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Stakeholders

Municipal Securities
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Notice Type

Request for Comment

Comment Deadline

January 4, 2022

Category

Fair Practice; Regulated
Entity Administration

Affected Rules

[Rule G-8](#), [Rule G-9](#), [Rule G-17](#), [Rule G-27](#), [Rule G-42](#), and [Rule G-44](#)

Request for Comment on Draft Compliance Resources for Dealers and Municipal Advisors Concerning New Issue Pricing

Overview

The Municipal Securities Rulemaking Board (MSRB) is requesting comment on draft companion compliance resources for brokers, dealers, and municipal securities dealers (collectively, “dealers”) and municipal advisors (together with dealers, “regulated entities”). The goal of the compliance resources is to enhance understanding regarding the existing regulatory standards applicable to regulated entities’ supervision of conduct when pricing a new issuance of municipal securities. The purpose of this notice is to seek information and insight from commenters to further inform the MSRB’s development of the attached drafts prior to any final publication.

The MSRB invites comments in response to this request, along with any other information commenters believe would be useful to the MSRB in developing the compliance resources. Information may be submitted through January 4, 2022 in electronic or paper form. Information provided in response to this request may be submitted electronically [by clicking here](#). Information submitted in paper form should be sent to Ronald W. Smith, Corporate Secretary, MSRB, 1300 I Street NW, Washington, DC 20005. All information submitted will be made available for public inspection on the MSRB’s website.¹

¹ Comments generally are posted on the MSRB website without change. For example, personal identifying information such as name, address, telephone number or email address will not be edited from submissions. Therefore, commenters should only submit information that they wish to make available publicly.



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Background

As part of its general practice, the MSRB provides compliance resources to enhance regulated entities' understanding of, and compliance with, MSRB rules. Compliance resources do not create new legal or regulatory requirements or new interpretations of existing requirements. Additionally, compliance resources are not filed with or approved by the Securities and Exchange Commission (SEC) and do not establish new standards of conduct or additional obligations.

The drafts were developed in response to stakeholder inquiries regarding the existing regulatory standards applicable to the supervision of activities associated with the pricing of a new issuance of municipal securities.

The first of the two draft resources is focused on underwriting activity and is intended to enhance dealer understanding of the applicable fair dealing obligations under MSRB Rule G-17, on conduct of municipal securities and municipal advisory activities, and the supervisory obligations under MSRB Rule G-27, on supervision (the "draft underwriter pricing resource"). The second of the two draft resources is focused on municipal advisory activities and is intended to enhance understanding of the applicable standards of conduct under MSRB Rule G-42, on duties of non-solicitor municipal advisors, and the supervisory obligations under MSRB Rule G-44, on supervisory and compliance obligations of municipal advisors (the "draft municipal advisor pricing resource") (together, the "draft new issue pricing resources").

Each draft new issue pricing resource: (1) highlights key rule provisions that are applicable to the provision of underwriting services or advice, respectively, with respect to pricing of a new issue of municipal securities; (2) answers certain related Frequently Asked Questions ("FAQs"); and (3) offers sample considerations to aid regulated entities in designing and assessing their compliance and written supervisory procedures.

Request for Comment

The MSRB welcomes comments regarding the draft new issue pricing compliance resources to help ensure that the FAQs provide useful compliance assistance. Commenters may respond to one or both draft new issue compliance resources. Commenters that wish to comment on both resources may do so in either a single comment letter or two separate comment letters. In addition to the general content discussed in the resources, the MSRB specifically seeks comments on the following questions with respect to each draft new issue pricing compliance resource:

- Do the FAQs pose questions that are relevant to supporting regulated entity compliance with the relevant obligations?
- Do the proposed responses to the FAQs add to regulated entities' understanding of the relevant rules? How could they be improved to provide greater understanding?
- Are there additional questions to which the MSRB should respond? If so, please offer suggestions.
- Are the questions presented in the Questions for Consideration section(s) practical and helpful in assessing relevant policies and procedures? Are there any additional questions for consideration that would be helpful to add to the resources? Are there any that should be removed? If so, please explain.
- Are there any other steps the MSRB can take to assist dealers and municipal advisors in assessing their relevant policies and procedures?
- How could the format or presentation of the draft new issue pricing compliance resources be revised to aid understanding? For example, does the FAQ format facilitate understanding? Does the Questions for Consideration format facilitate understanding?
- Do the draft new issue pricing compliance resources appropriately convey the flexibility a firm has in tailoring its supervisory system to its business activities? If not, how are drafts too restrictive or permissive? How can the drafts be improved in this respect?
- Rather than (or in addition to) issuing the draft new issue pricing compliance resources to aid in understanding current obligations and in assessing a regulated entities' current supervisory and compliance procedures, should the MSRB consider amending the relevant rules (*e.g.*, Rules G-17 and G-42) or adopting/amending formal interpretive guidance that expressly defines a regulated entity's obligations with respect to new issue pricing?
 - a. If so, how would the standards posed in such an amendment or guidance differ from the content in the draft new issue pricing compliance resources?
 - b. If so, would there be a need for amendments or guidance with respect to any other rules that may also be relevant to a

regulated entity's new issue pricing obligations?

- The MSRB is undertaking a retrospective review of the catalogue of interpretive guidance in its rule book with the goal of streamlining and modernizing the rule book.² Among other things, this may result in the codification of certain guidance into clearer and potentially easier to identify obligations or the deletion of guidance that is repetitive with other guidance and superfluous. Is any of the guidance from which the draft dealer new issue compliance resource was derived a candidate for such deletion or codification?

October 5, 2021

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² See MSRB Notice 2021-02, MSRB to Retire Select Interpretive Guidance for Dealers and Municipal Advisors (Feb. 11, 2021).

OVERVIEW

The Municipal Securities Rulemaking Board (MSRB) is providing this resource for brokers, dealers, and municipal securities dealers (collectively, “dealers” and, individually, each a “dealer”) to enhance understanding of their fair dealing obligations under MSRB Rule G-17, on conduct of municipal securities and municipal advisory activities, and dealers’ supervisory obligations under MSRB Rule G-27, on supervision, when acting as an underwriter to an issuer of municipal securities.

This resource highlights key rule provisions and interpretations that are applicable to underwriters with respect to the pricing of a new issuance of municipal securities; answers to Frequently Asked Questions (FAQs); and offers questions for consideration to aid dealers in designing and assessing their compliance policies and written supervisory procedures (WSPs).

This compliance resource should not be read to suggest that there is a widespread problem with new issue pricing, and it is not meant to instruct or provide specific guidance to dealers with respect to the substantive steps they undertake when pricing a new issuance of municipal securities. The MSRB recognizes that dealers provide a wide range of underwriting services to issuers.

The MSRB does not require or expect dealers to implement any specific practices regarding their underwriting activities that are described in this resource. This compliance resource does not create new legal or regulatory requirements or new interpretations of existing requirements. This resource has not been filed with the Securities and Exchange Commission (SEC) and has not been approved nor disapproved by the SEC. Regulated entities, examining authorities and others should not interpret this resource as establishing new or additional obligations for any person. However, as cited to in this resource’s *Summary of Relevant Rule Requirements* below, there are established legal requirements under existing MSRB rules that underwriters are expected to fulfill. Dealers may find this resource to be a useful tool in supporting their continuing compliance efforts and in assessments of their applicable policies and procedures as the concepts discussed in this compliance resource reflect the relevant MSRB rules and/or interpretive guidance.

This compliance resource should be read in conjunction with applicable MSRB rules and interpretations, as this resource does not provide a comprehensive list of considerations for ensuring compliance with all applicable rules. [The complete text of all MSRB rules and interpretations is available here.](#) The MSRB is

also publishing a companion compliance resource for municipal advisors regarding municipal advisory services related to pricing of a new issuance of municipal securities.¹

SUMMARY OF RELEVANT RULE REQUIREMENTS

MSRB Rule G-17, Rule G-27, and the other rules summarized below may not speak directly to every aspect of new issue pricing activities, but are applicable to a dealer's underlying fair dealing obligations and the development and implementation of appropriate supervision.

Rule G-17: Conduct of Municipal Securities and Municipal Advisory Activities

Basic Fair Dealing Obligation. Rule G-17 precludes a dealer, in the conduct of its municipal securities activities, from engaging in any deceptive, dishonest, or unfair practice with any person, including issuers and investors. Rule G-17's fair dealing obligation includes an anti-fraud prohibition. Underwriters must not misrepresent or omit the facts, risks, potential benefits, or other material information about municipal securities activities undertaken with a municipal issuer. However, Rule G-17 does not merely prohibit deceptive conduct on the part of the dealer; it also establishes a general duty of a dealer to deal fairly with all persons (including, but not limited to, issuers and investors), even in the absence of fraud.

Excessive Compensation. Depending on the facts and circumstances, an underwriter's compensation for a new issue may be so

disproportionate to the nature of the underwriting and related services performed as to constitute an unfair practice in violation of Rule G-17. Among the factors relevant to whether an underwriter's compensation is disproportionate to the nature of the underwriting and related services performed, are:

- the credit quality of the issue,
- the size of the issue,
- market conditions,
- the length of time spent structuring the issue, and
- whether the underwriter is paying the fee of the underwriter's counsel or any other relevant costs related to the financing.

General Fair Pricing. The duty of fair dealing under Rule G-17 includes an implied representation that the price an underwriter pays to an issuer is fair and reasonable, taking into consideration all relevant factors, including the best judgment of the underwriter as to the fair market value of the issue at the time it is priced. The MSRB has previously observed that whether an underwriter has dealt fairly with an issuer for purposes of Rule G-17 is dependent upon all of the facts and circumstances of an underwriting and is not dependent solely on the price of the issue.

¹ Because underwriters and municipal advisors often perform complementary roles in connection with the pricing of a new issuance of municipal securities, municipal advisors may find it helpful to review the underwriter compliance resource as well.

- **Competitive Underwritings.** In general, a dealer purchasing bonds in a competitive underwriting for which the issuer may reject any and all bids will be deemed to have satisfied its duty of fairness to the issuer with respect to the purchase price of the issue as long as the dealer's bid is a bona fide bid (as defined in MSRB Rule G-13) that is based on the dealer's best judgment of the fair market value of the securities that are the subject of the bid. The MSRB views competitive offerings narrowly to mean new issues sold by the issuer to the underwriter on the basis of the lowest price bid. As an example, the fact that an issuer publishes a request for proposals and potential underwriters compete to be selected based on their professional qualifications, experience, financing ideas, and other subjective factors would not be viewed as representing a competitive offering for purposes of an underwriter's fair dealing obligations to an issuer.
- **Negotiated Underwritings.** In a negotiated underwriting, the underwriter has a duty under Rule G-17 to negotiate in good faith with the issuer. This duty includes the obligation of the dealer to ensure the accuracy of representations made during the course of such negotiations, including representations regarding the price negotiated and the nature of investor demand for the securities (*e.g.*, the status of the order period and the order book). If, for example, the dealer represents to the

issuer that it is providing the "best" market price available on the new issue, or that it will exert its best efforts to obtain the "most favorable" pricing, the dealer may violate Rule G-17 if its actions are inconsistent with such representations.

Rule G-27: Supervision

Supervision. Rule G-27 requires, among other things, that each dealer establish and maintain a supervisory system, including WSPs, to supervise the municipal securities activities of each registered representative, registered principal and associated person that is reasonably designed to achieve compliance with all applicable rules, including their Rule G-17 fair dealing obligations.

Rules G-8 and G-9: Books and Records to be Made by Dealers and Preservation of Records

Maintenance and Preservation of Records.

Dealers are subject to certain general obligations under MSRB Rule G-8 that encompass the maintenance of certain records related to primary offerings. Under Rule G-8(a)(viii), sole underwriters and syndicate managers, respectively, are required to maintain records regarding, among others, the par value of the securities, all terms and conditions required by the issuer (including, those of any retail order period, if applicable), all orders received for the purchase of the securities, all allotments of securities, and the price at which sold. MSRB Rule G-9(a)(iv) requires that the

records listed in Rule G-(8)(a)(viii) be preserved for no less than six years. Additionally, Rule G-9(b)(viii)(c) also requires a dealer to preserve for at least four years any written or electronic communication received or sent, including any inter-office memoranda, relating to the conduct of the activities of such municipal securities broker or municipal securities dealer with respect to municipal securities. This four-year preservation requirement includes written or electronic communication received or sent in the course of an underwriting.

FREQUENTLY ASKED QUESTIONS

The following FAQs are intended to show the application of the duties and obligations underwriters owe issuers in the course of pricing a new issuance of municipal securities under Rule G-17 and underwriters' related supervisory obligations under Rule G-27. Dealers may be able to use these FAQs as a resource in tailoring their compliance and supervisory programs.

1. May an underwriter consider additional factors to those described above when evaluating whether its compensation is consistent with the fair dealing obligations of Rule G-17?

Yes. In addition to the credit quality of the issue, the size of the issue, market conditions, the length of time spent structuring the issue, and whether the underwriter is paying the fee of the underwriter's counsel (or any other relevant costs related to the financing), an underwriter may take into consideration any other relevant

factors, such as the time and complexity of marketing a new issuance, among others.

2. Must a fair and reasonable price necessarily be the "best" price for the issuer?

No. The final purchase price paid by the underwriter to an issuer must be a fair and reasonable price under Rule G-17, which need not be the "best" price for the issuer. MSRB rules reflect the fact that underwriting engagements are arm's-length commercial transactions where underwriters have financial and other interests that differ from those of issuers. Consistent with Rule G-17, a firm may place its own commercial interests ahead of the issuer's interests when pricing a new issuance, such as by ensuring that the firm receives adequate compensation for the underwriting services it performs and/or by attempting to limit the financial risks associated with an underwriting (like risks resulting from unsold maturities).

3. Is the final purchase price paid to an issuer solely determinative of whether an underwriter has met its fair pricing obligation?

No. As discussed above, the duty of fair dealing under Rule G-17 includes an implied representation that the price an underwriter pays to an issuer is fair and reasonable, taking into consideration all relevant factors, including the best judgment of the underwriter as to the fair market value of the issue at the time it is priced. In this way, MSRB rules make clear that the pricing process inherently involves a degree of subjectivity; and an underwriter's best judgment

can only be informed with the limited market information reasonably available up to and at the time a new issuance is priced. So, while the final purchase price paid to an issuer is a key piece of information, it is one fact in the context of many others. For example, the lone fact that the final purchase price paid is relatively inconsistent with contemporaneous market pricing, or that the municipal securities may have subsequently traded up in price in the secondary market, is not conclusive of whether an underwriter has acted inconsistent with Rule G-17. In such circumstances, the process by which an underwriter arrives at and documents its best judgment of the fair market value of a new issuance can be helpful to affirming compliance with Rule G-17.

4. Beyond the final purchase price paid, what other facts and circumstances might be relevant to the analysis of whether an underwriter has met its fair pricing obligations?

All of the facts and circumstances of the underwriting are relevant, including all of the facts in the pricing process that led up to the final purchase price paid. These may include, but are not necessarily limited to:

- Market dynamics leading up to and at the time of pricing (which may include the pricing of comparable transactions or the impact of other transactions in the market at the same time);

- Movements of benchmark curves and corresponding impacts to any preliminary pricing scales;
- Whether the underwriting is solely managed or managed by a syndicate;
- Whether the underwriting is for a complex structure;
- Any unique or uncommon features of the underwriting;
- Any specific instructions or other communications related to pricing from the issuer or the issuer's municipal advisor (such as specific limitations regarding price(s), coupon(s), or other characteristics of the issuance);
- Whether the underwriting is for a new and/or unknown credit;
- The type and nature of investor demand for the issuance (e.g., how price adjustments might alter demand on a maturity-by-maturity basis and/or as a whole); or
- The changing status of the order book as pricing evolves.

The MSRB recognizes that no two issuances may be exactly alike, so a firm's supervision may not fully capture every aspect of the pricing process for every transaction and supervision might differ based on the type of transaction.

5. Do MSRB rules account for the limited role that underwriters may play in the final purchase price of a new issuance?

Yes. The MSRB acknowledges that many aspects of the pricing process are subject to underlying market dynamics beyond the underwriter's control. In this regard, MSRB rules are understood to recognize that an underwriter cannot unilaterally establish the final purchase price paid to an issuer; the borrowing interests of an issuer are generally in competition with the economic interests of investors; and the pricing of a new issuance of municipal securities can be subject to the input and agreement of multiple parties (including, the input and agreement of the issuer itself). As a result of these factors and the unique facts and circumstances of the pricing process for each transaction, the MSRB does not expect firms to be able to fully document and recreate every aspect of the pricing process for supervisory and examination purposes.

Consistent with Rule G-27, a firm may employ a risk-based methodology, or other reasonable supervisory methodology, for these aspects of its underwriting activities. Depending on its business model, a firm's supervisory policies and procedures do not need to be extensive and may be relatively short and concise.

6. May a firm's supervisory methodology rely on after-the-fact oral explanations to supplement the records it otherwise is required to maintain and preserve?

Yes. MSRB rules permit firms to adopt supervisory methodologies that afford a reasonable degree of deference and flexibility to

their underwriting personnel. Firm's need not document every aspect of the pricing process and may rely on oral explanations to supplement the records they otherwise maintain and preserve in accordance with MSRB rules. Given the pace, complexity, and variety of pricing activities, the MSRB understands that details beyond those found in written or electronic communications may not be readily reduced to a written record, in real time or after the fact (e.g. in a closing memorandum or other similar post-closing record). Oral explanations of such pricing details may be necessary and reasonably relied upon, in accordance with the firm's policies and procedures, as reasonably sufficient for supervisory and examination purposes.

7. While WSPs are not one-size-fits-all, are there any common elements that the MSRB would expect to see in the WSPs of large and small firms alike?

Yes. Under Rule G-27, a firm's WSPs should have sufficient detail to demonstrate that the WSPs are tailored to the nature and scope of the firm's pricing activities. In tailoring WSPs to their pricing activities and/or assessing whether their WSPs are appropriately tailored, dealers may wish to utilize the *Summary of Relevant Rule Requirements, Responses to Frequently Asked Questions, and Questions for Consideration* discussed in this compliance resource. Most importantly, pursuant to Rule G-27, large and small firms should assess whether their WSPs are sufficiently tailored to identify:

- The individual(s) responsible for supervising the firm’s pricing activities;
- The supervisory process those individual(s) undertake;
- The frequency of such activities undertaken by those individual(s) responsible for supervision; and
- The document(s) the individual(s) responsible for supervision review or maintain to reflect that the supervisory procedure was undertaken.

WSPs that are appropriately tailored with these firm-specific details will help ensure that a dealer firm’s supervisory procedures are reasonably designed to achieve compliance with applicable MSRB rules. *See, e.g.,* FINRA, Letter of Acceptance Waiver and Consent No. 20160491831-01 (January 2018) (accepted settlement related to a finding by FINRA that the firm’s WSPs were deficient in regard to these four firm-specific details for certain transactions with customers) (link available in *Additional Resources* below). Depending on its business model, a firm’s WSPs may not need to be extensive and may be relatively short and concise.

QUESTIONS FOR CONSIDERATION

As noted, this resource does not address all regulatory obligations applicable to dealers who act as underwriters and one firm’s approach to compliance may not necessarily be appropriate or reasonable for another firm. Therefore, dealers who act as underwriters should consider their own business models, practices, and

activities in reviewing the following questions for consideration with a view towards assessing their supervisory policies and procedures with respect to pricing-related activities.

1. Do the firm’s compliance policies and WSPs identify the obligation related to compensation that is potentially so disproportionate to the nature of the underwriting and related services performed to be considered excessive underwriter compensation and an unfair practice under Rule G-17?
2. Do the firm’s compliance policies and WSPs address the dealer’s fair pricing obligation owed to an issuer under Rule G-17?
 - For example, do the firm’s compliance policies and WSPs identify that an underwriter has to balance its duty to purchase securities from the issuer at a fair and reasonable price with its duty to sell municipal securities to investors at prices that are fair and reasonable?
3. What written information does the firm’s underwriting personnel reference as a possible resource when developing their best judgment as to the fair market value of a new issuance?
4. What aspects of the pricing process can the firm’s underwriting personnel reasonably and routinely document, whether in real time or after the fact?

- What aspects of the pricing process are not able to be captured and preserved in writing?
 - Can any of these aspects be material to the pricing process?
 - Do any of these material aspects change based on the type or characteristics of the transaction, market dynamics, or other relevant factors?
 - To the extent aspects of the pricing process are not reasonably able to be documented and/or preserved can the firm's underwriting personnel supplement any available written documentation with an after-the-fact oral explanation for these material aspects?
5. If the firm utilizes a risk-based methodology to supervise aspects of its pricing activities, does this methodology reasonably enable the firm to identify and/or review aspects of its pricing activity in a manner appropriate considering the firm's particular business model?
- Does the risk-based methodology incorporate the documentation required to be maintained and/or retained under MSRB rules?
6. Are the firm WSPs adequately tailored to its business and do the WSPs identify the following four elements:
- The individual(s) responsible for supervising the firm's pricing activities;
 - The supervisory process those individual(s) undertake;
 - The frequency of such activities undertaken by those individual(s) responsible for supervision; and
 - The document(s) the individual(s) responsible for supervision review or maintain to reflect that the supervisory procedure was undertaken?

ADDITIONAL RESOURCES

This resource should be read in conjunction with the relevant rules and related guidance, including:

[MSRB Rule G-17](#)

- [Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities \(March 31, 2021\)](#)
- [SR-MSRB-2019-10 \(August 1, 2019\) \(discussing the fair pricing obligations owed to issuers under Rule G-17\)](#)
- [Reminder Notice on Fair Practice Duties to Issuers of Municipal Securities, MSRB Notice 2009-57 \(July 14, 2009\)](#)
- [Purchase of New Issue from Issuer, MSRB Interpretation \(December 1, 1997\)](#)

[MSRB Rule G-27](#)

- [Supervisory Responsibilities of Qualified Principals, MSRB Compliance Resource \(August 2018\)](#)
- [Compliance Advisory for Brokers, Dealers, and Municipal Securities Dealers, MSRB Notice 2018-17 \(August 14, 2018\)](#)
- [SEC Approves Amendments to Rule G-27 on Supervision, Rule G-8 on Recordkeeping, and Rule G-9 on Record Retention, MSRB Notice 2007-16 \(May 25, 2007\)](#)
- [SR-MSRB-2006-10 \(November 24, 2006\) \(discussing how Rule G-27 should be read consistently with the analogous NASD/FINRA supervisory provisions\)](#)

FINRA/NASD Publications

- [Letter of Acceptance Waiver and Consent No. 20160491831-01, FINRA \(January 2018\)](#)
- [NASD Provides Guidance on Supervisory Responsibilities, NASD Notice to Members 99-45 \(June 1999\)](#)
- [NASD Elaborates on Member Firms' Supervision Responsibilities For Trade Reporting And Market-Making Activities, NASD Notice 98-96 \(December 1998\)](#)

About the MSRB

The MSRB protects investors, state and local governments and other municipal entities, and the public interest by promoting a fair and efficient municipal securities market. The MSRB fulfills this mission by regulating the municipal securities firms, banks and municipal advisors that engage in municipal securities and advisory activities. To further protect market participants, the MSRB provides market transparency through its Electronic Municipal Market Access (EMMA[®]) website, the official repository for information on all municipal bonds. The MSRB also serves as an objective resource on the municipal market and conducts extensive education and outreach to market stakeholders. The MSRB is a self-regulatory organization governed by a board of directors that has a majority of public members, in addition to representatives of regulated entities. The MSRB is overseen by the Securities and Exchange Commission and Congress.

Municipal Advisor Considerations for Assessing Written Supervisory Procedures Regarding New Issue Pricing

OVERVIEW

The Municipal Securities Rulemaking Board (MSRB) is providing this resource for municipal advisors to enhance understanding of their duty of care obligations under MSRB Rule G-42, on duties of non-solicitor municipal advisors, and their supervisory obligations under MSRB Rule G-44, on supervisory and compliance obligations of municipal advisors when providing advice¹ to municipal entity clients or obligated person clients (hereinafter “client” unless otherwise specified). Specifically, this resource: highlights key rule provisions that are applicable to municipal advisory services with respect to pricing of a new issue of municipal securities; answers related Frequently Asked Questions (FAQs); and offers questions for consideration to aid municipal advisors in designing and assessing their compliance policies and written supervisory procedures (WSPs).

This compliance resource should not be read to suggest that there is a widespread problem with new issue pricing, and it is not meant to instruct or provide guidance to municipal advisors with respect to the substantive steps they undertake in providing advice on pricing of a new issuance of municipal securities. The MSRB recognizes that municipal advisors provide varying services and advice to their clients including with respect to the structure, timing, and terms of a new issuance.

The MSRB does not require municipal advisors to implement any specific practices regarding advice on the pricing of a new issuance that are described in this resource. This compliance resource does not create new legal or regulatory requirements or new interpretations of existing requirements. This resource has not been filed with the Securities and Exchange Commission (SEC) and has not been approved nor disapproved by the SEC. Regulated entities, examining authorities and others should not interpret this resource as establishing new or additional obligations for any person. However, as cited to in this resource’s Summary of Relevant Rule Requirements below, there are established legal requirements under existing MSRB rules that municipal advisors are expected to fulfill. Municipal advisors may find this resource to be a useful tool in supporting their continuing compliance efforts and in assessments of their applicable policies and procedures as the answers discussed in this compliance resource reflect the relevant MSRB rules and/or interpretive guidance.

This compliance resource should be read in conjunction with applicable MSRB rules and interpretations, as this resource does not provide a comprehensive list of considerations for ensuring compliance with all applicable

¹ This compliance resource does not provide guidance concerning whether advice, as that term is used in this document, constitutes a recommendation for purposes of Rule G-42. The MSRB previously provided answers to frequently asked questions and related scenarios regarding Rule G-42, on duties of non-solicitor municipal advisors, and the making of recommendations. See [FAQs Regarding MSRB Rule G-42 and Making Recommendations \(June 2018\)](#)

rules. [The complete text of all MSRB rules and interpretations is available here.](#) The MSRB is also publishing a companion compliance resource for brokers, dealers and municipal securities dealers acting as an underwriter in connection with a new issuance of municipal securities.²

SUMMARY OF RELEVANT RULE REQUIREMENTS

Rule G-42, Rule G-44 and the other rules summarized below may not speak directly to new issue pricing activities, but are applicable to a municipal advisor's underlying obligations and the development and implementation of appropriate policies and procedures, respectively.

Rule G-42: Duties of Non-Solicitor Municipal Advisors

[Rule G-42](#) establishes the core standards of conduct and duties of municipal advisors when engaging in municipal advisory activities, other than solicitation activities. Among other things, Rule G-42 obligates a municipal advisor to:

1. Act in a manner consistent with its duty of care to its client;
2. Document its municipal advisory relationship in writing(s) that include(s) certain minimum content;
3. Conduct a suitability analysis in connection with its recommendations to its client; and
4. If within the scope of its engagement, conduct a suitability analysis in connection with its review of recommendations made by a third party.

The information below will touch on the requirements related to each of these obligations.

Duty of Care. Rule G-42 provides that a municipal advisor owes a duty of care to its clients. Supplementary Material .01 of Rule G-42 explains that the duty of care requires a municipal advisor to, among other things:

1. Possess the degree of knowledge and expertise necessary to provide the client with informed advice;
2. Make a reasonable inquiry as to the facts that are relevant to a client's determination as to whether to proceed with a course of action or that form the basis for any advice provided to the client;
3. Undertake a reasonable investigation to determine that it is not basing any recommendation on materially inaccurate or incomplete information; and
4. Have a reasonable basis for any advice provided to or on behalf of the client.

Other Duties. To the extent the client is a municipal entity, the municipal advisor also is subject to a fiduciary duty with respect to that municipal entity client. A municipal advisor's fiduciary duty includes the duty of loyalty as well as the duty of care.

Documentation of the Municipal Advisory Relationship. Rule G-42 requires a municipal advisor to document each of its municipal advisory

² Because municipal advisors and underwriters often perform complementary roles in connection with the pricing of a new issuance of municipal securities, municipal advisors may find it helpful to review the underwriter compliance resource as well.

relationships in writing. The documentation must be dated and include certain minimum content specified in Rule G-42(c). Among other things, the writing(s) must specify the form and basis of direct or indirect compensation, if any, for the municipal advisory activities to be performed; and the scope of the municipal advisory activities to be performed and any limitations on the scope of the engagement.

Per Supplementary Material .04 of Rule G-42, if requested or expressly consented to by the client, a municipal advisor may limit the scope of the municipal advisory activities to be performed to certain specified activities or services. However, if a municipal advisor engages in a course of conduct that is inconsistent with the previously agreed upon limitation, then the municipal advisor's conduct may effectively negate such limitations.

Recommendation(s). Rule G-42(d) imposes a suitability obligation on municipal advisors when making a recommendation to a client or reviewing the recommendation of another party at the request of the client (to the extent the review is within the scope of the engagement). The suitability obligation requires the municipal advisor to undertake an analysis to determine whether the recommendation is suitable for the client based on information the municipal advisor obtained through reasonable diligence.

Suitability Analysis. A determination of whether a municipal securities transaction is suitable must be based on many factors, as applicable to the particular type of client, including but not limited to certain factors specified in Supplementary Material

.09 of Rule G-42. Additionally, Supplementary Material .10 of Rule G-42 provides that a municipal advisor must use reasonable diligence to know and retain essential facts concerning the client. After making a suitability determination, the municipal advisor must inform the client of certain information that was relevant to its suitability determination, as described in Rule G-42(d).

Rule G-17: Conduct of Municipal Securities and Municipal Advisory Activities

Under [Rule G-17](#), when engaging in municipal advisory activities, a municipal advisor must deal fairly with all persons and must not engage in any deceptive, dishonest, or unfair practice, which includes its interactions with other deal participants such as underwriters.

Excessive Compensation. Depending on the specific facts and circumstances of the engagement, a municipal advisor's compensation may be so disproportionate to the nature of municipal advisory activities performed as to constitute an unfair practice in violation of Rule G-17. Rule G-42, Supplementary Material .11 sets forth a non-exclusive list of factors that are relevant to determining whether compensation is excessive, including but not limited to the municipal advisor's expertise and the complexity of the municipal securities transaction or municipal financial product.

Rules G-8 and G-9: Books and Records to be Made by Municipal Advisors and Preservation of Records

Municipal advisors are subject to a general obligation under [Rule G-8\(h\)](#) to make and keep

records consistent with MSRB rules and Securities Exchange Act of 1934 (“Exchange Act”) Rules 15Ba1-8(a)(1)-(8). Additionally, under MSRB Rule G-8, a municipal advisor must adhere to additional recordkeeping obligations when making a recommendation. More specifically, Rule G-8(h)(iv) requires a municipal advisor to make and keep a copy of any document created by a municipal advisor that was material to its review of a recommendation by another party or that memorializes the basis for any determination as to suitability.³ [Rule G-9\(h\)](#), on municipal advisor records, requires a municipal advisor to preserve its books and records described in Rule G-8(h) for no less than five years. Additionally, pursuant to Rule G-9(d), records must be easily accessible for the first two years; and thereafter, within a reasonable period of time.

Rule G-44: Supervisory and Compliance Obligations of Municipal Advisors

[Rule G-44](#) requires municipal advisors to develop a system to supervise the activities of the firm and its associated persons that is reasonably designed to achieve compliance with applicable securities laws and regulations, including applicable MSRB rules (collectively, “applicable rules”). In establishing a supervisory system, Rule G-44 requires, among other things, that a municipal advisor establish, implement, maintain, and enforce written compliance policies and WSPs that are reasonably designed to ensure that the municipal advisory activities of the municipal advisor and that of its associated persons are in compliance with applicable rules.

One municipal advisor’s compliance policies and WSPs may reasonably differ from that of another municipal advisor’s policies and procedures as a result of the fact each municipal advisor’s approach to establishing WSPs will be informed by the considerations outlined in Rule G-44, Supplementary Material .02. Those considerations include, but are not limited to:

- The firm’s size;
- The firm’s organizational structure;
- The nature and scope of the firm’s municipal advisory activities;
- The firm’s number of offices;
- The disciplinary and legal history of the firm’s associated persons;
- Any relevant outside business activities of associated persons; and
- Indicators of irregularities or misconduct.

FREQUENTLY ASKED QUESTIONS

The following FAQs are intended to show the application of the duties and obligations under Rule G-42 and G-44 to municipal advisor pricing activities. Municipal advisors may be able to use these FAQs as a resource in tailoring their compliance and supervisory programs.

³ See also SEC Rule 15Ba1-8(a)(4) under the Exchange Act, which requires a municipal advisor to maintain a copy of any document created that was material to making a recommendation to a client or that memorializes the basis for that recommendation.

1. With respect to the scope of services, what information should be included in the documentation evidencing the municipal advisor's relationship with its client?

Pursuant to Rule G-42(c), a municipal advisor must evidence each of its municipal advisory relationships in a dated writing or writings (referred to as "Relationship Documentation") that include(s), among other things, the scope of the municipal advisory activities to be performed and any mutually agreed upon limitations on such scope. While the MSRB has not dictated the specific format or more specific content requirements for what must be included in the Relationship Documentation's scope of services section, the Relationship Documentation should include sufficient details to allow both the municipal advisor and the client to understand the services that the municipal advisor will provide and any mutually agreed upon limitations from the engagement.

Additionally, because the Relationship Documentation may be comprised of more than one writing, municipal advisors should consider whether they may have expressly or impliedly undertaken to perform certain services described in a document other than an engagement letter (*e.g.*, a response to a Request for Proposals/Request for Qualifications ("RFP/RFQ")).

2. May a municipal advisor exclude certain advice, such as advice regarding the pricing of a new issuance, from its scope of services with a client?

Yes. Supplementary Material .04 of Rule G-42 permits a municipal advisor flexibility to limit the

scope of municipal advisory activities to be performed to certain specified activities or services, so long as such limitations are requested or expressly consented to by the client. Accordingly, Rule G-42 does not preclude a municipal advisor from excluding advice related to pricing a new issuance from its scope of services with a client.

However, per Supplementary Material .04 of Rule G-42, if a municipal advisor engages in a course of conduct that is inconsistent with an otherwise valid limitation in its Relationship Documentation, then the municipal advisor may negate the effectiveness of such limitation. For example, if a municipal advisor's Relationship Documentation excludes the provision of advice to a client regarding the pricing of a new issuance and, nonetheless, the municipal advisor provides advice to the client regarding the pricing of a new issuance, then the municipal advisor's conduct would be subject to the applicable standards regardless of the limitation included in the Relationship Documentation (*i.e.*, a duty of care for obligated person clients and the duties of care and loyalty for municipal entity clients).

3. If a municipal advisor and its client mutually agree to exclude certain municipal advisory activities from an engagement, how should the municipal advisor reflect that limitation in its relationship documentation?

Rule G-42(c) requires a municipal advisor's Relationship Documentation to evidence the scope of the municipal advisory activities to be performed by the municipal advisor and any limitations on the scope of the engagement with the client. Accordingly, if for example a municipal advisor and its client mutually agree that the scope of services

for a new municipal advisory engagement will not encompass the provision of advice related to pricing a new issuance, then the municipal advisor's Relationship Documentation should be drafted to reflect this agreed-upon limitation.

In addition, Supplementary Material .06 of Rule G-42 requires that a municipal advisor's Relationship Documentation be promptly amended or supplemented to reflect any material changes or additions. Accordingly, if for example a municipal advisor and its client mutually agree that the scope of services for an existing municipal advisory engagement should be amended to exclude the provision of advice related to pricing a new issuance, then the municipal advisor's Relationship Documentation should be amended or supplemented to reflect this agreed-upon limitation.

4. Is it inconsistent with Rule G-42(c), on documentation of the municipal advisory relationship, if the municipal advisor's Relationship Documentation is silent or otherwise ambiguous with respect to whether the municipal advisor will provide pricing advice?

Maybe, depending on all of the facts and circumstances, including the services that are actually performed.⁴ While Rule G-42(c) requires a municipal advisor's Relationship Documentation to accurately describe the agreed-upon scope of services to be performed during an engagement with a client, the rule does not require the scope of

services incorporated into the Relationship Documentation to address every eventuality that potentially may (or may not) arise in the course of a client engagement.

However, municipal advisors should be very mindful of any aspects of a scope of services, that, intentionally or unintentionally, are left unspecified, open ended, or are otherwise undetermined. In such instances, municipal advisors should consider whether their Relationship Documentation is appropriately tailored and sufficiently clear as to the municipal advisory services that they intend to perform. They should also be mindful that any subsequent material changes or additions to the agreed-upon scope of services must be reflected in an amendment or supplement to the Relationship Documentation. *See also FAQs 5 and 6.*

5. If the Relationship Documentation is silent or otherwise ambiguous with respect to whether advice on pricing is included in a scope of services, does a municipal advisor have any pricing-related obligations under Rule G-42?

Maybe, depending on the municipal advisory activities actually performed and the other facts and circumstances of the engagement. Silent or otherwise ambiguous Relationship Documentation will not relieve the municipal advisor of any of the specific obligations and duties prescribed by Rule G-42. As one example, Supplementary Material .04 of Rule G-42 makes clear that municipal advisors are

⁴ For example, if a municipal advisor routinely limits the advice it provides to a subset of advice (*e.g.*, the municipal advisor agrees to provide advice only with respect to municipal financial products and not the new issuance as a whole), the MSRB would not expect the Relationship Documentation to speak to new issue pricing.

not permitted to alter the standards of conduct or impose any limitations on the duties prescribed by the rule. In other words, the Relationship Documentation cannot alter the baseline duties of loyalty and care a municipal advisor owes to a municipal entity client, nor the baseline duty of care a municipal advisor owes to a non-municipal entity obligated person client.

Rule G-42 does not impose a specific obligation to provide pricing-related advice and a municipal advisor and its client can mutually agree that pricing advice will not be part of the engagement. However, if a municipal advisor, through its conduct (or otherwise) has effectively agreed to provide pricing-related services or does perform such services, the applicable standards of care (the duty of care and, if applicable, the duty of loyalty) will apply with respect to those services. This is so even if the Relationship Documentation is silent or ambiguous as to whether such services will be performed.

6. Are there conditions under which a municipal advisor must amend its Relationship Documentation?

Yes. During the term of the municipal advisory relationship, the Relationship Documentation must be promptly amended or supplemented to reflect any material changes or additions to the engagement. For example, if a municipal advisor and its client initially agree to a more general scope of services at the outset of the relationship, but subsequently refine their expectations of the services to be performed, the Relationship Documentation must be amended or supplemented promptly to reflect any material modifications.

7. While WSPs are not one-size-fits-all, are there any common elements that the MSRB would expect to see in the WSPs of large and small firms alike?

A municipal advisor's WSPs should include sufficient detail tailored to a firm's business. In tailoring their WSPs to their business, municipal advisors may wish to consider the content in this compliance resource, including the questions for consideration below. Additionally, municipal advisors may wish to consult the [MSRB Sample Template and Checklist for Municipal Advisor WSPs](#), which sets forth one approach to developing WSPs. A municipal advisor that follows that format would include in its WSPs: (a) the individual(s) responsible for supervision; (b) the supervisory process the individual(s) take; (c) the frequency of the activities undertaken by the individual(s) responsible for supervision; and (d) what document(s) the individual(s) responsible for supervision review or create to reflect that the supervisory procedure was undertaken. The MSRB believes that inclusion of these elements in a firm's WSPs will help ensure that the supervisory procedures are reasonably designed to achieve compliance with applicable rules.

8. Are municipal advisors expected to have WSPs that speak to the review of new issue pricing?

Rule G-44 requires municipal advisors to develop a system to supervise the activities of the municipal advisor and its associated persons that is reasonably designed to achieve compliance with applicable rules. Such a supervisory system incorporates the adoption of compliance policies and WSPs that are tailored to the nature and scope of a firm's municipal advisory activities. Accordingly, the

compliance policies and WSPs of a municipal advisor should describe the municipal advisory activities in which the municipal advisor engages and should explain how the municipal advisor supervises those activities to help ensure that they are in compliance with applicable rules. Therefore, if a municipal advisor routinely provides pricing-related advice, the WSPs would speak to how a municipal advisor principal at the firm supervises such activity. Importantly, Rule G-44 establishes a primarily principles-based approach to supervision and compliance, recognizing that there is no one-size-fits-all approach to supervision. Accordingly, municipal advisors' WSPs may be consistent with Rule G-44 even though they reasonably differ as to specificity with respect to the review of pricing-related activities and as to supervisory oversight, based on facts and circumstances in tailoring such WSPs to the firm's activities.

9. May a firm's supervisory methodology rely on after-the-fact oral explanations to supplement the records it otherwise is required to maintain and preserve?

Yes. MSRB rules permit firms to adopt supervisory methodologies that afford a reasonable degree of deference and flexibility to their municipal advisory personnel. Firms do not need to document every aspect of the pricing process and may need to rely on oral explanations to supplement the records they otherwise maintain and preserve in accordance with MSRB rules. Given the pace, complexity, and variety of pricing activities, the MSRB understands that details beyond those found in written or electronic communications may not be readily reduced to a written record, in real time or after the fact (*e.g.*, in a closing memorandum or other similar post-closing

record). Oral explanations of such pricing details may be necessary and reasonably relied upon, in accordance with the firm's policies and procedures, as reasonably sufficient for supervisory and examination purposes.

QUESTIONS FOR CONSIDERATION

As noted, this resource does not address all regulatory obligations applicable to municipal advisors and one firm's approach to compliance may not necessarily be appropriate or reasonable for another firm. Therefore, municipal advisors should consider their own business model, practices, and activities in reviewing the following questions for consideration with a view towards assessing their supervisory policies and procedures with respect to pricing-related activities.

1. Does the municipal advisor's Relationship Documentation appropriately describe the scope of municipal advisory services to be performed and/or any limitations on the scope of engagement? For example, does the Relationship Documentation indicate whether pricing-related advice with respect to a new issuance of municipal securities is included within the scope of the engagement or specifically excluded from the scope of engagement?
2. Does the municipal advisor have a process to help ensure that any necessary amendments or supplements to a municipal advisor's Relationship Documentation are made as and when required?
3. Based on the services provided and a municipal advisor's obligation to appropriately tailor its

WSPs to the nature and scope of the firm's municipal advisory activities, would it be beneficial to have compliance policies and WSPs that specifically address its obligations when providing pricing-related advice with respect to a new issue?

4. What are the processes followed by the municipal advisor's professionals when providing pricing-related advice to the firm's clients in connection with a new issuance? Are these processes sufficient to help the municipal advisor discharge its duty of care (and if the client is a municipal entity, duty of loyalty) obligations? Are these processes appropriately captured in the municipal advisor's processes and WSPs?
5. Based on the municipal advisor's business model and the types of services provided by the municipal advisor, does the municipal advisor expect different processes to be followed and/or different documentation to be made and kept in connection with different types of offerings (e.g., negotiated, competitive, private placement, deals with unique attributes that may impact pricing or make pricing unusual or challenging)?
6. To the extent a municipal advisor provides pricing-related advice, does the municipal advisor retain documentation that supports the basis for such advice? (E.g., recently priced comparable transactions, industry indices, economic conditions, degree and/or nature of investor demand, number of potential investors contacted, special instructions from the issuer, special or unique features of the issuance, etc.) In what manner does the municipal advisor

show compliance with the requirement in Rule G-42, Supplementary Material .01 that the firm had a reasonable basis for any advice provided to or on behalf of its client?

7. Do the policies and WSPs speak to the timing of documentation? (E.g., may such information be included in a post-closing memorandum as opposed to being documented at the time of pricing?) Do the WSPs address whether certain information can be provided to the supervisory principal orally upon request?
8. Does the municipal advisor have a process for reviewing pricing-related advice, such as the periodic review of the municipal advisor's pricing-related activities on deals? Do certain deals warrant having an escalation and review process, such as those with unique attributes that may make pricing unusual or challenging?

ADDITIONAL RESOURCES

This resource should be read in conjunction with the relevant rules and related guidance, including:

MSRB Rule G-42

- [SEC Approves New Rule G-42 on Duties of Non-Solicitor Municipal Advisors and Related Amendments to MSRB Rule G-8, MSRB Notice 2016-03](#)
- [FAQs Regarding MSRB Rule G-42 and Making Recommendations](#)
- [Municipal Advisors: Understanding Standards of Conduct](#)
- [Underwriters: Understanding Duties of Municipal Advisors](#)

MSRB Rule G-44

- [SEC Approves MSRB Rule G-44 on Supervisory and Compliance Obligations of Municipal Advisors, and Amendments to MSRB Rules G-8 and G-9, MSRB Notice, MSRB Notice 2014-19](#)
- [Sample Template and Checklist for Municipal Advisor WSPs](#)
- [Considerations for Developing a Municipal Advisory Supervisory System and Compliance Program](#)
- [Q&A Summary: MSRB's Compliance Workshop: Small Firm Municipal Advisor Supervision](#)

SEC MA Registration/FAQs

- [Securities and Exchange Commission \(SEC\) Final Municipal Advisor Registration Rule](#) (see discussion regarding advice)
- [SEC FAQs on Registration of Municipal Advisors](#) (updated September 20, 2017)

About the MSRB

The MSRB protects investors, state and local governments and other municipal entities, and the public interest by promoting a fair and efficient municipal securities market. The MSRB fulfills this mission by regulating the municipal securities firms, banks and municipal advisors that engage in municipal securities and advisory activities. To further protect market participants, the MSRB provides market transparency through its Electronic Municipal Market Access (EMMA®) website, the official repository for information on all municipal bonds. The MSRB also serves as an objective resource on the municipal market and conducts extensive education and outreach to market stakeholders. The MSRB is a self-regulatory organization governed by a board of directors that has a majority of public members, in addition to representatives of regulated entities. The MSRB is overseen by the Securities and Exchange Commission and Congress.