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March 18, 2014

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

RE: NABL Comments on MSRB Notice 2014-01 (January 9, 2014)
Request for Comments on Draft MSRB Rule G-42, on Duties of Non-Solicitor Municipal Advisors

Dear Mr. Smith:

The National Association of Bond Lawyers ("**NABL**") respectfully submits the enclosed response to the Municipal Securities Rulemaking Board's ("**MSRB**") solicitation of comments on MSRB Notice 2014-01 related to draft MSRB Rule G-42 and Supplementary Material to the draft rule (the "**Notice")**. The comments were prepared by an ad hoc subcommittee of the NABL Securities Law and Disclosure Committee comprising those individuals listed on Exhibit A and were approved by the NABL Board of Directors.

In the Notice, the MSRB requests comments regarding specific questions posed by the MSRB and NABL has provided comments in response to certain of those questions. In addition, NABL is providing general comments on the draft rule and comments on specific aspects of the draft rule.

NABL exists to promote the integrity of the municipal securities market by advancing the understanding of and compliance with the law affecting public finance. A professional association incorporated in 1979, NABL has approximately 2,700 members and is headquartered in Washington, DC.

If you have any questions concerning the comments, please feel free to contact William Daly, Director of Governmental Affairs, at (202) 503-3302 or bdaly@nabl.org.

Thank you in advance for your consideration of these comments.

Sincerely,

Allen K. Robertson

Allen K. Robertson

CC:: Michael Post

COMMENTS OF

THE NATIONAL ASSOCIATION OF BOND LAWYERS

REGARDING

MSRB NOTICE 2014-01, REQUEST FOR COMMENT ON DRAFT MSRB RULE G-42 ON DUTIES OF NON-SOLICITOR MUNICIPAL ADVISORS

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**")[1] which, among other things, amended Section 15B of the Securities Exchange Act of 1934 (the "**Exchange Act**") to provide for the regulation by the Securities and Exchange Commission ("**SEC**") and the Municipal Securities Rulemaking Board (the "**MSRB**") of municipal advisors[2] in order to protect "municipal entities"[3] and "obligated persons."[4] The regulation of municipal advisors and their advisory activities is, as the SEC has recognized, generally intended to address problems observed with the conduct of some municipal advisors, "including 'pay-to-play' practices, undisclosed conflicts of interest, advice rendered by financial advisors without adequate training or qualifications, and failure to place the duty of loyalty to their clients ahead of their own interests."[5]

[1] Pub. Law No. 111-203, 124 Stat. 1376 (2010).

[2] Section 15B(e)(4)(A) of the Exchange Act defines the term "municipal advisor" to mean, in relevant part and subject to certain exceptions, "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."

[3] Section 15B(e)(8) of the Exchange Act defines the term "municipal entity" to mean "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."

[4] Section 15B(e)(10) of the Exchange Act defines the term "obligated person" to mean "any person, including an issuer of municipal securities, who is either generally or through an enterprise, fund, or account of such person, committed by contract or other arrangement to support the payment of all or part of the obligations on the municipal securities to be sold in an offering of municipal securities."

[5] 78 FR 67468 (November 12, 2013) ("**SEC Final Rule**") at 67469 (Nov. 12, 2013).

In keeping with its stated purpose, the Dodd-Frank Act specifically establishes that a fiduciary duty is owed by a municipal advisor to its municipal entity clients.[6] By contrast, the Dodd-Frank Act does not impose a fiduciary duty with respect to a municipal advisor's obligated person clients.[7]

The SEC and MSRB have developed registration regimes for municipal advisors. In September 2010, the SEC adopted, and subsequently extended, a temporary registration program for municipal advisors.[8] In November 2010, the MSRB amended its rules to require municipal advisors to register with the MSRB.[9] In December 2010, the SEC proposed a permanent registration regime for municipal advisors.[10]

On September 18, 2013, the SEC adopted final rules to, among other things, define who is a municipal advisor, establish a permanent registration regime for that defined set of persons, and establish basic recordkeeping requirements for such advisors (the "**SEC Final Rule**").[11] The SEC Final Rule was originally scheduled to take effect on January 13, 2014, but on that day, the SEC announced that the SEC Final Rule would be stayed until July 1, 2014.[12]

The Exchange Act, as amended by the Dodd-Frank Act, requires that the MSRB propose and adopt rules to effect the purposes of the Exchange Act with respect to advice provided to or on behalf of municipal entities or obligated persons by municipal advisors regarding municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons. The rules must prescribe records to be made and kept by municipal advisors (and the periods for which such records must be preserved) and must prescribe means reasonably designed to prevent acts, practices, and courses of business that are inconsistent with a municipal advisor's fiduciary duty to its clients.[13]

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[6] Section 15B(c)(1) of the Exchange Act provides "A municipal advisor and any person associated with such municipal advisor shall be deemed to have a fiduciary duty to any municipal entity for whom such municipal advisor acts as a municipal advisor, and no municipal advisor may engage in any act, practice, or course of business which is not consistent with a municipal advisor's fiduciary duty or that is in contravention of any rule of the Board."

[7] *See* SEC Final Rule at 67475 n.100.

[8] *See* Exchange Act Release No. 34-62824 (September 1, 2010); 75 FR 54465 (September 8, 2010).

[9] *See* Exchange Act Release No. 34-63308 (November 12, 2010); 75 FR 70335 (November 17, 2010).

[10] Exchange Act Release No. 34-63576 (December 20, 2010), 76 FR 824 (January 6, 2011).

[11] *See supra* note 5.

[12] Registration of Municipal Advisors – Temporary Stay of Final Rule, Exchange Act Release No. 34-71288, 79 Fed. Reg. 2777 (Jan. 16, 2014).

[13] Exchange Act §15B(b)(2).

On January 9, 2014, the MSRB published a Request for Comment on Draft MSRB Rule G-42, on Duties of Non-Solicitor Municipal Advisors (the "**Request for Comments**"), which included the text of draft Rule G-42 and Supplementary Material to the draft rule.[14]

Summary of Draft Rule G-42

Draft Rule G-42 proposes basic duties and responsibilities of a municipal advisor. Central among the obligations proposed in draft Rule G-42 are duties of a municipal advisor as a fiduciary to its municipal entity clients, including a duty of care and a duty of loyalty. Draft Rule G-42 would also require municipal advisors to disclose conflicts of interest and require a municipal advisor to have a reasonable basis for believing that a transaction or product is suitable for its client prior to recommending it.

Under draft Rule G-42, municipal advisors would be required to evidence their municipal advisory relationship with a client by a writing entered into prior to, upon, or promptly after the inception of the municipal advisory relationship. Draft Rule G-42 would require the writing establishing the relationship to describe the scope of the municipal advisory activities to be performed and any limitations on the scope of the engagement.

Overview of NABL's Comments

As more particularly described below, NABL writes to urge that careful consideration be given to the precise language used in final Rule G-42 to ensure that municipal advisors are clearly informed of their duties and not unduly burdened, and that the choices available to municipal entities and obligated persons in engaging municipal advisors are not inadvertently or unduly limited.

We also focus our comments on the fiduciary duty aspect of the G-42 draft rules. As lawyers, we are familiar with fiduciary duty principles under common law. We are also subject to certain rules of professional conduct, which may be analogized in certain respects to fiduciary duties, and which we believe should be considered as examples for the rules applicable to municipal advisors. Our comments are divided into three categories, the first of which consists of general comments related to the framework of the municipal advisor rules. The second section of our comments is responsive to certain of the MSRB's questions. The third section consists of comments related to specific provisions of, and language in, the draft Rule G-42.

NABL's General Comments

- ***In undertaking to define the duties of municipal advisors as fiduciaries to municipal entities, MSRB Rule G-42 should draw on established common law and similar standards that have been used to express or elaborate fiduciary duties, for example, the standards that are applicable to attorneys.***

[14] MSRB Notice 2014-1 (Jan. 9, 2014).

- *Rule G-42 appears to comingle broker-dealer duties with traditional fiduciary duty standards.* For example, the provisions of draft Rule G-42 applying to the disclosure of conflicts of interest and recommendations are drawn from comparable requirements for broker-dealers rather than from standards that apply to common law fiduciaries or attorneys.

- *Rule G-42 also appears to draw heavily from registered investment advisor duties.* The relationship between a registered investment advisor and its client arises in narrower contexts than the municipal advisor-client relationship, and, thus, there are limits to how much the MSRB should draw from the duties applicable to registered investment advisors in defining the duties of municipal advisors. The attorney-client relationship is more comparable to the municipal advisor-client relationship, because both relationships can have (a) a wide spectrum of scopes of responsibilities, (b) similar contexts in which there are interactions with the client, and (c) a longer duration over which the representation occurs. The duties of attorneys tend to be more principle-based, allow for wide latitude in how the attorney and client fashion their relationship, and tend to be less specifically proscriptive.

- ***The provisions in draft Rule G-42 concerning conflicts of interest are currently unclear. Such provisions could be structured in a way that is similar to the provisions for attorneys.***

  - To that end, we believe that the ABA Model Rules of Professional Conduct (the "**Model Rules**") are helpful because they incorporate concepts applicable to an attorney's ability to address conflicts, including a procedure for obtaining informed consent that protects his or her clients.

  - The Model Rules provide a definition of conflicts, which, broadly stated, involve the representation of one client while being adverse to another client, or involve a significant risk that the representation of one or more clients will be materially limited by the attorney's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

  - If an attorney has a conflict of interest, the Model Rules provide that: "Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing."[15]

[15] ABA Model Rules of Professional Conduct, Rule 1.7(b).

- We believe that the regulation of conflicts of interest affecting municipal advisors could be similar. In particular, we believe that MSRB Rule G-42 could incorporate the following concepts:

    - Municipal advisors should be required to disclose all material conflicts of interests as paragraph (b) of draft Rule G-42 currently requires.

    - Borrowing from the Model Rules, municipal advisors could be required to obtain "informed consent, confirmed in writing" to each waivable material conflict of interest. We think that this requirement should not be different for municipal advisors than it is for common law fiduciaries or attorneys. Consent could take the form of a writing evidencing an engagement, including a letter of intent, after disclosure to the client sufficient to establish informed consent. We believe that the requirement to obtain informed written consent from an advisory client is a necessary corollary to the requirement that an advisor disclose and provide sufficient detail about the nature of all material conflicts of interest.

    - Like the Model Rules, MSRB Rule G-42 could also preclude municipal advisory engagements that involve unwaivable conflicts of interest. The Model Rules describe such a conflict as one that will cause the attorney to be unable to provide competent and diligent representation to each affected client. Under draft Rule G-42, a municipal advisor could proceed with an engagement if it merely disclosed any "actual or potential conflicts of interest of which it is aware after reasonable inquiry that might impair its ability either to render unbiased and competent advice to or on behalf of the client or to fulfill its fiduciary duty to the client, as applicable" We believe that, if a municipal advisor concludes that a conflict of interest substantially impairs its ability to render unbiased and competent advice, final Rule G-42 could prohibit the municipal advisor from undertaking the representation.

- ***We believe that the proposal's requirements concerning recommendations are more formal than is necessary***.

    - Paragraph (d) of draft Rule G-42 places certain obligations and restrictions on municipal advisors with respect to recommendations provided to clients. However, just like attorney-client relationships, municipal advisor-client relationships could include a wide spectrum of activities. Just like attorney-client relationships, the task that municipal advisors must perform in providing their advice should be governed by the terms of the engagement. For example, a municipal advisor should be free to provide advice regarding or otherwise recommend pricing of a transaction even if it does not believe that the transaction is preferable to other possible transactions, if its client instructs it to do so. In addition, a municipal advisor should be free to recommend a transaction based on facts given to it by its client, without exercising any diligence to check the facts, if consistent with its engagement.

- Suitability is a regulatory concept that may not be appropriate in all municipal advisor-client settings. In addition, if a municipal entity or obligated person has determined to undertake a transaction, a municipal advisor should be permitted to make a recommendation as to pricing or some other limited aspect of the transaction, even if it does not agree that the transaction is suitable for the client.

- If a municipal advisor represents a municipal entity, the municipal advisor should be permitted to recommend a range of transactions that would be in the client's interest, even though only one could be in the "best" interest of the client.

- ***We believe that MSRB Rule G-42 should contain a provision describing how municipal advisors may withdraw from or terminate municipal advisor relationships with municipal entities***.

    - As with other fiduciary standards, MSRB Rule G-42 should provide for the withdrawal and termination of municipal advisory relationships. Municipal advisors must ensure that their withdrawal or termination complies with fiduciary duty standards. Further, any rule or guidance should state that when a municipal advisory relationship is no longer in existence, the municipal advisor no longer owes duties to its former client.

NABL's Responses to MSRB's Specific Questions Numbers 1 and 7

"1) Draft Rule G-42 follows the Dodd-Frank Act in deeming a municipal advisor to owe a fiduciary duty, for purposes of the draft Rule G-42, only to its municipal entity clients. Is carrying forward that distinction in the draft rule appropriate in light of the services a municipal advisor provides to its obligated person clients? Would having a uniform fiduciary standard applied to <u>all</u> of a municipal advisor's clients facilitate compliance with the draft rule or provide better protection for issuers? If so, are there any legal impediments to the MSRB extending a fiduciary duty in the draft rule to all clients of a municipal advisor?"

- ***We do not recommend that the MSRB mandatorily extend the fiduciary duty of a municipal advisor to obligated persons, but Rule G-42 should leave them free to do so by agreement .***

    - Obligated persons include a wide spectrum of entities (for instance, universities, hospitals, corporate borrowers, and developers), and applying a fiduciary duty to each and every one of those entities could lead to unintended consequences.

    - Municipal advisors and their obligated person clients should be free to fashion their relationships in any way that they deem appropriate for both of their interests. Obligated persons are free to impose fiduciary duties on their advisors by contract, if they choose. Since the Dodd-Frank Act specifically omitted advice to obligated persons from statutory fiduciary duties, the MSRB, consistent with statutory intent, should not extend fiduciary duties to their advisors. To do so would unnecessarily reduce the choices available to obligated persons and, in many cases, increase their transaction expenses.

"7) Should a municipal advisor be required to obtain a written acknowledgment from the client of receipt of the conflicts disclosure and consent to any conflicts disclosed before proceeding with a municipal advisory engagement?"

- We believe municipal advisors could be required to obtain "informed consent, confirmed in writing" to material conflicts of interest. Please see our discussion of the conflicts disclosure and prohibition provisions above as they relate to the Model Rules. Requiring informed consent, confirmed in writing also would be consistent with the requirements of the Commodities Futures Trading Commission for commodity trading advisors. We believe consent could take the form of a writing evidencing an engagement, including a letter of intent, after disclosure to the client sufficient to establish informed consent.

NABL's Comments Related to Specific Provisions and Language

- ***Paragraph (b) of draft Rule G-42 - Disclosure of Conflicts of Interest and Other Information.***

  - If retained, the lead-in to draft Rule G-42(b) should be revised to clarify its intent. As worded, draft Rule G-42(b) would require a municipal advisor to make "full and fair disclosure of all material conflicts of interest, *including disclosure of*" [emphasis added] the matters described in the nine subparagraphs following the lead-in. This lead-in sensibly suggests that only conflicts that could materially affect the municipal advisor's advice would need to be disclosed. However, the nine subparagraphs include matters that would not appear to present a conflict of interest, but rather might otherwise influence a client's decision to engage the municipal advisor (e.g., whether the municipal advisor has professional liability insurance or has been a party to disciplinary proceedings). The inclusion of these items confuses whether disclosure of other items is required only if they could materially affect the municipal advisor's advice. For example, must payments to third parties be disclosed if they will have no impact of the independence of the advice? If draft Rule G-42(b) is retained, we believe it should be revised to describe less ambiguously what must be disclosed.

  - We question the proposed requirement to disclose professional liability insurance coverage, since policies insure the advisor, not the advisee; advisors are not guarantors of results; and policy coverage provisions can be very complicated, so it would be difficult to make a "full and fair disclosure…of…the amount and scope of coverage of professional liability insurance." Issuers are free to (and often do) ask for such information, if material to them. If the requirement is retained, to avoid unnecessary risk and expense, the MSRB should consider a safe harbor of some type for the fullness and fairness of policy summaries.

  - Municipal advisors should not have a disclosure obligation to investors, as proposed in Supplemental Materials .07. Mandated disclosure of conflicts that are not material to an issuer's credit or an investment in its securities will nonetheless create an impression that they are material to the offering. Since the Dodd-Frank Act does not require a municipal advisor for offerings, it follows that

the intent of the municipal advisor provisions is to protect issuers, not investors. Consequently, the MSRB should leave to issuers whether to disclose conflicts of interest that they choose to waive.

- The phrase "inception of a municipal advisory relationship" is used in both paragraphs (b) and (c). Draft Rule G-42 provides that a "municipal advisory relationship" is ". . .deemed to exist when a municipal advisor engages in or enters into an agreement to engage in municipal advisory activities. . ." Further guidance on when and how casual or preliminary discussions would constitute "engaging in municipal advisory activities" and thus trigger the delivery of documentation would be helpful.

- ***Paragraph (d) of Draft Rule G-42 – Recommendations.***

  - Draft Rule G-42(d) would provide that a municipal advisor may recommend a municipal securities or financial product transaction to a municipal entity only if the transaction *is* in the client's best interest. By contrast, the preceding portion of the same paragraph would impose a suitability requirement that requires only a *reasonable basis for believing* that a recommended transaction is suitable. If retained, final Rule G-42(d) should clarify that compliance with the best interest test will be satisfied by a municipal advisor's reasonable belief, rather than whether a transaction objectively was in the issuer's best interest, especially if judged in retrospect.

- ***Paragraph (f) of Draft Rule G-42 – Principal Transactions***.

  - The MSRB should revise draft Rule G-42(f) to be consistent with our suggestions for conflicts of interest above. Final Rule G-42 could provide a standard that governs which conflicts can and cannot be waived by a client. If Final Rule G-42 provides that certain conflicts cannot be waived by a client, we recommend that the only unwaivable conflicts be transaction-based, i.e., a municipal advisor cannot serve as a municipal advisor and act as a principal in the same transaction.

    - Unless the principal prohibition is limited as described above, it would unnecessarily and substantially restrict the choices available to municipal entities in engaging municipal advisors and engaging in other transactions with them or their affiliates. Under common law, an agent's fiduciary duties of loyalty (including avoiding conflicts of interest) and care may be waived or otherwise modified by the principal, if the principal is not legally incompetent.[16] As a result, any unwaivable conflicts of interest would be inconsistent with these established common law principles.[17]

[16] See Restatement of the Law Third, Agency Sec. 8.06 (duties described in Sec 8.01 [to act loyally], Sec 8.02 [not to acquire material benefit], and Sec 8.03 [not to deal with the principal as or on behalf of an adverse party in a transaction in connection with the agency relationship], may

- Consistent with the duties of other fiduciaries, if a municipal advisor is representing a client on a specific transaction, the advisor or its affiliates should be able to act in a principal capacity on an unrelated transaction with the client upon full disclosure of the unrelated transaction and, if it presents a conflict, informed consent by the client. A transaction-based prohibition aligns with the SEC's guidance on the scope of the fiduciary duty that attaches to a dealer that "acts as an advisor" to a municipal entity. Furthermore, we note that the SEC permits registered investment advisors to act as principals in transactions with clients as long as they provide disclosure and obtain informed consent, and municipal advisors should be permitted the same relief in dealings with their clients. Consistency with the SEC's guidance will provide clear guidance to market participants and will avoid confusion.

- The prohibition on principal transactions should also be revised to exclude traditional banking services provided to municipal entities. Many banks provide financial advisory services to municipal entities through separately-identifiable departments or divisions, subsidiaries or affiliates, in addition to traditional banking services. These banking services are essential to the daily operations of municipal entities throughout the U.S., and include checking and deposit account relationships and extensions of credit that are specifically permitted to be undertaken by banks under the SEC's municipal advisor rules.

    - In addition, as proposed, Paragraph (f) would preclude a bank that serves as a municipal advisor for a municipal entity's general obligation bond offerings from acting as a principal in a direct purchase transaction for bonds issued by the municipal entity and secured wholly by special revenues. The two transactions would be entirely separate and, given full disclosure by the bank and informed consent by the municipal entity, there would be no confusion regarding the role or interests of the bank in the direct purchase transaction.

- As proposed, Paragraph (f) is an overly broad prohibition, and a possibly unintended regulation of entities not engaged in non-exempt municipal advisory activities. The MSRB should confirm that all activities exempted or excluded under the SEC's municipal advisor rules, as well as those activities already regulated or exempted by the SEC or other federal agencies, are not prohibited by Paragraph (f).

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be waived by the principal, if in obtaining consent the agent acts in good faith, the agent describes all facts known or that should be known, and the agent otherwise deals fairly), and Sec. 8.08 (duty to act with care, competence and diligence is subject to the terms of the principal-agent agreement).

[17] Because there is no guidance as to whether Congress intended to depart from established common law principles and impose a heightened fiduciary duty on municipal advisors, we would encourage the MSRB to carefully consider any fiduciary duties that go beyond those principles.

- As the MSRB does not have apparent authority to regulate the conduct of affiliates of municipal advisors that are not brokers, dealers or municipal securities dealers, any prohibition on principal transactions should be narrowly-tailored and addressed to the municipal advisor's right to advise, rather than its affiliates' right to engage in unrelated transactions.

- The phrase "Except for an activity that is expressly permitted under Rule G-23" is unclear as to exactly what activity is permitted. The interplay between the activities expressly permitted under Rule G-23 and the SEC's guidance on the fiduciary duty and associated prohibitions that attach to a person that "acts as advisor" to a municipal entity have created considerable uncertainty among market participants. To avoid further uncertainty, and pending any further guidance by the MSRB on Rule G-23, we recommend that this phrase be deleted.

- ***There are several places where draft Rule G-42 appears to apply to persons engaged in unregulated activities, and we think these portions of the draft Rule should be amended to clarify that the Rule does not so apply.***

  - Draft Rule G-42 would impose business conduct rules on municipal advisors when they engage in "municipal advisory activities" or "municipal advisory relationships" (e.g. G-42(a)(i) and (ii), G-42(b), and G-42(c)), and it would define those phrases by reference to Section 15B(e)(4)(A) of the Dodd-Frank Act and the SEC Final Rule, except that it would exclude solicitation activities. The phrase "municipal advisory activities" is not used in the Dodd-Frank Act. In the SEC Final Rule the phrase is defined as specified activities that, *absent an exemption or exclusion contained in the definition of "municipal advisor,*" would cause a person to be a municipal advisor. Consequently, unless clarified, draft Rule G-42 would refer to activities that are unregulated (because exempted or excluded by the SEC Final Rule) in addition to those regulated under the SEC Final Rule. To avoid that surely unintended and possibly overreaching consequence, the definition of "municipal advisor activities" in draft Rule G-42 should be clarified to refer to the activities described in paragraph (1) of the definition of that term in the SEC Final Rule, but only when the activities do not qualify for an exemption or exclusion included in the definition of "municipal advisor" in the SEC Final Rule.

  - Similarly, draft Rule G-42 would require disclosure of and/or prohibit certain payments made to obtain or retain "municipal advisory business," and it would define that phrase to include the provision of any advice in connection with municipal securities and municipal financial products, even if the advice is excluded (by the Dodd-Frank Act) or exempted (by the SEC Final Rule) from the definition of "municipal advisor" under the SEC Final Rule. While the MSRB might have authority to require disclosure of or prohibit unregulated activity as a condition to lawfully conducting regulated activities, we believe that extending these disclosure and prohibition provisions to unregulated activities would be inconsistent with legislative intent (at least for activities excluded from regulation by the Dodd-Frank Act). In addition, if all other aspects of the MSRB's business

conduct rules were to apply only to regulated activity, expanding the scope of these disclosure and prohibition provisions to unregulated activities would complicate and substantially increase the cost of compliance. For these reasons, we believe the definition of "municipal advisor business" should be clarified to exclude exempt advice.

- Similarly, draft Rule G-42(e) (requiring a reasonable basis for recommendations and, for municipal entity clients, limiting recommendations to those in the clients' best interest) on its face appears to apply to all recommendations for transactions in municipal securities or municipal financial products, including those excluded or exempted from the definition of "municipal securities" by the Dodd-Frank Act or the SEC Final Rule. For the reasons discussed above, it should be limited to non-excluded, non-exempt recommendations.

- Similarly, draft Rule G-42(g)(iv) (prohibiting certain fee-splitting arrangements) on its face appears to apply to transactions even when advice with respect to the transaction is exempted or excluded from the term "municipal advisor" by the SEC Final Rule. A dealer-advisor may be a municipal advisor in one transaction with one client and an underwriter in another transaction with another issuer. We believe the prohibition on fee-splitting should apply only when a municipal advisor is giving non-exempt advice as part of the same transaction, not when it is giving exempt advice as an underwriter or otherwise. Otherwise the draft ban on fee-splitting with underwriters could effectively make it illegal for dealer-advisors to join underwriting syndicates for issuers whom they do not advise.

- ***The proposed prohibition or requirement of some other activities should be revised to avoid unintended consequences.***

  - The duties proposed to be imposed by draft Rule G-42 in connection with offering documents are ambiguous, because they provide that issuers may control the scope of engagement, but not the duties of municipal advisors in performing the engagement. Draft Rule G-42(a)(i) would impose a duty of care in the conduct of municipal advisory activities, which the Supplementary Material states would include a duty to make a reasonable inquiry as to relevant facts and, unless otherwise directed by the client, to undertake a thorough review of the official statement for municipal securities transactions. Consequently, it is not clear whether issuers would be permitted to engage a municipal advisor to prepare a draft offering document without also engaging it to "make a reasonable inquiry as to the relevant facts" by checking the accuracy and completeness of the information in the document. The provisions of draft Rule G-42 should be clarified to unambiguously permit an issuer to engage an advisor to assemble an offering document without imposing a duty on the advisor to check the information supplied to it, especially if the information is supplied by the issuer. In addition, the advisor should not have a duty to check information supplied by others if the issuer prefers to check that information itself or to engage disclosure counsel to do so.

EXHIBIT A

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