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March 10, 2014

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

Re: MSRB Notice 2014-01: Request for Comment on Draft MSRB Rule G-42, on Duties of Non-Solicitor Municipal Advisors

Dear Mr. Smith:

This letter is written in response to the request of the Municipal Securities Rulemaking Board (the "MSRB") in Regulatory Notice 2014-01 ("the "Notice) for comments on the draft MSRB Rule G-42 with respect to the standards of conduct and duties of non-solicitor municipal advisors (the "Proposed Rule"). The Proposed Rule sets forth suggested standards of conduct and duties of municipal advisors when engaging in advisory activities other than the undertaking of solicitations. We endorse the MSRB's broad request to solicit comments with respect to the Proposed Rule, and we offer our comments based on our firm's broad-based national municipal finance practice and the experience we have accumulated in our daily interactions with numerous municipal entities and municipal advisors, both large and small. We are not commenting as counsel to any client. We assume the initial breadth of the Proposed Rule will be followed by a revised rule which is reflective of both comments received and the practices and realities of the municipal finance world. We particularly note the Executive Order issued on January 18, 2011 by the President which states, inter alia, that each federal regulatory agency "must . . . tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives . . . .", and that (as the Notice states) the Dodd-Frank Act provides that MSRB rules should 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 a robust protection of investors against fraud.

The Notice contains many requests for comments, but we have restricted our comments to those requests for which we feel we have sufficient experience to respond appropriately. To facilitate our response to the MSRB's requests for comments, we have organized our comments by following the Notice and noting those pages of the Notice in which comments are requested and to which we are responding.

Page 6 (Top)

You ask whether a fiduciary duty of a municipal advisor should be expanded to include obligated persons under the MSRB's municipal issuer protection mandates. We would strongly suggest that a fiduciary duty should not be expanded to include obligated persons. The universe of obligated persons is quite broad, and generally includes larger and more sophisticated parties than the universe of municipal issuers, which includes tens of thousands of small relatively unsophisticated issuers which issue small amounts of bonds and often on only an infrequent basis. For example, the universe of obligated persons includes multinational corporations who are registered with the SEC, such as Exxon, Cargill, U.S. Steel, numerous privately owned utilities and the like – entities which are large and sufficiently knowledgeable to be aware of the capital markets, financing options and the roles of finance professionals. Clearly an advisor owes a duty of care to all its clients; however, the fiduciary duty is so much broader and all-encompassing that it would unnecessarily impede sophisticated broad-based advisors from interacting at all with sophisticated business organizations.

Page 13 (Top) (Also see page 16, #s 12 & 13)

The Notice asks whether it is appropriate to prohibit principal transactions by municipal advisors with their clients, even if the client consents. We believe such an absolute prohibition is inappropriate, and would advocate instead for a general prohibition with an exception where informed consent is obtained. There clearly are many municipalities that are sufficiently sophisticated to adequately assess principal transactions. Moreover, as noted above there are many large obligated parties who are similarly situated. It is clearly anomalous that the Proposed Rule would purport to protect New York City, the State of California, GE, Exxon or Berkshire Hathaway because they are deemed incapable of assessing a transaction with an entity which happens to technically be a "municipal advisor" to them. Especially if these financially sophisticated entities believe that their technical "advisor" offers them the best execution with respect to a transaction.

We believe that a municipal advisor should be permitted to engage in certain types of principal transactions with its clients, with full and fair disclosure informing written client consent. We think this is particularly true with respect to transactions involving securities or investments for which there is an established open market and for which a price is easily determined by the public. For example, it would seem to be overkill to prohibit a municipal advisor from selling Treasuries to its client, when there's clearly an established Treasury market and the client can readily ascertain the reasonableness and fairness of the price. Furthermore, we do not think this rule should differ based upon whether or not the municipal advisor has a fiduciary duty to the client. Rather, the rule should be based upon those concepts of fairness and full disclosure applicable to all activities of a municipal advisor.

Page 15 (#2)

We strongly believe that a municipal advisor should be permitted to limit the scope of its engagement with its client, as discussed below – consistent with the idea that the SEC municipal advisor rules are "activities" based, implying that there are multiple possible activities that an advisor could be providing. In particular, an advisor should be permitted to limit the scope of its engagement with respect to review of the official statement, and if agreed upon by the client it should not be required to review the official statement. Any limitation should be specifically spelled out in the contractual arrangement between the client and the municipal advisor. There are organizations which provide special types of limited advice which would make them a municipal advisor within the technical definition of that term, but the advice is limited to less than the full panoply of services included in the definition. For example, there are a number of cashflow consultants who provide computer cashflows to municipal issuers, and as part of that make suggestions to issuers about how they might structure more efficient bond issues or cashflows that depend upon bond issues. Arguably, the provision of that advice with respect to the bond issue would make them a municipal advisor. However, these consultants are not providing advice with respect to the timing of the bond issue, its legal or financial covenants or other matters. Such an advisor should be permitted to limit its engagement accordingly and, likewise, to limit its review of the official statement. The same thing could happen with respect to entities which provide feasibility studies in conjunction with a project being financed by a bond issue where the advice technically goes beyond the feasibility exemption, but which clearly does not go to the timing, financial structure or other provisions with respect to a bond issue, and thus it would be inappropriate to require them to review an entire official statement for matters beyond their scope of employment and expertise.

Page 16 (#8)

We do not believe that it is appropriate to require disclosure of legal and disciplinary events that relate to an individual employed by a municipal advisor if that person is not reasonably expected to be part of the advisor's team or working for the client in question. This would be a particular burden for larger municipal advisory firms, which may employ numerous, even hundreds, of people. If the individual in question is not part of the advisory team, query the relevance of such disclosure. Requiring such disclosure would seem to unnecessarily highlight those individuals, and in very large organizations may well simply produce a constant stream of information which will be disregarded (and may effectively bury information about team members). This would also seem to be in keeping with the exception of a material person associated with registered municipal advisors from registration under SEC Rule 15Ba1-3.

We would endorse the idea of having disciplinary histories and legal events disclosed through registration forms instead of directly to clients. We would strongly suggest that municipal advisors be required to inform clients in their written engagement agreement of how the client can access such information, thus leaving it up to the client to determine whether or not

it wishes to do so. Moreover, from a practical standpoint, and particularly for large municipal advisors who may have ongoing histories and numerous legal events to disclose, the requirement of continually disclosing such information to all clients would be time consuming and expensive. One also would question its value, for clients would probably quickly become inoculated to the information. Imagine what it would be like to be the city clerk for a small city who happens to have hired a large national municipal advisory firm and who receives an almost daily stream of such information.

Page 16 (#9)

We do not believe the MSRB should require professional liability insurance be carried by municipal advisors, nor specify the minimum amount in terms of such coverage. We do believe that in some cases it may be an appropriate question for an issuer to ask in an RFP process, just as on occasion such a question is asked with respect to lawyers or accountants, but we would note that it is extremely unusual for that question to be asked with respect to comparable financial entities such as broker-dealers or underwriters. Also, we would note that such liability insurance normally has numerous acts that are not covered so its true coverage (and value to the client) is not clear and often even ephemeral, and that such insurance is expensive. And, there is no doubt that the cost of such insurance would create a barrier to entry for potential municipal advisors, particularly small municipal advisors.

Moreover, the requirement that a municipal advisor disclose that it does not carry professional liability insurance creates a potential competitive advantage for those municipal advisors which either already have such insurance or have the resources to afford this insurance. While the Proposed Rule does not require the insurance, the requirement for disclosure regarding the status of this insurance may create an expectation from municipal entities that the absence of professional liability insurance is indicative of the qualifications of the municipal advisor. This creates a barrier to entry into the municipal advisor market not based on competence or level of service but rather upon the existing resources of the municipal advisor which may serve to drive out small municipal advisors contrary to the Dodd-Frank Act provision that the MSRB may 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 a robust protection of investors against fraud.

And, in case the MSRB is not familiar with plaintiff class-action securities lawsuits, plaintiffs' firms regularly go to almost any length to determine whether a potential defendant carries liability insurance and the amount of the coverage, clearly targeting those that have insurance policies. Requiring professional liability insurance and specifying minimum coverage would be of minimal value to an issuer but of great value to plaintiffs' class-action lawyers and could well encourage expensive and often frivolous litigation involving both advisors and their clients.

Page 16 (#11)

In light of the fact that we believe a municipal advisor should be permitted to contractually limit its activities and services as an advisor, we think it inappropriate to require an advisor to review any feasibility study as part of the information considered in its evaluation of whether a transaction it recommends is suitable for the client. We are assuming that "suitability" is intended to be broadly read and cover all aspects of suitability for a client. If an advisor limits the nature of the advice it provides to an issuer, and the nature of that advice does not encompass the topic of a feasibility study, it seems entirely inappropriate to require an advisor to review the feasibility study with respect to any recommendation it makes. This is especially true if the advisor's expertise clearly does not encompass the topic of the feasibility study – in fact, in such a case the advisor should totally disclaim the value of any advice it provides. For example, a computer cash flow consultant "advisor" may know nothing about the feasibility of a proposed nuclear power plant or a low income housing tax credit project.

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The MSRB requests meaningful feedback regarding the potential economic impact of the Proposed Rule and amendments on small municipal advisors. In our practice, we routinely work with a number of very small municipal advisors, including some which are single-person organizations. Obviously, the Proposed Rule has not been fully implemented as yet, nor have all the administrative details been worked out. However, anecdotal evidence clearly indicates that this rule is going to impose a significant burden upon small municipal advisor organizations, and in fact will probably result in a substantial decrease in the number of such operations. The MSRB has recognized this natural result, and appears to be attempting to take steps to minimize the effect on small advisors. We heartily encourage the MSRB to continue to do so, as our experience is that in many geographic areas, particularly non-urban areas, small municipal advisors are the norm rather than the exception, and they provide personalized advice that cannot economically be provided at the same level by larger municipal advisors, particularly for municipal issuers who infrequently access the capital markets (that is, the small towns, villages and school districts which geographically populate a large part of our country). Again, anecdotal evidence is that the municipal entities which will ultimately suffer the most include the small municipal issuers, for they will no longer receive the kind of personalized economical advice that they are presently obtaining either from underwriters (due to the limitations on underwriters set forth in SEC Release No. 34-70462) or from small municipal advisors (that find the regulatory landscape too expensive to navigate). In fact, the overhang of the Proposed Rule is already beginning to have this effect.

Page 27 (#12)

To the extent that Rule G-42 establishes or clarifies standards of conduct and duties, it will certainly establish a floor for the same, which we believe is commendable. However, it may

also effectively establish a ceiling, which in some cases may lower the quality of services provided unless the MSRB is clear that these are minimal standards expected of municipal advisors and not general "industry standards."

Page 27 (#s 13, 14, 15 and 16)

It is highly likely that the additional cost imposed on municipal advisors by virtue of the MSRB rules will be passed on to municipal entities or obligated persons in the form of higher fees. To think otherwise is to ignore economic reality. This in turn will increase issuance costs for issuers. It will probably not lead to a concomitant reduction in the costs to the issuer for underwriters or other professionals, for the additional cost will largely relate to the administrative burdens imposed on municipal advisors and not reduce the expenses of other financial professionals or redound to the benefit of issuers. We do not believe the requirements of the Proposed Rule will affect the willingness of market participants to use municipal advisors and may indirectly encourage issuers to retain municipal advisors to enable them to utilize the municipal advisor exemption so underwriters can continue to provide a free flow of information to issuers; such free flow of information to issuers is otherwise clearly going to be inhibited by the municipal advisor rules. On an overall basis, anecdotal evidence at present would indicate that the Proposed Rule will probably result in less competition among municipal advisors (because there will clearly be fewer of them), may increase the efficiency and capital formation for large issuers but will substantially decrease efficiency and capital formation for the thousands of periodic small municipal issuers, and clearly will not decrease issuance costs. In fact, we are already seeing the issuance cost increases and inefficiencies in our daily practice involving small infrequent issuers.

Page 29 (Rule G-42(c)(i))

The requirement that the municipal advisor contract include an estimate of the reasonably expected compensation in dollars is cumbersome and such an estimate may be contingent upon too many factors to be of benefit to the parties. If the compensation under the municipal advisor contract has as a component a transaction-related fee, there is no way of knowing how often the municipal entity will issue debt and in what amounts so as to be able to accurately estimate the overall compensation due under the contract at the time the contract is executed. By including this requirement, the municipal advisor will either overestimate its fees and potentially run afoul of the Proposed Rule's restriction against excessive compensation or the municipal advisor will underestimate the compensation and will be left in the difficult position of explaining to its municipal client why its actual invoice for fees exceed the estimate included in the municipal advisor contract.

We would be pleased to discuss any of the foregoing comments in greater detail. Please feel free to contact me or my colleague, Josh Meyer, at (402) 346-6000.

Very truly yours,

John J. Wagner