



April 16, 2018

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street NW, Suite 1000
Washington, DC 20005

Re: MSRB Notice 2018-03: Request for Input on Draft Frequently Asked Questions Regarding Rule G-42 and the Making of Recommendations

Dear Mr. Smith:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ greatly appreciates this opportunity to respond to Notice 2018-03 (the “Notice”)² issued by the Municipal Securities Rulemaking Board (the “MSRB”) requesting comment on draft frequently asked questions and proposed responses (“FAQs”) regarding Rule G-42 and the making of recommendations. According to the MSRB, the FAQs are intended to provide market participants with an enhanced understanding of the provisions of Rule G-42 on duties of non-solicitor municipal advisors (“municipal advisors”) related to providing “advice” and “recommendations” and related provisions of Rule G-8 on books and records.

We applaud the MSRB’s effort to seek information and insight from commenters to further inform the development of the FAQs for publication. We previously expressed the need for more published MSRB interpretive guidance and stated that market participants could benefit from interpretive guidance with respect to Rule G-42 and the recordkeeping requirements associated with MSRB rules.³ We do, however, have a few concerns with (1) the proposed

¹ SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over \$2.5 trillion for businesses and municipalities in the U.S., serving clients with over \$18.5 trillion in assets and managing more than \$67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² MSRB Notice 2018-03, Request for Input on Draft Frequently Asked Questions Regarding Rule G-42 and the Making of Recommendations (Feb. 15, 2018).

³ See Letter to Corporate Secretary, MSRB regarding MSRB Notice 2017-22: Request for Comment on Compliance Support, from Leslie M. Norwood, Managing Director and Associate General Counsel, dated January 23, 2018.

FAQs, (2) the scenarios, and (3) the process that are set forth herein. Also, responses to the MSRB's specific questions are attached hereto as Appendix A.

I. Concerns with the FAQs

Ambiguity and Imprecision

While the FAQs are helpful in providing some clarity as to what constitutes a Rule G-42 Recommendation, we are concerned about the absence of discussion regarding rules of the Securities and Exchange Commission ("SEC"). The MSRB acknowledges in the FAQs that there may be instances where, under SEC rules, the advice given by a municipal advisor may be characterized as a recommendation, but the same advice given would not constitute a G-42 Recommendation. This divergence causes confusion and creates ambiguities and imprecisions in the FAQs. For example, in FAQ 10, the MSRB emphasizes that it is important to remember that a municipal advisor has obligations to maintain and preserve books and records pursuant to SEC rules that go beyond its obligations under Rule G-8. Specifically, the MSRB states that advice that lacks specificity regarding a municipal financial product or an issuance of municipal securities (i.e., advice that is not a G-42 Recommendation) may, nevertheless, rise to the level of a recommendation for purposes of SEC rules and, if so, the records relating to such recommendation would be required to be maintained in accordance with SEC Rule 15Ba1-8(a)(4). In this instance, the identification of the divergence is appreciated but further guidance should be provided to help ensure that municipal advisors understand the recordkeeping requirements of both SEC and MSRB rules. Notably, in 2017, one of the most frequently observed examination violations by the SEC's Office of Compliance Inspection and Examinations was with respect to municipal advisors that failed to make and keep documents material to a recommendation made to a client.⁴

We are similarly concerned about the absence of discussion regarding the interpretive guidance provided by the SEC's Office of Municipal Securities on the advice standard (the "OMS FAQs").⁵ For example, in FAQ 1, the MSRB states that if a communication would constitute advice under the Securities Exchange Act of 1934 ("Exchange Act") and rules and regulations thereunder for purposes of applying the definition of "municipal advisor," then that communication would also be deemed advice for purposes of Rule G-42. This guidance is helpful. It is unclear, however, whether and how the OMS FAQs, which provide interpretive guidance about the advice standard, would apply when determining whether a communication would be deemed advice for purposes of Rule G-42.⁶ While we understand that the OMS FAQs

⁴ See SEC National Exam Program Risk Alert, Volume III, Issue I (November 7, 2017) [available at https://www.sec.gov/files/observations-from-municipal-advisor-examinations.pdf](https://www.sec.gov/files/observations-from-municipal-advisor-examinations.pdf).

⁵ See Registration of Municipal Advisors Frequently Asked Questions, SEC's Office of Municipal Securities, [available at https://www.sec.gov/info/municipal/mun-advisors-faqs.shtml](https://www.sec.gov/info/municipal/mun-advisors-faqs.shtml).

⁶ The OMS FAQs were published on January 10, 2014, and on January 13, 2014, the SEC temporarily stayed the effective date of the final rules to provide market participants with additional time to, among other things,

are not rules, regulations, or statements of the SEC, they are critical in helping our members understand the scope and application of the SEC final rules, including the advice standard.⁷

We believe the lack of discussion regarding SEC rules and the OMS FAQs and their application will cause confusion for municipal advisors, including examination and enforcement staff. As such, we strongly encourage a coordinated effort in connection with the development of the FAQs. In the past, the MSRB has coordinated with the Financial Industry Regulatory Authority (“FINRA”), in consultation with the SEC, on an interpretive guidance project.⁸ This type of coordination is critical when regulated entities must comply with similar rules from two separate regulators. The same is true here because municipal advisors must comply with both SEC and MSRB rules.

Importantly, one of the eight principles that SEC Chairman Clayton has identified as helping guide the future work of the SEC is the importance of coordination.⁹ Specifically, Chairman Clayton stated that “not only is coordination between and among regulators essential – but coordination and open communication between regulators and the industries that they regulate is also vitally important.”¹⁰ We strongly encourage the MSRB to coordinate directly with SEC staff and market participants in further developing the FAQs, including in connection with the development of SEC staff interpretive guidance, if appropriate.

Use of Mandatory Terms

Throughout the FAQs, the MSRB in certain instances uses terms, such as “must” and “requires,” however, use of these mandatory terms should only be used to describe any existing statutory or regulatory requirements. For example, in FAQ 1, the MSRB makes clear that Rule G-42 does not specifically define the term “recommendation” or the phrase “recommendation of

analyze the OMS FAQs. See Securities Exchange Act Release 34-71288 (January 13, 2014) 79 FR 2777 (January 16, 2014).

⁷ We are concerned that the MSRB may not be discussing the relevance and application of the OMS FAQs simply because they are not adopted by the SEC. For example, in connection with the MSRB’s proposed rule change related to its advertising rules, commenters suggested that the MSRB adopt the SEC’s staff definition of testimonial by either adopting certain staff no-action guidance or completely adopting staff interpretive guidance. The MSRB chose not to adopt the SEC’s staff definition by stating, among other things, that the staff definition is staff guidance and not guidance issued by the SEC. See Securities Exchange Act Release No. 34-82616 (February 1, 2018) 83 FR 5474 (February 7, 2018).

⁸ See MSRB Notice 2017-12, MSRB Provides Implementation Guidance on Confirmation Disclosure and Prevailing Market Price (July 12, 2017).

⁹ See Remarks at the Economic Club of New York, by Chairman Jay Clayton (July 12, 2017) available at <https://www.sec.gov/news/speech/remarks-economic-club-new-york>.

¹⁰ See Opening Remarks at the National Compliance Outreach Program for Broker-Dealers, by Chairman Jay Clayton (July 27, 2017) available at <https://www.sec.gov/news/public-statement/clayton-statement-cco-program-broker-dealers>.

a municipal securities transaction or municipal financial product.” The MSRB then goes on to state that “[h]owever, in order for a communication by a municipal advisor to be a recommendation for purposes of Rule G-42, it must as a threshold matter be advice and that advice must exhibit both a call to action and a specificity as to what municipal financial product or issuance of municipal securities the municipal advisor is advising the MA client to proceed with (hereinafter a “G-42 Recommendation”).” While we don’t disagree with this interpretation, we do think defining a new term using principles stated in the rulemaking record (i.e., G-42 Recommendation) and including it in a “compliance resource” is problematic. For more information regarding our concerns identifying the FAQs as a “compliance resource,” please see heading III. Concerns with the Process.

Following the Rulemaking Record More Closely

There are instances where the MSRB provides a citation to the rulemaking record but the language in the FAQs does not necessarily support the statement. For example, in FAQ 6, the MSRB cites to the Rule G-42 rulemaking record in connection with a municipal advisor’s reasonable determination that it is not basing a G-42 Recommendation on materially inaccurate or incomplete information. The MSRB states that “a municipal advisor would not be expected to go to impractical lengths to make such a determination.” The rulemaking record, however, uses the mandatory term “required.” Specifically, the MSRB stated twice in the rulemaking record that “a municipal advisor would not be required to go to impractical lengths to determine the accuracy and completeness of the information.” By changing the term from “required” to “expected,” the MSRB appears to be loosening the language. We suggest that the MSRB more closely review the statements made in the FAQs along with the citations that support these statements.

Specificity

Throughout the FAQs, the MSRB states that “specificity as to what municipal financial product or issuance of municipal securities the municipal advisor is advising a client to proceed with” is a critical factor in determining whether a recommendation is a G-42 Recommendation. A specificity determination is the second prong of the two-pronged analysis. The MSRB provides an example in FAQ 4 that states that if advice by a municipal advisor to a client details a specific municipal securities offering then it is a specific issuance. This interpretation is helpful and we appreciate this guidance, however, we also think that the FAQs should include guiding principles for determining how the specificity prong of the analysis could be satisfied in other scenarios.

II. Concerns with the Scenarios

General

We appreciate the effort of the MSRB in developing the scenarios. We have a few general concerns. First, the scenarios only concern the application of Rule G-42. We think it would be appropriate in the scenarios to include analysis of other rules that may affect municipal

advisors. For example, could the scenarios trigger the application of SEC rules. Second, each of the scenarios includes a municipal advisor that has been engaged or hired by the client. We think it would be appropriate to include scenarios where the municipal advisor has not been formally hired or engaged by the client. Third, the scenarios all involve or are related to the issuance of municipal securities. We think including other scenarios regarding the investment of proceeds of municipal securities and recommendation of and brokerage of municipal escrow investments would be helpful. Fourth, none of the scenarios are of a municipal advisor that is providing an implied recommendation. We think addressing the potential of implied recommendations would be helpful. Fifth, we think it would be helpful to introduce other facts into the scenarios, such as, for example, when a municipal advisor is advising an issuer on deciding between a negotiated versus competitive offering, fixed rate offering versus variable rate, and variable rate offering with a swap. Lastly, the scenarios are generally directed toward non-dealer municipal advisors. We think it would be helpful to provide scenarios that include other types of dually-registered municipal advisors (e.g., investment advisor/municipal advisor or broker-dealer/municipal advisor).

Scenario 2

In Scenario 2, the municipal advisor provides the school district with general information and the MSRB concludes that there is no G-42 Recommendation since there is no call to action. We are concerned that this scenario may cause confusion because SEC rules are not discussed or even mentioned in the analysis. For example, the general information that the municipal advisor provides appears to fit within the general information exclusion of Rule 15Ba1-1(d)(1)(ii).¹¹ In such case, there would be no need to discuss Rule G-42 because it would not apply.¹² By not discussing or even mentioning the applicability of SEC rules, the FAQs become ambiguous and imprecise. Again, as mentioned in heading I. Concerns with the FAQs – Ambiguity and Imprecision, we suggest that the MSRB coordinate directly with SEC staff and market participants in further developing the FAQs, including in connection with the development of SEC staff interpretive guidance, if appropriate.

Additionally, in Scenario 2, the MSRB states that the general information described in the scenario was made about and in the preliminary stages of developing a plan to issue municipal securities and is not a call to action. The MSRB then goes on to conclude that communications to a client that concern preliminary matters, or minor ancillary matters that relate to, but are not calls to action to proceed with, an issuance or municipal financial product are not G-42 Recommendations. We believe that communications about and in the preliminary stages versus communications that concern preliminary matters are very different concepts. We

¹¹ Exchange Act Rule 15Ba1-1(d)(1)(ii).

¹² The standards of conduct required by Rule G-42 are only applicable to a municipal advisor when conducting municipal advisory activities. For example, if certain communications made by an engaged municipal advisor are outside the scope of municipal advisory activities (e.g., general information), then such communications would not be subject to the standards of conduct in Rule G-42.

are concerned that the lack of clarity surrounding these two different concepts will cause confusion.¹³

Scenario 3

In Scenario 3, a municipal advisor provides a five-year plan that will allow the city to undertake certain projects. The plan also informs the city that it should issue five municipal bond offerings and specifies the timing, terms, and structure for each issuance. It appears that including the information about the five municipal bond offerings is the trigger that makes the five-year plan a G-42 Recommendation. This guidance is helpful, however, we also believe that guidance should be provided with respect to when such a five-year plan would not constitute a G-42 Recommendation.

Scenario 4

In Scenario 4, the city informs the municipal advisor that it has determined to privately place debt with a particular bank. We understand, based on the language used in the scenario, that the MSRB is trying to limit the scope of the scenario to avoid discussion of whether the municipal advisor must determine whether the debt is a bank loan or security. We think, however, including such discussion is appropriate since the MSRB has in the past stated that firms must determine whether the nature of a financing instrument is a security or a loan and the consequences of failing to perform this analysis may be significant.¹⁴

Additionally, in Scenario 4 the MSRB states that there is no G-42 Recommendation, however, it is unclear why this is the outcome of the analysis. Is this the outcome because the City already determined to issue the bonds? Is this the outcome because the City already determined to issue the bonds and also decided the method of sale, structure, timing and amount? What are the factors that make this not a G-42 Recommendation? We also think more guidance should be provided that addresses if and how a municipal advisor could rely on an issuer's determination to issue the bonds independently of the municipal advisor to limit the scope of the engagement and duties of determining suitability. Also, including a scenario where a municipal advisor limits the scope of the engagement in connection with a broadly drafted multi-year contract would be helpful.

¹³ For example, in Scenario 2, the municipal advisor provided general information about the favorable results of other similar school districts, including information about the basic terms of each issuance. If, after the presentation, the school district decided to move forward with an issuance because of the favorable results of the other school districts, would the analysis be any different (e.g., could an examiner conclude that the presentation was a G-42 Recommendation because it did not concern preliminary matters).

¹⁴ See MSRB Notice 2016-12, Direct Purchases and Bank Loans as Alternatives to Public Financing in the Municipal Securities Market (April 4, 2016).

Scenario 6

In Scenario 6, a municipal advisor is asked to assist in structuring a municipal securities offering that will allow the county to borrow funds over a 30 year period. The MSRB determines that a G-42 Recommendation has been made when the municipal advisor has presented a document to the county detailing the structure and terms of an offering of municipal securities that the municipal advisor believed was in the best interest of the county. It is unclear why the MSRB emphasized the best interest of the county in its analysis. This standard is already required under Rule G-42. We are concerned that the current analysis does not clearly focus on satisfaction of the two-pronged analysis and may confuse market participants.

III. Concerns with the Process

Interpretive Guidance

Well-designed interpretive guidance serves many important or even critical functions in regulatory programs.¹⁵ Interpretive guidance, used properly, increases efficiency, and enhances fairness by providing the public clear notice of the line between permissible and impermissible conduct while ensuring equal treatment of similarly situated parties.¹⁶ The MSRB makes clear that the FAQs are not meant to be interpretive guidance.¹⁷ The MSRB intends that the FAQs serve as a “compliance resource.”¹⁸ According to the MSRB, the intent of a “compliance resource” is to highlight key rule provisions or considerations to enhance the understanding of a rule, by for example, providing a checklist, sample template or fact sheet.¹⁹

The FAQs, however, are not simply a “compliance resource” that provide a checklist, sample template, or fact sheet. Instead, the FAQs provide interpretive guidance that clarifies the application of the principles of MSRB rules. For example, in the response to FAQ 3 the MSRB states that dealer guidance principles on suitability of recommendations are applicable to municipal advisors when determining whether advice to a client would be considered a call to action. While we agree that the rulemaking record supports this assertion, the rulemaking record does not state that the same principles are equally applicable to municipal advisors for determining whether advice rises to the level of a G-42 Recommendation. In this example, the

¹⁵ See Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 FR 3432 (January 25, 2007).

¹⁶ Id.

¹⁷ Supra note 2.

¹⁸ Id.

¹⁹ See MSRB Compliance Resource: Types of Compliance Information available at <http://www.msrb.org/~media/Files/Resources/MSRB-Types-of-Compliance-Information.ashx?la=en>.

MSRB demonstrates that it is clarifying the application of the principles of an MSRB rule, which is considered interpretive guidance by the MSRB.²⁰

The FAQs also provide more prescriptive information about obligations and conduct under Rule G-42. For example, the various hypothetical scenarios and related analyses used in the FAQs relate to the imposition and enforcement of Rule G-42. In the scenarios and related analysis, the MSRB clearly demonstrates that it is providing prescriptive information about obligations and prohibited conduct under Rule G-42, which is considered interpretive guidance by the MSRB.²¹

Based on these concerns and assuming that the MSRB addresses our other concerns stated herein, we request that the MSRB classify the FAQs as interpretive guidance.

File Interpretive Guidance with the SEC

A cornerstone of the regulatory framework for municipal advisors is MSRB Rule G-42. During the development of Rule G-42, the MSRB requested public comment two times.²² The SEC requested public comment four times, including on the related amendments that sought to address and balance the concerns of the public.²³ At each stage of the rulemaking process, the MSRB coordinated with the SEC and considered all comments submitted, as reflected in a number of revisions to the rule text that were responsive to or derivative of comments received. The SEC played a significant role in the development of Rule G-42, including by, among other things, making findings and determinations that Rule G-42 is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the MSRB.²⁴

SEC review and the public comment process, established pursuant to Exchange Act Section 19(b) and Rule 19b-4 thereunder, are intended to ensure that the self-regulatory organizations, including the MSRB, carry out the purposes of the Exchange Act.²⁵ Rule 19b-4,

²⁰ Id.

²¹ Id.

²² See MSRB Notice 2014-01, Request for Comment on Draft MSRB Rule G-42, on Duties of Non-Solicitor Municipal Advisors (January 9, 2014); and MSRB Notice 2014-12, Request for Comment on Revised Draft MSRB Rule G-42, on duties of Non-Solicitor Municipal Advisors (July 23, 2014).

²³ See Securities Exchange Act Release No. 34-74860 (May 4, 2015) 80 FR 26752 (May 8, 2015); Securities Exchange Act Release No. 34-75628 (August 6, 2015) 80 FR 48355 (August 12, 2015); Securities Exchange Act Release No. 34-75737 (August 19, 2015) 80 FR 51645 (August 25, 2015); and Securities Exchange Act Release No. 34-76420 (November 10, 2015) 80 FR 71858 (November 17, 2015).

²⁴ See Securities Exchange Act Release No. 34-76753 (December 23, 2015) 80 FR 81614 (December 30, 2015).

²⁵ The legislative history of the Securities Acts Amendments of 1975, which establishes rulemaking procedures for self-regulatory organizations, makes clear that Congress chose to develop a unique pattern of regulation combining both industry and government responsibility and that the self-regulatory organizations are

among other things, requires the SEC to determine whether a proposed rule change, including certain interpretations, are consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the MSRB.²⁶ The SEC's review and public comment process are extremely important to our membership and we strongly believe that any interpretation that provides guidance about a significant MSRB rule should benefit from such review and process.²⁷

In the past, the MSRB has filed interpretive guidance with the SEC using the Rule 19b-4 process under either Exchange Act Section 19(b)(2)²⁸ or Section 19(b)(3)(A).²⁹ Specifically, from 2005 through 2012, the MSRB filed with the SEC nine interpretations under Section 19(b)(2) and five interpretations under Section 19(b)(3)(A), including frequently asked questions and answers concerning the application of Rule G-37. Since 2013, however, the MSRB has filed

intended to be subject to the SEC's control and have no governmentally derived authority to act independently of SEC oversight. See House Report No. 94-229, 94th Congress 1st Session, House Committee on Interstate and Foreign Commerce (May 19, 1975).

²⁶ 17 CFR 240.19b-4.

²⁷ In addition, the Rule 19b-4 process, among other things, helps to (i) provide broader notice to the public about the request for comment (not just regulated entities that receive regulatory notices), (ii) ensure that the public is aware of the interpretive guidance, if approved, and (iii) ensure that regulated entities could rely on the interpretive guidance since it has the full force and effect of MSRB rules.

²⁸ See SR-MSRB-2005-11, Securities Exchange Act Release No. 34-53961 (December 13, 2005) (MSRB providing interpretive guidance relating to the definition of solicitation for purposes of Rules G-37 and G-38); SR-MSRB-2006-03, Securities Exchange Act Release No. 34-53715 (April 25, 2006) (MSRB providing interpretive guidance on customer protection obligations relating to 529 college savings plans); SR-MSRB-2007-01, Securities Exchange Act Release No. 34-55957 (June 26, 2007) (MSRB providing an interpretation of Rule G-14 reports of sales and purchases); SR-MSRB-2009-17, Securities Exchange Act Release No. 34-61110 (December 3, 2009) (MSRB providing interpretive guidance regarding Rule G-17); SR-MSRB-2010-07, Securities Exchange Act Release No. 34-62830 (September 2, 2010) (MSRB providing interpretive notice regarding Rule G-37 on political contributions); SR-MSRB-2011-03, Securities Exchange Act Release No. 34-63946 (February 22, 2011) (MSRB providing an interpretive notice concerning Rule G-23); SR-MSRB-2011-09, Securities Exchange Act Release No. 34-65263 (September 6, 2011) (MSRB providing interpretive notice concerning application of Rule G-17); SR-MSRB-2012-04, Securities Exchange Act Release No. 66625 (March 20, 2012) (MSRB providing interpretive notice on the duties of dealers that use the services of broker's brokers); and SR-MSRB-2012-05, Securities Exchange Act Release No. 34-66772 (April 9, 2012) (MSRB providing interpretive notice concerning the application of Rule G-17 to sophisticated municipal market professionals).

²⁹ See SR-MSRB-2005-01, Securities Exchange Act Release No. 34-51020 (January 11, 2005) (MSRB providing interpretive notice regarding Rule G-17 on disclosure of certain material information); SR-MSRB-2009-08, Securities Exchange Act Release No. 34-60359 (July 21, 2009) (MSRB providing interpretive guidance on disclosure and other sales practices obligations relating to sales of municipal securities to individual and other retail investors); SR-MSRB-2009-14, Securities Exchange Act Release No. 34-60690 (September 18, 2009) (MSRB providing interpretive guidance on use of electronic confirmations produced by clearing agencies or qualified vendors); SR-MSRB-2010-01, Securities Exchange Act Release No. 34-61647 (March 4, 2010) (MSRB providing interpretive questions and answers on the application of Rule G-37); and SR-MSRB-2010-04, Securities Exchange Act Release No. 34-62322 (June 7, 2010) (MSRB providing interpretive questions and answers concerning the public access facility).

only one interpretive notice with the SEC.³⁰ In fact, the MSRB has instead, in an effort to streamline and codify existing guidance, requested approval from the SEC to delete existing guidance.³¹ While SIFMA supports the MSRB's efforts to promote regulatory efficiency by streamlining and codifying existing guidance, there is a serious risk that MSRB interpretive guidance is not being properly submitted to the SEC for approval. The goal of streamlining and codifying must be balanced with the benefit of providing interpretive guidance that has been reviewed and approved by the SEC using Rule 19b-4. The U.S. Department of the Treasury has recommended that the self-regulatory organizations, including the MSRB, adopt and release an action plan to review and update its rules, guidance and procedures on a periodic basis.³² We strongly believe that the MSRB should critically analyze its past and current practices regarding interpretive guidance.

Additionally, the MSRB's policy on interpretive guidance states that "[g]enerally, interpretive guidance must be filed with the SEC if it is not reasonably and fairly implied by an existing rule."³³ This language follows Rule 19b-4(c). We are concerned that certain FAQs appear to be reasonably and fairly implied by the rulemaking record, instead of by Rule G-42. While the rulemaking record is an important part of the rulemaking process, it is not the rule. If the FAQs are not reasonably and fairly implied by Rule G-42, then they shall be deemed to be a proposed rule change under Rule 19b-4(c).

Based on these concerns and assuming that the MSRB addresses our other concerns stated herein, we request that the MSRB submit the FAQs to the SEC using the process established by Rule 19b-4.

Coordinate with other Regulators

We are also concerned that certain regulators may not be aware or become aware of the FAQs, if finalized. For example, with respect to a filing that is submitted to the SEC using the Rule 19b-4 process, the SEC, Federal Reserve, the Comptroller of the Currency, and the Federal

³⁰ See SR-MSRB-2016-03, Securities Exchange Act Release 34-77316 (MSRB providing interpretive notice concerning the application of the amended pricing formula). While we understand that the MSRB and SEC may coordinate informally regarding certain interpretive guidance, such as the implementation guidance on confirmation disclosure and prevailing market price, we are still concerned about the lack of interpretive guidance that is subject to the Rule 19b-4 process.

³¹ See SR-MSRB-2013-07, Securities Exchange Release No. 34-70593 (October 1, 2013) (MSRB proposing the deletion of certain interpretive guidance); and SR-MSRB-2015-09, Securities Exchange Release No. 34-75932 (September 16, 2015) (MSRB proposing the deletion of prior interpretive guidance).

³² See U.S. Department of the Treasury, A Financial System that Creates Economic Opportunities Capital Markets (October 2017) available at <https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf>.

³³ MSRB Policy on Interpretive Guidance, available at <http://www.msrb.org/Rules-and-Interpretations/MSRB-Policy-on-Interpretive-Guidance.aspx>.

Deposit Insurance Corporation are all directly made aware of the filing based on the requirements set forth in Form 19b-4.³⁴ Since the MSRB relies on the SEC, FINRA and federal bank regulators to conduct examinations and enforcement investigations, it is important that they are made aware or become aware of the FAQs. Based on these concerns and assuming that the MSRB addresses our other concerns stated herein, we request that the MSRB coordinate with the SEC, FINRA, and federal bank regulators in connection with the FAQs, including staff that is responsible for examinations and enforcement investigations.

Coordinate with Market Participants

In the FAQs, the MSRB states that “though it is not routine” for the MSRB formally to seek written comments on draft frequently asked questions, given the unique nature of the application of Rule G-42, the MSRB believes that market participation and public input would help ensure the FAQs provide useful compliance assistance. We believe that coordination and open communication between the MSRB and market participants should become routine. As noted by SEC Chairman Clayton, such coordination and communication are vital.³⁵ We encourage the MSRB to continue to coordinate and communicate with market participants in connection with the FAQs and any other types of significant compliance information, including interpretive guidance.³⁶

IV. Conclusion

SIFMA and its members applaud the MSRB for its effort to seek information and insight from commenters to further inform the development of the FAQs. As previously noted, it is the view of our members that, in recent years, too much interpretation of MSRB rules has occurred through examination and enforcement investigations rather than by published MSRB guidance.³⁷ We appreciate the opportunity to provide input and your consideration of the views presented

³⁴ See Form 19b-4, available at <https://www.sec.gov/files/form19b-4.pdf>.

³⁵ Supra note 10.

³⁶ Supra note 19.

³⁷ See Letter to Corporate Secretary, MSRB, regarding MSRB Notice 2017-22: Request for Comment on Compliance Support, from Leslie M. Norwood, Managing Director and Associate General Counsel, dated January 23, 2018.

Mr. Ronald W. Smith
Municipal Securities Rulemaking Board
Page 12 of 13

herein. We stand ready to provide any additional information or assistance that the MSRB might find useful. Please do not hesitate to contact me at (212) 313-1130 with any questions.

Sincerely yours,

A handwritten signature in dark ink, appearing to be 'L. Norwood', written in a cursive style.

Leslie M. Norwood
Managing Director and
Associate General Counsel

cc: ***Securities and Exchange Commission***
Rebecca Olsen, Director, Office of Municipal Securities

Municipal Securities Rulemaking Board
Lynnette Kelly, Executive Director
Michael Post, General Counsel
Lanny Schwartz, Chief Regulatory Officer

Appendix A

Responses to the MSRB's Questions

The MSRB specifically seeks input on the following questions:

- **Do the draft FAQs ask and answer the appropriate questions relevant to supporting a municipal advisor's compliance with the relevant obligations under Rule G-42?**

Response: See heading I. Concerns with FAQs.

- **Do the draft FAQs clearly distinguish giving "advice" from making a "recommendation" under the rule? If not, where is additional clarification needed?**

Response: See heading I. Concerns with FAQs.

- **Do the proposed responses to the FAQs add to the understanding of the rule? How could they be improved to provide greater understanding?**

Response: If SEC rules and OMS FAQs are not discussed, certain FAQs are ambiguous and imprecise. As previously mentioned, we suggest that the MSRB coordinate directly with SEC staff and market participants in further developing the FAQs, including in connection with the development of SEC staff interpretive guidance, if appropriate. See heading I. Concerns with FAQs.

- **Are there additional questions that the MSRB should respond to related to making recommendations under Rule G-42?**

Response: See heading I. Concerns with FAQs.

- **Are the scenarios presented practical and helpful in understanding the application of the rule to municipal advisory activities? Do the scenarios realistically reflect market activity? If not, how could they be improved?**

Response: See heading II. Concerns with Scenarios.