSRB Notice 2011-04, at "Draft New MSRB Rule G-42: Draft Rule G-42 Distinguished from Rule G-37," n.27.

[99] The MSRB can address its concern for cases "in which the solicitation might have been made at the time of the contribution" by either (i) revising the compensation ban to focus squarely upon that issue or (ii) making clear in an interpretive guidance that such simultaneous solicitations and contributions cannot be used to circumvent Proposed Rule G-42's pay-to-play regime. *Id*.

terminated."[100] Because an municipal advisor engaged in municipal advisory business owes its clients a fiduciary duty and must take time to wind down any business before terminating it, the MSRB's proposed approach makes the ban on compensation effectively longer than two years from the date of a covered contribution. We see no reason why a greater-than-two-year ban is necessary to deter pay-to-pay corruption.[101]

The SEC's Pay-to-Play Rule—which also addresses advisory relationships—does not impose such a ban, but instead provides that an investment adviser may not "provide investment advisory services for compensation to a government entity within two years after" a covered political contribution.[102] Like the MSRB, the SEC has recognized that an advisor has a fiduciary duty and must unwind advisory relationships before terminating them. And like the MSRB, the SEC has recognized that an advisor should not be forced to conduct advisory services for an extended period of time, but rather should be allowed to terminate business after a "reasonable" time period.[103] But unlike the MSRB, the SEC has recognized that there is no reason to impose a ban on compensation that is in effect longer than two years from the date of a political contribution simply because an advisor (who is already not being compensated) is properly dismissing its fiduciary duty.

We recommend that the MSRB follow the SEC's model in the Pay-to-Play Rule and measure the end of the two-year compensation ban from the date of the covered political contribution in all cases. A more stringent approach is unnecessary and unduly burdensome.

IV. THE MSRB SHOULD SET AN OPERATIVE DATE THAT ALLOWS COVERED MUNICIPAL ADVISORS AN ADEQUATE OPPORTUNITY TO DEVELOP COMPLIANCE REGIMES

Finally, we respectfully request that the MSRB give covered municipal advisors an adequate opportunity to adapt their compliance structures to the new requirements of Proposed Rule G-42. Developing a comprehensive Rule G-42 compliance framework will be a time-consuming and burdensome task for many covered parties, and in particular, a significant amount of time will be necessary if the SEC adopts a broad definition of "municipal advisor" and thus sweeps many

[100] Proposed Rule G-42(b)(iv).

[101] Instead, the MSRB has simply noted that advisors have a fiduciary duty and must wind down their advisory relationships, *see* MSRB Notice 2011-04, at "Draft New MSRB Rule G-42: Ban on Business for Compensation," but that fact alone does not mandate a greater-than-two-year ban on compensation.

[102] Rule 206(4)-5(a)(1), 17 C.F.R. § 275.206(4)-5(a)(1).

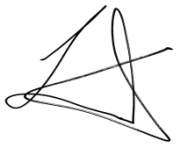
[103] *See* SEC's Pay-to-Play Rule, 75 Fed. Reg. at 41,057; MSRB Notice 2011-04, at "Draft New MSRB Rule G-42: Reasonable Transition Period."

already-regulated entities—such as banks providing traditional banking services—into Proposed Rule G-42. Accordingly, the MSRB should follow the approach taken in the SEC's Pay-to-Play Rule and provide that covered municipal advisors are not subject to the prohibitions of Proposed Rule G-42 for a period of time after the Rule takes effect, although—in light of the September problem—we recommend that the MSRB permit covered municipal advisors to voluntarily subject themselves to the Rule's restrictions at an earlier date.[104]

* * *

SIFMA appreciates this opportunity to comment upon Proposed Rule G-42. Please do not hesitate to contact me with any questions at (212) 313-1130; or Barbara Stettner and Charles Borden, of O'Melveny & Myers LLP, at (202) 383-5283 and (202) 383-5269, respectively.

Sincerely,



Leslie M. Norwood
Managing Director and
Associate General Counsel

Enclosure

[104] As we discuss *supra* page 5-6, SIFMA recommends that if it is necessary to solve the September problem the MSRB should promulgate an interim final pay-to-play rule for persons who have voluntarily registered as municipal advisors.

cc: The Honorable Mary L. Schapiro, Chairman
The Honorable Kathleen L. Casey, Commissioner
The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
Robert Cook, Director, Division of Trading and Markets
James Brigagliano, Deputy Director, Division of Trading and Markets
David Shillman, Associate Director, Division of Trading and Markets
Martha Haines, Assistant Director and Chief, Office of Municipal Securities
Victoria Crane, Assistant Director, Office of Market Supervision
Robert Plaze, Associate Director, Division of Investment Management

Lynnette Hotchkiss, Executive Director, Municipal Securities Rulemaking Board

APPENDIX A: COVERED PERSONS UNDER SECTION 975 OF THE DODD-FRANK ACT

The following chart reflects the categories of parties who are clearly covered and clearly outside the scope of the definition of "municipal advisor" in the Dodd-Frank Act. The disputed category column reflects conflicts between the statute and the SEC's proposed definition of "municipal advisor."

Category A	Category B[105]	Category C
Unaffiliated solicitors seeking investment advisory services contracts	Regulated, unaffiliated solicitors placing fund interests (*e.g.*, third-party BD placement agents) selling fund, LGIP, other pooled investment vehicle interests	Affiliated solicitors seeking investment advisory services contracts[106] (*e.g.*, BDs or investment advisers soliciting for separate accounts or other direct advising arrangements)
Unregulated solicitors/advisors to muni entities (*e.g.*, municipal consultants, finders) [107]	Any person providing advice (or soliciting advisory services) with respect to assets that are not the initial proceeds of municipal securities (*e.g.*, banks providing traditional banking activities)	Advisers to pooled investment vehicles[108]

[105] In addition to the examples offered herein, this category includes the disputed entities discussed in SIFMA's comment letter to the SEC on the Municipal Advisors NPRM. *See* SIFMA Municipal Advisors NPRM Letter.

[106] The SEC has proposed that affiliates should "voluntarily" register as municipal advisors. *See* Municipal Advisors NPRM, 76 Fed. Reg. at 831-32.

[107] This category is a subset of the three categories below it.

[108] SIFMA is requesting confirmation of this point in its comments to the SEC on the Municipal Advisors NPRM. SIFMA Municipal Advisors NPRM Letter at 18-20.

Category A (con't)	Category B (con't)	Category C (con't)
Any person who is providing advice (or soliciting advisory services) on (i) the initial investment of the proceeds of municipal securities and (ii) the recommendation of and brokerage of municipal escrow investments (except for BD/muni dealer underwriters, investment advisers providing advice on the issuance of municipal securities under the Advisers Act, commodity traders providing advice on municipal swaps, or attorneys and engineers)[109]		Regulated, affiliated solicitors placing fund interests[110] (BDs, investment advisers)
Any person who is providing advice (or soliciting advisory services) with respect to the issuance of muni securities (except for BD/muni dealer underwriters, investment advisers providing advice on the issuance of municipal securities under the Advisers Act, commodity traders providing advice on municipal swaps, or attorneys or engineers acting in their professional capacities)[111]		
Any person who is providing advice (or soliciting advisory services) on municipal derivatives or GICs (except for BD/muni dealer underwriters, investment advisers providing advice on the issuance of muni securities under the Advisers Act, commodity traders providing advice on muni swaps, or attorneys or engineers acting in their professional capacities)[112]		

[109] The scope of the exception noted here is still unclear and was the subject of comments from SIFMA on the Municipal Advisors NPRM. SIFMA Municipal Advisors NPRM Letter at 28-35.

[110] The SEC has proposed that affiliates should "voluntarily" register as municipal advisors. *See* Municipal Advisors NPRM, 76 Fed. Reg. at 831-32.

[111] The scope of the exception noted here is still unclear and was the subject of comments from SIFMA on the Municipal Advisors NPRM. SIFMA Municipal Advisors NPRM Letter at 28-35.

[112] The scope of the exception noted here is still unclear and was the subject of comments from SIFMA on the Municipal Advisors NPRM. *Id*.

TEXAS COMPTROLLER *of* PUBLIC ACCOUNTS

SUSAN COMBS

February 25, 2011

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, Virginia 22314-3447

re: MSRB Notice 2011-04

Dear Mr. Smith:

I respectfully submit this letter in response to a request by the Municipal Securities Rulemaking Board (MSRB) for comments regarding the above referenced notice. I submitted comments to the Securities and Exchange Commission (Commission) in response to Exchange Act Release No. 34-63576. My comments encouraged the Commission to exclude appointed board members of municipal advisory and governing boards from the definition of municipal advisor.

I understand that if the Commission's final adopted regulations apply to appointed board members as municipal advisors, additional rules addressing political contributions and prohibitions on municipal advisory activities will be proposed by the MSRB at that time. Pending the outcome of the SEC's rulemaking process, I request the opportunity to provide comments as necessary.

Thank you for the opportunity to comment on the MSRB's proposed rules. Our staff is available to provide further input and assistance to your office. If you have any questions regarding the foregoing, please contact Victoria North at (512) 463-6273 or by e-mail at Victoria.North@cpa.state.tx.us or Marianne Dwight regarding Trust Company boards at (512) 936-7957 or by e-mail at Marianne.Dwight@cpa.state.tx.us.

Sincerely,

Susan Combs

cc: Victoria North
Marianne Dwight

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 25, 2011

By Electronic Mail

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street
Alexandria, VA 22134

Re: MSRB Notice 2011-04; Request for Comment on Pay to Play Rule for Municipal Advisors

Dear Secretary Smith:

We write in response to the draft proposal of the Municipal Securities Rulemaking Board (MSRB) to establish "pay to play" rules for municipal advisors set out in the above referenced regulatory notice. On February 22, 2011 this office filed comments with the Securities and Exchange Commission (SEC) on behalf of the State of Texas to express our objection to the Commission's proposal to require appointed board members of municipal entities to register as municipal advisors. (Attached) We are gratified that the MSRB filed comments with the SEC taking the same position.

Our comments filed with the SEC point out the problems of applying the draft proposed MSRB "pay to play" rules, and other anticipated MSRB rules, to appointed board members. We understand that that these difficulties result from the SEC's proposal and are not of the MSRB's making. As the MSRB's comments to the SEC recognize, the SEC's rule making is likely to have a significant impact on the substance, interpretation and enforcement of MSRB rules. In apparent recognition of this, the MSRB's comments to the SEC state that the MSRB may request comment on revisions to its draft proposals of other rules implementing the Dodd- Frank Act if the SEC's proposed rules were to be adopted in their current form. We trust that if the SEC adopts final rules requiring board members of municipal entities to register as municipal advisors, the MSRB will indeed reconsider all of its draft proposed rules relating to the registration of municipal advisors, including the "pay to play" rules, and invite comments to guide that reconsideration. We will reserve any further comments for that reconsideration, should it be necessary.

Thank you for the opportunity to comment on the MSRB's draft proposals.

Sincerely,

CHARLES B. MCDONALD
Assistant Attorney General
Financial Litigation Division
P.O. Box 12548
Austin, Texas 78711-2548
TEL: (512) 475-4298

Attachment To Comments Of Office Of Attorney General Of Texas
To MSRB Notice 2011-04; Request For Comment On Pay To Play Rule
For Municipal Advisors

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 22, 2011

By Electronic Mail
Ms. Mary L. Schapiro
Chairman
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: S.E.C. Release No. 34-63576: File No. S7-45-10 (Dec. 20, 2010)

Dear Chairman Schapiro and Secretary Murphy:

We write in response to the notice of proposed rule for the registration of municipal advisors issued by the Securities and Exchange Commission on December 20, 2010. This comment is submitted on behalf of the State of Texas, including the Office of the Governor, the Office of Attorney General, the Texas Comptroller of Public Accounts and the agencies on the attached list. We write to express our objection to the Commission's proposal to require appointed board members of municipal entities to register as municipal advisors.

Introduction

Texas Relies Upon Its Citizen Volunteers To An Extraordinary Degree.

Citizen volunteers serve on approximately 400 Texas state boards, commissions, authorities and committees. Collectively, they are critical to the governance of Texas. These citizen volunteers oversee great universities, public health and safety, criminal justice, historic preservation, parks and wildlife, environmental protection, public utilities, occupational licensing, and virtually every other aspect of Texas state government. These boards and commissions are a bastion of democracy, where over

POST OFFICE BOX 12548, AUSTIN, TEXAS 78711-2548 TEL:(512)463-2100 WWW.OAG.STATE.TX.US

3000 uncompensated citizen volunteers, selected from 25 million Texans for their skills for the job and their heart for the work, come to serve their State on a part time basis in the finest tradition of participatory government. There is no beltway mentality in Austin because these citizen volunteers bring Texas to the Capitol. Their hometown insights and experience guide Texas government. Texas government cannot run without the service of these citizen volunteers on its state boards and commissions. The SEC must not create a needless roadblock to their service.

Texas therefore opposes the SEC's proposed interpretation and application[1] of the Dodd Frank Wall Street Reform and Consumer Protection Act[2] ("Dodd Frank Act") to the extent it requires these citizen volunteers to register as municipal advisors. To do so would be profoundly unwise and statutorily unauthorized.

The SEC Should Issue Definitive Public Guidance on the Interim Rules.

Unfortunately, the SEC release has created needless anxiety and confusion among the thousands of citizen volunteers who serve their states and communities in Texas and across this country. The SEC release states, "The Commission does not believe that appointed members of a governing body of a municipal entity that are not elected ex officio members should be excluded from the definition of a "municipal advisor." *Id* at 41. Many have raised the concern that this statutory interpretation, combined with the interim rule[3], in effect since October 1, 2010, requiring municipal advisors to register, could mean that appointed members of boards are required to register immediately. Conflicting reports of inconsistent guidance from the SEC are circulating. The SEC should issue definitive public guidance immediately that the interim rules do not require members of the boards of municipal entities to register as municipal advisors unless, for some reason other than their service on their board, they meet the definition of municipal advisor.

The Proposed Rule Interferes with Traditional State Authority.

In his first inaugural address, Thomas Jefferson reviewed what he deemed "the essential principles of our Government." Among them was "support of the State governments in all their rights, as the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies." The SEC should adhere to this essential principle and conclude that determining who is qualified to serve on State boards and commissions is quintessentially a State right and function that should be supported rather than interfered with by the federal government. Surely, Texas and the other States are more competent and better positioned than the SEC to select those with the skills for the job and the heart for the work of State governance.

---

1 S.E.C. Release No. 34-63576: File No. S7-45-10 (Dec. 20, 2010) found at 76 Fed. Reg. 824 (Jan. 6, 2011) and *available at* http://sec.gov/rules/proposed/2010/34-63576.pdf. ("SEC Release") References in this comment to the SEC Release are to the version posted at the SEC website.

2 Pub. L. No. 111-203, 124 Stat. 1376 (2010)

3 17 C.F.R. 240.15Ba2-6T

The Intrusion of the Proposed Interpretation into State Governance Is Breathtaking.

The proposed rules would allow the SEC and the Municipal Securities Rulemaking Board (MSRB), rather than state elected officials, to set the requirements for service on virtually any state or local board. For example, the SEC Release states that boards of charter schools are municipal entities. SEC Release at 22 – 23. In addition, because the SEC Release proposes that the registration requirement reach even to those who provide advice to "municipal entities with respect to their bank accounts" or any other investment, the members of virtually any board or committee could be deemed by the SEC to be a "municipal advisor" and required to register. *See* SEC Release at 25-26. If board members are deemed to be "advisors", then the SEC and MSRB rules on municipal advisors could determine who serves on environmental boards, parks and wildlife boards, historical commissions, and other boards having little or nothing to do with public finance. Even if this transfer of power from elected state officials to the unelected staff of the SEC and the MSRB[4] was limited to those boards directly involved in public finance, it would be objectionable to anyone, who like Jefferson, was concerned about "antirepublican tendencies" and the constitutional role of the states in our federal system.

The Proposed Registration Requirements Could Cripple Texas State Boards.

The knot of rules and requirements, including an initial combined registration and annual fee of $600 followed by an annual $500 registration fee, to be imposed by the SEC and MSRB, will deter citizen volunteers from serving on boards. Some have already stated they will not serve if they are required to register. Furthermore, unless the SEC establishes clear standards that allow board members to determine with certainty when they need not register, the fear of penalties, both civil and criminal, for failing to register will chill the deliberation and comments of those brave enough to serve.

Board Members Do Not Meet the Definition of Municipal Advisors.

Members of governing boards are not municipal advisors because they do not provide advice. Furthermore, governing board members, as the very embodiment of the "municipal entity" they govern, fall within the "municipal entity" exception to the Act's "municipal advisor" definition

Advisory boards are a component part of the municipal entity they advise. In addition, an advisory board is a separate "municipal entity" as defined by the Act. The

---

4 The MSRB is a Virginia non-stock corporation established by the SEC pursuant to the Securities Acts Amendments of 1975, Securities Exchange Act of 1934 §15B(b), 15 U.S.C. §78o-4(b). *See also* MSRB Governance *available at* http://www.msrb.org/About-MSRB/Governance.aspx. The Board consists of 15 members selected by the Board. MSRB By-Laws, Rule A-3, *available at* http://www.msrb.org/About-MSRB/~/media/Files/Goverance/By-Laws.ashx

citizen members of the advisory board are the embodiment of the advisory board and therefore are excepted by the "municipal entity" exception from the definition of municipal advisor. In addition, citizens who serve on advisory boards that act collectively do not individually provide advice to the governing body. Accordingly, members of such boards do not meet the definition of a "municipal advisor" by reason of their service.

If Necessary, the SEC Should Exercise Its Discretion to Exempt Board Members.

Congress granted the SEC discretion to exempt anyone from the municipal advisor registration requirement. 15 U.S.C. § 78o-4(a)(4). If the SEC concludes that the proposal to treat board members as municipal advisors is statutorily compelled, the SEC should exercise that discretion here and exempt any member of a governing or advisory board of a municipal entity from the registration requirement. The SEC cannot allow a population, whose willingness to serve is critical to the nation, to be dissuaded from service by unnecessary and overreaching regulations

Board Members Are Not Municipal Advisors.

The Act defines "municipal advisor" as "a person (who is not a municipal entity or an employee of a municipal entity) that provides advice to or on behalf of a municipal entity. ..." 15 U.S.C. § 78o-4(e)(4). Without considering whether a governing board member "provides advice" or constitutes a "municipal entity", the SEC Release states: "The Commission does not believe that appointed members of a governing body of a municipal entity that are not elected ex officio members should be excluded from the definition of a 'municipal advisor.'"

Board Members Do Not Provide Advice.

Governing board members do not provide advice to their respective boards. They deliberate, decide and act on it. Governing board members function by receiving advice, debating and discussing that advice, questioning and deliberating, and ultimately, voting. These actions should not be considered "advice" for purposes of the registration requirement.

Furthermore, a governing board and its members are a single legal entity. A municipal entity cannot advise itself any more than a private individual can.

Board Members Embody the Municipal Entity and Are Therefore Excepted from the Definition of Municipal Advisor.

Municipal entities are explicitly excepted from the definition of municipal advisors. Members of the governing board of a municipal entity are the very embodiment of the municipal entity and, as such, are excepted from the statutory definition of municipal advisor. This principle of identity between a board and its members is reflected in sovereign immunity law which holds that a claim or suit against a

board member in his official capacity, for acts within his authority, is a claim or suit against the board. Congress understandably wished to exempt municipal entities from the burdens of registration and regulation as municipal advisors. That statutory objective is foiled if citizen volunteers serving as the boards of municipal entities are subjected to those burdens.

Citizen members of official advisory boards are likewise excepted from the definition of municipal advisors. Official advisory boards are municipal entities for two independent reasons. First, they are a component part of the municipal entity they advise and therefore a municipal entity. Second, they meet the statutory definition of a "municipal entity" standing alone. That definition expressly includes "any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality;" 15 U.S.C. § 78o-4(e)(8)(A). (Emphasis added.) Official advisory boards are therefore a "municipal entity" and excepted from the registration requirement. The citizen members of the advisory board are the embodiment of the advisory board and therefore excepted from the definition of "municipal advisor".

Citizen Members of Advisory Boards that Act Collectively Are Not Persons Who Provide Advice.

Many advisory boards only offer advice collectively such as upon a vote or resolution approved by its members. In these cases, the individual board members do not offer advice. The advice is provided by the advisory board. Accordingly, citizens who serve on advisory boards that act collectively, by vote or otherwise, should not be included within the definition of a "municipal advisor" by reason of that service.

Texas Does Not Ask For Immunity for Citizens Who Serve on Boards.

If citizen volunteers act as a municipal advisor outside of their role as a board member they should be subject to the registration requirements. However, there must be clear and definitive criteria that allow these citizen volunteers to determine with certainty when they need to register.

Concern About Who Is Accountable Does Not Trump Statutory Exceptions.

Under the SEC's interpretation of the Act, elected officials serving on governing boards are considered municipal employees, but appointed governing board members are not. SEC Release at 40-41. The SEC Release gave this explanation. "The Commission believes that this interpretation is appropriate because employees and elected members are accountable to the municipal entity for their actions. In addition, the Commission is concerned that appointed members, unlike elected officials and elected ex officio members, are not directly accountable for their performance to the citizens of the municipal entity." *Id.*

That the SEC would have this concern about the accountability of appointed governing board members is puzzling given the SEC's recognition that municipal

security issuers are "governed by state and local laws, including state constitutions, statutes, city charters, and municipal codes. Such constitutions, statutes, charters, and codes impose on municipal issuers a vast and varied multiplicity of requirements relating to governance, budgeting, accounting, and other financial matters. The governing bodies of municipal issuers are as varied as the types of issuers, ranging from state governments, cities, towns, and counties with elected officials to commissions and other special purpose enterprises having appointed members."[5] SEC Release at 9. (Emphasis added) Unfortunately, the SEC release fails to consider whether application of a new layer of federal regulation, on top of the existing "vast and varied multiplicity of requirements" to which the citizen members of these bodies are subject, is needed or counterproductive.

Later, the Commission asked whether the distinction between elected and appointed members was appropriate. *Id* at 51. The distinction is not appropriate. First, the explanation ignores the text of the statute. There is no explanation of why being "accountable" to someone is the determining criteria of a "municipal advisor" such that an elected official is considered not to be an advisor but "concerns" about the accountability of an appointed member requires registration.

Second, the SEC offers no explanation of why appointed members must be "directly accountable ... to the citizens of the municipal entity" when municipal employees are not. As the Commission itself stated, municipal employees "are accountable to the municipal entity for their actions." SEC Release at 41. (Emphasis added.) Why then require appointed members to be directly accountable to the citizens?

Third, in Texas, members of state boards are held directly accountable by law for honest and ethical conduct.

In Texas, Citizen Volunteers Are Held Directly and Publicly Accountable by Law for Honest and Ethical Conduct. Accordingly, There Is No Justification for the Many Burdens Resulting from the SEC's Proposed Intrusion into State Governance.

Conflicts of Interest Are Against the Official Policy of the State of Texas.

The State of Texas has, by statute, declared its official policy "that a state officer or state employee may not have a direct or indirect interest, including financial and other interests, or engage in a business transaction or professional activity, or incur any obligation of any nature that is in substantial conflict with the proper discharge of the officer's or employee's duties in the public interest." The statute defines "state officer" to include appointed members of governing boards. *See* Tex. Gov't Code §§ 572.001 and 572.002 (1) and (12).

---

5 The SEC Release refers only to municipal securities issuers in this discussion. Given the expansive definition of municipal entity to include municipal entities that make any type of investment, the requirements to which governing boards and their members are subject are even more vast and varied.

The statute recognizes that citizens who serve owe a responsibility to the people and government of Texas. The statute states "...this chapter provides standards of conduct and disclosure requirements to be observed by persons owing a responsibility to the people and government of this state in the performance of their official duties." §572.001

The statute provides both a guide for conduct and a basis for discipline. It continues, "It is the intent of the legislature that this chapter serve not only as a guide for official conduct of those persons but also as a basis for discipline of those who refuse to abide by its terms." *Id.*

Texas Law Goes Well Beyond the Municipal Advisor Registration Requirements.

The Texas statute requires governing members of state boards to file public financial statements, publicly disclose conflicts of interest and recuse themselves from voting on or participating in any decision on which they are conflicted. *See* Tex. Gov't Code §§ 572.021, 023, .032 and .058. Those who fail to file financial statements as required are subject to civil and criminal penalties. *See* §§ 572.33 and .34. Those who fail to disclose conflicts of interest and recuse themselves may be removed from office. *See* § 572.058. This information is available to both the Commission and participants in the municipal securities markets and thus satisfies the Commission's objectives for registration. *See* SEC Release at 19. Section 572.051 prohibits gifts, employment, investments or compensation that could create a conflict of interest.

Texas laws specific to the operation of particular state boards also hold board members accountable for honest and ethical service. *See* e.g. Tex. Educ. Code §§ 54.606. - .611 (Governing the Texas Prepaid Higher Education Tuition Board.) *See also*, Exhibit A, ERS Accountability and Oversight Chart, attached to the February 18, 2011 comments of the Employees Retirement System of Texas submitted to the SEC on the subject rulemaking.

Registration of Citizen Board Members Is Not Necessary Because the Appointment Process and Operation of Government Are a Matter of Public Record in Texas and Subject to Official and Public Scrutiny.

In Texas, the Governor's Office appoints most members of state boards. That office seeks to select from the 25 million Texans those with the skill for the job and the heart for the work. In doing so, it screens the candidates to eliminate those who do not qualify under Texas Government Code Chapter 572 and the specific statutes governing the board in question. Everything in an applicant's file is a public record subject to the Texas Public Information Act. *See generally*, Tex Gov't Code Chapter 552.

All appointees subject to Chapter 572 (the vast majority of appointees) are subject to approval by the Texas State Senate. This public appointment process, combined with official scrutiny by the Senate, and public disclosure of the citizen's finances and conflicts of interest go far beyond the information made available by the registration requirement.

State Open Records and Open Meetings Laws Are Another Measure of Transparency at the State and Local Level That Make the Proposed Registration Requirement for Board Members Unnecessary.

In Texas, the Open Meetings Act requires prior public notice of the time, place, and subject matter of meetings of governmental bodies. Except for expressly authorized exceptions, the meetings must be open to the public. *See* Tex. Gov't Code §§ 551.002, 551.041. Under Texas law, the authority vested in a governmental body may be exercised only at a meeting of a quorum of its members.[6] The provisions of the Act are mandatory and are to be liberally construed in favor of open government. *See City of Laredo v. Escamilla*, 219 S.W.3d 14, 19 (Tex. App.—San Antonio 2006, pet. denied).

Under the Texas Public Information Act, information in the possession of a governmental body is generally available to the public. *See* Tex. Gov't Code §§ 552.002(a) and .021. Exceptions to this requirement exist, but generally, disputes about the availability of information must be submitted to the Office of the Attorney General. *See* Tex. Gov't Code §§ 552.301 – 303. The Act also authorizes the public to file suit to compel the release of information, even if the Attorney General has ruled otherwise. Tex. Gov't Code § 552.321. Like the Open Meetings Act, the Public Records Act is to be liberally construed in favor of open government. Tex Gov't Code § 552.001.

The Public Information Act is based on the principle that:

> "The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created." *Id.*

This principle is best defended and upheld by the people of Texas rather than the SEC and MSRB. It is the people, not the SEC and MSRB, that should control these boards.

The Commission Should Not Distinguish Between Those Who Serve on Governing Boards and Those Who Serve on Advisory Boards.

Such a distinction is unworkable as some advisory boards are subcommittees of governing boards; other advisory boards are made up of a combination of governing board members and other citizen volunteers; and others have no members from the governing board. These advisory board members are screened and selected by state officials, usually in compliance with specific statutory requirements. The identities of the citizen volunteers who serve on the advisory boards are public information. These citizen volunteers are accountable to the appointing official, to the advisory board and to the entity they advise. Texas law regulates these boards in a manner appropriate to their

---

[6] *See* Office of the Attorney General of Texas, *Open Meetings Act Handbook*, at 2-3 (2010), *available at* www.oag.state.tx.us/open/publications_og.shtml.

function and authority, and it should be the State of Texas and not the SEC and the MSRB that determines their eligibility requirements and duties.

The Proposed Rule Would Impose a Significant Financial Burden on States at a Time When They Can Least Afford It.

The expenses of most state board members are reimbursed by the State. The initial MSRB registration and annual fees alone will cost $1.8 million for the estimated 3000 Texas appointed board members. What could be more significant is the cost of advising and training these 3000 citizen volunteers on their obligations in this complex and evolving regulatory environment. At the MSRB's Out Reach Seminar in Austin on February 15, 2011, its General Counsel stated that the MSRB had just begun to write rules for municipal advisors and he expected the rule making to take "years and years" to complete. The SEC's proposed rule will compel states to assign attorneys to monitor that process and inform the citizen volunteers of the ever changing requirements. The cost in both time and money is multiplied many times when the burdens borne by local governments are added.

Texas' Ability to Recruit Board Members Could Be Crippled If the Proposed Rule Is Adopted.

Texas and the other states must be able to recruit qualified people with a background in finance to its boards. Texas has already heard from citizen volunteers who are stating that they will not continue to serve if they are required to register. The burden on the citizen volunteers is not limited to the SEC registration. Board members required to register with the SEC will also have to register with the MSRB and will be subject to MSRB rules. It appears that political contributions by the member's employer or the member's associates or supervisors could disqualify the member from service under the MSRB's proposed "pay to play" rules. The MSRB has also proposed rules that would impose overlapping fair play and fiduciary duty requirements on board members if they are deemed municipal advisors. In the near future, the MSRB will propose additional rules regulating gifts and gratuities and setting professional qualifications, including tests, for municipal advisors. It is hard to imagine how the States might convince a sensible person to serve her state if doing so subjects her employer and her to this knot of evolving regulations laid on top of existing state regulations.

The Proposed Rules Will Interrupt State Government and Place Board Members Choosing Not to Register in an Untenable Position.

The Texas Constitution, Article 16, Section 17, commands that "[a]ll officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified." The purpose of the provision is to prevent the interruption of governmental functions. That purpose will be frustrated when Texas board members decide not to register and the proposed registration requirement prevents or delays selection of willing successors. The resigning board members will be in the untenable

position of being compelled by the Texas Constitution to continue to perform their duties but prohibited by the proposed rules from doing so because they are not registered. Boards will be unable to function if a quorum cannot be obtained. The likely eventual result is reduced reliance on governing and advisory boards. The Commission should alter its proposal to avoid these consequences.

A "Facts and Circumstances" Approach to the Application of the Municipal Advisor Registration Requirement is Unworkable and Unfair.

Some have suggested a "facts and circumstances" approach for determining when a board member must register. This nebulous approach is unworkable and unfair to citizen volunteers.

Uncertainty as to the registration requirement might be tolerable if the consequence of an error was a trivial matter. It is not. The MSRB registration fee is $100.00 and the MSRB annual fee is $500.00. The penalties for failing to register are potentially severe and, at a minimum, career threatening.

If board members are expected to serve, they must be able to determine what they can or must do to lawfully avoid the registration requirement. A "facts and circumstances" approach will leave the members unable to determine how much, if any, discussion at a meeting or consultation with staff would constitute "advice" under the Dodd-Frank Act and thereby subject them to penalties for failing to register. This approach will cause many citizen volunteers to withdraw from service. Other volunteers will needlessly register. The uncertainty will chill the debate, discussion, and inquiry of those remaining members who are brave enough to continue to serve without registering.

The SEC Should Adopt the Same Standard for Appointed Members as Elected Members.

Texas objects to any approach that fails to inform volunteer citizens serving on boards what they can or must do to lawfully avoid the burdens of registration. The SEC proposed such a standard for elected board members and should adopt the same standard for all board members. All members of both advisory and governing boards should be excepted from the definition of "municipal advisor" to the extent they are acting within the scope of their role as a member of a board of the municipal entity.

The SEC should make clear that all of the following would fall within the scope of citizens' roles as a member of a governing or advisory board of the municipal entity:

1. Votes or communications of board members made or distributed at or for official meetings, whether in public or in closed session, of a board of the municipal entity on which the appointed member serves;

2. Communications by board members with the municipal entity's staff, attorneys, or other hired professionals; and

3. Communications or activities carried out by board members in furtherance of any board duty or assignment.

This approach addresses concerns that board members might improperly promote investments or solicit business outside of their roles as board members and offers a clear standard for determining when an appointed board member may decline to register.

Questions Presented by the SEC's Proposed Statutory Interpretation.

1. Are employees of municipal entities, who serve on boards of other municipal entities, considered to be employees? For example:

   a. Is a city employee serving on the board of a pension fund for city employees an employee of a municipal entity for purposes of the exception to the definition of municipal advisor?

   b. Would an employee of a state agency that provides the staff and administrative functions to a state board be an employee of a municipal entity for purposes of the exception?

As the SEC Release recognized, employees are accountable to the municipal entity. Consequently, all municipal employees acting within the scope of their employment should be exempt from the registration requirement whether or not they are advising their employer. Otherwise, Congressional intent to except municipal employees will be frustrated.

2. Are members elected by pension beneficiaries as opposed to the "citizens of the municipal entity" "elected" members?

3. Are members nominated by vote of the beneficiaries and appointed by a public official, as in the case of the Teachers Retirement System of Texas, "elected" officials?

4. Is a person designated by an elected official to represent the official on a board considered an elected member of the board?

That none of these questions can be answered by referring to the text of the statute demonstrates that the SEC's interpretation is not statutorily based.

5. Assuming only for the sake of this question that board members are not excepted from the definition of "municipal adviser", would a board member "provide advice" if he participated in the oversight of a grant and loan guarantee fund where the grants and loan guarantees are not made for investment purposes? The fund no longer loans money but collects payments

on existing loans. Authority to refinance existing bond debt of the fund has been delegated to staff. This oversight includes:

a. approval of a budget for the fund;

b. delegating authority to staff to make decisions on loan guarantees;

c. approving loan guarantees;

d. determining the amount available for grants from the fund subject to statutory limits;

e. determining eligibility for grants from the fund;

f. awarding grants from the fund;

g. approval of loan modifications;

h. delegating authority to staff to make decisions on loan modifications; and

i. reviewing and approving audits.

Conclusion.

The SEC should issue immediate public notice that citizen volunteers need not fear enforcement action under the interim rule with respect to activities within the scope of their role as board members.

The SEC should abandon its unnecessary and counterproductive proposal to regulate citizen volunteers for their service on governing or advisory boards of municipal entities.

If the SEC concludes that the proposal to treat citizen volunteer board members as municipal advisors is statutorily compelled, the SEC should exercise its discretion under 15 U.S.C. § 78o-4(a)(4) and exempt any member of a governing or advisory board of a municipal entity from the registration requirement.

Joining Entities

Alamo Regional Mobility Authority
Angelina and Neches River Authority
Brazos River Authority
Cameron County Regional Mobility Authority
Camino Real Regional Mobility Authority
Cancer Prevention and Research Institute of Texas Oversight Committee
Lavaca-Navidad River Authority
Lower Neches Valley Authority
Northeast Texas Regional Mobility Authority
Nueces River Authority
Office of the City Attorney for the City of Houston, Texas
Red River Authority of Texas
Sabine River Authority
San Antonio River Authority
San Jacinto River Authority
Sulphur River Basin Authority
Teacher Retirement System of Texas
Texas Agricultural Finance Authority
Texas Board of Criminal Justice
Texas Board of Professional Engineers
Texas Board of Professional Land Surveying
Texas Commission on Law Enforcement Officer Standards and Education
Texas Department of Agriculture
Texas Department of Housing and Community Affairs
Texas Department of Transportation
Texas Education Agency
Texas General Land Office
Texas Health and Human Services Commission
Texas Health Services Authority Corporation
Texas Higher Education Coordinating Board
Texas Prepaid Higher Education Tuition Board
Texas Public Finance Authority
Texas School for the Deaf
Texas State Board of Public Accountancy
Texas Treasury Safekeeping Trust Company
The Texas State University System
Trinity River Authority of Texas
University of Houston System
Upper Neches River Municipal Water Authority

T. ROWE PRICE INVESTMENT SERVICES, INC.

WWW.TROWEPRICE.COM

P.O. Box 89000
Baltimore, Maryland
21289-1020

100 East Pratt Street
Baltimore, Maryland
21202-1009

Phone 800-638-5660

February 25, 2011

Mr. Ronald W. Smith
Corporate Secretary
MSRB
1900 Duke Street
Alexandria, VA 22134

Re: ***Comments on Pay-to-Play Rule for Municipal Advisors (the "Proposal"), MSRB Notice 2011-04 (January 14, 2011)***

Dear Mr. Smith:

T. Rowe Price Investment Services, Inc. and its affiliates (collectively, "**T. Rowe Price**")[1] appreciate the opportunity to provide comments to the Municipal Securities Rulemaking Board (the "**MSRB**") regarding the Proposal (i) to establish "pay-to-play" and related rules in connection with municipal advisors, and (ii) to make certain conforming changes to its existing pay-to-play rules for brokers, dealers, and municipal securities dealers (**"dealers**"). Our comments and suggestions are below.

MSRB Notice 2011-04 ("**Notice**") has proposed, among other things, a new MSRB Rule G-42 that would create pay-to-play restrictions on political contributions by municipal advisors. The Notice also requests comment on whether the MSRB's existing restrictions on types of solicitors that may be used, Rule G-38, should be amended or eliminated.

1. Rule G-42 Proposal

The Securities and Exchange Commission ("SEC") proposed an amendment to its Rule 206(4)-5, the SEC's pay-to-play rule applicable to SEC registered investment advisers.[2] This proposed amendment provides that it is unlawful for investment advisers subject to the Rule "to provide or agree to provide, directly or indirectly, payment to any person to solicit a government entity for investment advisory services on behalf of such investment adviser unless such person is (A) a regulated municipal advisor; or (B) an executive officer, general partner, managing member (or, in each case, a person with similar status

[1] T. Rowe Price Associates, Inc., an SEC registered investment adviser and a wholly owned subsidiary of T. Rowe Price Group, Inc., is the program manager for section 529 College Savings Plans issued by two states; its registered broker/dealer affiliate, T. Rowe Price Investment Services, Inc., acts as primary distributor for these Plans and, as a result, is subject to MSRB rules G-37 and G-38. In addition, T. Rowe Price Associates, Inc., together with its advisory affiliates, had $482 billion of assets under management as of December 31, 2010.

[2] SEC Release No. IA-3110 (Nov. 19, 2010)("SEC Release IA-3110").

or function), or employee of the investment adviser." The SEC specifically asked if it should "amend rule 206(4)-5 to provide that any person that controls, is controlled by, or is under common control with an investment adviser (and, if that person is an entity, its personnel) would be deemed to be a "covered associate" of the investment adviser if the investment adviser pays or agrees to pay such person (or such personnel) to solicit a government entity on its behalf?"[3] T. Rowe Price submitted a comment letter to the SEC in support of allowing investment advisers subjecting its related persons to Rule 206(4)-5 to be able to solicit government entities on behalf of such investment adviser.

We believe it is of critical importance to many advisory firms that are part of large complexes that provide integrated services to certain advisory clients to allow related persons to solicit government entities and to get paid for such services. In our comment letter to the SEC, we made it clear that our experience in dealing with 529 plans and other advisory clients has demonstrated to us that clients and prospective clients often demand to speak with personnel of affiliated entities of the adviser, especially when the advisory relationship will also entail functions such as recordkeeping or the provision of information to plan participants. In a large complex, the personnel the client or prospective client wants to meet may work in areas as varied as Information Technology, Compliance, and Human Resources and are often employed by affiliates of the adviser, such as a registered transfer agent or a separately incorporated Information Technology entity. They may also be registered or associated with an affiliated broker/dealer.

We also clarified the nature of the compensation paid to affiliated individuals within these large, global firms who would be viewed as soliciting under Rule 206(4)-5 when providing information such as that described above. These individuals, in many cases, are not compensated directly if they provide information that may lead to the acquisition or retention of an advisory client.[4] The payments that typically occur are between the affiliated entities as intra-company transfers to acknowledge the many services that the various affiliates provide to each other. We believe that this structure is common at many firms.

Revising Rule 206(4)-5 to permit any person that controls, is controlled by, or is under common control with an investment adviser (and, if that person is an entity, its personnel) to solicit a government entity on the adviser's behalf, and treating such a person as a "covered associate" of the adviser will better align the SEC's regulation of adviser pay-to-play practices with the MSRB's current and effective regulation in this area. It will also ensure that conflicts of interest are effectively addressed, because these persons will be "covered associates" subject to the same restrictions on political contributions under

[3] SEC Release IA-3110 at pages 72-73.

[4] In fact, in many firms, even those individuals within the complex whose positions are in sales may not paid commissions for winning advisory business; such successes are simply one consideration when their compensation is reviewed.

which the adviser and its associates operate. This will result in regulation precisely targeted to the potential abuses that compelled the SEC to adopt pay-to-play restrictions for investment advisers.

For these reasons, we also believe strongly that adviser-affiliated entities with employees who solicit on behalf of the adviser should not be required to register with the SEC or the MSRB as municipal advisors. Imposing this new registration requirement will simply add complexity and cost without providing any additional protection from the conflicts of interest identified by the SEC and the MSRB.

Proposed Rule G-42 assumes that investment adviser affiliates that solicit business for the investment adviser from governmental entities will register voluntarily as municipal advisors because only municipal advisors (and certain investment adviser personnel) will be able to solicit this business if the SEC adopts its proposed amendment to Rule 206(4)-5 on this point. However, as noted above, the SEC has asked for comment, as an alternative to voluntary registration, about whether employees of affiliated entities of the investment adviser who solicit on behalf of the investment adviser should be treated as covered persons of the investment adviser, rather than requiring the registration of the affiliates as municipal advisors. The MSRB should wait for the SEC to decide this important point before adopting proposed Rule G-42. Failure to do so will lead to confusion and regulatory uncertainty under the MSRB rule related to the status of affiliates and their employees who solicits.

If the MSRB nevertheless decides to adopt Rule G-42 at this time, the de minimis contribution limits in that Rule and in Rule G-37 should be changed to conform to the limits in Rule 206(4)-5. Otherwise, a large firm will find that most, if not all, of its employees are subject to political contribution restrictions with different parameters. Realistically, this will force most firms to adopt the MSRB standards, undermining the SEC's attempt to allow small contributions to officials for whom the employee cannot vote and slightly higher, but still relatively small, contributions to officials for whom the employee can vote.

2. Proposal to Eliminate or Amend G-38

The MSRB requested comment on whether Rule G-38 should be eliminated or amended. We do not think Rule G-38 should be eliminated. We believe that MSRB Rules G-37 and G-38 have in concert provided effective regulation of pay-to-play issues for dealers. We also believe that the appropriate action for the MSRB to take on these issues will depend in large part on the decisions that the SEC makes on related issues in its proposed amendments to Rule 206(4)-5 (as described above). Until the SEC makes a decision on this point, any move to amend or eliminate current Rule G-38, which permits affiliated employees to solicit municipal business for a broker-dealer, but requires those affiliated

employees to be subject to the same pay-to-play rules as similar employees of the broker-dealer, is premature.

We appreciate this opportunity to comment on this Proposal. If you have any questions concerning our comments or would like additional information, please contact me.

Sincerely,

David Oestreicher
Chief Legal Counsel

CC: Robert Cook, SEC Director of Investment Management
Eileen Rominger, SEC Director of Trading and Markets

Two Logan Square
Suite 1600
18th & Arch Street
Philadelphia, PA 19103-2770

215 567-6100
215 567-4180 fax
www.pfm.com

The PFM Group
Public Financial Management, Inc.
PFM Asset Management LLC
PFM Advisors

February 23, 2011

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

Re: Notice No. 2011-04 (Proposed Rule G-42)

Dear Members:

I am responding to the Board's request for comments to its Proposed Rule G-42 as explained in MSRB Notice 2011-04. I am a member of the Bar of the Commonwealth of Pennsylvania, and I devote a considerable portion of my practice to matters arising in the regulation of municipal securities.

My comments are framed in the following paragraphs:

1. Ambiguities in Proposed Rule G-42(c). It would be useful to registered municipal advisors if the Board were to address two ambiguities which Proposed Rule G-42 incorporates from Rule G-37.

    A. Paragraph (c)(i) of the Proposed Rule, like its Rule G-37 analog, prohibits the "solicitation" (not defined) of a "contribution" to an "official of a municipal entity" with whom the municipal advisor is seeking to engage in municipal advisory business. The Proposed Rule makes no attempt to define the period of time when the municipal advisor's "seeking" begins and ends. Municipal advisory services almost always are sold by direct contact with the prospective client. The municipal advisor's "seeking" presumably begins with some contact by the advisor, but it is important to the advisor to know when the "seeking" ends, because the acts of "solicitation" are undefined and doubtless are less identifiable than the making of a contribution. The expiration of the period that constitutes "seeking" necessarily is arbitrary, but finance professionals

deserve reasonable certainty, and I would suggest that Paragraph (c)(i) not apply to any activity occurring more than six months after the advisor's latest contact with the municipal entity looking toward an engagement. In those situations in which the municipal entity issues an RFP for the services in respect of which the advisor has made a contact, the "seeking" period of an advisor who submits a response to the RFP would continue up to the date the municipal entity issues a contract for the service to another firm and would not be deemed to resume until the next contact with the municipal entity initiated by the advisor. Contacts initiated by the municipal entity should not be taken into account because they are beyond the control of the municipal advisor.

B. Paragraph (c)(ii) of the Proposed Rule prohibits a municipal advisor and certain specified persons from soliciting (not defined) "payments" (defined) to "a political party of a state or locality where the municipal advisor is * * * seeking to engage in municipal advisory business * * *." The time period within which this suspension of solicitation would be in effect is the same issue as discussed above. Paragraph (c)(ii) presents the additional issue of identifying the embargoed "political party of a state or locality" where the municipal entity is situated. In suburban Philadelphia, for example, with which I am familiar, my political subdivision is Lower Merion Township. There are Republican and Democratic "party" organizations active in Lower Merion Township. Lower Merion Township is a legislatively-created political division of Montgomery County, and each major political party has a county organization. The configuration of Lower Merion Township, Montgomery County is replicated throughout the Commonwealth of Pennsylvania. Each major political party of course has a state-wide organized entity, and, in addition, there doubtless are other configurations of political organizations that comprehend several counties, such as, hypothetically, "Republicans of Southeastern Pennsylvania". There is no reason to expect that a similar multiplicity of "party" organizations is not replicated throughout the United States.

> Having those facts in mind, the ambiguity created by Paragraph (c)(ii) is whether the Board intends that the prohibition against solicitation of "payments" should apply to "payments" only to the party organization the constitutional boundaries of which most narrowly comprehend the governmental entity which is the subject of the advisor's marketing efforts, or whether the prohibition extends all the way to the State organization and all variations in between. For my part, I believe that the former interpretation makes the most sense in the light of the need to correct the evil that appears to be seen by the Board. That is so because the relationship between a distant political organization and a municipal entity seeking financial advice is clearly attenuated. But, in all events, the ambiguity should be corrected in Proposed Rule G-42 and in Rule G-37.

Finally, I would like to suggest that, as defined in draft Rule G-42 (and in Rule G-37), the word "payment" has a connotation which exceeds the purpose of the Rule. Specifically, the use of the word "payment" necessarily (and doubtless unintentionally) implicates all commercial transactions with a political party. In a case, say, where a local political party allows its document production equipment to be used by a community organization for a nominal reimbursement, if a municipal advisory professional should make a communication to the community organization that it should pay the agreed fee, that would constitute a completed violation of Rule G-42, with such consequences for the municipal advisory professional and his/her firm that, as of now, only the SEC knows. One would like to think that the foregoing example is an unusual case, but since it is possible that, under the analysis expressed in SEC Release 34-63576, a municipal advisor potentially could be anyone, and everyone, in the world (with a single exception), it is appropriate to correct the uncertainty. I suggest that the definition of "payment" be modified to include the concept of an amount in excess of the fair value of goods or services provided by the political party.

2. Third Party Business. If I correctly understand the objective and the effect of the "third-party business" provisions of Paragraph (b)(i) of the Proposed Rule, those provisions preclude an advisor from hiring itself out to seek business for a broker/dealer, investment advisor or another municipal advisor during the stand-down period after the first advisor has made a disallowed contribution. I would observe:

A. The acceptance of a compensable engagement by a municipal advisor subsumes the receipt of compensation by the advisor, thus making the receipt of the compensation as a trigger for enforcement consequences academic, except in the odd circumstances in which the advisor fails to follow the cardinal rule of getting paid up-front and its disallowed contribution is made in the interval between the solicitation and the receipt of the compensation. In all events, it would appear that the only effect of the solicitation/payment distinction is in the calendar interval covered by the stand-down period.

B. By using in the definition of "third-party business" the phrase "for or in connection with municipal financial products or the issuance of municipal securities" rather than the phrase "municipal advisory business" the Board, quite correctly, recognizes that there would be a high incentive for a broker/dealer seek to obtain highly profitable underwriting business through the intervention of an advisor that contributes to the election of issuer officials (particularly if Rule G-38 is tampered with, see below). It is a serious omission, therefore, that the Board has not included in the Proposed Rule some significant consequences on a broker that hires an advisor (in any circumstances not disallowed by Rule G-38) who makes a disallowed contribution after engagement by the broker.

3. Retention of Rule G-38. The Board's Notice asks for comment with respect to the effect on Rule G-38 which may be implied by Proposed Rule G-42. It plainly would be a mistake to repeal Rule G-38. The purposes to be accomplished by Rule G-38 remain entirely valid, and the elimination of Rule G-38 would leave unregulated the abuses which Rule G-38 was intended to prevent to the extent that broker/dealers can restructure certain practices to avoid (or hope to avoid) registration as municipal advisors under Section 15B(a) of the Exchange Act. The repeal of Rule G-38 would reopen the field to brokers' use of intermediaries' political contributions, because Rule G-42 and Rule G-37 contain no sanctions against a broker's (or a broker/advisor's) enjoying the benefit of an intermediaries' solicitation that is enhanced by a prohibited contribution. Finally, there appears to be no good reason why the Board

should not expand Rule G-38 to apply its prohibitions to the use of solicitors by municipal advisors.

Respectfully submitted,

Joseph J. Connolly
Counsel

JJC:plj

WM Financial Strategies

11710 ADMINISTRATION DRIVE
SUITE 7
ST. LOUIS, MISSOURI 63146
(314) 423-2122

February 21, 2011

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

Re: Request for Comments to Rule G-42

Ladies and Gentlemen:

This letter is in response to the MSRB's request for comments on the proposed new Rule G-42 that will preclude a financial advisor from making certain political contributions in order to prevent "pay to play." WM Financial Strategies is fully supportive of the ban on political contributions included in Rule G-37 and the proposed Rule G-42. We would like the MSRB to consider a change to the proposed Rule G-42 and amend Rule G-37 to impose a ban on contributions to bond ballot campaigns.

In 2005, at the Bond Market Association's 10th Legal and Compliance Conference, Martha Mahan Haines, chief of the SEC's Office of Municipal Securities, suggested that contributions for bond referenda is a pay-to-play activity.

On January 7, 2009, *The Bond Buyer* reported that the MSRB was reviewing rule G-37. *The Bond Buyer's* article followed the submission of a December 2008 letter to the MSRB by executives from Citi, JP Morgan and Morgan Stanley suggesting that bond election contributions could cause an underwriter to be selected and that a level playing field is needed for all underwriters.

At its April 2009 meeting, the MSRB elected not to place a ban on contributions for bond referenda. The MSRB's press release stated that "The Board determined that, based on the information it has been able to gather, there is not adequate evidence to suggest that bond ballot campaign contributions have a negative effect on the integrity of the municipal marketplace."

In January 2010, the MSRB amended Rule G-37 to require disclosure of contributions for bond elections (other than a contribution made by a municipal finance professional or a non-MFP executive officer to a bond ballot campaign for a ballot initiative with respect to which such person is entitled to vote if all contributions by such person to such bond ballot campaign, in total, do not exceed $250 per ballot initiative). The MSRB indicated that it would study the contribution disclosures and later determine whether restrictions would be placed on election contributions. With the passage of time, the MSRB has now had the opportunity to gather fact finding data. In addition, various newspapers periodically report, unequivocally, that there have been ties between engagement of municipal market participants and bond ballot campaign contributions. Whether this occurrence is occasional or frequent, bond ballot campaign contributions, when made outside of an individual's voting jurisdiction, are a form of play-to-play that taint the integrity of the municipal market.

Sincerely,

Joy A Howard

Joy A. Howard
Principal

EXHIBIT 3

Form G-37/G-42[1]
(Items to be provided pursuant to Rule G-37(e) and Rule G-42(e), for each calendar quarter.

For filings pursuant to Rule G-37(e):

(1) The name of the broker, dealer, or municipal securities dealer ("dealer").

(2) The report period.

(3) The contributions made to issuer officials by state, contributor category, and contribution amount.

(4) The complete name and title (including any city/county/state or other political subdivision) of each issuer official.

(5) The amount of contribution and the date of automatic exemption, if any contribution is the subject of an automatic exemption pursuant to Rule G-37(j).

(6) The payments made to political parties of states, cities, counties, or other political subdivisions, by state, contributor category, and payment amount.

(7) The complete name (including any city/county/state or other political subdivision) of the political party.

(8) The contributions made to bond ballot campaigns, by state, contributor category, and contribution amount.

(9) The official name of the bond ballot campaign and jurisdiction (including city/county/state or other political subdivision) for which municipal securities would be issued.

(10) The type of municipal securities business the dealer has engaged in, by state.

(11) The complete name of the issuer and the city/county with which dealer has engaged in municipal securities business.

(12) The name, address, and phone number of the officer of the dealer submitting the form.

For filings pursuant to Rule G-42(e):

---

[1] Paper Form G-37 is replaced in its entirety by electronic Form G-37/G-42.

(1) The name of the municipal advisor.

(2) The report period.

(3) The contributions made to officials of municipal entities, by state, contributor category, and contribution amount.

(4) The complete name and title (including any city/county/state or other political subdivision) of each official of a municipal entity.

(5) The amount of contribution and the date of automatic exemption, if any contribution is the subject of an automatic exemption pursuant to Rule G-42(i).

(6) The payments made to political parties of states, cities, counties, or other political subdivisions, by state, contributor category, and payment amount.

(7) The complete name (including any city/county/state or other political subdivision) of the political party.

(8) The contributions made to bond ballot campaigns, by state, contributor category, and contribution amount.

(9) The official name of the bond ballot campaign and jurisdiction (including city/county/state or other political subdivision) for which municipal securities would be issued.

(10) The complete names of the municipal entities with which, or on behalf of which, the municipal advisor has engaged in municipal advisory business, by state.

(11) The third-party business awarded that was the subject of a solicitation by the municipal advisor, by state.

(12) The complete name of the persons on behalf of which the third-party business was solicited and the type of third-party business awarded.

(13) The name, address, and phone number of the officer of the municipal advisor submitting the form.

Form G-37x/G-42x[2]

(Items to be provided pursuant to Rule G-37(e) and Rule G-42(e)

(1) The name of the dealer or the municipal advisor.

(2) A certification that the dealer or municipal advisor did not engage in "municipal securities business" (as defined in Rule G-37) or "municipal advisory business" (as defined in Rule G-42), as applicable, during the eight full consecutive calendar quarters ending immediately on or prior to the date of the Form G-37x/G-42x.

(3) If Form G-37x/G-42x is filed pursuant to Rule G-37(e), an acknowledgement that, notwithstanding the submission of Form G-37x/G-42x to the MSRB, such dealer will be required to:

(a) submit Form G-37/G-42 for each calendar quarter unless it has met all of the requirements for an exemption set forth in Rule G-37(e)(ii) for such calendar quarter;

(b) undertake the recordkeeping obligations set forth in Rule G-8(a)(xvi) at such time as it no longer qualifies for the exemption set forth in Rule G-8(a)(xvi)(M);

(c) undertake the disclosure obligations set forth in Rule G-37(e), including in particular the disclosure obligations under paragraph (e)(iii) thereof, at such time as it no longer qualifies for the exemption set forth in Rule G-37(e)(ii)(B); and

(d) submit a new Form G-37x/G-42x in order to again meet the requirements for the exemption set forth in Rule G-37(e)(ii)(B) in the event that the dealer has engaged in municipal securities business subsequent to the date of this Form G-37x/G-42x and thereafter wishes to qualify for said exemption.

(4) If Form G-37x/G-42x is filed pursuant to Rule G-42(e), an acknowledgement that, notwithstanding the submission of Form G-37x/G-42x to the MSRB, such municipal advisor will be required to:

(a) submit Form G-37/G-42 for each calendar quarter unless it has met all of the requirements for an exemption set forth in Rule G-42(e)(ii) for such calendar quarter;

(b) undertake the recordkeeping obligations set forth in Rule G-8(h)(i) at such time as it no longer qualifies for the exemption set forth in Rule G-8(h)(i)(M);

---

[2] Paper Form G-37x is replaced in its entirety by electronic Form G-37x/G-42x.

(c) undertake the disclosure obligations set forth in Rule G-42(e), including in particular the disclosure obligations under paragraph (e)(iii) thereof, at such time as it no longer qualifies for the exemption set forth in Rule G-42(e)(ii)(B); and

(d) submit a new Form G-37x/G-42x in order to again meet the requirements for the exemption set forth in Rule G-42(e)(ii)(B) in the event that the municipal advisor has engaged in municipal advisory business subsequent to the date of this Form G-37x/G-42x and thereafter wishes to qualify for said exemption.

(5) The name, address, and phone number of the officer of the dealer or municipal advisor submitting the form.