



April 16, 2018

VIA ELECTRONIC DELIVERY

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

pfm

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Dear Mr. Smith:

PFM Financial Advisors LLC (PFM¹) would like to thank the Municipal Securities Rulemaking Board ("MSRB") for providing additional clarity in the Draft Frequently Asked Questions Regarding Rule G-42 and the Making of Recommendations in MSRB Notice 2018-03 (hereinafter, referred to as the "Draft FAQs"). Throughout the development of Rule G-42 the MSRB has requested comment from the public regarding the rule in order to understand, address, and balance the concerns of market participants within the municipal securities industry with respect to establishing a new regulatory regime for municipal advisors. Accordingly, PFM appreciates and welcomes the opportunity to respond to the Draft FAQs in order to assist the MSRB in facilitating its efforts focused on providing additional guidance. PFM is an affiliate of Public Financial Management, Inc., and the combined financial advisory services business has been in operation for over 40 years, and is the top-ranked municipal advisor in the nation in terms of both number of transactions and total dollar amount according to Thomson Reuters as of December 2017.¹ Therefore, we are hopeful that our comments, grounded in a broad-based perspective, will prove helpful in providing further refinement of the Draft FAQs presented.

¹ PFM's financial advisory business consists of both Public Financial Management Inc. and PFM Financial Advisors LLC. PFM Financial Advisors LLC commenced operations on June 1, 2016, and all financial advisory relationships previously serviced by Public Financial Management Inc. are now in the process of transferring and being assigned to PFM Financial Advisors LLC.



I. **Does the term “Recommendation” Apply in Instances when a Municipal Advisor Advises a Municipal Entity or Obligated Person Client to “Refrain From Engaging in” a Municipal Securities Transaction or Product**

PFM suggests that as the MSRB refines the FAQs additional clarification is provided with respect to Draft FAQ questions 1 thru 4 related to the definition of the term “recommendation.” The Draft FAQs define a “recommendation” as advice that “exhibits both a call to action and a specificity as to what municipal financial product or issuance of a municipal security the municipal advisor is advising the municipal advisory client to proceed with.” This definition in the Draft FAQs appears to differ from the definition of a “recommendation” cited in the adopting release issued by the Securities and Exchange Commission (the “Commission”) in connection with implementation of MA regulation under the Dodd-Frank Act, in which the Commission stated that “what constitutes a recommendation for purposes of a municipal advisor, is consistent with the FINRA approach” and that “an important factor in the inquiry is whether considering its content, context and manner of presentation, the information communicated to the municipal entity or obligated person reasonably would be viewed as a suggestion that the municipal entity or obligated person either *take action or refrain from taking action* regarding a municipal financial product or the issuance of a municipal security [emphasis added].”² While the Draft FAQs appear to address the affirmative taking of action, it is unclear as to whether an act of a municipal advisor advising a municipal entity or obligated person for purposes of differentiating the provision of “advice” versus a “recommendation” includes a suggestion “to refrain” from engaging in a specific municipal securities transaction or product. As this seems to have been omitted from guidance regarding what constitutes a “recommendation” in the Draft FAQs, we seek clarity as to whether such omission was intended, or if a “recommendation” (G-42

² Section 975 of the Dodd-Frank Act enacted new municipal advisor provisions as additional sections of Section 15B of the 1934 Act. The Commission adopted final rules implementing the new legislation in late 2013. See *Registration of Municipal Advisors*, SEC Rel. No. 34-70462 (Sep. 20, 2013), 78 FR 67468 (Nov. 12, 2013) (“Adopting Release”). *CF.* 78 FR 67468 at 67480.



Recommendation) would include the act of advising a municipal client to either *engage in or refrain from engaging in* a municipal securities transaction or product. If the latter, then PFM respectfully requests that scenarios or questions addressing both actions be included within the MSRB's Draft FAQs for clarity.

II. Guidance Related to Documents to Be Maintained in Memorialization of Suitability; Appreciable Risks to be Disclosed With Respect to Transactions; and Practical Examples Illustrating Distinction Between Advice and G-42 Recommendation

With respect to Question 5 of the Draft FAQs, while it is understood that a G-42 Recommendation requires a municipal advisor to create a copy of any document created by the municipal advisor that memorializes the basis for any determination as to suitability³, PFM believes that the MSRB should also provide municipal advisors with a list of documents, or types of substantive information which should be included in documents, to consider as examples to assist in ensuring that appropriate records with respect to suitability are being adequately maintained. Such a listing of documents or substantive information, which by no means should be construed as exhaustive, could provide greater consistency and meaningful memorialization with respect to performing and documenting the suitability analysis. For instance, examples of documents, or types of substantive information which should be included in documents that may serve to aid municipal advisors in memorializing the basis for suitability could include, but not be limited to (each, to the extent applicable): Indentures; Authorizing Resolutions; Ordinances; Loan Documentation; Credit Memorandums; Ratings Agency Presentations; Ratings Agency Reports; and Transaction Summaries.

Further, it would be helpful if the MSRB provided additional guidance for specific transaction types or products (e.g. Competitive Sale, Negotiated Sale, Refundings,

³ MSRB Rule G-8 (h)(iv)(A).



Direct Placement, Derivatives, etc.) as to what appreciable risks could be considered by municipal advisors for disclosure so as to ensure that municipal clients receive a more balanced and robust disclosure of the material benefits and risks associated with recommendations of municipal securities transaction or municipal financial products.

Lastly with respect to Question 5, in assisting municipal advisors in understanding the distinctions between advice and G-42 Recommendations, it may be important for the MSRB to also note in its revisions to the Draft FAQs that municipal advisor observations or analyses about a client that stop short of providing "advice" or a "recommendation" as contemplated by Rule G-42 (e.g., analysis of a municipal client's debt capacity) are informational in nature and do not constitute municipal advice or a G-42 Recommendation, although they may form the basis of the municipal advisor's "advice" or a G-42 Recommendation. The same is also true of "considerations" or a series of options, including advantages and disadvantages, provided by municipal advisors without indication as to the municipal advisor's recommendation (e.g. possibilities for a method of sale). This should clearly be distinguished from guidance concerning a recommendation (G-42 Recommendation) where there is a specific call to action (or potentially to inaction) with respect to a specific municipal securities product or a municipal securities transactions.

Sincerely,

Catherine Humphrey-Bennett
Municipal Advisory Compliance Officer

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