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MSRB Answers FAQs Regarding Use of Municipal Advisory Client Lists and Case Studies under MSRB Rule G-40

Overview

On June 27, 2018, the Municipal Securities Rulemaking Board (MSRB) sought public comment on a draft set of frequently asked questions (FAQs) related to the application of MSRB Rule G-40, on advertising by municipal advisors, to the use of municipal advisory client lists and case studies by municipal advisors. The MSRB received three comment letters¹ and revised the draft FAQs to reflect those comments as well as additional insight gained from the MSRB's ongoing engagement with the industry concerning compliance with Rule G-40.

[FAQs Regarding the Use of Municipal Advisory Client Lists and Case Studies under MSRB Rule G-40, on Advertising by Municipal Advisors](#), published today, provide further explanation of Rule G-40, particularly with respect to a municipal advisor's use of municipal advisory client lists and case studies. Access the FAQs and other compliance resources in the [Compliance Center](#) on MSRB.org and attached here.

The MSRB derived the principles discussed in these FAQs from Rule G-40 and its related rulemaking record, and these FAQs should be read in conjunction with Rule G-40 and related guidance. These FAQs do not create new legal or regulatory requirements. The MSRB does not intend for these FAQs to be interpreted by municipal advisors or examining authorities as establishing new standards of conduct.

¹ Letter from Mike Nicholas, Chief Executive Officer, Bond Dealers of America, dated July 27, 2018 (the "BDA letter"); Letter from Susan Gaffney, Executive Director, National Association of Municipal Advisors, dated July 27, 2018 (the "NAMA letter"); and Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated July 26, 2018 (the "SIFMA letter").



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Background

Rule G-40, which becomes effective on February 7, 2019, includes general provisions, addresses professional advertisements by municipal advisors and requires municipal advisor principal approval, in writing, for advertisements by municipal advisors before their first use. The general provisions (i) define key terms, including the term “advertisement,” (ii) provide content standards, such as the requirement that an advertisement be based on the principles of fair dealing and good faith and be fair and balanced, and (iii) provide general standards for advertisements, namely that a municipal advisor shall not publish or disseminate an advertisement that the municipal advisor knows or has reason to know contains any untrue statement of material fact or is otherwise false or misleading.

Rule G-40 also prohibits the use of certain testimonials. Specifically, Rule G-40(a)(iv)(G) prohibits a municipal advisor, directly or indirectly, from publishing, circulating or distributing any advertisement which refers, directly or indirectly, to any testimonial of any kind concerning the municipal advisor or concerning the advice, analysis, report or other service rendered by the municipal advisor.

During the development of Rule G-40, the MSRB received requests for guidance regarding whether (i) municipal advisory client lists and case studies would be advertisements under Rule G-40 and (ii) a municipal advisor would be able to use municipal advisory client lists and case studies in light of Rule G-40(a)(iv)(G)’s ban on the use of testimonials in advertising by municipal advisors. These FAQs provide that requested guidance.

Response to Comments

In response to the MSRB’s request for comment, commenters expressed appreciation for the opportunity to comment on the draft FAQs.

One commenter suggested a number of formatting and drafting edits to help clarify a particular FAQ and provided suggestions to improve the draft guidance.² The MSRB incorporated a number of those suggestions.

² NAMA letter at 1.

Commenters also made a number of more substantive suggestions, including requests for:

- Additional straightforward examples;³
- Clarification that when determining whether a document, such as a response to a request for proposal (“RFP”), is an advertisement under Rule G-40, it is appropriate to consider the document as a whole and not its constituent parts;⁴ and
- Guidance regarding the use of a “pitch” book and a tombstone by a municipal advisor.

The MSRB revised the FAQs in response to the comments, as described below.⁵

Additional Straightforward Examples

In response to the request for additional straightforward examples, the MSRB added seven examples to illustrate the use of a municipal advisory client list or case study by a municipal advisor.

Responses to Request for Proposals (RFP)

The MSRB clarified that to determine whether a document is an advertisement under Rule G-40, a municipal advisor should review the document as a whole and not its constituent parts. Therefore, for a response to an RFP, the municipal advisor should review the entire response to determine whether the response to the RFP would be an advertisement under Rule G-40. *See* Question 1 of the FAQs.

“Pitch” Books and Tombstones

The MSRB received requests for guidance regarding (i) the use of municipal advisory client lists and/or case studies in “pitch” books and (ii) publication of

³ NAMA letter at 1-2. The MSRB also received a suggestion that the examples be more nuanced. *See* BDA letter.

⁴ BDA letter; SIFMA letter at 2.

⁵ In addition to receiving comments regarding guidance on the use of client lists and case studies by municipal advisors, one commenter requested the MSRB issue guidance to clarify the activities governed by G-40, on advertising by municipal advisors, when the municipal advisor is also a broker, dealer or municipal securities dealer subject to Rule G-21, on advertising. SIFMA letter at 3. Consistent with the MSRB’s response to comments in proposing Rule G-40, the MSRB expects to begin to address such jurisdictional issues during its next fiscal year. *See* [Letter from Pamela K. Ellis, Associate General Counsel, Municipal Securities Rulemaking Board, dated April 30, 2018 at 19-21.](#)

tombstones promoting new issues of municipal securities. The MSRB provided such guidance. See Examples 10 and 11 of the FAQs.

The use of the same municipal advisory client list and/or case study in different “pitch” books generally would not make the “pitch” books advertisements under Rule G-40(a)(i). The definition of an advertisement has parts that relate to the content of the material and parts that relate to the distribution of that material. In terms of content, a “pitch” book is written promotional literature concerning the services of the municipal advisor or the engagement of a municipal advisory client under Rule G-40(a)(i). However, in terms of the distribution, because the MSRB generally expects a municipal advisor would tailor a “pitch” book to a specific municipal advisory client or potential municipal advisory client and would generally only distribute the specific “pitch” book to that municipal advisory client or potential municipal advisory client within any period of 90 consecutive days, a “pitch” book generally would not be an advertisement under Rule G-40(a)(i). A “pitch” book would not be an advertisement primarily because it would not be a form letter under Rule G-40(a)(ii).⁶ The “pitch” book would only be distributed to the potential municipal entity client.⁷

By contrast to a “pitch” book, a single “tombstone” to promote the new issuance of municipal securities that the municipal advisor and the underwriting syndicate jointly prepare and publish would be an advertisement under Rule G-40(a)(i). Such a “tombstone” would be material published or used in electronic or other public media, or written promotional literature generally made available to municipal entities, obligated persons, municipal advisory clients or the public concerning the services of the municipal advisor or the engagement of a municipal advisory client.⁸ The municipal advisor would therefore need to comply with the various requirements of Rule G-40, which are applicable to advertisements, as more fully described in the FAQs.

However, the publication of a “tombstone” that does no more than provide (i) general factual information about an issuance of municipal securities and

⁶ Rule G-40(a)(ii) defines a form letter as “any written letter or electronic mail message distributed to more than 25 persons within any period of 90 consecutive days.”

⁷ The inclusion of the same municipal advisory client list and/or case study in “pitch” books to different municipal advisory clients or potential municipal advisory clients would not by itself make the “pitch” books form letters.

⁸ The MSRB does not consider a “tombstone” to be “listings of offerings,” which would be exempt from the definition of “advertisement” under Rule G-40(a)(i).

does not contain an endorsement from a municipal advisory client and (ii) limited identifying information about the municipal advisor would not run afoul of Rule G-40(a)(iv)(G)'s ban on the use of testimonials.

The MSRB welcomes additional comments and questions about the FAQs or other compliance matters at compliance@msrb.org.

September 17, 2018

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FAQs on Use of Municipal Advisory Client Lists and Case Studies

The Municipal Securities Rulemaking Board (MSRB) provides these answers to frequently asked questions (FAQs) to illustrate permissible and impermissible uses of municipal advisory client lists and case studies by municipal advisors under MSRB Rule G-40, on advertising by municipal advisors. These FAQs can assist municipal advisors with their compliance with the MSRB's advertising rule. In addition, these FAQs illustrate the potential application of certain other MSRB rules to municipal advisors' use of municipal advisory client lists and case studies.

The MSRB derived the principles discussed in this compliance resource from Rule G-40 and its related rulemaking record, and these FAQs should be read in conjunction with the rule and its related guidance. The FAQs do not create new legal or regulatory requirements, or new interpretations of existing requirements. The MSRB does not intend these FAQs to be interpreted by municipal advisors or examining authorities as establishing new standards of conduct.

BACKGROUND

Rule G-40

Rule G-40, effective February 7, 2019, includes general provisions, addresses professional advertisements by municipal advisors, and requires principal approval, in writing, for advertisements by municipal advisors before their first use. The general provisions (i) define key terms, including the term "advertisement," (ii) provide content standards, such as the requirement that an advertisement be based on the principles of fair dealing and good faith and be fair and balanced, and (iii) provide general standards for advertisements, namely that a municipal advisor shall not publish or disseminate an advertisement that the municipal advisor knows or has reason to know contains any untrue statement of material fact or is otherwise false or misleading.

Rule G-40 also prohibits certain testimonials. Specifically, Rule G-40(a)(iv)(G) prohibits a municipal advisor, directly or indirectly, from publishing, circulating or distributing any advertisement which refers, directly or indirectly, to any testimonial of any kind concerning the municipal

advisor or concerning the advice, analysis, report or other service rendered by the municipal advisor. This prohibition extends to the publication, circulation, or distribution of any advertisement which refers, directly or indirectly, to any testimonial of any kind about an associated person of a municipal advisor concerning the advice, analysis, report or other service rendered by the municipal advisor or an associated person on behalf of the municipal advisor.¹

Municipal advisory client lists and case studies as potential testimonials

Currently, some municipal advisors may use municipal advisory client lists to highlight their past experience or current engagements. Similarly, some municipal advisors may use case studies² to illustrate how the municipal advisor handled, or is currently handling, a particular engagement for a municipal advisory client.³

During the development of Rule G-40, the MSRB received requests for guidance regarding whether (i) municipal advisory client lists and case studies would be

¹ Consistent with MSRB Rule D-11, unless the context requires otherwise, the term "municipal advisor" used in MSRB rules includes the associated persons of the municipal advisor.

² See, e.g., Letter from Catherine Humphry-Bennett, Municipal Advisory Compliance Officer, Public Financial Management, Inc. and PFM Financial Advisors LLC, dated February 28, 2018 (stating that municipal advisors sometimes use case studies as examples of the types of services performed for existing or previous clients) available at <https://www.sec.gov/comments/sr-msrb-2018-01/msrb201801-3177878-161986.pdf>.

³ This guidance does not address the use of hypothetical illustrations.

advertisements under Rule G-40 and (ii) a municipal advisor would be able to use municipal advisory client lists and case studies in light of the ban, under Rule G-40(a)(iv)(G) on the use of testimonials in advertising by municipal advisors. These FAQs provide that requested guidance. Specifically, these FAQs address:

- **Advertisements:** The FAQs discuss how a municipal advisor's use of a municipal advisory client list or case study may be deemed to be an advertisement under Rule G-40 (see Questions 1-3 with Examples 1 through 8);
- **Partial Municipal Advisory Client Lists; "Pitch" Books; Tombstones:** Assuming that a municipal advisor's use of a partial municipal advisory client list is deemed to be an advertisement under Rule G-40, the FAQs provide guidance regarding the considerations under Rule G-40 that a municipal advisor may want to address with its use of a partial municipal advisory client list (see Question 4 with Examples 9-12); and
- **Case Studies:** Assuming that a municipal advisor's use of a case study is deemed to be advertising under Rule G-40, the FAQs discuss the standards under Rule G-40 that would apply to a municipal advisor's use of a case study (see Question 5 with Example 13).

FREQUENTLY ASKED QUESTIONS

1. Is the use of a municipal advisory client list or a case study an advertisement under Rule G-40?

Yes, depending on the facts and circumstances. With limited exceptions, any material that relates to (i) the services of the municipal advisor or (ii) the engagement of a municipal advisory client by the municipal advisor, may constitute an advertisement under Rule G-40, if such material is:

- ✓ published or used in any electronic or other public media; or
- ✓ written or electronic promotional literature distributed or made generally available to municipal entities, obligated persons, municipal advisory clients or the public.

Written or electronic promotional literature could take many forms, including a notice, circular, report, market letter, form letter,⁴ telemarketing script, seminar text, press release concerning the services of the municipal advisor or the engagement of a municipal advisory client.⁵

For example, a municipal advisor's use of a municipal advisory client list or case study could be written or electronic promotional literature distributed or generally made available to municipal entities, obligated persons, municipal advisory clients or the public, and thus an advertisement, if the municipal advisor uses the municipal advisory client list or case study in:

- ✓ a written letter or electronic mail message; and
- ✓ distributes that written letter or electronic mail message to more than 25 persons within any period of 90 consecutive days.⁶

A municipal advisor that distributes a written letter or electronic mail message that contains a municipal advisory client list or a case study to fewer than 25 persons within any period of 90 consecutive days and is not otherwise subject to Rule G-40(a)(i), would not be distributing an advertisement.

Among the circumstances when a municipal advisor's use of a municipal advisory client list or case study would not be deemed to be advertising are with, in general, a municipal advisor's typical response to a request for proposal (RFP), a request for qualification (RFQ) or a similar request.

A response to an RFP, RFQ or similar request is normally distributed to one potential municipal advisory client at a time such that the response (including the municipal advisory client list and/or case study) would not be material that is published, or written or electronic promotional literature distributed or made generally available to municipal entities, obligated persons, municipal advisory clients or the public. As provided in Supplementary Material .01 to Rule G-40, for purposes of Rule G-40(a)(ii), the number of "persons" for a response to a RFP, a RFQ, or similar request is determined at the entity level. Therefore, for example, if a municipal advisor were to send a response to an RFP to a municipal entity, that municipal entity would

⁴ Rule G-40(a)(ii) defines a form letter as "any written letter or electronic mail message distributed to more than 25 persons within any period of 90 consecutive days."

⁵ Regardless of the manner of distribution of a communication, the communication does not constitute an advertisement for purposes of Rule G-40 unless it concerns the municipal advisory services of the municipal advisor or the engagement of a municipal advisory client.

⁶ However, an e-mail that includes only required regulatory disclosures and does not contain any material that is promotional in nature, that is sent to more than 25 municipal advisory clients through blind carbon copies would not be an advertisement. See Letter from Pamela K. Ellis, Associate General Counsel, Municipal Securities Rulemaking Board, dated April 30, 2018, at 18-19, available at <http://msrb.org/~media/Files/SEC-Filings/2018/MSRB-2018-01%20MSRB%20Letter%20to%20SEC.ashx?> (Response Letter).

count as one “person” no matter how many employees of the municipal entity may review the response to the RFP.⁷

Further, to determine whether a document, such as an RFP, is an advertisement under Rule G-40, the municipal advisor should review the document as a whole and not its constituent parts. Therefore, the municipal advisor should review the entire response to the RFP and not a portion of a response (e.g., a municipal advisory client list included as an attachment) to determine whether the response to the RFP would be an advertisement under Rule G-40.⁸

2. If a municipal advisory client list or case study is deemed to be an advertisement, what are the other provisions of Rule G-40 with which the advertisement must comply?

If a municipal advisory client list or case study is, or would be deemed to be, an advertisement based on the analysis in Question 1 the municipal advisor then must comply with the other applicable provisions of Rule G-40, including its content standards, principal pre-approval provision and recordkeeping requirement.

The content standards address certain requirements for an advertisement, including the requirements that the advertisement:

- ✓ Be based on the principles of fair dealing and good faith;
- ✓ Be fair and balanced;
- ✓ Contain statements that are clear and not misleading within the context in which they are made; and
- ✓ Not omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the advertisement to be misleading.

In addition, the content provisions prohibit a municipal advisor from, directly or indirectly, publishing, circulating, or distributing any advertisement which refers, directly or indirectly, to any testimonial of any kind concerning the municipal advisor or concerning the advice, analysis, report or other service rendered by the municipal advisor.

Besides the content provisions, provisions of Rule G-40 address principal pre-approval and a recordkeeping

requirement for advertisements. Specifically, Rule G-40(c) requires that a municipal advisor principal approve any advertisement before its first use. Rule G-40(c) also requires that the municipal advisor make and keep, in a separate file, records of all advertisements.

3. What standards apply to a municipal advisor’s use of a case study in advertising?

While it may be possible for a municipal advisor to generalize about the facts and circumstances concerning the municipal advisor’s past or existing engagement in a case study, a municipal advisor’s use of a case study in an advertisement remains subject to the standards of Rule G-40(a)(iv). Among other things, the rule requires that all advertisements by a municipal advisor be based on the principles of fair dealing and good faith, and that the statements made in an advertisement be clear and not misleading within the context in which they are made. A municipal advisor must ensure that its use of a case study in advertising is consistent with the municipal advisor’s obligations under Rule G-40(a)(iv).

In addition, as a municipal advisor prepares its case study, the municipal advisor should be mindful of its obligations under other MSRB rules. For example, consistent with its obligations under Rules G-17 and G-42, a municipal advisor must present any case study in a manner that complies with the MSRB’s fair dealing and fair practice principles. See “Other MSRB rules that may apply to municipal advisory client lists and case studies” under Question 4.

4. What other MSRB rules may apply to a municipal advisor’s use of municipal advisory client lists and case studies?

As a municipal advisor considers its use of a municipal advisory client list or case study, a municipal advisor also should be mindful of its obligations under Rule G-40 as well as under other applicable MSRB rules. Those MSRB rules include:

- **Rule G-42, on duties of non-solicitor municipal advisors.** Whether or not material or promotional literature is an advertisement for purposes of Rule G-40, the material or promotional literature is nevertheless subject to Rule G-42(e)(i)(C), which prohibits a non-solicitor municipal advisor from making representations or submitting information that the municipal advisor

⁷ See, e.g., Response Letter at 18. In addition, the *unilateral publication* of a response to an RFP or RFQ or similar request by an issuer official would not make that response an advertisement. *Id.*

⁸ Similarly, in general, the MSRB would not view a municipal advisor’s typical use of a “pitch” book to be an advertisement that would be subject to Rule G-40 because it is a tailored document not distributed or generally made available. See Example 10.

knows or should know is materially false or materially misleading for the purpose of obtaining or retaining an engagement to perform municipal advisory activities.⁹ For example, the use of a municipal advisory client list in a response to an RFP or RFQ in a manner that is false or misleading would be a violation of MSRB rules even though the response may not be, itself, an advertisement.

- **Rule G-17, on conduct of municipal securities and municipal advisory activities.** Rule G-17 provides that a municipal advisor, in the conduct of its municipal advisory activities, shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice. To the extent that a municipal advisor uses a municipal advisory client list or case study in its municipal advisory activities, that use must be consistent with the municipal advisor's fair dealing obligations under Rule G-17.
- **Rule G-44, on supervisory and compliance obligations of municipal advisors.** Rule G-44 requires that a municipal advisor establish, implement, and maintain a system to supervise its and its associated persons' municipal advisory activities that is reasonably designed to achieve compliance with MSRB rules, including Rule G-40. Municipal advisors may want to consider addressing the use of municipal advisory client lists and case studies as part of their supervisory procedures.
- **Rule G-8, on books and records to be made by brokers, dealers, municipal securities dealers and municipal advisors.** Rule G-8(h)(i) requires that a municipal advisor keep all books and records described in Rule 15Ba1-8(a)(1)-(8) under the Securities Exchange Act of 1934, as amended. Among the books and records that a municipal advisor must keep under Rule 15Ba1-8(a)(1) are originals or copies of all written communications received, and originals or copies of all written communications sent, by such municipal advisor (including inter-office memoranda and communications) relating to municipal advisory activities, regardless of the format of such communications.

- **Rule G-9, on preservation of records.** Rule G-9(h)(i) requires that, subject to the other provisions of Rule G-9(h)(ii) and (iii), that a municipal advisor retain records for at least five years. The records required by Rule G-40(c) are among those records that a municipal advisor must retain for at least five years.

5. Must a municipal advisor include all of its clients in a municipal advisory client list?

No, a municipal advisor may develop a partial municipal advisory client list as long as that partial municipal advisory client list:

- does not contain any untrue statement of material fact or is not otherwise false or misleading, and
- complies with all other applicable provisions of Rule G-40, including Rule G-40(a)(iv)'s content standards.

Among other things, Rule G-40(a)(iv) requires that all advertisements by a municipal advisor be based on the principles of fair dealing and good faith, be fair and balanced, and that the statements made in an advertisement be clear and not misleading within the context in which they are made. A municipal advisor must consider these obligations under Rule G-40(a)(iv) as it prepares its municipal advisory client list. While Rule G-40(a)(iv) does not, *per se*, prohibit the inclusion of partial municipal advisory client lists in an advertisement, the municipal advisor must consider whether a partial municipal advisory client list would create a false or misleading impression under the circumstances and in the context in which the partial municipal advisory client list is provided.

In addition to the specific content standards of Rule G-40 for advertisements, in considering its use of client lists generally, the municipal advisor should be mindful of its obligations under other MSRB rules. For example, consistent with its obligations under Rule G-17 and Rule G-42, as applicable to non-solicitor municipal advisors, a municipal advisor must present any municipal advisory client list in a manner that complies with the MSRB's fair dealing and fair practice principles.¹⁰ See "Other MSRB rules that may apply to municipal advisory client lists and case studies" under Question 4.

⁹ Rule G-42(e)(i)(C) provides that a municipal advisor is prohibited from:

making any representation or the submission of any information that the municipal advisor knows or should know is either materially false or materially misleading due to the omission of a material fact about the capacity, resources or knowledge of the municipal advisor, in response to requests for proposals or qualifications or in oral presentations to a client or prospective client, for the purpose of obtaining or retaining an engagement to perform municipal advisory activities.

¹⁰ Also, for example, if a municipal advisor has agreed with the municipal advisory client that the municipal advisor will not use the client's name in advertisements, the breach of that agreement could be inconsistent with Rule G-17. The same general principle would apply to the use of a municipal advisory client's name in a case study.

The MSRB developed the examples used throughout this FAQ to illustrate the application of Rule G-40 to a municipal advisor's use of a municipal advisory client list and a case study.

As used in the examples, the hypothetical municipal advisor is Municipal Advisor ABC, a large regional municipal advisor with 25 years of experience that engages in municipal advisory activities with multiple municipal advisory clients each year, and the hypothetical municipal entity client is Issuer XYZ. Also, for purposes of the examples, a testimonial by a municipal advisory client would only be included in a municipal advisory client list or case study.

The hypothetical facts are limited to the example in which they are discussed.

ADVERTISEMENTS

Municipal Advisory Client Lists, in General

- **Example 1:** Municipal Advisor ABC develops a municipal advisory client list that sets forth Municipal Advisor ABC's municipal advisory clients for the past two years. Municipal Advisor ABC posts the municipal advisory client list on its website, which is accessible to the general public on an unrestricted basis. The municipal advisory client list excludes any endorsement from a municipal advisory client.

Advertisement: Based on its content and distribution, the post that contains the municipal advisory client list would be an advertisement under Rule G-40(a)(i) because it is material published or used in electronic or other public media, or electronic promotional literature generally made available to municipal entities, obligated persons, municipal advisory clients or the public concerning the services of the municipal advisor or the engagement of a municipal advisory client.

Testimonial: Although the post would be an advertisement, the inclusion of the municipal advisory client list in the post would not run afoul of Rule G-40's ban on the use of testimonials because the post does not include any endorsement from the municipal advisory client.¹¹

Compliance considerations under Rule G-40:

Municipal Advisor ABC's general posting on its website of the municipal advisory client list would be an advertisement subject to Rule G-40. Among the compliance considerations under Rule G-40, is the requirement that Municipal Advisor ABC would have to ensure that the municipal advisory client list is accurate. Also, a municipal advisor principal would have to approve the advertisement before its first use. Further, Municipal Advisor ABC would have to make and keep in a separate file a record of the advertisement.¹²

Compliance considerations under other MSRB rules. Municipal Advisor ABC should review the other MSRB rules that may apply to the advertisement. See Question 4 concerning such other MSRB rules.

- **Example 2:** Municipal Advisor ABC develops a municipal advisory client list that sets forth Municipal Advisor ABC's municipal advisory clients for the past two years. Municipal Advisor ABC plans to include the municipal advisory client list in (i) a brochure that Municipal Advisor ABC plans to distribute at a public finance conference and (ii) an electronic newsletter that Municipal Advisor ABC will send to more than 40 municipal advisory clients on a single day. The brochure and the electronic newsletter exclude any endorsement from a municipal advisory client.

¹¹ Unless otherwise stated, the examples assume that for an advertisement that does not contain a testimonial, the presentation of the municipal advisory client list and/or the case study does not imply a statement or otherwise create an indication that a municipal advisory client is endorsing the municipal advisor.

¹² The mere inclusion of a client list in an advertisement would ordinarily not be considered to be a testimonial. *Cf. Cambiar Investors, Inc.* (publicly avail. Aug. 27, 1997) (under analogous situations presented under the Investment Advisers Act of 1940, as amended, SEC staff has provided guidance that a testimonial is "a statement of a client's experience with, or endorsement of, an investment adviser"). Unless the context of the presentation of a municipal advisory client list in an advertisement states or implies a statement regarding any client's experience with the municipal advisor or an endorsement of the municipal advisor, it would not generally be a testimonial.

Advertisement: Based on its content and distribution, both the brochure and electronic newsletter would be advertisements under Rule G-40(a)(i) that would incorporate the municipal advisory client list. The brochure would be written or electronic promotional literature distributed or made generally available to municipal entities, obligated persons, municipal advisory clients or the public concerning the services of the municipal advisor or the engagement of a municipal advisory client. Similarly, the electronic newsletter would be material used in electronic or other public media, or electronic promotional literature distributed or made generally available to municipal entities, obligated persons, municipal advisory clients or the public concerning the services of the municipal advisor or the engagement of a municipal advisory client.

Testimonial: Although the brochure and the electronic newsletter would be advertisements, the inclusion of the municipal advisory client list in the brochure and the electronic newsletter would not run afoul of Rule G-40(a)(iv)(G)'s ban on the use of testimonials, since neither the brochure nor the electronic newsletter includes any endorsement from the municipal advisory client.

Compliance considerations under Rule G-40: The brochure and electronic newsletter would be advertisements subject to Rule G-40. Among the compliance considerations under Rule G-40, is the requirement that Municipal Advisor ABC would have to ensure that the brochure and electronic newsletter meet the content standards. Also, a municipal advisor principal would have to approve each advertisement before its first use. Further, Municipal Advisor ABC would have to make and keep in a separate file a record of each advertisement.

Compliance considerations under other MSRB rules. Municipal Advisor ABC should review the other MSRB rules that may apply to the advertisements. See Question 4 concerning such other MSRB rules.

- **Example 3:** Municipal Advisor ABC develops a municipal advisory client list that sets forth Municipal Advisor ABC's municipal advisory clients for the past two years. Next to each municipal advisory client included on the list, Municipal Advisor ABC adds a brief statement from the municipal advisory client about

Municipal Advisor ABC's services. For example, next to the listing of Issuer XYZ, Municipal Advisor ABC includes the statement:

"Municipal Advisor ABC gave us great advice helping us to secure low cost financing; Issuer XYZ will use Municipal Advisor ABC again."

Municipal Advisor ABC posts the municipal advisory client list on its website, which is accessible to the general public on an unrestricted basis.

Advertisement: Based on its content and distribution, the posting of the municipal advisory client list would be an advertisement under Rule G-40(a)(i). The post would be material published or used in electronic or other public media, or electronic promotional literature distributed or made generally available to municipal entities, obligated persons, municipal advisory clients or the public concerning the services of the municipal advisor or the engagement of a municipal advisory client.

Testimonial: The post includes an endorsement from a municipal advisory client. Thus, the post would run afoul of Rule G-40(a)(iv)(G)'s ban on the use of testimonials.

Compliance considerations under Rule G-40: Municipal Advisor ABC's posting on its website of the municipal advisory client list, because it includes a testimonial, would be an advertisement that would not comply with Rule G-40(a)(iv)(G).¹³

Municipal Advisory Client Lists Used in Responses to RFPs

- **Example 4:** In its response to an RFP by a municipal entity, Municipal Advisor ABC includes a list of its municipal advisory clients for the past two years in a particular geographic region for which Municipal Advisor ABC provided advice relating to school financings.¹⁴

Advertisement: Although the municipal advisory client list would be written promotional literature made available to a municipal entity, the response to the RFP would not be an advertisement under Rule G-40(a)(i). As noted in Question 1, the MSRB views a response

¹³ In this example as well as the following examples, where the use of the municipal advisory client list or case study would violate Rule G-40, the FAQs do not discuss compliance considerations under other MSRB rules. Nevertheless, if an advertisement would violate Rule G-40, the municipal advisor's use of the advertisement also may run afoul of other MSRB rules.

¹⁴ Examples 4-6 assume that Municipal Advisor ABC limits the distribution of its response to the RFP to the municipal entity for which Municipal Advisor ABC prepared the response.

to an RFP as a single document under Rule G-40. Therefore, the municipal advisory client list included in the response to the RFP would not be an advertisement solely because the municipal advisory client list was included in that response.

In general, a response to an RFP would not be an advertisement primarily because such response would not be generally distributed. In this case, the response to the RFP would not be a form letter under Rule G-40(a)(ii) because the response would only be distributed to the potential municipal entity client.

Testimonial: Municipal Advisor ABC's response to the RFP would not be an advertisement. Thus, Rule G-40(a)(iv)(G)'s ban on the use of testimonials would not apply.

Compliance considerations under Rule G-40: Municipal Advisor ABC's response to the RFP would not be an advertisement. Thus, the response to the RFP would not be subject to the specific requirements of Rule G-40.

Compliance considerations under other MSRB rules. Municipal Advisor ABC should review the other MSRB rules that may apply to the inclusion of the municipal advisory client list in the response to the RFP. See Question 4 concerning such other MSRB rules.

- **Example 5:** On June 1, in its response to an RFP published by municipal entity HIJ, Municipal Advisor ABC includes a list of its municipal advisory clients for the past two years in a particular geographic region for which Municipal Advisor ABC provided advice relating to school financings. On June 15, in its response to an RFP published by Issuer XYZ, Municipal Advisor ABC includes the same municipal advisory client list that Municipal Advisor ABC included in its response to municipal entity HIJ's RFP.

Advertisement: Although the municipal advisory client list would be written promotional literature made available to a municipal entity, neither response would be an advertisement under Rule G-40(a)(i). In general, a response to an RFP would not be generally distributed. In this case, the response to the RFP would not be a form letter under Rule G-40(a)(ii) because the response would only be distributed to the potential municipal entity client.

As noted in Question 1, the MSRB views a response to an RFP as a single document under Rule G-40. Therefore, the municipal advisory client list included in

the response to the RFP would not be an advertisement solely because the municipal advisory client list was included in that response.

Testimonial: Municipal Advisor ABC's responses to the RFPs would not be advertisements. Thus, Rule G-40(a)(iv)(G)'s ban on the use of testimonials would not apply.

Compliance considerations under Rule G-40: Municipal Advisor ABC's responses to the RFPs would not be advertisements. Thus, the responses to the RFPs would not be subject to the specific requirements of Rule G-40.

Compliance considerations under other MSRB rules. Municipal Advisor ABC should review the other MSRB rules that may apply to the inclusion of the municipal advisory client list in each response to the RFP. See Question 4 concerning such other MSRB rules.

- **Example 6:** In its response to an RFP by a municipal entity, Municipal Advisor ABC includes a list of its municipal advisory clients for the past two years in a particular geographic region for which Municipal Advisor ABC provided advice relating to school financings. Municipal Advisor ABC includes a brief statement from each listed municipal advisory client about Municipal Advisor ABC's services. For example, next to the listing of Issuer XYZ, Municipal Advisor ABC includes the statement:

"Municipal Advisor ABC gave great advice helping us to secure low cost financing; Issuer XYZ will use Municipal Advisor ABC again."

Advertisement: Although the municipal advisory client list would be written promotional literature made available to a municipal entity, the response would not be an advertisement under Rule G-40(a)(i). As noted in Question 1, the MSRB views a response to an RFP as a single document under Rule G-40. Therefore, the municipal advisory client list included in the response to the RFP would not be an advertisement solely because it was included in that response.

In general, a response to an RFP would not be an advertisement primarily because such response would not be generally distributed. In this case, the response to the RFP would not be a form letter under Rule G-40(a)(ii) because the response would only be distributed to the potential municipal entity client.

Testimonial: Municipal Advisor ABC's response to the RFP would not be an advertisement. Thus, Rule G-40(a)(iv)(G)'s ban on the use of testimonials would not apply.

Compliance considerations under Rule G-40:

Municipal Advisor ABC's response to the RFP would not be an advertisement. Thus, the response to the RFP would not be subject to the specific requirements of Rule G-40.

Compliance considerations under other MSRB

rules. Municipal Advisor ABC should review the other MSRB rules that may apply to the inclusion of the municipal advisory client list in the response to the RFP. See Question 4 concerning such other MSRB rules.

Use of Case Studies

- **Example 7:** Municipal Advisor ABC develops a case study about a financing for a municipal ice rink. The case study excludes any statement from the municipal advisory client concerning Municipal Advisor ABC or concerning the advice, analysis, report or other service rendered by Municipal Advisor ABC.

Municipal Advisor ABC incorporates the case study into the firm brochure that Municipal Advisor ABC will include in a widely distributed promotional bag at a public finance industry conference.

Advertisement: Based on its content and distribution, the firm brochure that incorporates the case study would be an advertisement under Rule G-40(a)(i) because it would be material published or used in electronic or other public media, or written promotional literature distributed or made generally available to municipal entities, obligated persons, municipal advisory clients or the public concerning the services of the municipal advisor or the engagement of a municipal advisory client.

Testimonial: Although the firm brochure would be an advertisement, the inclusion of the case study in the firm brochure would not run afoul of Rule G-40(a)(iv)(G)'s ban on the use of testimonials, since the firm brochure does not include any endorsement from the municipal advisory client.

Compliance considerations under Rule G-40: The firm brochure would be an advertisement subject to Rule G-40. Among the compliance considerations under Rule G-40, is the requirement that Municipal Advisor ABC would have to ensure that the firm brochure

meets the content standards. Also, a municipal advisor principal would have to approve the advertisement before its first use. Further, Municipal Advisor ABC would have to make and keep in a separate file a record of the advertisement.

Compliance considerations under other MSRB rules. Municipal Advisor ABC should review the other MSRB rules that may apply to the inclusion of the case study in the firm brochure. See Question 4 concerning such other MSRB rules.

- **Example 8:** Municipal Advisor ABC develops a case study about a financing for a municipal ice rink. The case study provides the following statement from the Issuer XYZ:

"Municipal Advisor ABC's expert recommendations allowed us to meet our goals — we met our timeline and secured low cost financing. Municipal Advisor ABC was terrific."

Municipal Advisor ABC includes the case study in the firm brochure that is included in a widely distributed promotional bag at a public finance industry conference.

Advertisement: Based on its content and distribution, the firm brochure that includes the case study would be an advertisement under Rule G-40(a)(i). The firm brochure would be material published or used in electronic or other public media, or written promotional literature distributed or made generally available to municipal entities, obligated persons, municipal advisory clients or the public concerning the services of the municipal advisor or the engagement of a municipal advisory client.

Testimonial: Because the firm brochure incorporates a case study that includes an endorsement from the Issuer XYZ, the firm brochure would include a testimonial that would run afoul of Rule G-40(a)(iv)(G)'s ban on the use of testimonials.

Compliance considerations under Rule G-40: Municipal Advisor ABC's use of the case study would violate Rule G-40(a)(iv)(G).

PARTIAL MUNICIPAL ADVISORY CLIENT LISTS; “PITCH” BOOKS; TOMBSTONES

Use of Partial Municipal Advisory Client Lists

- Example 9:** Municipal Advisor ABC publishes promotional material regarding its municipal advisory services in an airport industry journal. Municipal Advisor ABC’s promotional material includes an accurate list of recent municipal advisory clients to which Municipal Advisor ABC has provided advice about airport financings within the past three years. Municipal Advisor ABC discloses in the promotional material that the municipal advisory client list is a partial municipal advisory client list limited to Municipal Advisor ABC’s municipal advisory engagements related to airport financings within the past three years. The partial municipal advisory client list does no more than list the relevant municipal advisory clients. Municipal Advisor ABC does not add any statement from any of the municipal advisory clients about Municipal Advisor ABC’s services.

This example assumes that the context in which Municipal Advisor ABC presents the list of recent municipal advisory clients is not misleading.

Advertisement: Based on its content and distribution, the promotional material that contains the partial municipal advisory client list would be an advertisement under Rule G 40(a)(i). The advertisement would be material published or used in electronic or other public media, or written promotional literature distributed or generally made available to municipal entities, obligated persons, municipal advisory clients or the public concerning the services of the municipal advisor or the engagement of a municipal advisory client.

Testimonial: Although the promotional material that contains the partial municipal advisory client list would be an advertisement, the inclusion of the partial municipal advisory client list in the promotional material would not run afoul of Rule G-40(a)(iv)(G)’s ban on the use of testimonials, since the promotional material does not include any endorsement from the municipal advisory client.

Compliance considerations under Rule G-40: Municipal Advisor ABC’s advertisement discloses that the municipal advisory client list is a partial municipal advisory client list limited to Municipal Advisor ABC’s

municipal advisory engagements related to airport financings within the past three years. By disclosing the relevant factors it used to develop the municipal advisory list, Municipal Advisor ABC helps ensure that the partial municipal advisory client list is not misleading. Further, Municipal Advisor ABC does not include statements from municipal advisory clients about Municipal Advisor ABC’s services in the advertisement. The publication by Municipal Advisor ABC of this partial municipal advisory client list would appear to not be prohibited under Rule G-40(a)(iv).

Further, Municipal Advisor ABC would have to consider the other provisions of Rule G-40. Among those provisions, is the requirement that Municipal Advisor ABC would have to ensure that the firm brochure meets the content standards. Also, a municipal advisor principal would have to approve the advertisement before its first use. Further, Municipal Advisor ABC would have to make and keep in a separate file a record of the advertisement.

Compliance considerations under other MSRB rules. Municipal Advisor ABC should review the other MSRB rules that may apply to the use of a partial municipal advisory client list in the advertisement. See Question 4 concerning such other MSRB rules.

Use of “Pitch” Books

- Example 10:** Municipal Advisor ABC prepares a “pitch” book for its meeting with Issuer XYZ. The “pitch” book is not a response to an RFP or similar request; rather, the “pitch” book is prepared and used by Municipal Advisor ABC to discuss potential engagements with a current or prospective municipal advisory client. The “pitch” book contains market information relevant to Issuer XYZ, including information about the debt portfolio of Issuer XYZ, information about certain of Municipal Advisor ABC’s past relevant transactions that Issuer XYZ may consider (*i.e.*, case studies) and a partial municipal advisory client list that is relevant to Issuer XYZ. Municipal Advisor ABC discloses that the “pitch” book contains a partial municipal advisory client list and case studies that are limited to Municipal Advisor ABC’s relevant municipal advisory services engagements within Issuer XYZ’s geographic region during the past five years. The partial municipal advisory client list and the case studies do not contain any testimonials from the municipal advisory client.

Municipal Advisor ABC tailors each “pitch” book it prepares for the particular current or prospective

municipal advisory client. Municipal Advisor ABC does not use the same “pitch” book twice, although certain current or prospective municipal advisory clients may receive “pitch” books with common or standardized information, including the same partial municipal advisory client and case studies, when certain current or prospective municipal advisory clients are similarly situated.

Advertisement: The definition of an advertisement has parts that relate to the content of the material and parts that relate to the distribution of that material. In terms of content, the “pitch” book is written promotional literature concerning the services of the municipal advisor or the engagement of a municipal advisory client under Rule G-40(a)(i). However, in terms of the distribution, because Municipal Advisor ABC distributes the specific “pitch” book only to Issuer XYZ, the “pitch” book would not be an advertisement under Rule G-40(a)(i).

The “pitch” book would not be an advertisement primarily because the “pitch” book would not be a form letter under Rule G-40(a)(ii). A form letter is a written letter or electronic mail message that is distributed to more than 25 persons within any period of 90 consecutive days. The “pitch” book would only be distributed to the potential municipal entity client.¹⁵

Testimonial: Municipal Advisor ABC’s use of the “pitch” book would not be an advertisement. Thus, Rule G-40(a)(iv)(G)’s ban on the use of testimonials would not apply.

Compliance considerations under Rule G-40: Municipal Advisor ABC’s use of the “pitch” book would not constitute an advertisement. Thus, the use of the “pitch” book would not be subject to the specific requirements of Rule G-40.

Compliance considerations under other MSRB rules. Municipal Advisor ABC should review the other MSRB rules that may apply to the inclusion of a partial municipal advisory client list and case studies’ inclusion in the “pitch” book. See Question 4 concerning such other MSRB rules.

Publication of a “Tombstone”

- **Example 11:** The underwriting syndicate and Municipal Advisor ABC for Issuer’s XYZ new bond issue jointly prepare and publish a single “tombstone” in an industry newspaper about a public offering of municipal bonds that lists Municipal Advisor ABC as the municipal advisor for the offering. The advertisement provides (i) general factual information about the new bond issue and (ii) identifying information about Municipal Advisor ABC, including its name, address, telephone number and e-mail address. The “tombstone” does not include an endorsement from a municipal advisory client, and is limited to the general facts related to Issuer ABC’s new bond issuance.

Advertisement: Based on its content and distribution, the “tombstone” would be an advertisement under Rule G-40(a)(i). The “tombstone” would be material published or used in electronic or other public media, or written promotional literature generally made available to municipal entities, obligated persons, municipal advisory clients or the public concerning the services of the municipal advisor or the engagement of a municipal advisory client.¹⁶

Testimonial: The publication of a “tombstone” that does no more than provide (i) general factual information about an issuance of municipal securities and does not contain an endorsement from a municipal advisory client and (ii) limited identifying information about the municipal advisor, would not run afoul of Rule G-40(a)(iv)(G)’s ban on the use of testimonials.

Compliance considerations under Rule G-40: The “tombstone” would be an advertisement subject to Rule G-40. Among the compliance considerations under Rule G-40, is the requirement that Municipal Advisor ABC would have to ensure that the “tombstone” is accurate. Also, a municipal advisor principal would have to approve the advertisement before its first use. Further, Municipal Advisor ABC would have to make and keep in a separate file a record of the advertisement.

Compliance considerations under other MSRB rules. Municipal Advisor ABC should review the other MSRB rules that may apply to “tombstone” advertisements. See Question 4 concerning such other MSRB rules.

¹⁵ The inclusion of the same municipal advisory client list and/or case study in “pitch” books to different municipal advisory clients or potential municipal advisory clients would not by itself make those “pitch” books form letters.

¹⁶ The MSRB does not consider a “tombstone” to be a “listings of offerings,” which would be exempt from the definition of “advertisement” under Rule G-40(a)(i).

Use of partial municipal advisory client list — Example of a violation of Rule G-40

- Example 12:** Municipal Advisor ABC posts on its website a municipal advisory client list under the title “Ten Recent Representative Municipal Advisory Clients.” However, that municipal advisory client list includes (i) entities that did not actually engage Municipal Advisor ABC and for which Municipal Advisor ABC only provided casual and informal “advice” and (ii) municipal advisory clients for which Municipal Advisor ABC has not provided advice for over fifteen years. Municipal Advisor ABC’s website does not contain any explanation about its very minor involvement with certain of the “municipal advisory clients.” Also, Municipal Advisor ABC’s website does not disclose that some of the municipal advisory services that Municipal Advisor ABC provided to those municipal advisory clients were from 15 years ago.

Advertisement: Based on its content and distribution, the post would be an advertisement under Rule G-40(a)(i). The post would be material published or used in electronic or other public media, or electronic promotional literature generally made available to municipal entities, obligated persons, municipal advisory clients or the public concerning the services of the municipal advisor or the engagement of a municipal advisory client.

Testimonial: Although the post would be an advertisement, the inclusion of the partial municipal advisory client list in the post would not run afoul of Rule G-40(a)(iv)(G)’s ban on the use of testimonials, since the post does not include any endorsement from the municipal advisory client.

Compliance considerations under Rule G-40: Municipal Advisor ABC’s post of the partial municipal advisory client list is misleading. Municipal Advisor ABC titles the list “Ten Recent Representative Municipal Advisory Clients.” However, the list includes municipal advisory clients that did not actually engage Municipal Advisor ABC for municipal advisory services and includes municipal advisory clients for which Municipal Advisor ABC has not provided advice for over fifteen years. As noted in the introduction to the hypothetical examples, Municipal Advisor ABC is a large regional municipal advisor with 25 years experience that engages in municipal advisory activities for multiple municipal advisory clients each year. In addition, a municipal advisor principal, in its review, should consider whether

it is consistent with the content standards for “Recent Representative Municipal Advisory Clients” to include clients to whom the firm has not provided advice to in over 15 years. Municipal Advisor ABC’s use of the municipal advisory client list would not comply with Municipal Advisor ABC’s obligations under Rule G-40(a)(iv).

CASE STUDIES

Use of a case study in a firm brochure — Example of a Violation of Rule G-40

- Example 13:** At its booth at a well-attended public finance industry conference, Municipal Advisor ABC makes available a brochure containing a case study. The case study discusses a recent bond issuance and the services that a municipal advisor provided in that bond issuance in which the issuer retained multiple municipal advisors. The case study is silent about which municipal advisor advised the municipality on a long-term bond issuance and debt management plan that resulted in a bond rating upgrade, but the context implies that it was Municipal Advisor ABC. Another municipal advisor, not Municipal Advisor ABC, actually provided the advice to the municipality that resulted in the bond rating upgrade.

Advertisement: Based on its content and distribution, the brochure that contains the case study would be an advertisement under Rule G-40(a)(i). The brochure would be material published or used in electronic or other public media, or written promotional literature generally made available to municipal entities, obligated persons, municipal advisory clients or the public concerning the services of the municipal advisor or the engagement of a municipal advisory client.

Testimonial: Although the brochure would be an advertisement, the inclusion of the case study in the brochure would not run afoul of Rule G-40(a)(iv)(G)’s ban on the use of testimonials, since the brochure does not include any endorsement from the municipal advisory client.

Compliance considerations under Rule G-40: Under the facts and circumstances presented in this Example 13 and among other issues, Municipal Advisor ABC would be using an advertisement, the brochure, which contains a case study that omits material information

and that is misleading.¹⁷ Municipal Advisor ABC implies that it provided the services discussed in the case study, but fails to disclose that another municipal advisor actually provided those services. Municipal Advisor ABC's use of the case study would not comply with Municipal Advisor ABC's obligations under Rule G-40(a)(iv).

ADDITIONAL RESOURCES

- [SR-MSRB-2018-01 \(January 24, 2018\)](#)
- [Letter from Pamela K. Ellis, Associate General Counsel, Municipal Securities Rulemaking Board, dated April 30, 2018](#)
- [Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval of a Proposed Rule Change, Consisting to Amendments to Rule G-21, on Advertising, Proposed New Rule G-40, on Advertising by Municipal Advisors, and a Technical Amendment to Rule G-42, on Duties of Non-Solicitor Municipal Advisors](#)
- [MSRB Notice 2018-08 \(SEC Approves Advertising Rule Changes for Dealers and Municipal Advisors\) \(May 7, 2018\)](#)

¹⁷ Cf., *In re Barcelona Strategies, LLC, et al.* Exchange Act Release No. 83191 (May 9, 2018) (order instituting cease-and-desist proceedings; finding that a municipal advisor and its associated person, among other things, violated MSRB Rule G-17 when the municipal advisor circulated a brochure to municipalities that overstated its experience). Because the conduct in question took place before the effective date of Rule G-40, Rule G-40 did not apply. Nonetheless, the facts of this case illustrate conduct that would likely be violative of Rule G-40 following its effective date.