

April 16, 2018

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

RE: Comments to Notice 2018-03, Request for Input on Draft FAQ's
Regarding Rule G-42 and the Making of Recommendations

Dear Mr. Smith:

Piper Jaffray & Co. ("Piper") is pleased to respond to the notice issued by the Municipal Securities Rulemaking Board (the "MSRB") on February 15, 2018, entitled, Notice 2018-03, Request for Input on Draft Frequently Asked Questions Regarding Rule G-42 and the Making of Recommendations (the "Request"). Piper Jaffray conducts a meaningful amount of municipal advisory business and as such have worked closely to understand and put in place mechanisms to comply with the various provisions of Rule G-42. We have closely read the frequently asked questions and scenarios in the MSRB's Request.

You have asked for comments about whether the draft FAQ's and scenarios provide relevant guidance and add to our understanding of the rule. My comments include some general reaction to the Request as well some specific feedback on the questions and scenarios presented.

Overview Comments Regarding to the Issuance of FAQ's and Scenarios

In its Request, the MSRB stresses that this release is a "compliance resource" that is designed "to enhance understanding of the provisions of MSRB Rule G-42" and is "not meant to be interpretive guidance". I have some concerns that, by putting out the FAQ's and scenarios, the MSRB is entering into a gray area by providing guidance that is not actually interpretive guidance and "does not guarantee compliance with regulatory requirements". While I found some of the FAQ's to be helpful, I found most of the scenarios to be somewhat confusing and of limited help. I do not have any major concerns with this particular release or areas where I have a strong disagreement with the conclusions drawn. However, I do caution the MSRB to be very thoughtful about this approach to furthering understanding of its rules. There is a fine line between providing helpful guidance, confusing guidance and, of greater concern, the possibility of

inadvertently creating new rule interpretations through a unique form of guidance rather than through the rulemaking process. I do not believe that this Request creates new rule interpretations but future releases of this type could cross that line if the MSRB is not very careful and thoughtful about its use of this type of “compliance resource”.

Feedback on the FAQ’s

As noted above, I found the FAQ’s to generally be helpful as an analysis and reminder of how to think through the concepts of “advice” and “recommendation”. As a starting point for my comments, I believe that the regulatory construct around the concept of advice and who is a municipal advisor is overly complex which creates challenges in understanding and establishing a system to comply with the rules and manage a municipal advisory business. This is primarily the result of the complexity of the SEC’s activity based approach to defining an MA and advice in its MA Rule. Unfortunately, the MSRB is forced to develop its own rules within the confines of the SEC Rule which causes complexity in the MSRB Rules.

I found the first 10 FAQ’s to mostly be a helpful overview and reminder of what advice is, what a recommendation is, the difference between a “recommendation” and a “G-42 Recommendation” (the fact that there are two different types of recommendations points out the complexity of the MA regulatory construct) and what a municipal advisor’s duties are relative to G-42 Recommendations. An area that could create confusion is where the difference lies between advice on the “structure, timing and terms” of a financing (which does not give rise to a G-42 Recommendation) and the “recommendation of a municipal securities transaction or municipal financial product” (which is a G-42 Recommendation). For example, Question 1 states that bond insurance is a “term” of a financing and not a “specific issuance of municipal securities or a municipal financial product”. I accept and generally agree with this answer but could debate this conclusion. Later in the Scenarios, the implication is that certain debt structures could represent a G-42 Recommendation but you could also argue that advice on a delayed principal amortization is really just advice on “structure”. My point is that there is still potentially confusion about when a recommendation is just about “structure and terms” as opposed to being a G-42 Recommendation as a “municipal finance product or issuance”. I could come up with other examples of situations where this difference is uncertain or could be debated based on the information in the FAQ’s.

With regard to FAQ 11, I did not find this question as helpful because, in my experience, clients are rarely asking us as an advisor to review a third party’s recommendation based solely on whether it is suitable. While a suitability analysis is required under the rule, in most cases an advisory client would be asking us for feedback on the third party recommendation on matters other than suitability. Question 12 introduced a concept that I will comment on more below, namely that a G-42 recommendation requires “a call to action” rather than just commentary on a financing idea or introduction of a financing idea as worth considering. While I agree with this

concept, I believe that it demonstrates the complexity of trying to give guidance on facts and circumstance based rules when the facts in real client situations are always more complicated and nuanced than the guidance being described.

Feedback on the Scenarios

I found the six scenarios described in the Request as less helpful than the FAQ's. While the examples in the scenarios are interesting food for thought about how to apply Rule G-42, I found the information in the scenarios as too simplified to draw firm conclusions and could argue an opposite answer from the guidance that is given for a number of the scenarios.

In particular, the guidance in Scenario 1 that the advice given is not a G-42 Recommendation stems largely from the advisor's language in commenting that the city "may wish to" restructure its debt. In Scenario 3 the facts are slightly different but the conclusion that the advisor provided a G-42 Recommendation in that scenario is based on their informing the city that it "should" issue its debt in a particular manner. I am somewhat troubled with the guidance that the difference in whether an advisor has provided a G-42 Recommendation is based primarily on the language used by the advisor relative to "should" or "may". In real life scenarios, the discussions tend to be more complex than this and could involve a mix of discussions, emails and formal written analysis. The guidance seems to be suggesting that as long as an advisor is careful in his/her wording that the advisor can always avoid making a G-42 Recommendation. I do not believe that enforcement agencies doing an examination of a transaction would have this flexible a view in most cases. I believe that in many cases, an advisor who leads his client to a conclusion through a series of discussions without ever saying that the client "should" proceed with a particular transaction or product would be deemed to have made a G-42 Recommendation regardless of the actual language used.

In Scenario 2, I agree with the conclusion that the advisor did not make a G-42 Recommendation. However, I could make a reasonable argument that the information provided to the school district relative to the three comparable offerings in the market is not really advice at all (as it is described in the scenario) but rather is just factual information. This gets to the complexity of the definition of advice under the MA Rule and whether this information is sufficiently particularized to this client to be considered advice or is just factual pricing information from the market that may be of interest to the school district.

Scenario 4 provides another example of how the nuances of the advisor's actions are important to determining whether it has given advice or a recommendation. As described, I agree with the conclusion that the advisor did not give a G-42 Recommendation but the scenario introduces the concept of an agreement to "limit the scope" of the advisor's activities which does not appear to me to be relevant to the conclusion (which will ultimately be based on activities of the advisor). It also suggests

in the conclusion that the outcome would be different if the advisor had “urged” the city to proceed. As above, this highlights the language used by the advisor as critical to the analysis. This scenario also implies that the municipal advisor gave “advice” by merely providing information on how similar bonds have recently priced which could be construed as just providing factual information that would not constitute advice.

In Scenario 5, the conclusion of the scenario is that the advisor’s tax projection calculations “may be advice” but are not a call to action or a G-42 Recommendation. I agree with the conclusion but the more complex issue in this scenario is whether these calculations actually are advice which is indeterminable from the limited facts here. I believe these calculations may or may not be advice depending on the details of the analysis.

In Scenario 6, I am not certain that the conclusion that the advisor made a G-42 Recommendation is correct. This points out again the complexity of the rule and the challenge in drawing definitive conclusions. I could argue that the language of the scenario which states that the advisor presented a document “detailing the structure and certain terms” of an offering demonstrates that the advisor was only providing advice related to “structure, timing and terms” of an offering which does not make it a call to action or a G-42 Recommendation. The scenario here does not specify the wording of the language used by the advisor (“could”, “should”, “may”) which was a key element of whether a G-42 Recommendation had been made in several of the previous scenarios.

Conclusions to My Comments

I hope that I have not sounded too critical in my comments because I believe that the MSRB has made a well intended attempt to provide guidance around what are very complex rules. The distinctions around what is advice, what is a call to action and when a G-42 Recommendation has been made are quite nuanced. Overall, the guidance is helpful, with the questions and answers in my mind being much more helpful than the scenarios. I believe that the scenarios point out how difficult it is to apply facts and circumstance concepts to theoretical scenarios with a limited set of facts. As a result, I would urge the MSRB to state that the scenarios are useful primarily as examples of ways to think about the application of the rules rather than as a definitive answer to a particular limited set of facts.

I believe that the MSRB should think carefully about whether the language based conclusions (“should” vs. “may”) in the scenarios are actually good guidance for advisors. This seems to be too simple an analysis that would negate other facts and communication that are present in most actual advisory relationships. I would also ask the MSRB to think carefully about whether and how the complexities of the municipal advisor rule structure can be made simpler as it considers future rulemaking in this area.

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Lastly, the Request demonstrates the complexity of the MSRB giving guidance on its own rules when the definitions under those rules (such as the definition of “advice”) are determined by referring to SEC rules. Because of this interconnection, it is impossible for the MSRB to give any guidance that creates any certainty for municipal advisors without the SEC reviewing, opining and agreeing with this guidance. This is the challenge created by a regulatory regime where multiple regulators have developed different rules related to similar activities.

I appreciate the opportunity to comment and would be happy to further discuss my views and experience on these issues with the MSRB staff. Feel free to contact me with any questions that you might have regarding this comment letter.

Sincerely,

A handwritten signature in cursive script that reads "Frank Fairman".

Frank Fairman
Managing Director
Head of Public Finance Services