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September 11, 2015

Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

RE: SR-MSRB-2015-03

Dear Secretary:

Thank you for the opportunity to once again comment on MSRB Revised Proposed Rule G-42 (the Revised Proposed Rule). The promulgation of this Rulemaking is essential to the business operations of our members and ensuring that their activities will comply with the relevant sections of the *Dodd–Frank Wall Street Reform and Consumer Protection Act*.

The National Association of Municipal Advisors (NAMA) is dedicated to ensuring that municipal advisors (MAs) are held to the highest standards of ethics, qualifications, education, training and regulatory compliance. These principles represent the framework for our comments on the Revised Proposed Rule.

We appreciate the modifications that were made from the Proposed Rule earlier this year in the areas of *Recommendations and Review of Recommendations of Other Parties*, *Timing of Evidencing a Municipal Advisory Relationship and Conflicts Disclosure*, and *providing clients with easier access to MA and MA-I forms*. These changes are helpful to both MAs and to the marketplace in general.

However, we respectfully note that the Revised Proposed Rule continues to lack clarifications of key provisions and remains in conflict with the *Exchange Act*. **These clarifications are essential for MAs to abide by the law because of the potential differences in interpretation that could occur between MAs and SEC examiners**. MSRB Rule G-42 is a new and important element in the implementation of the *Dodd-Frank Act*, and if it is implemented with numerous unclear provisions, it will undermine efforts by Congress and the SEC to regulate MAs and provide meaningful protection to municipal issuers. We believe that the MSRB should further refine the Rulemaking and provide greater clarity regarding the responsibilities of MAs and the corresponding documentation standards. This should be done by supplementing the Revised Proposed Rule with additional interpretive guidance as we detail below and as the MSRB has done with other recent rulemaking. Further, the Revised Proposed Rule should not become effective until the MSRB provides, at a minimum, the interpretive guidance

requested herein. As it stands now, MAs will have to devote substantial time and resources to establish meaningful procedures that attempt to comply with the vague and broad text of the Revised Proposed Rule. Because this puts an undue burden on MAs, and especially small MAs, the Revised Proposed Rule fails to comply with the *Exchange Act*.

While the MSRB and the SEC may believe that the Revised Proposed Rule is clear enough and phrases in the MSRB's response to comment letters such as "Under the proposed rule, municipal advisors would not be required to go to the impractical lengths suggested by some commentators"[1] are meant to appease readers and professionals that more specificity is unnecessary, one must be cognizant of how the Revised Proposed Rule, as ultimately promulgated (the Promulgated Rule), will work as a practical manner, especially at the time of a MA examination by the SEC's Office of Compliance, Inspections and Examinations (OCIE). It is in these circumstances that the Promulgated Rule must be precise enough so that MAs and OCIE examiners alike are working from the same set of rules and not a variable "*I know it when I see it"* standard. Additionally, better precision can be expected to reduce, or maybe even eliminate, inconsistencies between FINRA examiners who will examine dealer-MAs and OCIE examiners who will examine non-dealer-MAs. It is impractical to expect that MAs and examiners will refer to the MSRB's August 12th letter responding to comments on the earlier Proposed Rule as the authority for interpreting MSRB Rule G-42. Much of that letter discusses and attempts to explain provisions that numerous commenters had cited as unclear, but these explanations were not included in the Revised Proposed Rule. Therefore, we ask that the MSRB and SEC collaborate to explain in greater detail numerous provisions in the Revised Proposed Rule highlighted below in order to promote MAs' compliance with the Promulgated Rule.

Meeting the Suitability Standard and Documentation of Recommendations

Determining Suitability. While giving a nod to the MSRB's comment that further clarification on an approach to determine suitability would "risk creating inflexible requirements that would fail to adequately account for the diversity of municipal advisors, the municipal advisors activities in which they engage and the varying needs for clients,"[2] further explanation of the manner in which a MA must perform reasonable due diligence to determine suitability is still needed. We strongly suggest that the MSRB provide more guidance on the process for determining suitability by shoring up the Promulgated Rule with supplementary material, interpretative guidance and/or non-exclusive examples. We believe that this can be accomplished while avoiding the MSRB's concern with being overly prescriptive.

Clarity is also needed to help MAs comply with the section of the Revised Proposed Rule relating to documentation standards for suitability determinations and recommendations. Specifically, when determining whether a financing is suitable and/or recommended by an MA, the current Revised Proposed Rule is unclear as to the scope of the documentation standard. One question that arises from the current non-specific language – are these standards in place for the financing as a whole (the significant and material items), or do the standards apply to every facet of a transaction, which is

[1] MSRB August 12, 2015 letter to SEC: Response to Comments on SR-MSRB-2015-03, page 9
[2] MSRB August 12, 2015 letter to SEC: Response to Comments on SR-MSRB-2015-03, page 8

something that could arise especially when a transaction could take months to come together and various options within a particular financing are discussed and determined throughout the deal. Again, without clarification, there could be varied expectations among examiners and MAs regarding these documentation standards.

Alternative Financings. The discussion in the MSRB's August 12th letter actually creates greater ambiguity rather than clarity with respect to documentation requirements related to alternative financings. According to that letter, the MA would only need to declare that he/she did consider or investigate reasonably feasible alternatives, but would not have to document those alternatives unless the MA and client had agreed to discuss them. This section of the Revised Proposed Rule would benefit from clarity so that during an examination, an MA can best demonstrate that it evaluated alternatives and, when appropriate, performed suitability analyses.

Duty of Care

Again, the need for greater clarity in this section mirrors our arguments above. The requirements of this section relate to MAs' need to conduct a reasonable investigation of the accuracy and completeness of the information which form the basis for recommendations. While the MSRB noted that this requirement will "not likely result in an unreasonable and unnecessary burden for MAs or their clients,"[3] the Revised Proposed Rule fails to provide sufficient guidance as to how to meet this standard. This vagueness could lead to unsettling results during an OCIE examination. Therefore, we call on the MSRB or SEC through rulemaking, interpretative guidance or non-exclusive examples further clarify what constitutes a "reasonable investigation" related to the Duty of Care requirements.

Intersection of Rules G-42 and G-23

In the MSRB's August 12 letter to the SEC, there is commentary on the relationship between current Rule G-23 and the prohibition on principal transactions standard set forth in Revised Proposed Rule G-42. The MSRB does make a statement in the above letter that industry professionals understand that Rule G-23 does not necessarily conflict with the *Exchange Act* or the Revised Proposed Rule.[4]

Thus, where certain conduct is permitted under Rule G-23 (as an exception to the general prohibition therein), Proposed Rule G-42(e)(iii) (the principal transaction provision) alone does not prohibit such conduct. Notwithstanding, other parts of Proposed Rule G-42 and statutory provisions must be considered to determine whether the conduct, although permitted under Rule G-23 and not specifically prohibited under Proposed Rule G-42(e)(ii), would violate another provision of Proposed Rule G-42 or other MSRB rules or other laws and regulations.

The MSRB had received clear commentary from both NAMA and a dealer group that recommended that the sentence referencing Rule G-23 be deleted from the Promulgated Rule. The statements by the

[3] MSRB August 12, 2015 letter to SEC: Response to Comments on SR-MSRB-2015-03, page 9
[4] MSRB August 12, 2015 letter to SEC: Response to Comments on SR-MSRB-2015-03, page 21

MSRB regarding this provision of the Revised Proposed Rule are unnecessarily complicated and continue to raise the question of why, if the MSRB believes that if conduct permitted by MSRB Rule G-23 would be otherwise prohibited by the Promulgated Rule G-42, that they would add to the confusion by making any reference to G-23 in the Revised Proposed Rule G-42. The muddled language could cause MAs to incur unnecessary work and costs in order to determine Rule G-42 compliance. Instead of discussion in a comment letter, the statements and intent of the MSRB in this area deserve to be made clear in connection with the Rule G-42 itself, namely that Rule G-42 overturns provisions of Rule G-23 that would purport to allow broker-dealers to engage in MA activity on the same transaction on which they are acting as underwriters. The SEC should delete the sentence referencing Rule G-23 from the Revised Proposed Rule because, notwithstanding the vague commentary from the MSRB in its response letter that this sentence is still subject to "statutory provisions" (which commentary is not part of the actual Revised Proposed Rule), including this sentence in the Promulgated Rule would be inconsistent with and violate the *Exchange Act*.

Overall Burdens on MAs and Small MAs

We acknowledge that while a principles-based approach to rulemaking provides some necessary flexibility – it also shifts the regulatory burden for fleshing out the practical application of the rules to the regulated entities which in turn places an undue cost on all municipal advisors, and especially on a proportional basis, on small municipal advisors. The MSRB and SEC are required by the provisions of the *Dodd-Frank Act* to address this burden on small MAs and could do that by providing the additional interpretive guidance and non-exclusive examples that we have requested in this letter and in our prior comment letters. By failing to do that, the Revised Proposed Rule is inconsistent with and violates the provisions of the *Exchange Act* that require the MSRB not to place an undue burden on small municipal advisors (defined as those MAs with annual revenues less than $7 million dollars).

In conclusion we would like to offer to work with the MSRB and the SEC to develop appropriate clarifications in this rulemaking and expected guidance to ensure that Rule G-42 is appropriately precise and can be best executed by municipal advisors and create a streamlined and unified examination process.

Thank you for the opportunity to comment on this important rulemaking.

Sincerely,

Terri Heaton, CIPMA
President, National Association of Municipal Advisors (NAMA)

cc: Jessica Kane, Director, Office of Municipal Securities
Rebecca Olsen, Deputy Director, Office of Municipal Securities
Lynnette Kelly, Executive Director, Municipal Securities Rulemaking Board