

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-75737; File No. SR-MSRB-2015-03]

### Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Amendment No. 1 to Proposed Rule Change Consisting of Proposed New Rule G-42, on Duties of Non-Solicitor Municipal Advisors, and Proposed Amendments to Rule G-8, on Books and Records To Be Made by Brokers, Dealers, Municipal Securities Dealers, and Municipal Advisors

#### I. Introduction

On April 24, 2015, the Municipal Securities Rulemaking Board (“MSRB”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change consisting of proposed new Rule G-42, on duties of non-solicitor municipal advisors, and proposed amendments to Rule G-8, on books and records to be made by brokers, dealers, municipal securities dealers, and municipal advisors. The proposed rule change was published for comment in the **Federal Register** on May 8, 2015.<sup>3</sup> The Commission received fifteen comment letters on the proposal.<sup>4</sup> On June 16, 2015, the MSRB granted an extension of time for the Commission to act on the filing until August 6, 2015. On August 6, 2015, the Commission issued an order instituting proceedings under Section 19(b)(2)(B) of the Act<sup>5</sup> to determine whether to approve or disapprove the proposed rule change.<sup>6</sup> On August 12, 2015, the MSRB responded to the comments<sup>7</sup> and filed Amendment No. 1 to the proposed rule change.<sup>8</sup> The text of Amendment No. 1 and the MSRB’s letter are available on

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Exchange Act Release No. 74860 (May 4, 2015), 80 FR 26752 (“Notice”). The comment period closed on May 29, 2015.

<sup>4</sup> Comment letters are available at [www.sec.gov/comments/sr-msrb-2015-03/msrb201503.shtml](http://www.sec.gov/comments/sr-msrb-2015-03/msrb201503.shtml).

<sup>5</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>6</sup> See Securities Exchange Act Release No. 75628 (August 6, 2015), 80 FR 48355 (August 12, 2015). The comment period closes on September 11, 2015.

<sup>7</sup> See Letter from Michael L. Post, MSRB, to Secretary, SEC, dated August 12, 2015 (“MSRB Response Letter”), available at <http://www.sec.gov/comments/sr-msrb-2015-03/msrb201503-19.pdf>.

<sup>8</sup> See Letter from Michael L. Post, MSRB, to Secretary, SEC, dated August 12, 2015 (“MSRB Amendment Letter”), available at <http://www.sec.gov/comments/sr-msrb-2015-03/msrb201503-20.pdf>.

the MSRB’s Web site. The Commission is publishing this notice to solicit comments on Amendment No. 1 to the proposed rule change from interested persons.

#### II. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Amendment

The MSRB is proposing to delete, in Proposed Rule G-42(a)(ii), the phrase “, without limitation,” to address any ambiguity regarding the relationship between additional fiduciary duties and the specified duties of care and loyalty. The MSRB, however, emphasizes the proposed amendment in no respect narrows or otherwise substantively modifies the scope of the fiduciary duty to which a municipal advisor would be subject under Proposed Rule G-42. Under Proposed Rule G-42(a)(ii), a municipal advisor is subject to a fiduciary duty that includes a duty of loyalty and a duty of care. It has been the MSRB’s intent from the inception of this rulemaking initiative not to purport to comprehensively set forth every aspect of the fiduciary duty that may be owed under the broad principle that Congress determined should apply to municipal advisors to municipal entity clients. Instead, Proposed Rule G-42 is designed primarily to set forth the core principles of the fiduciary duty that a municipal advisor would owe to its municipal entity client, and address and provide guidance on certain conduct that is likely to occur and issues that are likely to arise in the provision of municipal advisory services. Although it is not possible for the MSRB to set forth every aspect of a fiduciary duty in Proposed Rule G-42 and the MSRB has not sought to do so, the MSRB nevertheless believes that the proposed rule change will provide municipal advisors with significant helpful guidance in understanding many aspects of their fiduciary duty and the conduct that is required of them.<sup>9</sup>

The MSRB is also proposing amendments to streamline the steps needed to comply with proposed sections (b) and (c) generally, which are also responsive to comments received regarding the combined requirements of the proposed paragraphs.<sup>10</sup> In proposed Rule G-42(b), the MSRB proposes to combine the substantially similar disclosures of conflicts of interest in proposed paragraphs (b)(i)(A) and (b)(i)(G) as new proposed paragraph (b)(i)(F) and delete proposed paragraphs (b)(i)(A) and (b)(i)(G). The MSRB also would renumber proposed paragraphs

(b)(i)(B) through (b)(i)(F), respectively, as proposed paragraphs (b)(i)(A) through (B)(i)(E).

The MSRB proposes amendments regarding proposed section (c), which requires the documentation of the municipal advisory relationship in writing, and, in proposed subsection (c)(ii), which provides that a municipal advisor must include in the documentation the disclosures of conflicts of interest and other information (*i.e.*, information regarding certain legal or disciplinary events as specified in proposed subsection (b)(ii)). Under the proposed amendment, a municipal advisor would not be required to provide the disclosure of conflicts of interest and other information required under proposed subsection (c)(ii) if the municipal advisor previously fully complied with the requirements of proposed section (b) to disclose such information and proposed subsection (c)(ii) would not require the disclosure of any materially different information than that previously disclosed to the client. The MSRB believes that the proposed amendment, to be incorporated in Proposed Rule G-42 as the third sentence of new proposed paragraph .06 of the Supplementary Material, entitled “Relationship Documentation,” would permit a municipal advisor to avoid making duplicative disclosures regarding its conflicts of interest and other matters. The proposed amendment also would include, as the first two sentences of new proposed paragraph .06, the un-numbered paragraph previously located after proposed subsection (c)(vii). The MSRB believes that the material set forth in the un-numbered paragraph, which relates to updating and supplementing the relationship documentation, is more appropriately organized with the proposed amendment relating to proposed subsection (c)(i) discussed above, and, therefore, proposes to organize such un-numbered paragraph in new proposed paragraph .06. Finally, with the incorporation of new proposed paragraph .06, proposed paragraphs .06 through .12 of the Supplementary Material would be renumbered, respectively, as proposed paragraphs .07 through .13 of the Supplementary Material.

The MSRB also proposes to amend, in response to comments, proposed subsection (c)(iv) of Rule G-42 of the original proposed rule change to require a municipal advisor, at the time of making the disclosures required under proposed subsections (c)(iii) and (c)(iv), to provide its clients with a brief explanation of the basis for the

<sup>9</sup> See Notice, 80 FR 26752, at 26762.

<sup>10</sup> See Notice, 80 FR 26752, at 26762–26763.

materiality of the change or addition to its Forms MA and MA-I. The proposed amendment would supplement a proposed requirement that the municipal advisor provide the date of the last material change or addition to the legal or disciplinary event disclosures on any Form MA or Form MA-I to the client. The proposed amendment to include the explanation of materiality would allow a municipal advisor client to assess the effect that such change or addition may have on the municipal advisory relationship and evaluate whether it should seek or review additional information.

In response to a concern raised in the comments, the MSRB proposes to clarify, in proposed section (d), a specific requirement applicable to a recommendation made by a municipal advisor, and distinguish it from the requirements a municipal advisor is subject to when reviewing a recommendation made by another party. The proposed amendment to proposed section (d) would add a statement providing that “a municipal advisor making a recommendation must have a reasonable basis to believe that the recommended municipal securities transaction or municipal financial product is suitable for the client,” which would clarify the proposed requirement that the municipal advisor must determine, based on the information obtained through the reasonable diligence of such municipal advisor, whether the municipal securities transaction or municipal financial product is suitable for the client. The proposed amendment would state more explicitly that a municipal advisor would be prohibited from making recommendations to clients regarding municipal securities transactions and municipal financial products that are unsuitable for such clients. To further clarify proposed section (d), the MSRB also proposes to modify proposed subsection (d)(ii) to provide that the requirement to inform the client that a recommendation is unsuitable potentially arises only in the context of the review of a recommendation of another, by adding the parenthetical phrase “(as may be applicable in the case of a review of a recommendation).”

The MSRB also proposes a minor amendment to clarify proposed Rule G-42(e)(i)(B), which prohibits a municipal advisor from delivering an invoice for fees or expenses for municipal advisory activities that do not accurately reflect the activities actually performed or the personnel that actually performed those activities. Specifically, as revised, the provision would prohibit the delivery of

such an invoice if it “is materially inaccurate in its reflection of the activities actually performed or the personnel that actually performed those activities.” The proposed clarification, which is responsive to comments that expressed concern regarding invoices containing minor or immaterial errors, would incorporate in the proposed provision an explicit, rather than implicit, limitation based on materiality, and is consistent with the MSRB’s explanation of the provision in the original proposed rule change.<sup>11</sup>

Finally, Amendment No. 1 would incorporate minor, non-substantive amendments to proposed subsections (e)(ii), regarding prohibited principal transactions. The proposed amendments to proposed subsection (e)(ii) would clarify the provision, to provide:

A municipal advisor to a municipal entity client, and any affiliate of such municipal advisor, is prohibited from engaging with the municipal entity client in a principal transaction that is the same, or directly related to the, municipal securities transaction or municipal financial product as to which the municipal advisor is providing or has provided advice to the municipal entity client.

Similarly, technical and non-substantive changes would be incorporated in proposed subsection (f)(i), defining the term, “Engaging in a principal transaction.” Finally, the proposed amendments to proposed paragraph .11 of the Supplementary Material would renumber the provision as proposed paragraph .12 of the Supplementary Material, as previously noted, and change the reference in the second line of the provision from “engaging in a principal transaction” to “principal transaction” to conform proposed renumbered paragraph .12 to proposed amended subsection (f)(i).

The MSRB proposes to make the proposed rule change effective six months after Commission approval of all changes.

### III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments regarding the foregoing, including whether the filing as amended by Amendment No. 1 is consistent with the 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-MSRB-2015-03 on the subject line.

#### Paper Comments

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

All submissions should refer to File Number SR-MSRB-2015-03. This file number should be included on the subject line if email 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 Internet Web site (<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 Web site 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 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the MSRB. 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-2015-03 and should be submitted on or before September 11, 2015.

For the Commission, pursuant to delegated authority.<sup>12</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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<sup>11</sup> In the original proposed rule change, the MSRB noted that the scope of inaccuracy targeted by the proposed provision was “limited to the significant subjects of the services performed and personnel who performed those services.” See Notice, 80 FR 26752, at 26777.

<sup>12</sup> 17 CFR 200.30-3(a)(12).