NATIONAL ASSOCIATION OF MUNICIPAL ADVISORS

April 16, 2018

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

RE: MSRB Notice: 2018-03

Dear Mr. Smith:

The National Association of Municipal Advisors ("NAMA") welcomes the opportunity to submit comments to the MSRB for Notice 2018-03. As an initial matter, we are grateful that the MSRB is accepting public comments on these FAQs and hope going forward that such action becomes routine.

NAMA appreciates the work that the MSRB has done to develop FAQs to help municipal advisors ("municipal advisor" or "MAs") comply with MSRB Rule G-42 ("Rule G-42") by clarifying the meaning of the term "recommendation" in the context of MSRB Rule G-42. Although the MSRB had previously stated[1] in response to comments on Rule G-42 proposals that providing a more "prescriptive" definition of recommendation was unnecessary, it has been clear from concerns raised at recent market events that a more workable understanding of the word "recommendation" is necessary specifically for purposes of MSRB Rule G-42(d). Market participants, including former MSRB Board members, have publicly raised concerns about the unrealistic compliance burdens imposed on MAs if the word "recommendation" for purposes of MSRB Rule G-42 was read as broadly as it is in other securities law contexts.

Importantly, on page 4 of the Notice the MSRB observes that "The principles discussed in this compliance resource were established in the MSRB's regulatory filings with the SEC that were associated with the development of MSRB Rule G-42." Given this assertion, the MSRB should characterize the FAQs as something greater than a "compliance resource." If the principles highlighted in the FAQs were part of the regulatory record considered and approved by the Securities and Exchange Commission ("SEC") when it approved MSRB Rule G-42, then MAs will be able to be assured that compliance with the adopted *Exchange Act* principles highlighted in the FAQs can be relied on for compliance with at least MSRB Rule G-42(d). Market participants should feel secure that principles that were articulated in the regulatory record and approved by action of the SEC (as opposed to SEC staff) – as the MSRB asserts is the case here -- can be relied on for compliance.

Before we comment on specific aspects of the FAQs we also note that the MSRB's references to the regulatory record in this Notice highlight the fact that the MSRB sees aspects of their comment letter responses to the SEC on proposed rulemaking as principles or insights that provide important guidance or clarifications to questions that arose during the MSRB's and SEC's comment periods (and many would argue remain unaddressed in the actual rule text or supplemental material). If these principles or guidance contained in the "regulatory record" should be used by MAs to better understand the rulemaking or seek answers to outstanding questions, the MSRB should more prominently display these filings (and their associated principles) within the resources section of each Rule. In addition, as some of these filings are very lengthy and contain much extraneous material and

[1] https://www.sec.gov/comments/sr-msrb-2015-03/msrb201503-44.pdf at page 54

discussion, a key way to assist practitioners may be to flag or index the sections of the MSRB filings that articulate principles or guidance not specifically included in the rule text or supplemental material. In many cases, the additional explanations or offers by the MSRB to study or clarify matters related to the proposed rulemaking are crucial to getting the proposed rules approved by the SEC. Therefore, these aspects of the regulatory record should be more clearly available to practitioners. Further, the MSRB should provide the public with information about the role these MSRB comment letters play in understanding rulemaking and compliance in the "MSRB Types of Compliance Information" document.

Below are our comments on each FAQ and scenario (lines noted in double underline reflect the language in the Notice). Responses to the general questions asked on page 3 of the Notice can be found at the end of this letter. Overall, most of our comments relate to and support the MSRB's articulation of a two-pronged approach to determining what constitutes a MSRB G-42 recommendation that requires both (1) a call to action and (2) a specific issuance or product.

FAQ 1

Fundamentally this FAQ is about Rule G-42(d) which does not use the term "advice." Therefore, an extended discussion of the SEC's definition of 'advice" is not necessary and confuses the overall message of this FAQ which is about MSRB Rule G-42(d). It is enough to say that "advice" means the same as in Section 15B of the *Exchange Act* (and footnoting that municipal advisors have a fiduciary duty when providing advice to their municipal entity clients) and then get right to the discussion of what "recommendation" means for purposes of Rule G-42(d). The last sentence of the recommendation in FAQ 1 more properly belongs in FAQs 5 and 6 that talk about the rule consequences of making a G-42 recommendation and that sentence should be deleted from FAQ 1. Finally, the MSRB should clarify that mutual bond insurance is not a municipal financial product even though the municipal entity is using the proceeds of an issuance of municipal securities to purchase insurance that promises future dividends or reduced premiums to the municipal entity.

Overall for FAQ 1 we would recommend making subgroups or separate questions to address the variety of topics covered in this question.

- **How does MSRB Rule G-42 define advice and what is different in that definition from the SEC MA Rule?** MSRB Rule G-42 defines advice the same as Section 15B of the Exchange Act. Rule G-42(f)(1) defines the term "advice" to have the same meaning as the term has when used in Section 15B of the Securities Exchange Act (the "Act") and the rules and regulations thereunder. Accordingly, if a communication would constitute advice under the 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.[2]

- **How does the MSRB Rule G-42 define recommendation?** 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"). (see additional discussion below)

[2] The SEC has noted that, for purposes of the definition of a municipal advisor, the term "advice" includes, without limitation, a recommendation that is particularized to the specific needs, objectives, or circumstances of a municipal entity or obligated person (hereinafter "MA Client" unless otherwise specified) with respect to municipal financial products or the issuance of municipal securities, including with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues, based on all the facts and circumstances. However, the SEC has indicated it does not believe "the term 'advice' is susceptible to a bright-line definition . . . [but instead] can be construed broadly, and that, therefore, the determination of whether a person provides advice to or on behalf of a municipal entity or an obligated person regarding municipal financial products or the issuance of municipal securities depends on all of the relevant facts and circumstances."

- **What would not be considered a recommendation under Rule G-42?** There are ancillary issues related to recommendations that would not be actual recommendations for Rule G-42 purposes. For example, if the structure, timing and terms of a transaction are otherwise established and before going to market the municipal advisor advises the issuer to purchase bond insurance, this communication would be advice *relating* to the terms of the issuance of municipal securities (advice carrying with it a fiduciary duty). However, this communication would not be a G-42 Recommendation because it is not a call to action to proceed with a specific issuance of municipal securities or a municipal financial product.

Note that there may be times, depending on the particular facts and circumstances, when advice is not a G-42 recommendation, but a subsequent communication is a G-42 recommendation because it is a call to action to proceed (or not to proceed) with a specific municipal financial product or issuance of municipal securities based on the advice previously provided. For example, if a municipal advisor advises its MA Client on the structure and terms of an issuance of municipal securities that the MA Client should consider for its next financing, and several months later, the municipal advisor advises the MA Client that it should proceed (or not proceed) with the described issuance, the later call to action is a G-42 recommendation and the prior advice on the structure and terms of the issuance is the basis for that G-42 recommendation.

In addition to a municipal advisor's G-42 recommendation requirements, it is important to remember that under G-42, municipal advisors have a duty of loyalty and duty of care to their municipal entity clients and a duty of loyalty to their obligated person clients (see further discussion in FAQ 9).

FAQ 2

This FAQ is largely repetitive of FAQ 1 and should be consolidated with the answer to "**How does the MSRB Rule G-42 define recommendation."**

FAQ 3

On the MSRB's web site under Rule G-42, there is no reference to MSRB Notice 2002-30. Furthermore, a reading of this Notice is unhelpful in determining what is a "call to action" for purposes of municipal advisory activity. Most of the Notice uses the word "recommendation" rather than the phrase "call to action" and most of the examples involve "recommendations" of multiple securities which is not consistent with the second prong identified by the MSRB requiring specificity.

We strongly recommend that the MSRB develop similar guidance specifically for municipal advisors related to the interpretation of the phrase "call to action" instead of citing 16-year-old interpretative guidance for broker/dealers that would likely not be easily (or ever) found by municipal advisors and, even if found, does not provide workable guidance in the context of Rule G-42. Nevertheless, structurally for the FAQs it is helpful to have something that addresses the first prong of the two-pronged analysis of a Rule G-42 recommendation.

FAQ 4

The presentation of this question would be less confusing if it asked "How can a municipal advisor determine if the second prong of the Rule G-42 recommendation analysis requiring specificity is satisfied?

FAQ 5

The question here could be simplified to "Why is it necessary to determine whether a municipal advisor has made a Rule G-42 recommendation? A lot of the answer here is duplicative of information in FAQs 1 and 6. We suggest that the MSRB focus on the requirements of Rule G-42(d) and keep ancillary discussions about advice separate and minimal.

FAQ 6

This question should be rephrased to solely discuss the issue of suitability (suggestion - What role does suitability play when making a Rule G-42 recommendation?). The next question should then be about the reasonable diligence responsibilities a MA must conduct to know their client (rephrase of FAQ8) (suggestion – What responsibilities does a MA have to conduct reasonable diligence to know and retain essential facts concerning the client?).

In answering this second question, it is notable that the MSRB cites its comment letter of December 16, 2015 to say that municipal advisors are not "expected" to go to impractical lengths to determine whether their recommendation was made on inaccurate or incomplete information. They also say that Rule G-42(d) requires a municipal advisor to give "timely, full and fair" disclosure even though this was apparently only stated in the rule filing and does not appear in the Rule G-42 rule text or Supplemental Material. These are both examples of the issue we noted earlier about the MSRB burying important clarifying points in comment letters rather than adding them to the rule text or Supplemental Material.

Additionally, the MSRB should further expand this discussion (in current FAQ 8) of what is meant by "a reasonable inquiry," when making a recommendation and that the MA "does not need to go to impractical lengths to determine the accuracy and completeness of the information on which it basis its recommendation."

We also note that the MSRB's assertion in FAQ 6 about the meaning of the last sentence of Rule G-42(d) and clauses (i) to (iii) appears more broad than a plain meaning of the rule would indicate. Clauses (i) to (iii) only appear to apply to reviews of recommendations of other parties. Further the discussion in the last part of FAQ 6 is not about the definition of Rule G-42 recommendations, and should be deleted.

FAQ 7

MSRB's statement referring to its December 16, 2015 response to comments that this provision does not require the MA to conduct suitability analysis on any reasonably feasible alternative….. unless it is part of the MA's scope of services to the client, is important and another key element of rule guidance that has not been previously highlighted.

FAQ 8

See comments n FAQ 6.

FAQ 9

As noted above, the MSRB should focus these FAQs on the meaning of Rule G-42 recommendation and keep ancillary discussions to a minimum or separated. This question should be rephrased to "Is there any difference in the duties and obligations a municipal advisor owes when providing a G-42 recommendation to a municipal entity client versus an obligated person client?" For purposes of this question it is more accurate to state that Rule G-42(d) imposes the same general obligations on G-42 recommendations regardless of whether they are provided to a municipal entity or obligated person. As a footnote the MSRB could note that other provisions of Rule G-42 impose additional obligations but not confuse the fact that obligations under Rule G-42(d) apply uniformly regardless of the client.

As a side note the MSRB should take the opportunity to rework the "interpretative guidance" that the MSRB released on July 13, 2017 regarding non-solicitor MAs work related to obligated persons. The MSRB should consider withdrawing or significantly revising this letter which unfortunately has not proved helpful to MAs nor many obligated persons. That guidance was unfortunately much more dense than necessary and did not directly respond to the questions that were posed to the MSRB by market participants. The answer to virtually all of those questions could have been far more straightforward – yes the municipal advisor can engage in the dual

representation (with conduit issuer and conduit borrower) described provided appropriate disclosures are met and the conflict is not unmanageable or objected to by either client.

We would also like to suggest a new scenario to help address the issue of Rule G-42 recommendations for issuer and obligated person scenarios borrowing from some of the scenarios in that July 13, 2017. The guidance should indicate which (if not both) entities the MA would have been deemed to have provided a G-42 recommendation in these (direct or indirect) dual representations.

FAQ 10

The second paragraph of this response is more properly a footnote.

Scenarios

We would suggest noting in the FAQ questions the Scenario that references information relayed in the answer.

Scenario 1

We appreciate the MSRB taking the position that simply stating a municipal entity "may wish to restructure a prior bond issue" is not a Rule G-42 recommendation. Rather a municipal advisor would have to be more directive and state that in the view of the municipal advisor, the municipal entity "**should** restructure its debt." This relatively clear line will aid municipal advisors in facilitating compliance.

Scenario 2

We appreciate the MSRB taking the position that simply presenting preliminary reactions to proposed issuances or products to a municipal entity is not a Rule G-42 recommendation. Again, this relatively clear line will aid municipal advisors in facilitating compliance.

Scenario 4

We appreciate the MSRB recognizing the reality that municipal entities may have already determined to proceed with an issuance of municipal securities or a municipal financial product and simply executing that issue or product does not constitute a Rule G-42 recommendation.

General Questions

Does the FAQ ask and answer appropriate questions relevant to MA's compliance with Rule G-42/making recommendations?

The FAQs need to be more clear that they are only about obligations under Rule G-42(d). The document should also indicate that telling a municipal entity client NOT to go forward with a specific financing would be considered a recommendation. See comments above, especially in FAQ 1. Additionally, some of the questions should be consolidated and some are off-topic and therefore confusing.

Does the draft clearly distinguish between advice and recommendation?

This Notice does a reasonable job of articulating what constitutes a Rule G-42 recommendation that triggers additional obligations and recordkeeping requirements. Ancillary issues (outside of the core discussion of what constitutes a Rule G-42 recommendation and what obligations follow from that), such as advice under the MA Rule's fiduciary standard should be minimized. Importantly, the Notice (and the MSRB in general) should not rely on largely inapplicable guidance relating to dealer rules to establish principles for municipal advisor specific rules.

Does this help with the understanding of the rule?

The questions should be more parsed out (see comments to FAQ 1) and clearly discuss each matter at hand rather than discuss various items in one sentence or area.

Are there additional questions that should be asked?

We have raised the issue of delineating the draft questions into further questions, and adding questions where greater clarity is needed.

Are scenarios helpful?

The scenarios are all similar in their message – is the scenario a call to action or not. We would argue that additional scenarios would be helpful to complement various issues raised by our comments and that have come forward in various educational forums including Rule G-42 responsibilities related to dual representation of obligated persons and municipal entity clients in conduit borrowings. Based on the scenarios and analysis presented we would expect the MSRB to also take the position that advising on issues such as competitive vs. negotiated sale vs. private placement is not considered to be a G-42 recommendation if the specific issuance has already been decided but rather would be considered advice from the municipal advisor.

We again appreciate the MSRB's efforts to develop MSRB Rule G-42 FAQs related to recommendations. This FAQ is great opportunity for the MSRB to provide greater clarity about the rulemaking and with changes to solely focus the document on the definition of a Rule G-42 recommendation, it will be useful to all MAs and MA firms, especially small MA firms, which has the added benefit of helping to fulfill MSRB's duty to small MA firms.

Finally, we would reiterate our position, shared by many other organizations, that the MSRB continue to seek public comment and dialogue with municipal market participants on its publications, guidance, rulemaking and educational efforts.

We would welcome the opportunity to discuss our comments with MSRB staff and answer any questions they may have.

Sincerely,

Susan Gaffney
Executive Director