LEWIS YOUNG
ROBERTSON & BURNINGHAM, INC.
AN INDEPENDENT MUNICIPAL FINANCIAL ADVISORY
AND CONSULTING FIRM

March 3, 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

Ladies and Gentlemen:

Lewis Young Robertson & Burningham ("LYRB") is pleased to submit comments on the above-referenced Notice.

LYRB is an independent financial advisory firm which has elected, since its inception 18 years ago, to be regulated as a broker dealer and, therefore, has been and remains subject to MSRB regulations. We are now also registered as a municipal advisor with the Securities and Exchange Commission and the MSRB pursuant to Rule 15Ba2-6T of the Commission. We have a staff of 21 and currently carry liability insurance.

LYRB does not underwrite or purchase securities for our own account or for sale to others nor do we carry customer accounts of any kind. We do not participate as a co-manager or member of selling groups and do not act as a remarketing agent. We are a major financial advisor in the State of Utah and work in some other states as well. LYRB has acted as a financial advisor on hundreds of transactions with a volume of over $7 billion. These transactions run the gamut from small to large, and include general obligation bonds, various types of revenue and tax backed bonds, revenue and bond anticipation notes, and taxable and tax-exempt (including Build America Bonds) bonds in both fixed rate and variable rate structures.

Proposed Rule G-42 generally covers the subject matter of Proposed Rule G-36, which was later withdrawn. We commented on that proposal in a letter to you dated April 11, 2011. While the Proposed Rule G-42 represents an improvement in several respects over the draft G-36, we nevertheless have several comments and concerns. We also address some of the questions set out in the notice. We first address the Questions under "General Matters" set out in notice 2014-01. Our numbered responses correspond to the items set forth in the Notice.

1) The rule is satisfactory as it stands. While we would likely apply a fiduciary standard to ourselves in advising obligated persons, we see no reason for the MSRB to go beyond the statutory mandate and possibly invite litigation.

2) While it is obvious to anyone with extensive experience in the municipal bond business that, among all transaction participants, each official statement needs a "thorough review," we object to the statements relating to review of official statements appearing in

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the second half of .01 Supplementary Material, which addresses this matter and to the specificity of proposed Rule G-42(b)(v). Our objections are manifold. First and foremost, the imposition of a "thorough review" default standard on one transaction participant, the financial advisor, in a situation which is highly variable, not only from client to client, but from transaction to transaction, is unwise at best. While the rule allows departures, documenting the deviations from the "default" standard will be the rule, not the exception, and will be time consuming for both the advisor and the client for no gain in utility. To illustrate, one of our clients issues, from time to time, general obligation bonds, lease revenue bonds, water and sewer revenue bonds, redevelopment agency (tax increment) bonds, sales and excise tax revenue bonds, and assessment bonds, as well as refunding bonds of each of these types. The focus and scope of our work on the respective official statements will depend on such factors as: How long it has been since the last public offering of that credit, is there disclosure counsel, and how much overlap of information is there in, say, a current lease revenue bond compared to a recent general obligation bond, among many others. The scope of review of the official statement by the financial advisor in each case will vary. Typically, we will review the transactional details very carefully, leaving legal details, document summaries and litigation matters primarily to lawyers and the issuer's financial and operational matters primarily to its own staff with more general or overview work from our office. If we are required to "thoroughly review" all of an official statement we will be duplicating effort and unnecessarily generating increased costs (to the irritation and disadvantage of our client). If we must carefully adjust and document our review standard and scope in each case we will take our client's time and our own unnecessarily. Second, as rational participants in the disclosure process, we work to have various parts of the official statement reviewed by those professionals or issuer staff members most competent to do so. This will often not be the advisor. Third, it is unclear what "thoroughly review" means. If it includes the common sense meaning, it will require much unnecessary duplication of effort in many cases in a process which is already (and necessarily) time consuming and exacting. The review of an official statement is necessarily a flexible and dynamic process that must be tailored to the specific circumstances of each bond offering. The initial review may identify topics where additional disclosure is necessary, which in turn results in further review and discussion between the advisor and its client. A "thorough review" default standard is overly simplistic and misleading.

We recommend the rule be silent on this point, leaving to the issuer and its advisors to apportion the necessary work among its various staff members, attorneys, auditors, and the financial advisor as each case appears. This approach is consistent with an advisor's fiduciary duty to assist an issuer (if engaged to do so) with its official statement(s) by seeing that an issuer is well advised (or staffed) to cover the various aspects of the official statement and that the proper subject matters are addressed, regardless of which employees or professionals actually do the detailed work. The vast majority of the professionals filling these roles know what to do and how to do it.

3) No, these should not be required to be written. We typically agree to assist the issuer and its counsel in preparing the official statement, leaving the scope of assistance to a case by case determination as needed. A detailed documentation of the adjustments in these

responsibilities is unnecessary. In any event, the participants in the preparation process know what is needed (or in the case of an unsophisticated or occasional issuer, can be more intensely guided on these matters). There is no need to document these allocations and doing so would unnecessarily add time and expense to each transaction.

4) This is unnecessary and should be deleted. Advisors rarely, if ever, work on an uncompensated basis. Some form of compensation would, if we are to believe the underlying premise of this proposed regulation, call for "conflicts" disclosure. A broader issue was raised by the detailed compensation conflicts disclosure under Proposed Rule G-36, since withdrawn. In the "real world" many if not most advisors' engagements are based on contingent fees. The proposed baseline compensation conflict disclosure would probably result in a disclosure statement to the effect that this may give the advisor an incentive to recommend that the client execute a transaction that was not in its best interest. This amounts to saying that the mere fact of being paid gives the advisor an incentive to breach its fiduciary duty, which would seem to accomplish nothing other than confusing the client. This is a solution in search of a problem.

5) Fee splitting arrangements should be fully disclosed but not prohibited. One example of an occasional situation calling for application of this rule would be fee-splitting with a structuring agent that was engaged to provide specific quantitative services on a transaction. Prohibition would be against the client's interests in such issues.

6) This matter is complex due to the wide ranging possible fact patterns. Requirements to disclose prior to inception of the agreement will often be unreasonable in that a newly retained advisor may not be familiar enough with the client's affairs to perceive the potential conflict.

   In addition, in the case of an engagement for a time, most conflicts will arise during the course of the engagement. For example, advisor A works for City B and City C, both of whom wish to attract manufacturer D to their city, for economic development reasons. If one, or both of these cities wishes assistance from A, she will need to disclose the conflict. If both parties agree, she then may need to limit her work to confidential analyses. Any situation in which negotiation assistance is called for on both sides would be untenable, but full disclosure and appropriate waivers should enable analytic work. Timely disclosure of and resolution of conflicts, if possible, as they arise should be the rule. For these reasons, conflict disclosure should be limited to actual conflicts. Potential conflicts should either not be covered, or be addressed generically with more specific disclosure required when they actually arise. Tailored explanations directed to potential or hypothetical situations will be expensive, time consuming, and not very helpful. Actual conflict resolution is best handled by discussion between advisor and client, rather than by additional or hypothetical disclosure.

7) No. Municipal advisors should not be required to obtain a written acknowledgment for disclosures before proceeding with the engagement, so long as the disclosures are provided and not objected to.

8) No. The bigger issue under proposed G-42(b)(ix) is whether advisors should be required to disclose a legal or disciplinary event that was already disclosed in the most recent Forms MA or MA-I. These are already public information. Perhaps the MSRB could require that the advisor provide a generic statement directing the client to the appropriate websites if it wants to view this information.

9) No.

10) It may be. Even if it is not currently, what are now reasonable premiums and coverage limits may change. Smaller firms may be driven from the market if they find they cannot afford coverage or if coverage limits rise to a level small firms cannot afford. Insurance should be left to the economic interest of the firm, as it is with attorneys. Further, insurance should be disclosed only when requested. Rule 42(b)(viii) should be deleted.

11) This should be left to the parties to decide.

12) Never. One cannot be both a fiduciary and principal party in a buyer/seller relationship if the subject of the sale is an asset, financial product, or something other than services compatible with the fiduciary role.

13) This seems fine, so long as a party cannot step into and out of a fiduciary relationship in a facile way.

Comments of 42(b)

We have largely addressed G-42(b) in the foregoing Q&A responses. However, we note that the final sentence of 42(b) is problematic. It is subject to all the logical problems of proving a negative. In addition, it could be confusing if an unknown or potential conflict either comes to light or becomes an actual conflict. For example; If advisor A has client B and is then hired by client C, then later the interests of B & C on a matter A is expected to advise them on come into conflict, a statement that there are no conflicts is true when C hires A, then ceases to be true when the conflict arises. It seems much better to disclose and address the conflict when it arises, rather than to make generic and hypothetical disclosures which then must be modified.

Comments on 42(c)

In general, (c)(i)(iv), and (vi) are always covered by written agreement between our firm and our clients. With respect to (ii), the proposed rule seems vague. This duplicates (i) or calls for a precision in the face of uncertainty (for example, does this require if a fee is based on dollars per $1000 issued, that estimates be given based on hypothetical sizes? If so, this requirement is unnecessary, adding no useful information for a client). (ii) Should be deleted. With respect to (c)(iii), known conflicts can and should be disclosed at the relations formation state (see response to Question 6 above).
With respect to (c)(v), see response to Question 2 above. A general description of this work should be included in the material called for, and under (c)(iv). However, it is unnecessary to cover this in detail in writing for multiple issue engagements. (c)(v) is superfluous and should be deleted.

Comments on 42(d)

The premise of this section is based upon a flawed assumption, i.e., that recommendations are made in all cases. In a long term client relationship, the advisor does make recommendations from time to time on his own initiative. This will be more common in the case of refunding transactions. However, the mine run case is that the client calls the advisor with a project in mind. This might be anything from an entirely new credit creation to step five of a multi-phase general obligation financed construction program stretching over years. The client will often have a financing vehicle in mind. In such cases, it will not make any sense to go over the risks and benefits of a particular structure or product either because it has already been done, because there is no other option, or because other available options are obviously inferior or disfavored by policy or circumstance. Discussion will often be a waste of time in these circumstances. Documenting such a discussion so as to have a "good answer" for the next regulatory audit would be even more a waste of time and resources.

There are, of course, many times where detailed discussions of a novel (to the client) financing mechanism, a financial "product" or a situation in which several possibilities for accomplishing the financing are available which would call for detailed discussion. There is no need to mandate the discussion in such cases, as it is covered by 42(a)(i). 42(d) should be deleted.

Comments on 42 (e)

This rule is unnecessary, as it is covered by 42(a)(i) and is a basic part of a generally engaged financial advisor's work.

Comments on 42(g)

The prohibition in 42(g)(i) is evaluated by what standard? There is no standard or set of standards which could rationally be applied. By its very nature a "price" is designed to encompass a vast amount of information (all of which is relevant). The market is all the discipline needed here.

Supplementary Material.

In addition to the comments on .01 given above with respect to official statement review, we note that .05 implies a level of disclosure on conflicts of interest such that only material conflicts should be disclosed rather than potential hypothetical conflicts. See our response to Question 6, above. Presumably, only potential conflicts which could affect A's judgment and full representation should be disclosed at the onset, leaving further disclosure to the change of circumstances. At the point it arises the conflict would be dealt with by several means, after full disclosure. Any requirement to disclose this at inception would entail multiple hypotheticals so voluminous as to be impossible.

Economic Analysis

We have several comments on economic analysis issues raised by the Notice and by the text of the Proposed Rule.

In general, we believe the increased oversight of the municipal advisor market represented by the core concept of the Dodd-Frank Act applicable to municipal advisors, in conjunction with the SEC rules defining municipal advisor and Rules G-17 and G-23 will assist

in capital formation and lower costs to municipal issuers generally in the form of better structure and lower interest costs. That said, several aspects of the proposed Rule G-42 unnecessarily increase costs and potentially burden smaller service providers, to the detriment of the overall potential positive effects mentioned above. For best results, MSRB must carefully consider the effect of the rules on the availability and cost of financial advisor services to all municipal entities, but especially small, mid-size and infrequent issuers. We note that these entities are likely to receive less coverage from broker-dealers. While this has many positive effects in protecting such issuers from self-interested presentations from non-fiduciary professionals, it points up a need for fiduciary advice. If anyone is going to pay continuing attention to them (e.g., pointing out savings refunding opportunities) it will and should be their Financial Advisor (if they have one). Rule G-42 should enable and facilitate longer-term Financial Advisory engagements. All aspects of the rule need a robust cost-benefit analysis to ensure that the costs imposed on advisors (which will be passed through to their clients) are justified by substantial and demonstrable benefits. It is also fair to observe that the cost-benefit analysis included with Proposed Rule G-42 is superficial and conclusionary.

More specifically, problematic cost increases we have identified include: (depending on how "potential" is ultimately interpreted under G-42 (b)(i)), excessive hypothetical speculation as to potential rather than actual conflicts of interest may require burdensome and ongoing drafting which will waste time and resources, confuse the client and generally add no value to a client's decision making.

G-42(b)(v) adds no value and should be deleted.

G-42(b)(viii) gives too much weight to insurance. See our discussion above. Over time, this may adversely affect the number of smaller firms offering services. The decision to carry insurance and its disclosure should be left to the advisory firm. Clients who require insurance currently request this information.

Rule G-42(b)(ix) should be limited to the item in clause (a). Clients who want the other material will ask for it.

Rule G-42(d) and (e) require excessive record keeping associated with "defensive" documentation in order to show compliance.

Rule G-42 (g)(i) should be deleted. It seems completely unworkable—there's no way to tell where the line is drawn. This could well lead to meaningless defensive paperwork for advisors to document all of their work—a $250,000 FA fee could appear excessive for a $10M deal, but not if it involved a new credit and three years of work. This is best left to market forces and a general fiduciary standard.

One of the unnecessary cost burdens imposed by the draft rule is found in the thoroughly review standard in .01 of the Supplement relating to Official Statements. This standard will usually need to be modified. The necessity of documenting this, probably in the case of each issue, will require far more time and energy than it is worth.

The overall effect of excessive documentation, record keeping and "defensive" record keeping will be to increase costs, across the board, but disproportionately so to smaller firms. This will result in increased service fees and, on the margins, less competition which will also increase service fees. The gains provided by the general tenor of the proposed Rule for the overall municipal bond market need not be diminished by these effects if the Rule text is modified as we suggest throughout our comments. As a medium size firm, some of that might work to our advantage in the event smaller competitors are forced out, but it is not in the best interests of the purposes of Dodd Frank.

Additional/Big Picture Comments:

One final thought, an orderly transition provision or phased effective date is necessary. Many Financial Advisory engagements are longer-term arrangements and advisors should be provided with a reasonable opportunity to conform existing agreements to the requirements of G-42 when they are renewed or after a reasonable phase-in period after G-42 is approved by the SEC.

Lewis Young Robertson & Burningham, Inc.

By: 

Principal