INVESTMENT COMPANY INSTITUTE

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May 29, 2015

Mr. Brent J. Fields, Secretary
U.S. Securities and Exchange Commission
100 F Street
Washington, DC 20549

Re: MSRB Code of Conduct Rules
File No. SR-MSRB-2015-03

Dear Mr. Fields:

The Investment Company Institute[1] appreciates the opportunity to provide comments to the U.S. Securities and Exchange Commission (Commission) on the proposal by the Municipal Securities Rulemaking Board (MSRB) to adopt MSRB Rule G-42. This new rule would govern standards of conduct for non-solicitor municipal advisors.[2] The Institute supports subjecting municipal advisors to standards of conduct and we commend the MSRB for adopting a rule to establish such standards. Notwithstanding our support for this new rule, for the reasons discussed below, we recommend that any final rule adopted not require municipal advisors to verify the veracity of information provided to them by their municipal clients. We also recommend that the Commission clarify that the new rule's disclosure and documentation requirements only will be applied prospectively.

[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $17.9 trillion and serve more than 90 million shareholders.

[2] *See Notice of Filing of a Proposed Rule Change Consisting of Proposed New Rule G-42, on Duties of Non-Solicitor Municipal Advisors, and Proposed Amendments to Rule G-8, on Books and Records To Be Made by Brokers, Dealers, and Municipal Securities Dealers, and Municipal Advisors,* SEC Release No. 34-74860 (May 4, 2015), (the "SEC Release"). Consistent with the scope of the proposed rule, as used in this letter the term "municipal advisor" or "advisor" refers to a "non-solicitor municipal advisor."

I. BACKGROUND ON THE MSRB'S PROPOSAL

The MSRB first published proposed Rule G-42 for comment in January 2014.[3] The Institute filed a comment letter that supported the rule's adoption but recommended that the MSRB consider tailoring it to it to better address its application to persons who qualify as municipal advisors as a result of the advice they render to 529 college savings plans.[4] Our letter also recommended that the MSRB clarify that the rule only would apply prospectively. When the MSRB published a revised version of the rule for comment in July 2014,[5] we filed a comment letter with the MSRB that again supported the rule's adoption, commended the MSRB for changes it had made to the rule in response to concerns raised by us and other commenters, and again recommended revisions to address our remaining concerns.[6] Subsequent to this round of comments, the MSRB filed a revised version of the rule with the Commission for adoption.

We are pleased that the MSRB has addressed the majority of concerns we raised with the prior two versions of the rule. We very much appreciate that the MSRB seriously considered, and acted upon, the views expressed in commenters' letters. Importantly, we believe the revisions the MSRB has made to the rule to address commenters' concerns will not, in any way, diminish the protections that Rule G-42 are intended to provide to advisory clients. Notwithstanding the revisions made to date, we continue to recommend that the MSRB revisit a provision in Supplementary Material .01, relating to an advisor's duty of care, which remains of concern to us. While our interest in this proposal is limited to municipal advisors to 529 plans, our concerns with Supplementary Material .01 would have application to all municipal advisors.[7]

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[3] *See Request for Comment on Draft MSRB Rule G-42, on Duties of Non-Solicitor Municipal Advisory,* MSRB Notice 2014-01 (January 9, 2014).

[4] *See* Letter from the undersigned to Ronald W. Smith, Corporate Secretary, MSRB, dated March 4, 2014, commenting on MSRB Notice 2014-01 ("ICI's March 2014 Letter").

[5] *See Request for Comment on Revised Draft MSRB Rule G-42, on Duties of Non-Solicitor Municipal Advisors,* MSRB Notice No. 2014-12 (July 23, 2014).

[6] *See* Letter from the undersigned to Ronald W. Smith, Corporate Secretary, MSRB, dated August 19, 2014, commenting on MSRB Notice 2014-12 (the "ICI's August 2014 Letter").

[7] As discussed below, Supplementary Material .01 supplements the suitability requirements imposed on municipal advisors in Rule G-42(d) and Supplementary Material .08. The current version of Supplementary Material .08 has been revised in response to commenters' recommendations to limit the suitability factors that must be considered to those listed in the Supplementary Material that are "applicable to the particular type of client." We support this change and note that few, if any, of the listed factors would be applicable when municipal advisers render advice relating to 529 plans.

II. THE INSTITUTE'S CONTINUING CONCERNS WITH PROPOSED RULE G-42

Supplementary Material .01 would provide additional detail regarding the scope of an advisor's duty of care as set forth in Rule G-42(a), which imposes upon all advisors a duty of care in the conduct of all of their activities on behalf of a municipal advisory client. It also provides additional detail regarding the scope of an adviser's suitability obligations as set forth in Rule G-42(d). According to Supplementary Material .01, an advisor's duty of care requires it to "undertake a reasonable investigation to determine that it is not basing any recommendation on materially inaccurate or incomplete information." In each of the comment letters the Institute has filed with the MSRB on G-42, we have expressed concern with this provision. As stated in our most recent letter:

> We continue to have serious concerns regarding the investigation required by Supplementary Material .01. While Rule G-42(d) would require a municipal advisor making a recommendation to a client to ensure that the recommendation is suitable for the client, the investigation required by Supplementary Material .01 would go far beyond that, and require a municipal advisor to actively investigate the veracity of information provided to it by a client prior to making a recommendation to the client. ... [S]uch requirement is both impractical and inconsistent with the rule's intent. Moreover, we are aware of no other financial professionals registered under the Federal securities laws that are required by law to investigate the veracity of information provided to them by a client prior to making a recommendation to the client.

According to the SEC Release, the MSRB's responded to this concern as follows:

> . . . the municipal advisor would only need to exercise reasonable diligence, thus obviating the need for a municipal advisor to go to impractical lengths to determine the accuracy and completeness of the information on which it will be basing its advice and/or recommendation. The MSRB believes that obtaining a representation from the municipal advisor's client that the information it has provided, with no or insufficient diligence conducted by the municipal advisor, would not satisfy either section (d) or paragraph .01 of the Supplementary Material of Proposed Rule G-42 because such a representation would not sufficiently preclude the potential for the risks associated with providing advice or recommendations without a reasonable inquiry into the accuracy and completeness of the information upon with such advice or recommendations are based. While alone, such a representation would not satisfy the requirements of the proposed rule change, a municipal advisor would be free to seek and obtain such a representation as a prudent part of its process for conducting a reasonable investigation of the veracity and completeness of the information on which it is basing its recommendation.[8]

[8] SEC Release at pp. 83-84.

We appreciate the MSRB again explaining what Supplementary Material .01 is intended to require of municipal advisors. Despite that, we do not believe it is reasonable for the MSRB to require such investigation unless it believes that, in the normal course of business, municipal advisory clients routinely provide "materially inaccurate or incomplete" information to their municipal advisors. Nor do we believe that it is reasonable to impose upon advisory clients, as a "prudent" practice, a duty for the client to provide the advisor "a representation" regarding the "veracity and completeness" of the information the client has provided to the advisor. Surely clients would find such a request to be off-putting.

In the context of 529 college savings plans, it is not uncommon for the municipal advisor that is acting as a plan sponsor to work with the appropriate representatives of a state's plan to design a plan that best meets the needs and requirements of the state and complies with any state or Federal laws governing the plan's operations. As part of this process, the advisor typically relies upon its state partner to provide the advisor the information that is necessary for the advisor to fulfill its obligations and duties to the plan. We believe that, in such circumstances, a municipal advisor should be able to presume that the states' representatives are providing materially accurate and complete information. As such, the municipal adviser relying on such information should not be required to verify its veracity or completeness; nor should the advisor expect the client to aver to the accuracy and completeness of such information.

We additionally note that the proposed requirement is both inconsistent with the suitability obligations imposed on other financial professionals and it is impractical. We remain concerned that this provision imposes upon municipal advisors, alone among financial professionals, a duty to investigate information that may be wholly within the client's control. As such, this requirement is unprecedented. Moreover, as discussed in ICI's March 2014 and August 2014 Letters, this requirement presumes that a municipal advisor will have access to the information it needs to assess the veracity and completeness of information provided by the client. We respectfully submit that this may not be the case. Indeed, much of the information necessary to confirm the accuracy and completeness of information provided by the client and relied upon by the municipal advisor may be non-pubic information in the client's possession that is not available to the advisor.[9] We question how an advisor can complete the required investigation if it is unable to obtain the information necessary to assess the accuracy or completeness of information provided by its client.

[9] For example, in the context of a 529 college savings plan, assume the state will administer the plan but is working with the municipal advisor to design the plan and such design needs to ensure that the plan generates sufficient revenues to cover the state's costs of administration. If, in working with the municipal advisor, the state provides the advisor information regarding the total costs that must be covered by the revenues generated by the plan, the advisor would likely not have access to the non-public information that would be necessary to verify the information provided by the client regarding the total amount or component parts of such costs. We question, therefore, how the MSRB would expect the advisor to determine the accuracy or completeness of the information the state client provides to the municipal advisor. Though our previous comment letters raised this concern, the MSRB has yet to address it.

This requirement also appears to be inconsistent with the rule's overarching principle "that the [municipal] client should be empowered to determine the scope of services and control the engagement with the municipal advisor."[10] We concur with the MSRB's interest in empowering the municipal client. Such empowerment, however, comes with responsibility and, in our view, this responsibility should include the client dealing fairly and honestly with the municipal advisor and the advisor, in turn, being able to rely on the information provided to it by the client. We therefore do not support including in the rule a provision that imposes upon the advisor a burden to uncover any false or incomplete information provided by the client.[11]

For all of the above reasons, we again strongly recommend that the adopted version of Supplementary Material .01 not impose a duty on municipal advisors to investigate information provided by the advisor's municipal client. If Supplementary Material .01 is not revised as we recommend, we request that the MSRB provide guidance regarding the investigation this requirement imposes on municipal advisors. In particular, we seek guidance regarding how extensive and detailed such an investigation must be and what the MSRB expects of municipal advisors when the information that would be necessary to verify the accuracy and completeness of the information provided by the municipal client is wholly within the client's control and unavailable to the advisor.

III. PROSPECTIVE APPLICATION OF RULE G-42

Finally, we again recommend that the Commission clarify that the disclosure and documentation requirements of G-42, once adopted, will only apply prospectively when a municipal advisor either enters into a new advisory relationship with a municipal client or when it recommends a new municipal securities transaction or municipal financial product to an existing municipal client. With respect to 529 plans, due to the nature of the advisor's relationship with the plan and the duration of existing 529 plan contracts, this clarification is particularly important in order to avoid disrupting existing relationships and contracts. While the SEC Release mentions the Institute's previous recommendation regarding prospective application of the rule, it does not provide certainty regarding the rule's prospective application. Instead, the SEC Release discusses how municipal advisors can create documentation of existing relationships to satisfy the rule's requirements – which seems to imply that the rule will not be applied prospectively.[12] We again recommend that, with respect to the provisions in the rule that impose disclosure requirements or that require documentation of advisory relationships, the Commission clarify that those obligations will only apply prospectively.

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[10] *See* MSRB Notice 2014-12 at p. 7.

[11] For example, consider the situation in which a municipal entity seeks advice from an advisor and, in doing so, deliberately lies to the advisor or provides the advisor with information the client knows to be false. Under the proposed rule, it is the advisor's obligation to determine the false nature of the information and, if it does not, it is the *advisor* who has violated Section G-42(d) and Supplementary Material .01, respectively, by basing a recommendation on the inaccurate information and by failing to discern its accuracy. This seems patently unfair.

[12] *See* SEC Release at pp. 65-67.

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We appreciate the opportunity to provide these comments and your consideration of them. If you have any questions, please contact the undersigned at [redacted].

Sincerely,
/s/
Tamara K. Salmon
Associate General Counsel