municipal advisor is a municipal advisor to the issuer or to the conduit borrower.[8] In addition, the fact that, as to the conduit borrower, the municipal advisor is paid compensation by a third party is also not a factor in determining if the municipal advisor is a municipal advisor to the conduit borrower.

In the First Scenario, the municipal advisor engages in municipal advisory activities solely for or on behalf of the conduit borrower, and is subject to the requirements of Rule G-42. The municipal advisor is required to comply with all the provisions of Rule G-42 as to the conduit borrower,[9] and the rule applies in all respects to the municipal advisor in its relationship with the conduit borrower, except provisions applicable solely to a municipal entity client.

The threshold question regarding the application of Rule G-42 to the municipal advisor in its relationship to the issuer is whether the Securities and Exchange Commission (SEC) would interpret the facts and circumstances of the First Scenario — where the issuer does not receive the municipal advisory services, and the services are in fact provided solely to and on behalf of the conduit borrower – as the municipal advisor engaging (as a legal matter) in municipal advisory activities also to or on behalf of the issuer.

The Exchange Act definition of municipal advisor includes a person that "[p]rovides advice[10] to *or on behalf of* [emphasis added] a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues."[11] The SEC has stated that the determination of "whether a person provides advice to or on behalf of a municipal entity or an obligated person regarding municipal financial products or the issuance of municipal securities depends on all the relevant facts and circumstances."[12] The meaning of the phrase "on behalf of" in the context of the First Scenario and more broadly, whether a person is engaged in municipal advisory activities for or on behalf of another person and is a municipal advisor to such person are interpretive issues that are solely within the jurisdiction of the SEC. Requests for interpretation regarding such issues should be directed to the SEC's Office of Municipal Securities.

If, in the First Scenario, the activities of the municipal advisor with the issuer are not interpreted by the SEC to mean that the municipal advisor is also a municipal advisor to the issuer, then the municipal advisor would not be required to comply with Rule G-42 with respect to the issuer. For example, the municipal advisor would not be required by Rule G-42 to provide disclosures of conflicts of interest, if any existed, to the issuer.

Although compensation is not a factor in determining whether a person is a municipal advisor to a particular party (except as to a solicitor municipal advisor), the MSRB believes that, in the First Scenario, the compensation paid by the issuer to the municipal advisor for services for a conduit borrower may present a material conflict of interest, requiring the municipal advisor to make full and fair disclosure of such conflict in writing to the conduit borrower. Rule G-42 requires a municipal advisor to disclose all material conflicts of interest under Rule G-42(b)(i). (Such requirements are also incorporated in Rule G-42(c)). The requirement is not limited to actual material conflicts of interest. As provided in Rule G-42(b)(i)(F), for example, the municipal advisor must disclose potential material conflicts of interest that the municipal advisor becomes aware of after reasonable inquiry, that could reasonably be anticipated to impair the municipal advisor's ability to provide advice to or on behalf of the client in accordance with the applicable standards of conduct under the Rule – the duty of care, and if applicable, the duty of loyalty. In this scenario, the client is the conduit borrower and the municipal advisor owes its client the duty of care as provided in Rule G 42(a)(i) and SM .01.[13] Even if the compensation paid by the issuer to the municipal advisor is not viewed as an actual material conflict of interest by the municipal advisor, the municipal advisor must carefully consider if such payments give rise to a potential material conflict of interest. In the MSRB's view, the payments from the issuer to the municipal advisor may create a relationship between the municipal advisor and the issuer, that even if not a municipal advisor-client relationship, generally would give rise to a potential material conflict of interest that could reasonably be anticipated to impair the municipal advisor's ability to provide advice to or on behalf of the conduit borrower in accordance with the standards of Rule G-42(a). Before making any such disclosures to the conduit borrower, the municipal advisor should consider the guidance set forth in SM .05. Under SM .05, when a municipal advisor is required to make disclosures of material conflicts of interest, including those required under Rule G-42(b)(i)(F), the municipal advisor's disclosures must be sufficiently detailed to inform the conduit borrower of the nature, implications and potential consequences of each conflict, and must also include an explanation of how the municipal advisor addresses or intends to manage or mitigate each conflict.

Finally, the relationship between the issuer and the municipal advisor, however characterized or limited, may create other compliance concerns under Rule G-42. For example, in some cases, the issuer, although not the client, may wish to provide policy direction or instructions to the municipal advisor regarding the issuance of the municipal securities. If the issuer communicates, explicitly or implicitly, an instruction or direction which the municipal advisor follows and which inhibited or limited the municipal advisor's ability to fulfill its duties and obligations to the conduit borrower client under Rule G-42, the municipal advisor would violate the rule.

Section 2: Second Scenario

The MSRB has been asked to provide guidance regarding a scenario where a municipal advisor is engaged in municipal advisory activities as directed by an issuer and for such issuer, pursuant to an explicit arrangement or agreement, and the municipal advisor "indirectly" also provides advice to a conduit

borrower, because the issuer provides to the conduit borrower the advice the issuer receives from the municipal advisor. For purposes of this Second Scenario, the MSRB assumes that the municipal advisor is aware of the flow of information from the issuer to the conduit borrower.

To assess whether the municipal advisor owes duties to the conduit borrower when the municipal advisor provides advice to the issuer that then flows through to the conduit borrower, again, a threshold question must be answered: Is the municipal advisor also engaged in municipal advisory activities for or on behalf of the conduit borrower because the conduit borrower is receiving, through the issuer, some or all of the advice that was provided by the municipal advisor to the issuer, establishing a municipal advisory relationship between the municipal advisor and the conduit borrower?

As set forth above, the SEC has stated that the determination of "whether a person provides advice to or on behalf of a municipal entity or an obligated person regarding municipal financial products or the issuance of municipal securities depends on all the relevant facts and circumstances,"[14] and whether a person is engaged in municipal advisory activities for or on behalf of another person and is a municipal advisor to such person are interpretive issues that are solely within the jurisdiction of the SEC.[15]

If, in the Second Scenario, the transfer of advice from the issuer to the conduit borrower is interpreted by the SEC to mean that the municipal advisor is engaged in municipal advisory activities for or on behalf of the conduit borrower, the municipal advisor must comply with the requirements of Rule G-42 with respect to the issuer and the conduit borrower. This dual representation may raise several compliance issues.

Rule G-42 distinguishes the duties and obligations that a municipal advisor owes to an issuer client (*i.e.*, a municipal entity) from those owed to a conduit borrower client in two provisions. First, in the conduct of all municipal advisory activities for and on behalf of an issuer client, a municipal advisor is subject to a fiduciary duty as provided in Rule G-42(a)(ii). The fiduciary duty is more specifically described as a requirement to act in accordance with a duty of loyalty[16] and a duty of care,[17] as described in, respectively, SM .02 and SM .01. In contrast and as discussed above, when the municipal advisor's client is a conduit borrower, the municipal advisor owes a duty of care to the client as provided in Rule G-42(a)(i) and SM .01, but not a duty of loyalty. Second, in connection with a municipal advisor's municipal advisory activities for and on behalf of an issuer client, a municipal advisor, and any affiliate of the municipal advisor, is prohibited from engaging in certain principal transactions with the issuer, as provided in Rule G-42(e)(ii).[18] This specific prohibition does not apply to a municipal advisor when its client is a conduit borrower. However, all other provisions and protections in Rule G-42 apply in the same manner to a municipal advisor whether its client is an issuer (*i.e.*, a municipal entity) or a conduit borrower. For example, municipal advisors must provide the same timely disclosures of material conflicts of interest and material legal and disciplinary events in the earliest stages of their dealings with their conduit borrower clients as they provide to their municipal entity clients (and supplement such disclosures as necessary during the relationship). Similarly, municipal advisors have the same obligations to an issuer client and a conduit borrower to provide written documentation of the municipal advisory relationship (and supplement such documentation as necessary during the relationship). Also, if a municipal advisor makes a recommendation of a municipal securities transaction to either type of client, the municipal advisor must have a reasonable basis to believe that the recommended municipal securities transaction is suitable for the client.

The MSRB believes that a municipal advisor's dual representation of an issuer and a conduit borrower with respect to the same issuance raises at least two types of compliance issues and concerns. First, the differing standards and other distinctions that Rule G-42 makes between issuer clients and conduit borrower clients will require a municipal advisor to consider whether, in every aspect of its conduct and representation, the municipal advisor acts in compliance with the more stringent standard applicable to its issuer client, and also fulfills its duties and obligations to its conduit borrower client. Moreover, under Rule G-42, compliance concerns and issues may require greater diligence to identify and address, because although certain duties and obligations are specified in Rule G-42(a)(i) and (ii) and SM. 01 and SM .02, generally, all of the specific duties or obligations that fall under the broad umbrella of the fiduciary duty cannot be specifically enumerated. Among other things, the MSRB cannot anticipate and identify all the situations that may arise in a particular offering, and, as a result, the rule cannot provide explicit instruction or guidance to a municipal advisor to an issuer, regarding what acts must be taken (or avoided) or what must be communicated (or not communicated) to an issuer to comply fully with the municipal advisor's fiduciary duty. Similarly, all duties and obligations that a municipal advisor owes to a conduit borrower under the duty of care in a particular offering also cannot be specifically enumerated for the same reasons.

Further, when compliance issues or concerns arise, whether the duty owed is a fiduciary duty (a duty of loyalty and a duty of care) or a duty of care, under Rule G-42 and SM .04, the standards of conduct applicable to the municipal advisor and, except as provided in SM .04, the duties and obligations owed to the municipal advisor's client(s), cannot be eliminated, diminished or modified by disclosure, mutual agreement or otherwise. SM .04 makes clear that nothing in the rule shall be construed to permit a municipal advisor to alter the standards of conduct or impose limitations on any of the duties prescribed in Rule G-42. For example, in various requests for guidance, the MSRB was asked, regarding dual representations, if the MSRB could confirm a municipal advisor engaged in dual representations could continue its representation of both clients if full and fair disclosures of any conflicts of interest or other issues were made to both clients. Gener-

ally, disclosure alone would not be sufficient for a municipal advisor to ensure, in all facts and circumstances, that a municipal advisor would be in compliance with all the duties and obligations owed to one or both clients, including, as to a fiduciary, the obligation of a municipal advisor not to "engage in municipal advisory activities for a municipal entity client if it cannot manage or mitigate its conflicts of interest in a manner that will permit it to act in the municipal entity's best interests."[19] However, certain limitations may be placed on the scope of a municipal advisory relationship with a client, and the ability to do so is not limited to dual representation scenarios. Under SM .04, if requested or expressly consented to by a client, a municipal advisor may limit the scope of the municipal advisory activities to be performed to certain specified activities or services. (The effectiveness of any such specified limitation of the scope of municipal advisory activities may be negated, however, if the municipal advisor then engages in a course of conduct that is inconsistent with the specified limitations.)

In the Second Scenario and any other scenario involving a dual representation, before entering into the dual representation, a municipal advisor must determine if it is possible to meet its duties and obligations to both clients under Rule G-42. The municipal advisor must determine it can comply with Rule G-42 when the duties and obligations owed to one client, the issuer, are more stringent and more difficult to fulfill, than those duties and obligations that the municipal advisor owes to the second client, the conduit borrower. Among other things, the duty of loyalty owed to the issuer requires a municipal advisor to act in the best interests of the issuer client without regard to the financial or other interests of the municipal advisor. The municipal advisor must consider whether it will be able to act consistently with this standard during the entire engagement while also providing municipal advisory services to the conduit borrower client, without putting its interests or the interests of the conduit borrower, before or above those of the issuer client, including not providing any advantages or benefits to itself or any other client to the loss or detriment of the issuer, including any financial loss or lost opportunity.

In addition, as discussed above, in all municipal advisory relationships, a municipal advisor must identify and disclose to its client material conflicts of interest, after reasonable inquiry, and such disclosures must be sufficiently detailed to inform the client of the nature, implications and potential consequences of each conflict. In the MSRB's view, conflicts of interest are, in most cases, inherent in a dual representation, although they may not always be material. In a dual representation, the MSRB believes that such conflicts of interest should be identified prior to or upon engaging in municipal advisory activities with each client. Further, in the MSRB's view, the potential for an identified, but non-material conflict to become a material conflict of interest during the dual representation is great enough that the municipal advisor will have an obligation to make an initial disclosure pursuant to Rule G-42(b)(i)(F), of the facts and circumstances of the dual representation, how such dual representation is a potential material conflict of interest and the risk that such conflict could reasonably be anticipated to impair the municipal advisor's ability to dually represent both clients in accordance with the standards of conduct under Rule G-42(a).[20] Further, for each client, the municipal advisor must include an explanation of how the municipal advisor addresses or intends to manage or mitigate each conflict, as provided in SM .05.

However, because the municipal advisor owes a fiduciary duty to one client but not the other, if any material conflict of interest is identified that the municipal advisor cannot manage or mitigate in a manner that will permit the municipal advisor to act in the issuer's best interests, the municipal advisor must not engage in, or must cease engaging in, the municipal advisory activities for the issuer. Practically, this would require the municipal advisor to terminate the relationship with the issuer, or act to eliminate the material conflict of interest. For example, if such conflicts derive from the municipal advisor's relationship with the conduit borrower, as an alternative to terminating its relationship with the issuer, the municipal advisor may be able to eliminate such material conflicts by amending or terminating its relationship with the conduit borrower. The MSRB notes that, in either scenario, the municipal advisor's elimination of its conflicts of interest, by terminating its relationship with the issuer, or by amending or terminating its municipal advisory relationship with the conduit borrower, may create both legal and related business issues. If termination of the municipal advisory relationship with the issuer or the conduit borrower is required, among other things, the termination may have a detrimental impact on the schedule or costs of completing the issuance, or impair the terminated client's ability to obtain informed advice. For these reasons, municipal advisors are cautioned to determine before or upon beginning a dual representation how either municipal advisory relationship would be modified or terminated if the municipal advisor is no longer able to comply with its Rule G-42 obligations in a dual representation. Among other things, a municipal advisor may wish to consider if, prior to finalizing the initial documentation of the municipal advisory relationship as required in Rule G-42(c), the municipal advisor should negotiate the specific terms and conditions that would apply to a future termination of a municipal advisory relationship with either of the clients. As required by Rule G-42(c), if specific terms regarding termination are agreed upon, such terms must be incorporated in the writing(s) that document the municipal advisory relationship.[21]

An example of a difficult circumstance for the municipal advisor to resolve arises when, for example, a major university or hospital chain is engaged in multiple conduit financings in different jurisdictions around the country. The conduit borrower may have developed a certain type of financing to fit within its own broader financing plan, such as consistently structured variable rate securities. One state education authority, which is approached by the university conduit borrower,

may, however, have a strong policy against the issuance of variable rate debt. The municipal advisor should bring the conflict to both parties at the earliest possible stage in the financing and make a determination whether it can advise both parties and fulfill its obligations under Rule G-42.

The MSRB also cautions municipal advisors that neither the facts and circumstances characterizing an issuance involving an issuer and a conduit borrower, nor the duties and obligations under Rule G-42 as applied to a relationship, are static or fixed. The requirements of Rule G-42 apply at any time during which municipal advisory activities are engaged in for or on behalf of an issuer or a conduit borrower, and with equal rigor throughout the representation. For example, although the standards of conduct do not change, as facts and circumstances change, a municipal advisor must assess if, under such changed circumstances, there are specific acts, duties or obligations that are not enumerated under Rule G-42 that must be performed or attended to arising from the broad duty of care and, if applicable, duty of loyalty.[22] Rule G-42 also incorporates protections for municipal advisory clients in certain key provisions, which are based on the recognition that key facts and circumstances may change (*i.e.*, the continuing obligation to provide promptly to a client amended or supplemental information in writing, regarding any changes and additions in the relationship documentation, such as amendments or supplements needed regarding the material conflicts of interest disclosures, or the disclosures regarding certain legal and disciplinary events).

Changes in the facts and circumstances regarding the municipal securities issuance, or in the municipal advisory relationships with an issuer, a conduit borrower or both may require the municipal advisor to review if such changes may affect its ability to continue the dual representation and fully comply with Rule G-42. Even if an issuer, a conduit borrower and a municipal advisor believe at the beginning of the dual representation that the issuer and conduit borrower will be in agreement on all major issues that may arise during the course of the issuance, the interests and goals of each client may diverge later. Either the issuer, the conduit borrower, or both, may develop substantially divergent views on issues material to the issuance. Municipal advisors considering dual representation should assess initially the extent to which the interests and goals of the issuer and the conduit borrower are the same or substantially similar and make reassessments periodically thereafter.

Although challenging, in certain circumstances, the MSRB believes that it may be possible for a municipal advisor to provide municipal advisory services to an issuer and, in the manner described in the Second Scenario, indirectly, to engage in municipal advisory activities for or on behalf of a conduit borrower and remain in compliance with Rule G-42. Specifically, the circumstances where dual representation as described in the Second Scenario may be most feasible are those where the interests of the issuer and the conduit borrower are aligned. This may occur when the issuer is created to finance a specific project for the benefit of a metropolitan area, or in instances where the issuer applies a policy-neutral or hands-off approach to proposed projects, provided that such projects and the related financings comply with fundamental legal requirements for issuance. In such circumstances where an issuer and a conduit borrower have a complete or substantially complete convergence of interests and goals, or where the issuer's concerns are somewhat limited and related for the most part to determining that an issuance will fully comply with the applicable legal and regulatory requirements, it may be possible for the municipal advisor to deal honestly and with the utmost good faith and act in the best interests of the issuer without regard to the financial or other interests of the municipal advisor (including the municipal advisor's financial or other interest arising from its relationship with the conduit borrower) as required under the duty of loyalty, and also meet its obligations to both clients under the duty of care. It also may be possible for the municipal advisor, which by the very status of its dual representation creates a potential material conflict of interest that must be disclosed in the initial disclosures made pursuant to Rule G-42(b), to manage or mitigate this and any other of "its conflicts of interest in a manner that will permit it to act in the municipal entity's best interests," as required under SM .02.

Conversely, where there is not a substantially complete convergence of interests and goals of the issuer and the conduit borrower, or when the shared interests and goals of the issuer and the conduit borrower at the beginning of the issuance process diverge during the course of the issuance, it may not be possible for a municipal advisor to fulfill its duties of loyalty and care to its municipal entity client, and also provide, under the duty of care, the appropriate expert professional advice to the conduit borrower and otherwise fulfill its obligations to the conduit borrower that arise under the duty of care. Although dual representation is possible, for every action taken during an issuance, it is incumbent upon a municipal advisor to assess and determine, as to each client, if such actions comply with the standards of conduct and other requirements under Rule G-42.

Given the broad scope of the duty of care and the broader and more strict obligations arising in a fiduciary relationship, the MSRB concludes that it may be possible for a municipal advisor in the Second Scenario to engage in dual representations for or on behalf of both an issuer and a conduit borrower, but the municipal advisor will face a number of challenges in such situations. Moreover, the challenges to fully and completely comply with its obligations to each client will be heightened in lengthier and more complex engagements.

Section 3: Third, Fourth and Fifth Scenarios

The Third, Fourth and Fifth Scenarios raise the same compliance issues and concerns under Rule G-42 as discussed in the First and Second Scenarios. In the Third Scenario, the municipal advisor, an issuer and a conduit borrower expressly recognize that the municipal advisor is retained by and pro-

vides municipal advisory services for the conduit borrower and, also, as a practical matter, provides advice to the issuer, on which the issuer relies.[23] Although in the Third Scenario, the conduit borrower, rather than the issuer compensates the municipal advisor, all the compliance and regulatory issues arising regarding Rule G-42 are the same as those discussed above regarding the Second Scenario.

In relation to the Third Scenario, municipal advisors also have requested guidance regarding the municipal advisor's responsibilities to the issuer when the municipal advisor is retained and compensated by the conduit borrower. For example, does the municipal advisor have a fiduciary responsibility to the issuer to whom advice is being provided, and is the municipal advisor required to provide disclosures of conflicts of interest to the issuer? If the provision of such advice to the issuer means, under SEC rules, that the provider is a municipal advisor to the issuer, then the municipal advisor would be a fiduciary to the issuer and subject to all the duties and obligations under Rule G-42. Thus, the municipal advisor would be required, among other things, to comply with the requirements to make disclosures of material conflicts of interest as provided in Rule G-42(b), and to provide such conflicts of interest disclosures as part of the relationship documentation as provided in Rule G-42(c).

The Fourth Scenario is another scenario in which a municipal advisor is engaged in a dual representation of an issuer and a conduit borrower. Rule G-42 would apply in the Fourth Scenario in the same manner as it applies in the Second Scenario.

The Fifth Scenario is also an example of dual representation by one municipal advisor of an issuer and a conduit borrower regarding the same issuance of municipal securities and, thus, raises the same issues regarding the municipal advisor's compliance with Rule G-42 that are discussed for the Second Scenario. The duties and obligations of Rule G-42 run not only from a municipal advisor firm's associated persons but also from the municipal advisor firm to the issuer and the conduit borrower. Although, in the Fifth Scenario, one employee is designated to act on behalf of the issuer and a second is designated to act on behalf of the conduit borrower, the employees are agents of their employer, a single municipal advisor firm. In the MSRB's view, therefore, how Rule G-42 applies in the Fifth Scenario does not differ in any material respect from the Second, Third and Fourth Scenarios. In a dual representation, and, in particular, a dual representation purposefully established from the beginning of the issuance, a municipal advisor firm having the capacity to do so is likely to rely on the services of more than one of its associated persons, whether structured to work in coordination as one team, or separately.

Section 4: When a Conduit Borrower is also a Municipal Entity

In the discussion above regarding the five scenarios, the MSRB assumes that, in dual representations, the issuer client is a municipal entity, and the second client, the conduit borrower, is not. As discussed above, because under the Exchange Act and Rule G-42, a municipal advisor owes more rigorous obligations and duties to a municipal entity client — that is, a fiduciary duty — than are owed to a conduit borrower, in certain scenarios involving dual representation, a municipal advisor may find it difficult, or not possible, to fully comply with its obligations to both clients under Rule G-42.

The MSRB recognizes that, at times, both the issuer and the conduit borrower are municipal entities, and, in this discussion, a conduit borrower that is a municipal entity is referred to as a municipal entity conduit borrower. In such cases, a municipal advisor that provides advice to or on behalf of the issuer and the municipal entity conduit borrower would owe the more rigorous duties required of a fiduciary to both clients equally (*e.g.*, the municipal advisor would be required, in all contexts, to deal honestly and with the utmost good faith with the issuer and the municipal entity conduit borrower, and, as to each, to act in the client's best interests without regard to the financial or other interests of the municipal advisor).

Before undertaking such a dual engagement, the municipal advisor must assess its ability to comply with Rule G-42, including the proscription in Rule G-42, SM .02, which prohibits a municipal advisor from engaging in municipal advisory activities for a client if the municipal advisor could not manage or mitigate its conflicts of interest in a manner that would permit the municipal advisor to act in the best interests of the client. In addition, if the dual representation were undertaken, the municipal advisor's assessment of its ability to fully comply with Rule G-42, including SM .02, should be carefully considered at the beginning of the dual representation and thoughtfully re-considered periodically during the course of the dual engagement. In the MSRB's view, the facts and circumstances wherein a municipal advisor would be able to fully comply with Rule G-42, including all obligations as a fiduciary to each municipal entity, are not likely to occur frequently.

> *This interpretive guidance is intended for use only as a resource. It does not describe all provisions of Rule G-42. In addition, the MSRB has adopted other rules and interpretations that may be applicable to the conduct described in the five scenarios.*

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[1] This guidance is limited to persons that are municipal advisors as defined in Section 15B(e)(4) of the Securities Exchange Act of 1934 ("Exchange Act"), and the relevant rules and regulations promulgated pursuant to the Exchange Act ("Exchange Act rules"), but excludes municipal advisors engaged solely in the undertaking of a solicitation of a municipal entity or an obligated person, for compensation, on behalf of certain third parties ("solicitor municipal advisors"), because Rule G-42 does not apply to solicitor municipal advisors. *See* Exchange Act Release No. 70462 (September 20, 2013), 78 FR 67467 (November 12, 2013) ("Order Adopting SEC Final Rule") (the Exchange Act rules and regulations referred to above include,

but are not limited to, Exchange Act Rules 15Ba1-1 through 15Ba1-8. *See also* Section 15B(e)(4)(A)(ii); Exchange Act Rule 15Ba1-1(d)(1)(i) (the term "municipal advisor" includes solicitors of obligated persons); Section 15B(e)(9) of the Exchange Act (definition of "solicitation of a municipal entity or obligated person"); and Order Adopting SEC Final Rule, 78 FR 67467, at n. 138 and n. 408.

[2] In Exchange Act Rule 15Ba1-1(e), the term "municipal advisory activities" means "(1) [p]roviding advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or (2) [s]olicitation of a municipal entity or an obligated person." Further, the Rule provides that, in the absence of an exclusion or an exemption, these activities would cause a person to be a municipal advisor.

[3] Although the term "conduit borrower" is not specifically defined in the Exchange Act, a conduit borrower in a municipal securities issuance, such as a private university, non-profit hospital, private corporation, or a public hospital or public university, is a type of "obligated person." See Order Adopting SEC Final Rule, at 67483, n. 200 (the term obligated person can include entities acting as conduit borrowers, such as private universities and non-profit hospitals).

The term, "obligated person," is defined in Exchange Act Section 15B(e)(10) to mean:

any person, including an issuer of municipal securities, who is either generally or through an enterprise, fund, or account of such person, committed by contract or other arrangement to support the payment of all or part of the obligations on the municipal securities to be sold in an offering of municipal securities.

Generally, for purposes of this guidance, the terms "obligated person" and "conduit borrower" have the same meaning. In addition, for this guidance, both terms exclude a municipal entity acting as an issuer of municipal securities.

[4] 15 U.S.C. 77a *et seq*.

[5] 15 U.S.C. 77c(a)(4).

[6] 17 CFR 230.500 – 508.

[7] 15 U.S.C. 77c(a)(2).

[8] *See* Order Adopting SEC Final Rule, at 67477 (the SEC concluded that compensation should not factor into a determination of whether a person must register (or be registered) as a municipal advisor, except in connection with solicitor municipal advisors; in such cases, the person *must be* compensated for such solicitation activity to be required to register (or be registered) as a municipal advisor).

[9] These requirements include, but are not limited to: complying with the broad obligations under the duty of care under Rule G-42(a)(i) and Supplemental Material ("SM") .01 under the rule in all aspects of the municipal advisor's municipal advisory relationship with the conduit borrower; making the required disclosures to the conduit borrower regarding material conflicts of interest and material legal and disciplinary events (and updating them as necessary) as set forth in Rule G-42(b) and SM .05; providing relationship documentation to the conduit borrower (and updating the documentation as necessary) as provided in Rule G-42(c) and SM .05 and SM .06; if making a recommendation to the conduit borrower, or if reviewing a recommendation from the issuer or another party to the conduit borrower, following the requirements of Rule G-42(d) and SM .09 and SM .10; and not engaging in the specifically prohibited conduct as outlined in Rule G-42(e)(i) and SM .11.

[10] In the Order Adopting SEC Final Rule, the SEC provided guidance to interpret "advice" as that term is used in the definition of municipal advisor and related terms. See Order Adopting SEC Final Rule, at 67471 (providing examples of communications that are excluded from the term "advice") and 67478 - 80 (SEC guidance regarding the meaning of "advice," statement that the SEC does not believe that the term "advice" is susceptible to a bright-line definition). Jurisdiction to resolve the interpretive issue of whether "advice" has been provided, based on the facts and circumstances, lies with the SEC.

[11] *See* Exchange Act Section 15B(e)(4)(A)(i).

[12] *See* Order Adopting SEC Final Rule, at 67479.

[13] SM .01 of Rule G-42 sets forth core principles regarding the duty of care a municipal advisor owes to all clients, whether issuers or conduit borrowers. The duty of care includes, but is not limited to, the specific duties enumerated in the rule. For example, to fulfill its obligations under the duty of care, the municipal advisor must, among other things: possess the degree of knowledge and expertise needed to provide the client with informed advice; 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 advice provided to the client; and undertake a reasonable investigation to determine that it is not basing any recommendation on materially inaccurate or incomplete information. Also, a municipal advisor must have a reasonable basis for any advice provided to or on behalf of a client; any representations made in a certificate that it signs that will be reasonably foreseeably relied upon by the client, any other party involved in the municipal securities transaction, or investors in the issuer's securities or municipal securities secured by payments from the conduit borrower client; and any information provided to the client or other parties involved in the municipal securities transaction in connection with the preparation of an official statement for any issue of municipal securities as to which the municipal advisor is advising. For example, to make a recommendation that complies with the duty of care, prior to making a recommendation, a municipal advisor is required to determine if the recommended municipal securities transaction is suitable, based on numerous factors, as applicable to the particular type of client. Various factors are set forth in SM .09 and include, but are not limited to: the client's financial situation and needs, objectives, tax status, risk tolerance, liquidity needs, the client's experience with, in this scenario, the issuance of municipal securities and related municipal securities transactions, the client's experience with municipal securities issuance and related municipal securities transactions of the type and complexity being recommended, the client's financial capacity to withstand changes in market conditions during the period that the municipal securities to be issued are reasonably expected to be outstanding and any other material information known by the municipal advisor about the client and the municipal securities issuance, after reasonable inquiry.

[14] *See* Order Adopting SEC Final Rule, at 67479.

[15] *See supra* notes 10-12, and accompanying text.

[16] SM .02 of Rule G-42 sets forth core principles regarding the duty of loyalty owed to the issuer. Under SM .02, the duty of loyalty includes, but is not limited to, the duties and obligations to "deal honestly and with the utmost good faith with a municipal entity client and act in the client's best interests without regard to the financial or other interests of the municipal advisor." In addition, "[a] municipal advisor must not engage in municipal advisory activities for a municipal entity client if it cannot manage or mitigate its conflicts of interest in a manner that will permit it to act in the municipal entity's best interests."

[17] *See* n. 13, *supra*.

[18] Additional information and requirements regarding the specific prohibition in Rule G 42(e)(ii) are set forth in SM .13, SM .14 and SM .15.

[19] More specifically, requestors asked if the MSRB would confirm that full and fair disclosure of any conflicts of interest or other issues would address any concerns under the Rule with the result that there would be no unmanageable conflict of interest or issue that would prevent a municipal advisor from advising both an issuer and a conduit borrower (or two advisors from the same firm from representing, separately, an issuer and the related conduit borrower) as required under SM .02.

[20] The MSRB believes that a conflict of interest arises in a dual representation described in the Second Scenario as it does in the First Scenario, when a municipal advisor provides municipal advisory services to a conduit borrower and the payment for such services is provided by a third-party, such as an issuer, in that such circumstances often can create or foster divided loyalties. In both cases, the MSRB believes that the potential that such

conflicts of interest, which are present at the onset of such relationship(s), may later become material conflicts of interest requires, at a minimum, that such conflict(s) be disclosed initially to the client(s) pursuant to Rule G-42(b)(i)(F).

[21] Rule G-42(c)(vi) requires that the written documentation of the municipal advisory relationship include, in writing, "the date, triggering event, or means for the termination of the municipal advisory relationship, or, if none, a statement that there is none." Rule G 42(c)(vii) requires that the written documentation include "any terms relating to withdrawal from the municipal advisory relationship."

[22] As noted above, all of the municipal advisor's obligations and duties cannot be specifically enumerated or identified at the beginning of the dual representation. Instead, the duties and obligations under either standard of conduct will unfold during the dual representation.

[23] The Third Scenario is limited to situations where an issuer chooses not to retain a separate municipal advisor. However, changing the facts and circumstances of the Third Scenario to include the retention of another municipal advisor by the issuer is not conclusive in determining if Rule G-42 would apply to the municipal advisor retained by the conduit borrower in its conduct with the issuer. If the municipal advisor retained by the conduit borrower provides municipal advisory services indirectly or, as a practical matter, to the issuer, and if the SEC interprets such conduct as engaging in municipal advisory activity for or on behalf of the issuer, the provision of such advice makes Rule G-42 applicable to the provider, except where the provider is subject to an exclusion or an exemption (from the definition of municipal advisor), such as the Independent Registered Municipal Advisor exemption provided under Exchange Act Rule 15Ba1-1(d)(3)(vi).

Rule G-42 Amendment History (since 2003)

Release No. 34-83177 (May 7, 2018), 83 FR 21794 (May 10, 2018); MSRB Notice 2018-08 (May 7, 2018)

Release No. 34-78622 (August 22, 2016), 81 FR 58989 (August 26, 2016); MSRB Notice 2016-20 (August 12, 2016)

Release No. 34-76753 (December 23, 2015), 80 FR 81614 (December 30, 2015); MSRB Notice 2016-03 (January 13, 2016)

Rule G-43
Broker's Brokers

(a) *Duty of Broker's Broker*.

(i) Each dealer acting as a "broker's broker" with respect to the execution of a transaction in municipal securities for or on behalf of another dealer shall make a reasonable effort to obtain a price for the dealer that is fair and reasonable in relation to prevailing market conditions. The broker's broker must employ the same care and diligence in doing so as if the transaction were being done for its own account.

(ii) A broker's broker that undertakes to act for or on behalf of another dealer in connection with a transaction or potential transaction in municipal securities must not take any action that works against that dealer's interest to receive advantageous pricing.

(iii) A broker's broker will be presumed to act for or on behalf of the seller in a bid-wanted for municipal securities, unless both the seller and bidders agree otherwise in writing in advance of the bid-wanted.

(b) *Conduct of Bid-Wanteds*. A broker's broker will satisfy its obligation under subsection (a)(i) of this rule with respect to a bid-wanted if it conducts that bid-wanted as follows:

(i) Unless otherwise directed by the seller, a broker's broker must make a reasonable effort to disseminate a bid-wanted widely (including, but not limited to, the underwriter of the issue and prior known bidders on the issue) to obtain exposure to multiple dealers with possible interest in the block of securities, although no fixed number of bids is required.

(ii) If securities are of limited interest (*e.g.*, small issues with credit quality issues and/or features generally unknown in the market), the broker's broker must make a reasonable effort to reach dealers with specific knowledge of the issue or known interest in securities of the type being offered.

(iii) Notwithstanding subsection (a)(ii) of this rule, each bid-wanted must have a deadline for the acceptance of bids, after which the broker's broker must not accept bids or changes to bids. That deadline may be either (A) a precise (or "sharp") deadline or (B) an "around time" deadline that ends upon the earliest of: (1) the time the seller directs the broker's broker to sell the securities to the current high bidder, (2) the time the seller informs the broker's broker that the bonds will not be sold in that bid-wanted, or (3) the end of the trading day as publicly posted by the broker's broker prior to the bid-wanted.

(iv) If the high bid received in a bid-wanted is above or below the predetermined parameters of the broker's broker and the broker's broker believes that the bid may have been submitted in error, the broker's broker may contact the bidder prior to the deadline for bids to determine whether its bid was submitted in error, without having to obtain the consent of the seller. If the high bid is within the predetermined parameters but the broker's broker believes that the bid may have been submitted in error, the broker's broker must receive the oral or written permission of the seller before it may contact the bidder to determine whether its bid was submitted in error.

(v) If the high bid received in a bid-wanted is below the predetermined parameters of the broker's broker, the broker's broker must disclose that fact to the seller, in which case the broker's broker may still effect the trade, if the seller acknowledges such disclosure either orally or in writing.

(c) *Policies and Procedures*.

(i) A broker's broker must adopt and comply with policies and procedures pertaining to the operation of bid-wanteds and offerings for municipal securities, which at a minimum:

(A) require the broker's broker to disclose the nature of its undertaking for the seller and bidders in bid-wanteds and offerings;

(B) require the broker's broker to disclose the manner in which the broker's broker will conduct bid-wanteds and offerings;

(C) require the broker's broker to be compensated on the basis of commissions or other economically similar basis and to provide the seller and bidders with a copy of its commission or other economically similar schedules for transactions, with such schedules reflecting at a minimum the maximum charge that the broker's broker could impose on a given transaction;

(D) if the winning high bidder's bid or the cover bid in a bid-wanted has been changed, require the broker's broker to disclose the change to the seller prior to execution and provide the seller with the original and changed bids;

(E) if a broker's broker allows customers (as defined in Rule D-9) or affiliates (as defined in Rule G-11(a)(x)) to place bids, require the disclosure of that fact to both sellers and bidders in writing and require disclosure to the seller if the high bid in a bid-wanted or offering is from a customer or an affiliate of the broker's broker; provided, however, that the broker's broker is not required to disclose the name of the customer or affiliate;

(F) if the broker's broker wishes to conduct a bid wanted in accordance with section (b) of this rule, require the broker's broker to adopt predetermined parameters for such bid-wanted, disclose such predetermined parameters prominently on its website in advance of the bid-wanted in which they are used, and periodically test such predetermined parameters to determine whether they have identified most bids that did not represent the fair market value of municipal securities that were the subject of bid-wanteds to which the predetermined parameters were applied;

(G) describe in detail the manner in which it will satisfy its obligation under subsection (a)(i) of this rule in the case of offerings and bid-wanteds not conducted in accordance with section (b) of this rule;

(H) prohibit the broker's broker from maintaining municipal securities in any proprietary or other accounts, other than for clearance and settlement purposes;

(I) prohibit self-dealing by the broker's broker;

(J) prohibit a broker's broker from encouraging bids that do not represent the fair market value of municipal securities that are the subject of a bid-wanted or offering;

(K) prohibit a broker's broker from giving preferential information to bidders in bid-wanteds, including but not limited to, "last looks," directions to a specific bidder that it should "review" its bid or that its bid is "sticking out";

(L) prohibit a broker's broker from changing a bid price or offer price without the bidder's or seller's respective permission;

(M) prohibit a broker's broker from failing to inform the seller of the highest bid in a bid-wanted or offering;

(N) prohibit a broker's broker from accepting a changed bid or a new bid from a bidder in the same bid-wanted after the broker's broker has selectively informed that bidder whether its bid is the high bid ("being used") in the bid-wanted; and

(O) subject to the provisions of sections (b), if applicable, and paragraph (c)(i)(N) of this rule, prohibit the broker's broker from providing any person other than the seller (which may receive all bid prices) and the winning bidder (which may only receive notice that its bid is the winning bid) with information about bid prices, until the bid-wanted has been completed, unless the broker's broker makes such information available to all market participants on an equal basis at no cost, together with disclosure that any bids may not represent the fair market value of the securities, and discloses publicly that it will make such information public.

(ii) The broker's broker must disclose the policies and procedures adopted pursuant to subsection (c)(i) of this rule to sellers of, and bidders for, municipal securities in writing at least annually and post such policies and procedures in a prominent position on its website.

(d) *Definitions*.

(i) "Bidder" means a potential buyer in a bid-wanted or offering.

(ii) "Bid-wanted" means an auction for the sale of municipal securities in which:

(A) the seller does not specify a minimum or desired price for the securities that are the subject of the auction at the commencement of the auction;

(B) the identities of the bidders and the seller are not disclosed prior to the conclusion of the auction, other than to the broker's broker;

(C) bidders must submit bids for the auctioned securities to the broker's broker; and

(D) the seller decides whether to accept the winning bid.

(iii) "Broker's broker" means a dealer, or a separately operated and supervised division or unit of a dealer, that principally effects transactions for other dealers or that holds itself out as a broker's broker. A broker's broker may be a separate company or part of a larger company.

An alternative trading system, registered as such with the Commission, is not a broker's broker for purposes of this rule if, with respect to its municipal securities activities:

(A) it utilizes only automated and electronic means to communicate with bidders and sellers in a systematic and non-discretionary fashion (with the exception of communications that are solely clerical or ministerial in nature and communications that occur after a trade has been executed);

(B) all of the customers (as defined in Rule D-9) of the alternative trading system, if any, are sophisticated municipal market professionals; and

(C) the alternative trading system adopts, and complies with, policies and procedures that, at a minimum,

(1) require the alternative trading system to disclose the nature of its undertaking for the seller and bidders in bid-wanteds and offerings;

(2) require the alternative trading system to disclose the manner in which it will conduct bid-wanteds and offerings; and

(3) prohibit the alternative trading system from engaging in the conduct described in paragraphs (H)-(O) of subsection (c)(i) of this rule.

(iv) For purposes of paragraph (c)(i)(O) of this rule, a bid-wanted for a municipal security will be considered "completed" when either of the following occurs: (A) the security is traded, whether through the broker's broker or otherwise or (B) the broker's broker is notified by the seller that the security will not trade;

(v) "Cover bid" means the next best bid after the winning bid.

(vi) "Dealer" means broker, dealer, or municipal securities dealer.

(vii) For purposes of this rule, "offering" means a process for the sale of municipal securities in which: