

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-83177; File No. SR-MSRB-2018-01)

May 7, 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

I. Introduction

On January 24, 2018, the Municipal Securities Rulemaking Board (the “MSRB” or “Board”) filed with the Securities and Exchange Commission (the “SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule consisting of amendments to MSRB Rule G-21, on advertising (“proposed amended Rule G-21”), proposed new MSRB Rule G-40, on advertising by municipal advisors (“proposed Rule G-40”), and a technical amendment to MSRB Rule G-42, on duties of non-solicitor municipal advisors (“proposed amended Rule G-42,” together with proposed amended Rule G-21 and proposed Rule G-40, the “proposed rule change”). The proposed rule change was published for comment in the Federal Register on February 7, 2018.<sup>3</sup>

The Commission received four comment letters on the proposed rule change.<sup>4</sup> On March

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR § 240.19b-4.

<sup>3</sup> Securities Exchange Act Release No. 82616 (February 1, 2018) (the “Notice of Filing”), 83 FR 5474 (February 7, 2017).

<sup>4</sup> See Letter to Secretary, Commission, from Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (“SIFMA”), dated February 28, 2018 (the “SIFMA Letter”); Letter to Secretary, Commission, from Susan Gaffney, Executive Director, National Association of Municipal Advisors (“NAMA”), dated February 28, 2018 ( the “NAMA Letter”); Letter

16, 2018, the MSRB granted an extension of time for the Commission to act on the filing until May 7, 2018. On April 30, 2018, the MSRB responded to the comment letters.<sup>5</sup> This order approves the proposed rule change.

## II. Description of Proposed Rule Change

As described more fully in the Notice of Filing, the MSRB stated that the purpose of proposed amended Rule G-21 is to, among other things: enhance the MSRB's fair-dealing provisions by promoting regulatory consistency among Rule G-21 and the advertising rules of other financial regulators; and promote regulatory consistency between Rule G-21(a)(ii), the definition of "form letter," and the Financial Industry Regulatory Authority, Inc. ("FINRA") Rule 2210's definition of "correspondence."<sup>6</sup> Proposed amended Rule G-21 also would make a technical amendment in paragraph (e), which the MSRB stated would streamline the rule.<sup>7</sup>

The MSRB stated that concurrent with its efforts to enhance Rule G-21 and promote regulatory consistency among Rule G-21 and the advertising rules of other financial regulators through proposed amended Rule G-21, it prepared proposed Rule G-40 to address advertising by

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to Secretary, Commission, from Michael Nicholas, Chief Executive Officer, Bond Dealers of America ("BDA"), dated February 28, 2018 (the "BDA Letter"); Letter to Secretary, Commission, from Catherine Humphrey-Bennett, Municipal Advisory Compliance Officer, PFM Financial Advisors LLC and PFM Asset Management LLC (collectively, "PFM"), dated February 28, 2018 (the "PFM Letter"). Staff from the Office of Municipal Securities discussed the proposed rule change with representatives from BDA on April 10, 2018.

<sup>5</sup> See Letter to Secretary, Commission, from Pamela K. Ellis, Associate General Counsel, MSRB, dated April 30, 2018 (the "Response Letter"), available at <https://www.sec.gov/comments/sr-msrb-2018-01/msrb201801-3551215-162309.pdf>.

<sup>6</sup> See Notice of Filing.

<sup>7</sup> Id.

municipal advisors.<sup>8</sup> The MSRB added that, similar to proposed amended Rule G-21, proposed Rule G-40 would: provide general provisions that define the terms “advertisement” and “form letter,” and would set forth the general standards and content standards for advertisements; provide the definition of professional advertisements, and would define the standard for those advertisements; and would require the approval by a principal, in writing, before the first use of an advertisement.<sup>9</sup> Also, proposed Rule G-40, similar to proposed amended Rule G-21, would apply to all advertisements by a municipal advisor, as defined in proposed Rule G-40(a)(i).<sup>10</sup> However, the MSRB noted, unlike proposed amended Rule G-21, proposed Rule G-40 would contain certain substituted terms that are more relevant to municipal advisors, and proposed Rule G-40 would omit the three provisions in Rule G-21 that concern product advertisements (i.e., product advertisements, new issue product advertisements, and municipal fund securities product advertisements).<sup>11</sup>

The proposed rule change also would make technical and non-substantive amendments to Rule G-42. Specifically, Rule G-42(f)(iv) defines municipal advisory activities as “those activities that would cause a person to be a municipal advisor as defined in subsection (f)(iv) of this rule.”<sup>12</sup> The proposed rule change would provide a technical amendment to Rule G-42(f)(iv) to correct the cross-reference. Proposed amended Rule G-42 would replace the reference to

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<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Id.

subsection (f)(iv) in Rule G-42(f)(iv) with the intended reference to subsection (f)(iii). Rule G-42(f)(iii) defines the term “municipal advisor” for purposes of Rule G-42.<sup>13</sup>

The MSRB requested that the proposed rule change be effective nine months from the date of Commission approval.<sup>14</sup>

A. Proposed Amended Rule G-21

The MSRB stated that to enhance Rule G-21’s fair dealing requirements, as well as to promote regulatory consistency among Rule G-21 and the advertising rules of other financial regulators, proposed amended Rule G-21 would provide more specific content standards than current Rule G-21.<sup>15</sup> The MSRB also stated that proposed amended Rule G-21 also would include revisions to the rule’s general standards for advertisements.<sup>16</sup>

a. Content Standards of Proposed Amended Rule G-21

In the Notice of Filing, the MSRB stated that proposed amended Rule G-21(a)(iii) would add content standards to make explicit many of the MSRB’s fair dealing obligations that follow from the MSRB’s requirements set forth in Rule G-21 and Rule G-17, on conduct of municipal securities and municipal advisory activities, and the interpretive guidance the MSRB has provided under those rules, and to specifically address them to advertising.<sup>17</sup> The MSRB stated that the proposed rule change would not supplant the MSRB’s regulatory guidance provided

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<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Id.

under Rule G-17.<sup>18</sup> The MSRB also stated that proposed amended Rule G-21 would enhance Rule G-21's fair dealing provisions by requiring that:

- an advertisement be based on principles of fair dealing and good faith, be fair and balanced and provide a sound basis for evaluating the facts about any particular municipal security or type of municipal security, industry, or service, and that a dealer not omit any material fact or qualification if such omission, in light of the context presented, would cause the advertisement to be misleading;
- an advertisement not contain any false, exaggerated, unwarranted, promissory or misleading statement or claim;
- a dealer limit the types of information placed in a legend or footnote of an advertisement so as to not inhibit a customer's or potential customer's understanding of the advertisement;
- an advertisement provide statements that are clear and not misleading within the context that they are made, that the advertisement provide a balanced treatment of the benefits and risks, and that the advertisement is consistent with the risks inherent to the investment;
- a dealer consider the audience to which the advertisement will be directed and that the advertisement provide details and explanations appropriate to that audience;
- an advertisement not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast; and
- an advertisement not include a testimonial unless it satisfies certain conditions.<sup>19</sup>

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<sup>18</sup> Id.

<sup>19</sup> Id.

The MSRB stated that, by so doing, proposed amended Rule G-21(a)(iii) would promote regulatory consistency with FINRA Rule 2210(d)(1)'s and FINRA Rule 2210(d)(6)'s content standards for advertisements.<sup>20</sup> The MSRB stated that the other topics and standards addressed by other provisions of FINRA Rule 2210(d) have not been historically addressed by Rule G-21 and/or may not be relevant to the municipal securities market, and the MSRB did not include those topics in the MSRB's request for comment on draft amendments to Rule G-21.<sup>21</sup>

Proposed amended Rule G-21 also would expand upon the guidance provided by Rule A-12, on registration. Rule A-12(e) permits a dealer to state that it is MSRB registered in its advertising, including on its website.<sup>22</sup> Proposed amended Rule G-21(a)(iii)(H) would continue to permit a dealer to state that it is MSRB registered.<sup>23</sup> However, the MSRB noted that proposed amended Rule G-21(a)(iii)(H) would provide that a dealer shall only state in an advertisement that it is MSRB registered as long as, among other things, the advertisement complies with the applicable standards of all other MSRB rules and neither states nor implies that the MSRB endorses, indemnifies, or guarantees the dealer's business practices, selling methods, the type of security offered, or the security offered.<sup>24</sup> The MSRB stated that, by so doing, the proposed rule change would promote regulatory consistency with FINRA Rule 2210(e)'s analogous limitations

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<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> Id.

on the use of FINRA’s name and any other corporate name owned by FINRA.<sup>25</sup>

b. General Standards of Proposed Rule G-21

The MSRB stated that proposed amended Rule G-21(a)(iv), (b)(ii), and (c)(ii) would promote regulatory consistency among Rule G-21’s general standard for advertisements, standard for professional advertisements, and standard for product advertisements (collectively, the “general standards”) and the content standards of FINRA Rule 2210(d). Currently, the MSRB stated, Rule G-21’s general standards prohibit a dealer, in part, from publishing or disseminating material that is “materially false or misleading.”<sup>26</sup> Proposed amended Rule G-21 would replace the phrase “materially false or misleading” with “any untrue statement of material fact” as well as add “or is otherwise false or misleading.” The MSRB stated that it believes that this harmonization with FINRA Rule 2210(d) would be consistent with Rule G-21’s current general standards and would ensure consistent regulation between similar regulated entities.<sup>27</sup>

c. Reconcile MSRB Rule G-21 Definition of “Form Letter” with FINRA Rule 2210 Definition of “Correspondence”

Currently, the MSRB stated, Rule G-21(a)(ii) defines a “form letter,” in part, as a written letter distributed to 25 or more persons.<sup>28</sup> The MSRB stated that the analogous provision in FINRA’s communications with the public rule to Rule G-21(a)(ii) is FINRA Rule 2210’s definition of correspondence.<sup>29</sup> The MSRB noted that FINRA Rule 2210(a)(2)’s definition of

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<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> Id.

<sup>29</sup> Id.

correspondence, however, defines “correspondence,” in part, as written communications distributed to 25 or fewer retail investors.<sup>30</sup> The MSRB stated that it understands that the one-person difference between Rule G-21 and FINRA Rule 2210 has created confusion and compliance challenges for dealers.<sup>31</sup> The MSRB stated that, to respond to this concern, proposed amended Rule G-21(a)(ii) would eliminate that one-person difference, and, therefore, under proposed amended Rule G-21, a form letter, in part, would be defined as a written letter distributed to more than 25 persons.<sup>32</sup>

Supplementary Material .03 to proposed amended Rule G-21 would explain the term “person” when used in the context of a form letter under Rule G-21(a)(ii).<sup>33</sup> Specifically, the MSRB noted, Supplementary Material .03 would explain that the number of “persons” is determined for the purposes of a response to a request for proposal (“RFP”), request for qualifications (“RFQ”) or similar request at the entity level.<sup>34</sup>

d. Technical Amendment to Rule G-21

In the Notice of Filing, the MSRB stated that proposed amended Rule G-21 would contain a technical amendment to Rule G-21(e).<sup>35</sup> The MSRB also stated that, to streamline and clarify the MSRB’s rules, the proposed rule change would delete references to the Financial Industry Regulatory Authority, Inc. in Rule G-21(e)(ii)(F) and Rule G-21(e)(vi) because, for

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<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> Id.

example, reference to any applicable regulatory body is sufficient and no limitation to any more narrow subset is intended.<sup>36</sup>

B. Proposed Rule G-40

The MSRB stated that proposed Rule G-40, similar to Rule G-21, would set forth general provisions, address professional advertisements and require principal approval in writing for advertisements by municipal advisors before their first use.<sup>37</sup> However, the MSRB noted that proposed Rule G-40 would not address product advertisements, as that term is defined in Rule G-21.<sup>38</sup> The MSRB also noted that proposed Rule G-40(a) would define the terms advertisement, form letter and municipal advisory client, and would provide content and general standards for advertisements by a non-solicitor or a solicitor municipal advisor.<sup>39</sup>

a. Definitions

According to the MSRB, the term “advertisement” in proposed Rule G-40(a)(i) would parallel the term “advertisement” in proposed amended Rule G-21(a)(i), but would be tailored for municipal advisors.<sup>40</sup> The MSRB stated that an advertisement would refer, in part, to any promotional literature distributed or made generally available to municipal entities, obligated persons, municipal advisory clients, or the public by a municipal advisor.<sup>41</sup> Further, the MSRB stated that an advertisement would include the promotional literature used by a solicitor

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<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Id.

municipal advisor to solicit a municipal entity or obligated person on behalf of the solicitor municipal advisor's municipal advisory client.<sup>42</sup>

In addition, the MSRB stated that, similar to proposed amended Rule G-21(a)(i), proposed Rule G-40(a)(i) would exclude certain types of documents from the definition of advertisement.<sup>43</sup> Under proposed Rule G-40, the documents that would be excluded would be preliminary official statements, official statements, preliminary prospectuses, prospectuses, summary prospectuses or registration statements.<sup>44</sup> According to the MSRB, these exclusions recognize the differences between the role of a dealer under Rule G-21 and the role of a solicitor municipal advisor under proposed Rule G-40.<sup>45</sup> The MSRB also stated that, as with Rule G-21, an abstract or summary of those documents or other such similar documents prepared by the municipal advisor would be considered an advertisement.<sup>46</sup> As an example, the MSRB stated that a municipal advisor may assist with the preparation of an official statement.<sup>47</sup> The MSRB also stated that an official statement would be excluded from the definition of an advertisement.<sup>48</sup> According to the MSRB, under proposed Rule G-40(a)(i), the municipal advisor that assists with the preparation of an official statement generally would not be assisting with an advertisement

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<sup>42</sup> Id.

<sup>43</sup> Id.

<sup>44</sup> Id.

<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> Id.

<sup>48</sup> Id.

and the municipal advisor’s work on the official statement generally would not be subject to the requirements of proposed Rule G-40.<sup>49</sup>

The term “form letter” in proposed Rule G-40 would be identical to the definition of that term set forth in proposed amended Rule G-21(a)(ii).<sup>50</sup> A form letter would be defined as any written letter or electronic mail message distributed to more than 25 persons within any period of 90 consecutive days.<sup>51</sup>

Proposed Rule G-40, similar to proposed amended Rule G-21, would include Supplementary Material .01 to clarify the number of “persons” for a response to an RFP, RFQ or similar request, when used in the context of a form letter under proposed Rule G-40(a)(ii), is determined at the entity level.<sup>52</sup>

Proposed Rule G-40(a)(iii), unlike Rule G-21, includes the definition of the term “municipal advisory client.”<sup>53</sup> The MSRB stated that the definition of municipal advisory client would be substantially similar in all material respects to the definition of that term as set forth in the recent amendments to Rule G-8, effective October 13, 2017, to address municipal advisory client complaint recordkeeping.<sup>54</sup> The MSRB stated that the definition of municipal advisory

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<sup>49</sup> Id.

<sup>50</sup> Id.

<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup> Id.

<sup>54</sup> Id.

client would account for differences in the activities of non-solicitor and solicitor municipal advisors.<sup>55</sup>

b. Proposed Rule G-40—Content Standards

The MSRB stated that proposed Rule G-40(a)(iv) sets forth content standards for advertisements.<sup>56</sup> According to the MSRB, those content standards would be substantially similar in all material respects to the content standards set forth in proposed amended Rule G-21.<sup>57</sup> The MSRB noted that proposed Rule G-40 would replace certain terms used in proposed amended Rule G-21 with terms more applicable to municipal advisors.<sup>58</sup> The MSRB stated that it believes that incorporating content standards for advertisements into proposed Rule G-40 would ensure consistent regulation between regulated entities in the municipal securities market, as well as promote regulatory consistency between dealer municipal advisors and non-dealer municipal advisors.<sup>59</sup>

As further described by the MSRB in the Notice of Filing, proposed Rule G-40 would require that:

- an advertisement be based on the principles of fair dealing and good faith, be fair and balanced and provide a sound basis for evaluating the municipal security or type of municipal security, municipal financial product, industry, or service and that a municipal advisor not omit any material fact or qualification if such

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<sup>55</sup> Id.

<sup>56</sup> Id.

<sup>57</sup> Id.

<sup>58</sup> Id.

<sup>59</sup> Id.

omission, in light of the context presented, would cause the advertisement to be misleading;

- an advertisement not contain any false, exaggerated, unwarranted, promissory or misleading statement or claim;
- a municipal advisor limit the types of information placed in a legend or footnote of an advertisement so as to not inhibit a municipal advisory client's or potential municipal advisory client's understanding of the advertisement;
- an advertisement provide statements that are clear and not misleading within the context that they are made, that the advertisement provides a balanced treatment of risks and potential benefits, and that the advertisement is consistent with the risks inherent to the municipal financial product or the issuance of the municipal security;
- a municipal advisor consider the audience to which the advertisement will be directed and that the advertisement provide details and explanations appropriate to that audience;
- an advertisement not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast;  
and
- an advertisement not refer, directly or indirectly, to any testimonial of any kind concerning the municipal advisor or concerning the advice, analysis, report or other service of the municipal advisor.<sup>60</sup>

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Id.

The MSRB also stated in the Notice of filing that, by so doing, proposed Rule G-40's content generally would promote regulatory consistency with proposed amended Rule G-21.<sup>61</sup>

However, unlike proposed amended Rule G-21, proposed Rule G-40 would prohibit a municipal advisor from using a testimonial in an advertisement.<sup>62</sup> The MSRB stated that this prohibition is based in part on the fiduciary duty that a non-solicitor municipal advisor (as opposed to a dealer) owes its municipal entity clients.<sup>63</sup> The MSRB noted that investment advisers also are subject to fiduciary duty standards.<sup>64</sup>

The MSRB stated that it believes that a testimonial in an advertisement by a municipal advisor would present significant issues, including the ability to be misleading.<sup>65</sup> The MSRB noted that in adopting Rule 206(4)-1 under the Investment Advisers Act of 1940, as amended (the "Advisers Act"), the rule that applies to advertisements by registered investment advisers, the SEC found that the use of testimonials in advertisements by an investment adviser was misleading.<sup>66</sup> The MSRB stated that Rule 206(4)-1 provides that the use of a testimonial by an investment adviser would constitute a fraudulent, deceptive, or manipulative act, practice, or course of action.<sup>67</sup> The MSRB stated that it believes prohibiting the use of testimonials by municipal advisors under proposed Rule G-40 would protect municipal entities and obligated

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<sup>61</sup> Id.

<sup>62</sup> Id.

<sup>63</sup> Id.

<sup>64</sup> Id.

<sup>65</sup> Id.

<sup>66</sup> Id.

<sup>67</sup> Id.

persons, help ensure consistent regulation between analogous regulated entities, and help ensure a level playing field between municipal advisors/investment advisers and other municipal advisors.<sup>68</sup>

The MSRB stated that, apart from the content standards discussed above, proposed Rule G-40(a)(iv)(H), similar to proposed amended Rule G-21(a)(iii)(H), also would expand upon the guidance provided by Rule A-12, on registration.<sup>69</sup> Rule A-12(e) permits a municipal advisor to state that it is MSRB registered in its advertising, including on its website. Proposed Rule G-40(a)(iv)(H) would continue to permit a municipal advisor to state that it is MSRB registered, but it would also provide that a municipal advisor shall only state in an advertisement that it is MSRB registered as long as, among other things, the advertisement complies with the applicable standards of all other MSRB rules and neither states nor implies that the MSRB endorses, indemnifies, or guarantees the municipal advisor's business practices, services, skills, or any specific municipal security or municipal financial product.<sup>70</sup>

c. Proposed Rule G-40—General Standard for Advertisements

In the Notice of Filing, the MSRB stated that proposed Rule G-40(a)(v) would set forth a general standard with which a municipal advisor must comply for advertisements.<sup>71</sup> The MSRB stated that that standard would require, in part, that a municipal advisor not publish or disseminate, or cause to be published or disseminated, any advertisement relating to municipal securities or municipal financial products that the municipal advisor knows or has reason to

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<sup>68</sup> Id.

<sup>69</sup> Id.

<sup>70</sup> Id.

<sup>71</sup> Id.

know contains any untrue statement of material fact or is otherwise false or misleading.<sup>72</sup> The MSRB believes that the knowledge standard as the general standard for advertisements is appropriate.<sup>73</sup> According to the MSRB, proposed Rule G-40 is similar to proposed amended Rule G-21(a)(iv) in all material respects, except proposed Rule G-40 substitutes “municipal advisor” for the term “dealer” and, consistent with Section 15B(e)(4) of the Act, applies with regard to municipal financial products in addition to municipal securities.<sup>74</sup>

d. Proposed Rule G-40—Professional Advertisements

Proposed Rule G-40(b) would define the term “professional advertisement,” and would provide the standard for such advertisements. As defined in proposed Rule G-40(b)(i), a professional advertisement would be an advertisement “concerning the facilities, services or skills with respect to the municipal advisory activities of the municipal advisor or of another municipal advisor.” Proposed Rule G-40(b)(ii) would provide, in part, that a municipal advisor shall not publish or disseminate any professional advertisement that contains any untrue statement of material fact or is otherwise false or misleading.

In the Notice of Filing, the MSRB stated that the strict liability standard for professional advertisements in proposed Rule G-40(b)(ii) is consistent with the MSRB’s long-standing belief that a regulated entity should be strictly liable for an advertisement about its facilities, skills, or services, and that a knowledge standard is not appropriate.<sup>75</sup> The MSRB also stated that it has held this belief since it developed its advertising rules for dealers over 40 years ago. According

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<sup>72</sup> Id.

<sup>73</sup> Id.

<sup>74</sup> Id.

<sup>75</sup> Id.

to the MSRB, proposed Rule G-40(b) would be substantially similar in all material respects to proposed amended Rule G-21(b).<sup>76</sup>

e. Proposed Rule G-40—Principal Approval

Proposed Rule G-40(c) would require that each advertisement that is subject to proposed Rule G-40 be approved in writing by a municipal advisor principal—as defined under MSRB Rule G-3(e)(i)—before its first use. Proposed Rule G-40(c) also would require that the municipal advisor keep a record of all such advertisements. The MSRB stated that proposed Rule G-40(c) is similar in all material respects to proposed amended Rule G-21(f).<sup>77</sup> The MSRB also stated that if the SEC approves the proposed rule change, municipal advisors should update their supervisory and compliance procedures required by Rule G-44, on supervisory and compliance obligations of municipal advisors, to address compliance with proposed Rule G-40(c).<sup>78</sup>

f. Proposed Rule G-40—Product Advertisements

Proposed Rule G-40 would omit the provisions set forth in Rule G-21 regarding product advertisements, new issue product advertisements, and municipal fund security product advertisements. The MSRB stated that it understands, at this juncture, that municipal advisors most likely do not prepare such advertisements, as municipal advisors generally advertise their municipal advisory services and not products.<sup>79</sup>

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<sup>76</sup> Id.

<sup>77</sup> Id.

<sup>78</sup> Id.

<sup>79</sup> Id.

### III. Summary of Comments Received and MSRB's Responses to Comments

As noted previously, the Commission received four comment letters in response to the Notice of Filing. The MSRB responded to the comment letters on the Notice of Filing in its Response Letter.<sup>80</sup>

#### A. Comments Received Regarding Proposed Amended Rule G-21

In response to the Notice of Filing, two commenters primarily addressed proposed Rule G-21.<sup>81</sup> Specifically, these commenters focused on (i) proposed amended Rule G-21's consistency with FINRA Rule 2210, (ii) the provision of additional exclusions from the definition of an "advertisement," (iii) the allowance of hypothetical illustrations in advertisements, (iv) the provision of jurisdictional guidance under Rule G-21 relating to dealer/municipal advisors, and (v) the economic analysis the MSRB provided regarding proposed amended Rule G-21.<sup>82</sup> Both commenters recommended that the Commission disapprove the proposed rule change.<sup>83</sup>

##### a. Request for Additional Amendments to Proposed Amended Rule G-21 to Promote Consistency with FINRA Rule 2210

Commenters supported proposed amended Rule G-21's promotion of regulatory consistency with FINRA Rule 2210, but believed that the amendments should be further harmonized with FINRA Rule 2210 by adopting that rule's (i) definition of "communications"

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<sup>80</sup> See Response Letter.

<sup>81</sup> See BDA Letter and SIFMA Letter.

<sup>82</sup> Id.

<sup>83</sup> Id.

and the distinctions in FINRA Rule 2210 that follow from that definition<sup>84</sup> and (ii) provisions on the use of testimonials,<sup>85</sup> or by incorporating FINRA Rule 2210 by reference into Rule G-21.<sup>86</sup> Further, to promote regulatory consistency among proposed amended Rule G-21 and proposed Rule G-40 and FINRA Rule 2210, commenters suggested that the definitions and product advertisement and professional advertisement sections could be deleted from proposed amended Rule G-21 and proposed Rule G-40.<sup>87</sup>

i. Proposed Amended Rule G-21 Definition of “Communication”

BDA and SIFMA suggested that the MSRB go beyond the MSRB’s stated purpose of the proposed amendments, i.e., to promote, in part, regulatory consistency among proposed amended Rule G-21 and the advertising rules of other financial regulators. Instead, BDA and SIFMA suggested that the MSRB “harmonize” Rule G-21 with FINRA Rule 2210 by adopting FINRA Rule 2210’s definition of “communications” and the distinctions in the rule that follow from that definition. BDA stated that “[i]n order for harmonization of MSRB rules with FINRA rules to be successful, MSRB must follow this general framework for MSRB Rule G-21.” Further, SIFMA commented that the “MSRB has not justified the need for differences from the FINRA advertising rule.” In particular, commenters favored the harmonization with FINRA Rule 2210’s communications definition because institutional communications would no longer be subject to pre-approval by a principal. BDA and SIFMA submitted that, if the MSRB were to do so, dealers then could apply common approval processes for institutional communications

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<sup>84</sup> Id.

<sup>85</sup> Id.

<sup>86</sup> See BDA Letter.

<sup>87</sup> See BDA Letter and SIFMA Letter.

across all asset classes. Alternatively, SIFMA suggested that, to provide even greater clarity, the MSRB revise proposed amended Rule G-21(a)(i) and proposed Rule G-40(a)(i) to add the term “otherwise” before the phrase “made generally available to municipal entities, obligated persons, municipal advisory clients or the public . . .”<sup>88</sup> BDA stated that principal pre-approval of advertisements imposes “completely unnecessary burdens on dealers” and that “[i]f MSRB has a rule that applies different definitions and different sets of responsibilities to municipal securities and does not differentiate between communications sent to retail and institutional customers, it will have created a new and unnecessarily increased regulatory burden along with considerable confusion for broker-dealers.”<sup>89</sup>

In response, the MSRB stated that it believes that BDA’s and SIFMA’s comments fail to recognize the statutory principles set forth in the Act that underlie the differences between FINRA’s communications rule and the MSRB’s advertising rule.<sup>90</sup> To explain the differences between the MSRB’s advertising rule and FINRA’s communication rule, the MSRB provided a description of the statutory authority granted by the Act to the MSRB and FINRA to promulgate rules to regulate its registrants and members, respectively, and provided a recitation of differences between the corporate and municipal securities market that, the MSRB stated, necessitate differences between FINRA’s communication rule and the MSRB’s advertising rules.<sup>91</sup> The MSRB noted that, unlike FINRA members, MSRB registrants are not “members”

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<sup>88</sup> See SIFMA Letter.

<sup>89</sup> See BDA Letter.

<sup>90</sup> See Response Letter.

<sup>91</sup> Id.

of the MSRB.<sup>92</sup> Rather, the MSRB stated, a dealer or municipal advisor becomes subject to MSRB rules based on the dealer's or municipal advisor's activities; those activities may require the dealer or municipal advisor to register with the SEC and the MSRB.<sup>93</sup> The MSRB further stated that the corporate securities markets and municipal securities markets are different – if only because, unlike with a corporate bond, interest on a municipal security may not be subject to federal income tax.<sup>94</sup>

The MSRB also stated that because the Act limits the MSRB's jurisdiction to the municipal securities market, the MSRB's rulemaking authority also is limited, in part, to dealers effecting transactions in municipal securities and advice provided to or on behalf of municipal entities by such dealers, and by municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by dealers and municipal advisors.<sup>95</sup> The MSRB also noted that, similar to FINRA's rules, the MSRB's rules are designed to protect investors and the public interest.<sup>96</sup> However, the MSRB noted that, unlike FINRA's rules, Section 15B of the Act requires that the MSRB's rules also be designed to protect municipal entities and obligated persons.<sup>97</sup> The MSRB further stated that Section 15B of the Act does not provide the MSRB with the authority to enforce its own

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<sup>92</sup> Id.

<sup>93</sup> Id.

<sup>94</sup> Id.

<sup>95</sup> Id.

<sup>96</sup> Id.

<sup>97</sup> Id.

rules.<sup>98</sup> Rather, the MSRB noted, the MSRB's rules are enforced by other financial regulators, including FINRA and the SEC.<sup>99</sup>

The MSRB stated that, in furtherance of the intent of Congress that the MSRB develop a prophylactic framework of regulation for the municipal securities industry, the MSRB developed its fair practice rules, including its advertising rules, to codify basic standards of fair and ethical business conduct for municipal securities professionals.<sup>100</sup> The MSRB stated that its advertising rules serve an important function to help prevent fraud from entering the marketplace and to protect investors, particularly retail investors, consistent with the MSRB's mission to protect municipal securities investors.<sup>101</sup> The MSRB further stated that, since 1978, when the MSRB first adopted its advertising rules, the MSRB has based its advertising regulation on the MSRB's fair practice principles and the important supervisory function of principal pre-approval along with liability provisions and document retention requirements to regulate advertisements by dealers.<sup>102</sup> By so doing, the MSRB stated, the MSRB's regulatory regime in general relied on the firm and its policies and procedures related to the supervision of an advertisement, with the degree of liability for the advertisement based on advertisement type.<sup>103</sup> The MSRB added that, consistent with the MSRB's reliance on other financial regulators to enforce MSRB rules, a dealer neither files any of its advertisements with, nor

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<sup>98</sup> Id.

<sup>99</sup> Id.

<sup>100</sup> Id.

<sup>101</sup> Id.

<sup>102</sup> Id.

<sup>103</sup> Id.

receives a substantive review of any of those advertisements, by the MSRB.<sup>104</sup> Rather, according to the MSRB, the dealer must retain records relating to the advertisement, and those records must be available for inspection by other financial regulators.<sup>105</sup> Thus, the MSRB stated, MSRB’s advertising regulations in general draw a sharp distinction from FINRA Rule 2210.<sup>106</sup>

In response to BDA’s comment that having different definitions and different sets of responsibilities imposed by proposed amended Rule G-21 and FINRA Rule 2210 would result in “new and unnecessarily increased regulatory burden along with considerable confusion for broker-dealers....”, the MSRB stated that the requirements in proposed amended Rule G-21, however, are not newly proposed and that they have been, and continue to be, core principles on which the MSRB’s advertising regulation is based.<sup>107</sup> The MSRB added that Rule G-21 currently requires that a municipal securities principal or general securities principal approve each advertisement in writing prior to first use.<sup>108</sup> The MSRB stated that it continues to believe that it is an important supervisory function to have a principal pre-approve an advertisement regardless of the intended recipient of the advertisement along with the liability provisions associated with the advertisement type.<sup>109</sup> The MSRB also stated that supervisory pre-approval, as opposed to submission of an advertisement and substantive review of an advertisement by MSRB staff, serves as an important investor protection in what has been recognized as a

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<sup>104</sup> Id.

<sup>105</sup> Id.

<sup>106</sup> Id.

<sup>107</sup> Id.

<sup>108</sup> Id.

<sup>109</sup> Id.

municipal bond market that “embraces a multi-faceted, complex array of state and local public debt.”<sup>110</sup> The MSRB stated that it has determined not to depart from the longstanding principles on which the MSRB has based its advertising regulations.<sup>111</sup>

ii. Use of Testimonials under Proposed Amended Rule G-21

BDA urged the MSRB to permit testimonials in dealer advertising to better harmonize Rule G-21 with FINRA Rule 2210.<sup>112</sup> BDA stated that to do otherwise would result in confusion and an inconsistent “patchwork” approach to make portions of FINRA rules applicable to dealers under MSRB rules.<sup>113</sup> The MSRB stated that proposed amended Rule G-21, in fact, would permit dealer advertisements to contain testimonials under the same conditions as are currently set forth in FINRA Rule 2210(d)(6).<sup>114</sup>

iii. Incorporation of FINRA Rule 2210 by Reference into Proposed Amended Rule G-21

SIFMA commented that, while it supported the MSRB’s efforts to level the playing field between dealers and municipal advisors, the better way to level that playing field, as well as to promote harmonization with FINRA’s rules, is for the MSRB to incorporate FINRA Rule 2210 by reference into the MSRB’s rules.<sup>115</sup> Nevertheless, SIFMA did not propose that the MSRB

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Id.

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Id.

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See BDA Letter.

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Id.

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See Response Letter.

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See SIFMA Letter.

incorporate FINRA Rule 2210 in its entirety by reference into Rule G-21.<sup>116</sup> Rather, SIFMA submitted that certain provisions of FINRA Rule 2210(c) relating to the filing of advertisements with FINRA and the review procedures for those advertisements were unnecessary and burdensome and should not be included.<sup>117</sup> Further, SIFMA recognized that there may be a need for certain MSRB regulation of dealer and municipal advisor advertising.<sup>118</sup> SIFMA stated that “[w]ith respect to advertising or public communications for most municipal securities products (except for municipal advisory business and municipal fund securities), we feel there is no compelling reason to establish a different rule set than that which exists under FINRA Rule 2210.”<sup>119</sup>

The MSRB responded to SIFMA’s comments by stating that the differences between FINRA’s and the MSRB’s statutory mandates account for certain of the differences between FINRA’s communications rules and the MSRB’s advertising rule, and that commenters’ suggestions fail to recognize the importance of those differences.<sup>120</sup> The MSRB stated that FINRA’s communications rules regulate the activities of its members in the broader corporate securities markets, where the securities “are relatively homogenous within major categories.”<sup>121</sup> Further, the MSRB stated, FINRA enforces its own rules.<sup>122</sup> By contrast, the MSRB stated, the

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<sup>116</sup> Id.

<sup>117</sup> Id.

<sup>118</sup> Id.

<sup>119</sup> Id.

<sup>120</sup> See Response Letter.

<sup>121</sup> Id.

<sup>122</sup> Id.

MSRB's statutory mandate is limited to the regulation of dealers and municipal advisors in the municipal securities market, a market that embraces a multi-faceted, complex array of state and local public debt as well as municipal fund securities, such as interests in 529 savings plans.<sup>123</sup> Moreover, the MSRB reiterated that it does not enforce its rules; other financial regulators enforce MSRB rules.<sup>124</sup>

The MSRB further noted that, as it had previously discussed in the Notice of Filing, Rule G-21 is one of the MSRB's core fair practice rules that has been in effect since 1978.<sup>125</sup> In proposing those rules, the MSRB stated the purpose of the fair practice rules is to codify basic standards of fair and ethical business conduct for municipal securities professionals.<sup>126</sup> The MSRB stated that it has based its advertising rules on the MSRB's fair practice principles and the important supervisory function of principal pre-approval along with liability provisions to regulate advertisements by dealers.<sup>127</sup> The MSRB stated that it believes that it would not fully meet its responsibilities under the Act to promote a fair and efficient municipal market with appropriately tailored regulation if it were to simply incorporate an advertising rule designed for other markets, as suggested by SIFMA, particularly when advertising regulation has been the

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<sup>123</sup> Id.

<sup>124</sup> Id.

<sup>125</sup> Id.

<sup>126</sup> See Response Letter and Notice of Filing.

<sup>127</sup> See Response Letter.

subject of a long-standing MSRB fair practice rule to help prevent fraud from entering the municipal securities market.<sup>128</sup>

Further, the MSRB noted that if the MSRB were to incorporate FINRA Rule 2210 by reference, and if FINRA or its staff were to provide an interpretation of FINRA Rule 2210, the MSRB could appear to be adopting that interpretation without considering the interpretation's ramifications for the special characteristics of the municipal securities market. The MSRB stated that, consistent with its statutory mandate, FINRA adopts rules for the broader corporate securities markets that include the corporate equity and debt markets.<sup>129</sup> The MSRB further stated that FINRA's rules are not tailored to the unique regulatory needs of the municipal securities market.<sup>130</sup> The MSRB stated that, at a minimum, if it were to incorporate FINRA Rule 2210 by reference, the MSRB would have to consider the ramifications of any future interpretations of FINRA Rule 2210 for the municipal securities market.<sup>131</sup>

In addition, the MSRB stated that there are municipal securities dealers that are not members of FINRA; those municipal securities dealers should not necessarily be expected to keep abreast of FINRA rule interpretations.<sup>132</sup> The MSRB stated that after carefully considering SIFMA's suggestions, including the recognition of the important differences between the

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128 Id.

129 Id.

130 Id.

131 Id.

132 Id.

municipal securities market and the corporate securities market, the MSRB determined not to incorporate FINRA Rule 2210 by reference into Rule G-21.<sup>133</sup>

iv. Definition of standards for product and professional advertisements

BDA commented that the definitions of standards for product advertisements and professional advertisements were “made redundant by the inclusion of the proposed general and content standards of proposed G-21 and G-40[,]” and that “these provisions should be deleted to signify that these types of communications are covered by the general and content standards of the proposed rule.”<sup>134</sup>

In response, the MSRB stated that although the provisions in proposed amended Rule G-21 and proposed Rule G-40 are analogous to the current provisions in Rule G-21, there are differences in those provisions.<sup>135</sup> For example, the MSRB noted, Rule G-21(b) contains a strict liability standard relating to the publication or dissemination of professional advertisements.<sup>136</sup> The MSRB stated that since it first proposed Rule G-21, the MSRB has believed that “a strict standard of responsibility for securities professionals [is necessary] to assure that their advertisements are accurate.”<sup>137</sup> The MSRB stated that it has based its advertising regulation on the MSRB’s long-standing fair practice principles and the important supervisory function of principal pre-approval along with liability and document retention provisions to regulate

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<sup>133</sup> Id.

<sup>134</sup> See BDA Letter.

<sup>135</sup> See Response Letter.

<sup>136</sup> Id.

<sup>137</sup> See Response Letter and Notice of Filing.

advertisements by dealers.<sup>138</sup> The MSRB stated that, after careful consideration, it determined at this time not to delete the standards for product and professional advertisements.<sup>139</sup>

b. Potential Additional Exclusions from the Definition of “Advertisement”

Commenters suggested additional exclusions from the definition of an advertisement related to private placement memoranda<sup>140</sup> and responses to RFPs or RFQs.<sup>141</sup>

i. Private placement memoranda and limited offering memoranda

BDA and SIFMA commented that, as part of its harmonization effort, the MSRB should exclude private placement memoranda and limited offering memoranda from the definition of advertisement in proposed amended Rule G-21.<sup>142</sup> SIFMA suggested that such harmonization would be consistent with the exception from FINRA’s content standards found in FINRA Rule 2210(d)(9).<sup>143</sup> SIFMA also suggested that private placement memoranda and limited offering memoranda be excluded from the definition of an “advertisement” in proposed Rule G-40.<sup>144</sup> BDA noted that “private placement memoranda and limited offering memoranda are frequently used as offering memoranda and thus should be excluded alongside preliminary offering statements [from the definition of an “advertisement”].”<sup>145</sup>

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<sup>138</sup> See Response Letter.

<sup>139</sup> Id.

<sup>140</sup> See BDA Letter and SIFMA Letter.

<sup>141</sup> Id.

<sup>142</sup> Id.

<sup>143</sup> See SIFMA Letter.

<sup>144</sup> Id.

<sup>145</sup> See BDA Letter.

The MSRB stated that it understands BDA’s comment as follows: because private placement memoranda and limited offering memoranda are used as a preliminary offering statement would be used, a private placement memorandum and a limited offering memorandum should be excluded from the definition of an “advertisement” on the same basis that a preliminary offering statement is excluded from that definition.<sup>146</sup> The MSRB, however, stated that after careful consideration it determined not to exclude private placement memoranda and limited offering memoranda from the definition of an advertisement.<sup>147</sup> The MSRB stated that the purpose of the proposed rule change, in part, was not to fully harmonize Rule G-21 with FINRA Rule 2210, as suggested by commenters.<sup>148</sup> Rather, the purpose of the proposed rule change, in part, was to promote regulatory consistency among the advertising rules of other financial regulators.<sup>149</sup> The MSRB also noted that FINRA Rule 2210 does not provide a similar exclusion.<sup>150</sup> The MSRB added that, for almost 40 years, it has limited the exclusions to the definition of an advertisement to issuer prepared documents that are widely disseminated.<sup>151</sup> The MSRB stated that, similarly, FINRA Rule 2210 does not exclude a private placement memorandum from the definition of a “communication.”<sup>152</sup> Rather, the MSRB stated,

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<sup>146</sup> See Response Letter.

<sup>147</sup> Id.

<sup>148</sup> Id.

<sup>149</sup> Id.

<sup>150</sup> Id.

<sup>151</sup> Id.

<sup>152</sup> Id.

FINRA Rule 2210 provides limited exclusions from FINRA Rule 2210(c)'s filing requirements and from Rule 2210(d)'s content standards for prospectuses, preliminary prospectuses, fund profiles, offering circulars and similar documents that have been filed with the SEC or any state and similar offering documents concerning securities offerings that are exempt from SEC and state registration requirements and free writing prospectuses that are exempt from filing with the SEC.<sup>153</sup> The MSRB stated that the exclusions from FINRA Rule 2210 avoid regulatory duplication.<sup>154</sup> Moreover, the MSRB noted, SIFMA stated that dealers or municipal advisors may have played a role in preparing the private placement memoranda or limited offering memoranda.<sup>155</sup> The MSRB stated that FINRA clearly has stated that in such cases, FINRA Rule 2210 would apply to dealers.<sup>156</sup>

The MSRB stated that it continues to believe that it can best fulfill its mission to protect investors, municipal entities, obligated persons, and the public interest by retaining the narrow exclusions from the definition of an advertisement that are currently set forth in Rule G-21 and that would be set forth in proposed Rule G-40.<sup>157</sup> In so doing, the MSRB stated that it believes, consistent with its regulatory charge and mission, that it is best able to prevent potential fraud from entering the municipal securities market.<sup>158</sup> Thus, the MSRB stated that it has determined,

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<sup>153</sup> Id.

<sup>154</sup> Id.

<sup>155</sup> Id.

<sup>156</sup> Id.

<sup>157</sup> Id.

<sup>158</sup> Id.

consistent with FINRA Rule 2210, not to exclude those materials from the scope of proposed amended Rule G-21.<sup>159</sup>

BDA also commented that, “[a]s part of its harmonization effort, the MSRB should exclude [from the scope of Rule G-21] materials that are comparable to offering materials that accompany preliminary official statements, such as investor roadshow presentations and other similar materials information [sic].”<sup>160</sup>

In response, the MSRB stated that an investor road show may be a written offer that contains a presentation about an offering by one or more members of the issuer’s management and includes discussion of one or more of the issuer, such management and the securities being offered.<sup>161</sup> The MSRB further stated that a written investor road show in general is a free writing prospectus that is not required to be filed with the SEC.<sup>162</sup> The MSRB stated that it recognizes that an investor road show may be used in connection with a private placement, as well as to accompany a preliminary official statement provided to institutional investors, and, in some cases, the investor road show may be made available to retail investors in municipal securities.<sup>163</sup>

ii. Response to an RFP or RFQ

BDA and SIFMA commented that the MSRB should amend Rule G-21 (BDA, SIFMA, and NAMA also made similar comments with respect to proposed Rule G-40) to exclude a

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<sup>159</sup> Id.

<sup>160</sup> See BDA Letter.

<sup>161</sup> See Response Letter.

<sup>162</sup> Id.

<sup>163</sup> Id.

response to an RFP or RFQ from the definition of an advertisement.<sup>164</sup> Commenters submitted that it was not appropriate for the MSRB to regulate responses to requests for proposals or qualifications the same way that the MSRB regulates “retail communications” – i.e., possibly requiring principal approval in writing before sending the response to the RFP or RFQ to an issuer.<sup>165</sup>

The MSRB stated that it agrees, and provided supplementary material in the proposed rule change to provide clarification to proposed amended Rule G-21’s definition of a “form letter”.<sup>166</sup> The MSRB stated that it believes that a response to an RFP or RFQ would generally not be within the definition of an advertisement primarily because such responses would not meet the definition of a form letter in proposed amended Rule G-21(a)(ii) and proposed Rule G-40(a)(ii).<sup>167</sup> The MSRB stated that Supplementary Material .03 to proposed amended Rule G-21 and Supplementary Material .01 to proposed Rule G-40 explain that an entity that receives a response to an RFP, RFQ or similar request would count as one “person” for the purposes of the definition of a form letter no matter the number of employees of the entity who may review the response.<sup>168</sup> Further, the MSRB stated that 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.<sup>169</sup> The MSRB noted that, nevertheless, such responses are subject to MSRB Rule G-17, on

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<sup>164</sup> See BDA Letter and SIFMA Letter.

<sup>165</sup> Id.

<sup>166</sup> See Response Letter.

<sup>167</sup> Id.

<sup>168</sup> Id.

<sup>169</sup> Id.

conduct of municipal securities and municipal advisory activities.<sup>170</sup> The MSRB added that, given the supplementary material contained in proposed amended Rule G-21 and proposed Rule G-40, the MSRB believes that no additional provisions are necessary at this time to address commenters' concerns.<sup>171</sup>

SIFMA requested guidance under proposed Rule G-40 about whether an e-mail that only includes required regulatory disclosures that is sent to more than 25 municipal advisory clients through blind copies would constitute an advertisement.<sup>172</sup> In response, the MSRB stated that such e-mails containing only required regulatory disclosures would not constitute advertisements under proposed Rule G-40.<sup>173</sup> The MSRB added that those emails would not be published or used in any electronic or other public media and would not constitute written or electronic promotional literature.<sup>174</sup> The MSRB also stated that if an e-mail that contained a required regulatory disclosure also included material that was promotional in nature and sent to more than 25 persons within any period of 90 consecutive days, that e-mail could constitute an advertisement and would be subject to proposed Rule G-40.<sup>175</sup>

### c. Hypothetical Illustrations

The Response Letter noted that FINRA had recently requested comment on draft amendments to FINRA Rule 2210 to create an exception to the rule's prohibition on projecting

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Id.

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Id.

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See SIFMA Letter.

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See Response Letter.

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Id.

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Id.

performance to permit a firm to distribute a customized hypothetical investment planning illustration that includes the projected performance of an investment strategy.<sup>176</sup> SIFMA commented that the MSRB should include a similar exception in the proposed rule change.<sup>177</sup> The MSRB noted that it had asked in its initial Request for Comment whether it should consider a similar proposal, in part to promote regulatory consistency among the advertising regulations of financial regulators.<sup>178</sup> The MSRB noted that the comment period on FINRA’s draft amendments to FINRA Rule 2210 closed March 27, 2017, and FINRA has not yet announced any next rulemaking steps.<sup>179</sup> The MSRB determined that it would be premature to include provisions to address FINRA’s draft amendments to Rule 2210 in the proposed rule change before FINRA determines how to proceed with those draft amendments and before the SEC has taken action with respect to the proposed rule change.<sup>180</sup> The MSRB also stated that such action currently would not promote regulatory consistency among the advertising regulations of financial regulators, but that it will continue to monitor the FINRA initiative.<sup>181</sup>

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<sup>176</sup> See Response Letter and MSRB Notice 2017-04, Request for Comment on Draft Amendments to MSRB Rule G-21, on Advertising, and on Draft Rule G-40, on Advertising by Municipal Advisors (Feb. 16, 2017) (“Request for Comment”).

<sup>177</sup> See SIFMA Letter.

<sup>178</sup> See Response Letter and Request for Comment.

<sup>179</sup> See Response Letter.

<sup>180</sup> Id.

<sup>181</sup> Id.

d. Dealer/Municipal Advisor Jurisdictional Guidance

SIFMA commented that the MSRB should provide guidance and/or exemptions from proposed amended Rule G-21 for dealer/municipal advisors.<sup>182</sup> Specifically, SIFMA suggested that the MSRB amend Rule G-21 to clarify that the activities of dealer/municipal advisors are governed by proposed Rule G-40 when those dealer/municipal advisors are engaging in municipal advisor advertising.<sup>183</sup>

In response, the MSRB stated that it believes, consistent with its statutory mandate, that a dealer or a municipal advisor only becomes subject to MSRB rules based on its activities, and that the MSRB's advertising rules are based, in part, on the activities in which the dealers or municipal advisors engage.<sup>184</sup> The MSRB noted, for example, that if a dealer/municipal advisor publishes a print advertisement relating to the sale of municipal bonds, those activities would be subject to Rule G-21.<sup>185</sup> Similarly, the MSRB stated, if the dealer/municipal advisor prepares a professional advertisement about its municipal advisory services that it then circulates to municipal entities, that advertisement would be subject to proposed Rule G-40.<sup>186</sup> The MSRB agreed that as currently drafted, certain provisions of proposed amended Rule G-21 and proposed Rule G-40 are similar.<sup>187</sup> For example, the MSRB stated, as noted by commenters, the

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<sup>182</sup> See SIFMA Letter.

<sup>183</sup> Id.

<sup>184</sup> See Response Letter.

<sup>185</sup> Id.

<sup>186</sup> Id.

<sup>187</sup> Id.

content standards of each rule are similar.<sup>188</sup> The MSRB stated that to the extent that there are differences between proposed amended Rule G-21 and proposed Rule G-40, those differences are based, in part, on the activities in which a dealer or municipal advisor engages.<sup>189</sup> Thus, the MSRB concluded that such jurisdictional guidance may not be needed at this time because of the similarities between proposed amended Rule G-21 and proposed Rule G-40.<sup>190</sup>

Nevertheless, the MSRB stated that jurisdictional guidance relating to dealer/municipal advisors under Rule G-21 may be beneficial in the future, and the MSRB expects to begin to address such issues in its next fiscal year.<sup>191</sup> The MSRB believes that its regulation of financial advisory activities (as an element of municipal securities activity) should remain in place at least until its advertising rule for municipal advisors is approved by the Commission and the professional qualification examinations for municipal advisors have been filed by the MSRB with the Commission.<sup>192</sup> The MSRB also stated that it had recently approved the filing of the Municipal Advisor Principal Qualification Examination Content Outline (Series 54) to formally establish the Series 54 examination.<sup>193</sup> However, in recognition, in part, of the challenges faced by dealer/municipal advisors, the MSRB expects to begin to address such jurisdictional issues

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188 Id.

189 Id.

190 Id.

191 Id.

192 Id.

193 Id.

during its next fiscal year.<sup>194</sup> Thus, after careful consideration of the commenter's suggestions, the MSRB<sup>195</sup> determined not to revise proposed amended Rule G-21 to reflect the commenter's request.

e. Economic Analysis of Proposed Amended Rule G-21

SIFMA commented that the advertising rules should be structured based on activity and not by registration.<sup>196</sup>

In response, the MSRB stated that it does consider the nature and scope of dealer and municipal advisor activities when it develops rules, and that the proposed rule change, in fact, is based on respective activities of dealers and municipal advisors.<sup>197</sup> Additionally, the MSRB stated that although dealer/municipal advisors will be governed by both proposed amended Rule G-21 and proposed Rule G-40, dual-registrants should recognize that advertisements that are solely related to dealer activities would only be subject to proposed amended Rule G-21.<sup>198</sup> Likewise, the MSRB noted, advertisements that are solely related to municipal advisory activities would only be subject to proposed Rule G-40.<sup>199</sup> The MSRB also stated that because the baseline is current Rule G-21, the MSRB believes that at least some of the costs associated with dealer advertising compliance are already reflected in existing costs.<sup>200</sup> The MSRB

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<sup>194</sup> Id.

<sup>195</sup> Id.

<sup>196</sup> See SIFMA Letter.

<sup>197</sup> See Response Letter.

<sup>198</sup> Id.

<sup>199</sup> Id.

<sup>200</sup> Id.

believes that many of the new or increased costs associated with proposed amended Rule G-21 would be up-front costs from initial compliance development such as updating or rewriting policies and procedures.<sup>201</sup> Finally, the MSRB stated that the proposed amended Rule G-21 will promote regulatory consistency with FINRA's rules that should, in fact, promote efficiency and be beneficial to regulated entities.<sup>202</sup>

#### B. Comments Received Regarding Proposed Rule G-40

Two comment letters primarily focused on proposed Rule G-40.<sup>203</sup> These commenters focused on (i) the ability of the MSRB to regulate advertising by municipal advisors through other MSRB rules without proposed Rule G-40, (ii) suggested revisions to proposed Rule G-40's content standards, (iii) the suggested adoption of the relief that SEC staff provided to investment advisers relating to testimonials in advertisements, (iv) principal pre-approval, (v) guidance relating to municipal advisor websites and the use of social media, and (vi) the economic analysis.<sup>204</sup> One commenter agreed with many of the provisions of proposed new Rule G-40.<sup>205</sup> The other commenter, although in agreement that municipal advisors should engage in advertisements based on the principles of fair dealing and good faith, recommended that the MSRB withdraw proposed Rule G-40.<sup>206</sup>

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<sup>201</sup> Id.

<sup>202</sup> See Response Letter.

<sup>203</sup> See NAMA Letter and PFM Letter.

<sup>204</sup> Id.

<sup>205</sup> See PFM Letter.

<sup>206</sup> See NAMA Letter

a. Ability to Regulate Municipal Advisor Advertising through Other Rules

NAMA commented that proposed Rule G-40 is not necessary because the protections offered by Rule G-17 provide sufficient investor protection from misleading statements..<sup>207</sup>

In response, the MSRB stated that adopting the course of action suggested by NAMA not only would be inconsistent with the MSRB's statutory mandate, but also would create an un-level playing field in the municipal securities market.<sup>208</sup> The MSRB stated that the United States Congress charged the MSRB with the responsibility to create a new regulatory regime for municipal advisors that, in part, requires the MSRB to protect municipal entities as well as obligated persons.<sup>209</sup> The MSRB added that to fulfill those statutory responsibilities, the MSRB has tailored its developing municipal advisor regulatory regime, as appropriate, to reflect the differences in the roles and responsibilities of municipal advisors and dealers in the municipal securities market.<sup>210</sup> The MSRB stated that it has long recognized that the market for municipal advisory services is separate and distinct from the market for services of municipal securities brokers and dealers, and as such, it is appropriate and reasonable to tailor MSRB rules for municipal advisors.<sup>211</sup>

The MSRB stated that one of the ways that fraud may enter the market for municipal advisory services is through advertising.<sup>212</sup> The MSRB added that, consistent with its statutory

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Id.

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See Response Letter.

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Id.

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Id.

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Id.

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Id.

mandate, the MSRB designed proposed Rule G-40 to help prevent fraudulent and manipulative practices in the market for municipal advisory services, and tailored proposed Rule G-40 to reflect the types of advertisements that municipal advisors publish.<sup>213</sup> The MSRB stated that regulating advertising by municipal advisors through Rule G-17 would be inconsistent with the MSRB's statutory mandate to protect municipal entities and obligated persons.<sup>214</sup> According to the MSRB, Rule G-17 sets forth the MSRB's fair dealing principles; Rule G-17 does not provide particular guidance on how a municipal advisor should apply those principles to its advertisements.<sup>215</sup> By contrast, the MSRB noted, proposed Rule G-40 provides the detail needed to enable municipal advisors through specific conduct to better comply with those fair dealing principles as they relate to advertising.<sup>216</sup>

Moreover, the MSRB believes that relying on Rule G-17 to regulate municipal advisor advertising would create an un-level playing field, and would be contrary to the recommendations of other market participants.<sup>217</sup> The MSRB stated that this un-level playing field would be between municipal advisors (subject to Rule G-17, but not Rule G-21) and dealers (subject to both Rules G-17 and G-21) and among municipal advisors that are not registered as dealers and municipal advisors that are also registered as dealers or investment advisers (subject to Rule G-21 and FINRA Rule 2210 or Rule 206(4)-1 under the Investment

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213 Id.

214 Id.

215 Id.

216 Id.

217 Id.

Advisers Act of 1940, as amended, (the “Advisers Act”), as relevant).<sup>218</sup> Further, the MSRB noted that other commenters believed that having a separate rule to address advertising by municipal advisors would be helpful as dealers and municipal advisors have different roles and responsibilities in the municipal securities market.<sup>219</sup> Therefore, after careful consideration, the MSRB determined to address advertising by municipal advisors through proposed Rule G-40.<sup>220</sup>

b. Definition of “Advertisement” under Proposed Rule G-40

NAMA commented that the general information exclusions from the definition of “advice” under Rule 15Ba1-1(d)(1)(ii) under the Act that would permit a municipal advisor to not register with the SEC should equally apply as exclusions to the MSRB’s municipal advisor advertising rule.<sup>221</sup>

In response to NAMA’s comment, the MSRB stated that the purpose of proposed Rule G-40, in part, is to ensure that municipal advisor advertising does not contain any untrue statement of material fact and is not otherwise false or misleading. The MSRB also stated that regardless of whether certain information rises to the level of advice, that information may be advertising used to market to potential municipal advisory clients.<sup>222</sup> The MSRB believes this type of information should be covered by proposed Rule G-40, as the MSRB is obligated to protect municipal entities under the Act.<sup>223</sup> The MSRB reiterated that Congress mandated that

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<sup>218</sup> Id.

<sup>219</sup> Id.

<sup>220</sup> Id.

<sup>221</sup> See NAMA Letter.

<sup>222</sup> See Response Letter.

<sup>223</sup> Id.

the MSRB protect investors; municipal entities, including issuers of municipal securities; obligated persons; and the public interest.<sup>224</sup> Thus, after considering commenters' suggestions, the MSRB determined not to include additional exceptions from the definition of an "advertisement" in proposed Rule G-40.<sup>225</sup>

c. Proposed Rule G-40's Content Standards

In the NAMA Letter, NAMA requested that the MSRB revise proposed Rule G-40 to provide more definitive content standards.<sup>226</sup> In particular, NAMA stated that the content standards in proposed Rule G-40 should reflect a clearer separation between the content standards applicable to product advertisements and the content standards applicable to professional advertisements.<sup>227</sup> NAMA suggested that this separation was important because the clear majority of municipal advisors only engage in professional services advertising.<sup>228</sup> To that end, NAMA suggested that there should be separate content standards for product advertisements and for professional advertisements, that the liability provisions in proposed Rule G-40 should be reduced, and that the requirement that all advertisements be fair and balanced should be deleted.<sup>229</sup>

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<sup>224</sup> Id.

<sup>225</sup> Id.

<sup>226</sup> See NAMA Letter.

<sup>227</sup> Id.

<sup>228</sup> Id.

<sup>229</sup> Id.

In response, the MSRB stated that it believes that such separate standards could needlessly increase the complexity of proposed Rule G-40 without any offsetting benefit of enhancing the ability of a municipal advisor to comply with proposed Rule G-40. Moreover, the MSRB stated, NAMA's suggestions about the content standards for professional advertisements would lessen the strict liability provisions set forth in proposed Rule G-40(b)(ii) that would apply to professional advertisements.<sup>230</sup>

NAMA also suggested that the MSRB completely delete the MSRB's general standard for advertisements set forth in proposed Rule G-40(a)(v).<sup>231</sup> The general standard for advertisements requires, in part, that a municipal advisor shall not publish an advertisement relating to municipal securities or municipal financial products that the municipal advisor knows or has reason to know contains any untrue statement of material fact or is otherwise false or misleading.<sup>232</sup> The MSRB stated that the liability provisions are important to the MSRB's advertising regulation, and since 1978, the MSRB has imposed strict liability with respect to professional advertisements.<sup>233</sup> The MSRB also stated that it has resisted prior suggestions that the MSRB lessen that standard for professional advertisements.<sup>234</sup> The MSRB continues to believe that (i) the liability provisions are key elements to its advertising regulation, (ii) the liability provisions in its advertising regulations should be consistent between dealers and

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<sup>230</sup> See Response Letter.

<sup>231</sup> See NAMA Letter.

<sup>232</sup> See Response Letter.

<sup>233</sup> Id.

<sup>234</sup> Id.

municipal advisors, and (iii) the liability provisions in the MSRB's advertising regulations should not be lessened.

NAMA commented that the content standards of the proposed rule change were not clear, and suggested that proposed Rule G-40(a)(iv)(A) be deleted because it is repetitive of Rule G-17.<sup>235</sup> The MSRB responded that proposed Rule G-40(a)(iv)(A) would require, in part, that an advertisement be fair and balanced, and those principles would apply to an advertisement of any service.<sup>236</sup> The MSRB stated that it developed the content standards based, in part, on analogous advertising regulations of other financial regulators, primarily those of FINRA, as well as those of the SEC and the National Futures Association.<sup>237</sup> The MSRB stated that similar content standards to those set forth in proposed Rule G-40(a)(iv)(A) have long been understood by the financial entities subject to regulation by those financial regulators.<sup>238</sup> In addition, the MSRB stated that reliance only on Rule G-17 to regulate municipal advisor advertising would result in municipal advisors not having the specificity needed based on their activities to enable municipal advisors to better comply with those principles.<sup>239</sup> Nevertheless, the MSRB stated, if the SEC were to approve proposed Rule G-40, the MSRB would publish guidance about proposed Rule G-40's content standards before proposed Rule G-40 were to

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<sup>235</sup> See NAMA Letter.

<sup>236</sup> See Response Letter.

<sup>237</sup> Id.

<sup>238</sup> Id.

<sup>239</sup> Id.

become effective.<sup>240</sup> Thus, after careful consideration and for the reasons stated above, the MSRB determined not to revise proposed Rule G-40's content standards.<sup>241</sup>

d. Use of Testimonials under Proposed Rule G-40

NAMA, PFM, and SIFMA commented on proposed Rule G-40(iv)(G)'s prohibition on the use of testimonials in municipal advisor advertisements.<sup>242</sup> Their comments ranged from the view that testimonials should be excluded from proposed Rule G-40<sup>243</sup> to the view that, while the prohibition on the use of testimonials may be warranted, the MSRB should provide guidance under proposed Rule G-40(iv)(G) relating to the use of client lists and case studies.<sup>244</sup> Specifically, NAMA suggested that "if any version of Rule G-40 is ultimately adopted, then the current circumstances argue strongly in favor of the MSRB removing testimonials from Rule G-40 for now and, if necessary, consider any future amendment to deal with testimonials in a way that is consistent with FINRA's and the SEC's overall treatment."<sup>245</sup> SIFMA suggested that proposed Rule G-40 be harmonized with FINRA Rule 2210(d)(6) which permits testimonials in advertisements by dealers, "subject to the content standards and requirements that apply."<sup>246</sup> NAMA also commented that at a minimum, testimonials should "be treated the same under both

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Id.

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Id.

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See NAMA Letter, PFM Letter and SIFMA Letter.

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See NAMA Letter.

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See PFM Letter.

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See NAMA Letter.

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See SIFMA Letter.

Rules G-21 and G-40.”<sup>247</sup> NAMA and PFM commented that, if proposed Rule G-40 were to prohibit testimonials by municipal advisors, then the MSRB should provide certain interpretive relief from that prohibition.<sup>248</sup> NAMA suggested that the MSRB narrow that prohibition by adopting all the SEC staff’s guidance that is applicable to investment advisers relating to testimonials.<sup>249</sup> NAMA also commented that the definition of advertisement should “provide for client lists and case studies to be exempt from advertising consistent with the SEC’s prior action and current investment adviser practices.”<sup>250</sup> PFM requested that the MSRB provide clarification relating to the use of client lists and case studies.<sup>251</sup>

In response, the MSRB stated that it considered commenters’ suggestions, and continues to believe that a testimonial presents significant issues, including the ability of the testimonial to be misleading.<sup>252</sup> The MSRB stated that dealers and municipal advisors have different types of relationships and roles with their customers or municipal advisory clients, respectively, and have different models for providing advice.<sup>253</sup> The MSRB further stated that those differences are recognized in the Act, particularly with regard to the fiduciary duties owed by a municipal advisor to its municipal entity clients.<sup>254</sup> Citing to the Act, the MSRB noted that dealers do not

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<sup>247</sup> See NAMA Letter.

<sup>248</sup> See NAMA Letter and PFM Letter.

<sup>249</sup> See NAMA Letter.

<sup>250</sup> Id.

<sup>251</sup> See PFM Letter.

<sup>252</sup> See Response Letter.

<sup>253</sup> Id.

<sup>254</sup> Id.

owe a similar fiduciary duty to their customers.<sup>255</sup> The MSRB stated that, recognizing the fiduciary duty owed by municipal advisors to their municipal entity clients, the MSRB considered the regulations of other financial regulators where the regulated entity owes a fiduciary duty to its clients.<sup>256</sup> Thus, the MSRB stated that it recognizes that other comparable financial regulations, such as Rule 206(4)-1 under the Advisers Act, prohibit advisers from including testimonials in advertisements and noted that investment advisers are subject to fiduciary standards.<sup>257</sup> The MSRB also stated, as discussed in the Notice of Filing, that it is aware of the interpretive guidance provided by the SEC staff relating to testimonials.<sup>258</sup>

For the reasons set forth in the Notice of Filing and the Request for Comment, the MSRB determined not to revise proposed Rule G-40 to delete the testimonial ban or to adopt all SEC staff guidance related to the testimonial ban under Rule 206(4)-1.<sup>259</sup> The MSRB stated that if the SEC were to approve proposed Rule G-40, the MSRB would publish guidance about the use of municipal advisory client lists and case studies by municipal advisors before Rule G-40 were to become effective.<sup>260</sup>

e. Principal Pre-Approval under Proposed Rule G-40

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<sup>255</sup> Id.

<sup>256</sup> Id.

<sup>257</sup> See Response Letter and Notice of Filing.

<sup>258</sup> Id.

<sup>259</sup> See Response Letter, Request for Comment and Notice of Filing.

<sup>260</sup> See Response Letter.

BDA commented that principal pre-approval was not needed or could be limited to certain types of advertisements.<sup>261</sup> BDA commented that clients of municipal advisors are institutions, and that as institutions, they do not need many of the “mechanistic protections applicable to dealer relationships with retail investors.”<sup>262</sup> BDA commented that it “does not believe that a principal needs to approve every municipal advisor advertisement . . . [but that] the MSRB should allow either a municipal advisor principal or a general securities principal to approve advertisements, consistent with Rule G-21.”<sup>263</sup> Similarly, SIFMA commented that proposed Rule G-40(c) should allow for a general securities principal to approve advertisements consistent with Rule G-21.<sup>264</sup>

In response, the MSRB stated that an important element of the MSRB’s statutory mandate is to protect municipal entities and obligated persons.<sup>265</sup> The MSRB noted that the Congress determined that municipal entities do need protection under the federal securities laws, and charged the MSRB with developing a municipal advisor regulatory scheme to so do.<sup>266</sup> Moreover, the MSRB stated, there is no general securities principal qualification applicable to municipal advisors.<sup>267</sup> Therefore, the MSRB stated that it interprets BDA’s and SIFMA’s comments as suggesting that a general securities principal who may review dealer

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<sup>261</sup> See BDA Letter.

<sup>262</sup> Id.

<sup>263</sup> Id.

<sup>264</sup> See SIFMA Letter.

<sup>265</sup> See Response Letter.

<sup>266</sup> Id.

<sup>267</sup> Id.

advertisements under Rule G-21 should also be able to review municipal advisor advertising under proposed Rule G-40.<sup>268</sup> The MSRB responded that, in that case, it believes that it would be inconsistent with the MSRB's regulatory framework for municipal advisors to have a general securities principal review municipal advisor advertising, as a general securities principal would not be qualified under Rule G-3, on professional qualification requirements, to do so.<sup>269</sup> The MSRB stated that it believed qualification as a general securities principal under FINRA's Series 24 examination would not ensure that the general securities principal would be aware of the regulatory requirements applicable to municipal advisors as those requirements are not tested as part of that examination.<sup>270</sup> Further, the MSRB noted that it believes it would be inconsistent with an important part of the MSRB's mission to protect state and local governments and other municipal entities to have a general securities principal, with little regulatory assurance of minimum knowledge of applicable MSRB rules, approve advertising by a municipal advisor.<sup>271</sup> Thus, the MSRB stated that it determined not to revise proposed Rule G-40 to permit a general securities principal to approve advertising by municipal advisors.<sup>272</sup>

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<sup>268</sup> Id.

<sup>269</sup> Id.

<sup>270</sup> Id.

<sup>271</sup> Id.

<sup>272</sup> Id.

f. Guidance Relating to Municipal Advisor Websites and the Use of Social Media

In the NAMA Letter, NAMA requested more specific guidance about the content posted on a municipal advisor’s website and about the use of social media by a municipal advisor.<sup>273</sup> Specifically, NAMA requested guidance about whether material posted on a municipal advisor’s website would constitute an advertisement under proposed Rule G-40.<sup>274</sup> Further, NAMA requested guidance on the use of social media.<sup>275</sup>

In response, the MSRB stated that the definition of advertisement under proposed Rule G-40 is broad, and similar to Rule G-21, would apply to any “material . . . published or used in any electronic or other public media . . . .”<sup>276</sup> Thus, the MSRB stated, because a website is electronic and public, any material posted on a municipal advisor’s website would be an advertisement if that material comes within the definition of an advertisement.<sup>277</sup> The MSRB added that simply publishing material on a website would not exclude material that otherwise would qualify as an advertisement under proposed Rule G-40(a)(i).<sup>278</sup> As such, the MSRB stated, proposed Rule G-40 would apply to any material posted on a municipal advisor’s public

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<sup>273</sup> See NAMA Letter.

<sup>274</sup> Id.

<sup>275</sup> Id.

<sup>276</sup> See Response Letter.

<sup>277</sup> Id.

<sup>278</sup> Id.

website or more generally, on any website, if that material comes within the other terms of the definition of an advertisement as set forth in proposed Rule G-40(a)(i).<sup>279</sup>

In response to NAMA's request for additional interpretive guidance regarding the use of social media by municipal advisors, the MSRB stated that it believes that such guidance would be timely after any SEC approval of an advertising rule for municipal advisors.<sup>280</sup> The MSRB further stated that if the SEC were to approve proposed Rule G-40, such that the terms of a rule that will be going into effect are determined, the MSRB would publish social media guidance before the effective date of such rule.<sup>281</sup>

g. Economic Analysis of Proposed Rule G-40

Several comments were received on the Economic Analysis that the MSRB performed on the proposed rule change from both NAMA and SIFMA.<sup>282</sup> NAMA suggested that the MSRB did not properly consider the aggregate burden that rulemaking has placed on municipal advisor firms.<sup>283</sup> NAMA also commented that the MSRB did not appropriately consider the burden placed on small firms.<sup>284</sup> SIFMA suggested that proposed Rule G-40 mirror proposed amended Rule G-21 to reduce costs for dual-registrants.<sup>285</sup>

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Id.

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Id.

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Id.

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See NAMA Letter and SIFMA Letter.

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See NAMA Letter.

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Id.

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Id.

As the MSRB noted in the Notice of Filing and the Response Letter, the MSRB stated that it is planning to conduct a retrospective analysis on the cumulative impact of the municipal advisor regulatory framework on the municipal advisory industry once the entire framework is implemented.<sup>286</sup> The MSRB stated that such analysis is currently planned for 2019 when proposed Rule G-40 would become effective, if approved by the SEC.<sup>287</sup> Thus, the MSRB stated, it does not believe that a formal analysis of the entire municipal advisor regulatory framework could commence prior to 2019.<sup>288</sup> The MSRB stated that as a part of the municipal advisor regulatory framework retrospective analysis, the MSRB is also planning to specifically examine the frequency with which issuers use municipal advisors over time, pending availability of data.<sup>289</sup> The MSRB stated that it believes the costs associated with the proposed rule change should not be unduly burdensome for small municipal advisory firms.<sup>290</sup> The MSRB contended that for some one-time initial compliance costs, the MSRB believes that small municipal advisory firms may incur proportionally larger costs than larger firms.<sup>291</sup> However, the MSRB noted that for many other ongoing costs, such as costs associated with principal approval and recordkeeping requirements, as well as investments in advertisements previously developed but no longer compliant, the costs should be proportionate to the size of the firm,

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<sup>286</sup> See Response Letter and Notice of Filing.

<sup>287</sup> Id.

<sup>288</sup> See Response Letter.

<sup>289</sup> Id.

<sup>290</sup> Id.

<sup>291</sup> Id.

assuming that small firms generally advertise less than larger firms.<sup>292</sup> Thus, the MSRB stated that it believes it is unlikely that proposed Rule G-40 would have an outsized impact on small firms.<sup>293</sup> The MSRB stated that it believes that proposed Rule G-40 and proposed amended Rule G-21 are already substantially similar; the main differences between the two rules are proposed Rule G-40's ban on testimonials and omission of three provisions that concern product advertisements.<sup>294</sup> The MSRB noted that in developing the substantially similar provisions, the MSRB was sensitive to the burdens on dealer/municipal advisors and the efficiencies resulting from consistent provisions.<sup>295</sup> The MSRB stated that the degree to which proposed Rule G-40 and proposed amended Rule G-21 mirror each other is a result of these considerations and that differences are attributable to aspects of municipal advisory activity that differs from broker-dealer activity, irrespective of whether the municipal advisor is a dealer or non-dealer municipal advisor.<sup>296</sup>

### C. MSRB's General Response to Comments and Commitment to Provide Interpretive Guidance

In response to the comments received regarding the proposed rule change, the MSRB stated that it believes that the proposed rule change will enhance the MSRB's fair practice rules for dealers by promoting regulatory consistency among Rule G-21 and the advertising rules of

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<sup>292</sup> Id.

<sup>293</sup> Id.

<sup>294</sup> Id.

<sup>295</sup> Id.

<sup>296</sup> Id.

other financial regulators.<sup>297</sup> Further, the MSRB stated that as the proposed rule change is a key element of the MSRB's development of its core regulatory framework for municipal advisors, the proposed rule change will enhance the MSRB's fair practice rules by, for the first time, providing rules about advertising by municipal advisors through proposed Rule G-40.<sup>298</sup> Finally, the MSRB stated that, consistent with the MSRB's goal of providing tools to enhance the ability of dealers and municipal advisors to comply with MSRB rules, if the SEC were to approve the proposed rule change, the MSRB would provide the following guidance before proposed amended Rule G-21 and proposed Rule G-40 would become effective:<sup>299</sup>

- Guidance under proposed Rule G-40(a)(iv)(G) relating to case studies and client lists;<sup>300</sup>
- Guidance under proposed Rule G-40(c) relating to content standards;<sup>301</sup> and
- Guidance under proposed Rule G-40 relating to a municipal advisor's use of social media.<sup>302</sup>

#### IV. Discussion and Commission Findings

The Commission has carefully considered the proposed rule change, the comment letters received and the Response Letter. The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the MSRB.

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<sup>297</sup> Id.

<sup>298</sup> Id.

<sup>299</sup> Id.

<sup>300</sup> Id.

<sup>301</sup> Id.

<sup>302</sup> Id.

In particular, the proposed amended Rule G-21 and proposed Rule G-40, are consistent with Section 15B(b)(2)(C) of the Act.<sup>303</sup> Section 15B(b)(2)(C) of the Act requires that the MSRB's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.<sup>304</sup>

The Commission believes that proposed amended Rule G-21 is consistent with the provisions of Section 15B(b)(2)(C)<sup>305</sup> of the Act because it will help prevent fraudulent and manipulative practices by prohibiting dealers from making any false, exaggerated, unwarranted, promissory or misleading statement or claim in an advertisement. Proposed amended Rule G-21 requires that advertisements be based on the principles of fair dealing and good faith, be fair and balanced, and provide a sound basis for evaluating the facts. A dealer will not be able to 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. Further, the prescriptive nature of proposed amended Rule G-21 provides guidelines for dealers to follow that will help prevent fraudulent and manipulative practices.

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<sup>303</sup> 15 U.S.C. 78o-4(b)(2)(C).

<sup>304</sup> See 15U.S.C. 78o-4(b)(2)(C).

<sup>305</sup> Id.

In addition, the Commission believes that proposed amended Rule G-21 also will help protect investors and the public interest by helping ensure that advertisements present a fair statement of the services, products, or municipal securities advertised.

The Commission believes that proposed Rule G-40 is consistent with the provisions of Section 15B(b)(2)(C)<sup>306</sup> of the Act because it will help prevent fraudulent and manipulative practices by prohibiting municipal advisors from making any false, exaggerated, unwarranted, promissory or misleading statement or claim in an advertisement. Proposed Rule G-40 requires that advertisements of municipal advisors be based on the principles of fair dealing and good faith, be fair and balanced, and provide a sound basis for municipal entities and obligated persons to evaluate the information presented in such advertisements. A municipal advisor will not be able to omit any material fact or qualification if the omission, in light of the context of the material present, would cause the advertisement to be misleading. Further, the prescriptive nature of proposed Rule G-40 provides guidelines for municipal advisors to follow that would help prevent fraudulent and manipulative practices.

In addition, the Commission believes that proposed Rule G-40 will help protect investors, municipal entities, obligated persons and the public interest by providing prescriptive requirements that will help ensure that advertisements present a fair statement of the municipal advisory services advertised.

The Commission also finds that the proposed rule change is consistent with Section 15B(b)(2)(L)(iv), in that it does not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal

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<sup>306</sup>

Id.

entities, and obligated persons.<sup>307</sup> For some one-time initial compliance costs, small municipal advisory firms may incur proportionally larger costs than larger firms. However, for many other ongoing costs, such as costs associated with principal approval and record-keeping requirements, as well as investments in advertisements previously developed but that would no longer be compliant, the costs should be proportionate to the size of the firm. Thus, the Commission believes it is unlikely that proposed Rule G-40 would have an outsized impact on small firms.

In approving the proposed rule change, the Commission also has considered the impact of the proposed rule change, on efficiency, competition, and capital formation.<sup>308</sup> The Commission does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Commission believes, through promoting regulatory consistency of certain MSRB advertising standards with those of other financial regulators, proposed amended Rule G-21 may improve efficiency in the form of less unnecessary complexity for dealers and reduced burdens and compliance costs over time, because such additional regulatory consistency should assist dealers with developing uniform policies and procedures. The Commission believes this may also benefit both retail and institutional investors, where transparency, consistency, truthful and accurate information and ease of comparison of different financial services would be highly valued. While dealers may experience increased costs because of the new requirements, these costs should not be significant for dealers also registered with FINRA as much of proposed amended Rule G-21 would align with FINRA Rule 2210. The Commission believes proposed amended Rule G-21 would not impose an unreasonable burden on dealers, and the likely

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<sup>307</sup> See 15 U.S.C. 78o-4(b)(2)(L)(iv).

<sup>308</sup> 15 U.S.C. 78c(f).

benefits, such as the prevention of fraudulent and manipulative advertising by dealers and the protection of investors, justify such costs.

The Commission believes that one benefit of proposed Rule G-40 may be that municipal advisors provide clients more accurate information through advertising, which may lead municipal entities and obligated persons to more informed decision-making when selecting municipal advisors. Furthermore, the Commission believes that as a result of municipal advisor compliance with proposed Rule G-40's advertising standards, municipal entities and obligated persons may be able to more easily establish objective criteria to use in selecting municipal advisors that may increase the likelihood that municipal advisors are hired because of their qualifications as opposed to other reasons. In addition, the Commission believes that transparency, consistency, truthful and accurate information in advertising should benefit municipal entities and obligated persons in general. Although municipal advisors are likely to incur costs associated with compliance with the proposed Rule G-40, the cost would be justified by the likely benefits of the proposed rule, such as the prevention of fraudulent and manipulative advertising by municipal advisors and the protection of municipal entities and obligated persons.

The Commission has reviewed the record for the proposed rule change and notes that the record does not contain any information to indicate that the proposed rule change would have a negative effect on capital formation.

As noted above, the Commission received four comment letters on the Notice of Filing. The Commission believes that the MSRB, through its responses and its commitment to provide additional interpretive guidance prior to the effective date of the proposed rule change, has addressed commenters' concerns.

For the reasons noted above, the Commission believes that the proposed rule change is

consistent with the Act.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>309</sup> that the proposed rule change (SR-MSRB-2018-01) be, and hereby is, approved.

For the Commission, pursuant to delegated authority.<sup>310</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>309</sup> 15 U.S.C. 78s(b)(2).

<sup>310</sup> 17 CFR 200.30-3(a)(12).