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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No. * SR 2023 - * 01

Amendment No. (req. for Amendments *)

Filing by Municipal Securities Rulemaking Board

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input checked="" type="checkbox"/>	Section 19(b)(3)(A) * <input type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
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Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>
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Rule

<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)
<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)
<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010 Section 806(e)(1) * <input type="checkbox"/>	Section 806(e)(2) * <input type="checkbox"/>
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Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934 Section 3C(b)(2) * <input type="checkbox"/>
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Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>
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Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked *).

Proposed Rule Change Consisting of Amendments to MSRB Rule G-40, on Advertising by Municipal Advisors, and MSRB Rule G-8, on Books and Records

Contact Information

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name * Saliha	Last Name * Olgun
Title * Interim Chief Regulatory Officer	
E-mail * solgun@msrb.org	
Telephone * (202) 838-1500	Fax

Signature

Pursuant to the requirements of the Securities Exchange of 1934, Municipal Securities Rulemaking Board has duty caused this filing to be signed on its behalf by the undersigned thereunto duty authorized.

Date 01/31/2023	(Title *)
By Ronald W. Smith	Corporate Secretary
(Name *)	

NOTE: Clicking the signature block at right will initiate digitally signing the form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

rsmith@msrb.o
rg
Digitally signed by rsmith@msrb.org
Date: 2023.01.31 11:09:53 -05'00'

Required fields are shown with yellow backgrounds and astericks.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

Form 19b-4 Information *

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MSRB-2023-01 19b-4.docx

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change *

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MSRB-2023-01 Exhibit 1.docx

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 1A - Notice of Proposed Rule Change, Security-Based Swap Submission, or Advanced Notice by Clearing Agencies *

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2- Notices, Written Comments, Transcripts, Other Communications

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Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit Sent As Paper Document

Exhibit 3 - Form, Report, or Questionnaire

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Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit Sent As Paper Document

Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

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MSRB-2023-01 EXHIBIT 5.docx

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change

Partial Amendment

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² the Municipal Securities Rulemaking Board (the “MSRB” or “Board”) is filing with the Securities and Exchange Commission (the “SEC” or “Commission”) a proposed rule change consisting of amendments to MSRB Rule G-40, on advertising by municipal advisors. Specifically, the proposed rule change consists of amendments to MSRB Rule G-40 to (i) permit municipal advisors to use testimonials in advertisements, subject to certain conditions; (ii) specify additional supervisory obligations with respect to the use of testimonials; (iii) modify the definition of municipal advisory client to better align with MSRB Rule G-38, on solicitation of municipal securities business; (iv) specify the obligation to keep a record of any payment for a testimonial; and (v) create a conforming obligation under MSRB Rule G-8, on books and records to be made by brokers, dealers, municipal securities dealers and municipal advisors, to include records to correspond with the current obligation under MSRB Rule G-40 to maintain records relating to the supervision of advertisements as well as the proposed obligation to maintain records of any payments for a testimonial (together “the proposed rule change”). The MSRB requests that the proposed rule change be approved with an implementation date to be announced by the MSRB in a regulatory notice published no later than one month following the Commission approval date, which implementation date shall be no later than three months following the Commission approval date.

(a) The text of the proposed rule change is attached as Exhibit 5. The text proposed to be added is underlined, and the text proposed to be deleted is enclosed in brackets.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The Board approved the proposed rule change at its September 15, 2022, meeting. Questions concerning this filing may be directed to Saliha Olgun, Interim Chief Regulatory Officer and Gail Marshall, Senior Advisor to the Chief Executive Officer at 202-838-1500.

3. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Consistent with the MSRB's strategic goal to modernize the MSRB Rulebook, the proposed rule change would amend MSRB Rule G-40 to allow municipal advisors to use testimonials in certain circumstances, which would better align MSRB Rule G-40 with, to the extent appropriate, the principles of MSRB Rule G-21, on advertising by brokers, dealers or municipal securities, as well as Rule 206(4)-1³ under the Investment Advisers Act of 1940 (the "Advisers Act")⁴ adopted by the Commission.⁵

A. Background

1. Advertisements under MSRB Rule G-40

In recognition of the fact that municipal advisors bear similarities with both brokers, dealers and municipal securities dealers (collectively and individually, "dealers") and investment advisers and to promote regulatory consistency for regulated entities dually registered as a dealer and as a municipal advisor, or as an investment adviser registered with the SEC, the MSRB established advertising standards for municipal advisors in 2018.⁶ These advertising standards were developed by aligning with, to the extent practicable, the then existing standards for investment advisers under Rule 206(4)-1 and the then existing standards for dealers under MSRB Rule G-21.

MSRB Rule G-40 is designed to protect municipal entities, obligated persons and the general public by requiring a municipal advisor's advertisement to adhere to specific content standards based on the principles of fair dealing and good faith. An advertisement is generally defined in MSRB Rule G-40 to include any material published or used in any electronic or other public media, or any written or electronic promotional literature distributed or made generally available to municipal entities, obligated persons, municipal advisory clients or the public, including any notice, circular, report, market letter, form letter, telemarketing script, seminar text, press release concerning the services of the municipal advisor or the engagement of a municipal advisory client or reprint, or any excerpt of the foregoing or of a published article.⁷ MSRB Rule G-40 specifies content standards that require, among other things, that all

³ 17 CFR 275.206(4)-1.

⁴ 15 U.S.C. 80b-1 et seq.

⁵ See Investment Advisers Act Release No. 5653 (Dec. 22, 2020), the adopting release for Investment Adviser Marketing (the "SEC 2020 Adopting Release"), 86 FR 13024-13147 (Mar. 5, 2021)).

⁶ See Exchange Act Release No. 83177 (May 7, 2018), 83 FR 21794 (May 10, 2018), approval of proposed rule change File No. SR-MSRB-2018-01 ("SEC approval order of MSRB Rule G-40"). The effective date for municipal advisors to comply with MSRB Rule G-40 was August 23, 2019.

⁷ See MSRB Rule G-40(a)(i).

advertisements by a municipal advisor be fair and balanced and provide a sound basis for evaluating the facts in regard to any particular municipal security or type of municipal security, municipal financial product, industry, or service.⁸ A municipal advisor may not make any false, exaggerated, unwarranted, promissory or misleading statement or claim in any advertisement or 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.⁹ Additionally, a municipal advisor is prohibited from publishing false or misleading advertisements concerning the services of the municipal advisor or the engagement of a municipal advisory client or concerning the facilities, services, or skills of any municipal advisor.¹⁰

In establishing MSRB Rule G-40, the MSRB determined to prohibit municipal advisors, directly or indirectly, from publishing, circulating or distributing any advertisement which refers, directly or indirectly, to any testimonial of any kind concerning the municipal advisor or concerning the advice, analysis, report or other service rendered by the municipal advisor.¹¹ At that time, the MSRB expressed the view that a testimonial in a municipal advisor's advertisement would present significant issues, including the possibility of being misleading.¹² As a basis for this view, the MSRB noted that the Commission had taken a similar position in adopting Advisers Act Rule 206(4)-1 in 1961 (the "Initial IA Advertising Rule" or "Initial Rule 206(4)-1"), determining that the use of a testimonial by an investment adviser would constitute a fraudulent, deceptive, or manipulative act, practice, or course of action.¹³ Believing that doing so would help ensure consistent regulation between regulated entities subject to a fiduciary standard, the MSRB determined to act consistently with the language of Initial Rule 206(4).¹⁴

2. Testimonials under MSRB Rule G-21

In establishing MSRB Rule G-40, the MSRB also sought, to the extent practicable, to harmonize with its existing rule governing the advertisements of dealers, MSRB Rule G-21.

⁸ See MSRB Rule G-40(a)(iv)(A).

⁹ See MSRB Rule G-40(a)(iv)(B).

¹⁰ See MSRB Rule G-40(a)(iv)(B).

¹¹ See MSRB Rule G-40(a)(iv)(G).

¹² See Exchange Act Release No. 82616 (Feb. 1, 2018), 83 FR 5474 (Feb. 7, 2018), notice of proposed rule change File No. SR-MSRB-2018-01) ("Notice of proposed Rule G-40").

¹³ See Investment Advisers Act Release No. 121 (Nov. 1, 1961) (the "1961 Advertising Rule Adopting Release"), 26 FR 10548 (Nov. 9, 1961). The Commission adopted the Advertising Rule in 1961 to target advertising practices that the Commission believed were likely to be misleading.

¹⁴ See Notice of Proposed MSRB Rule G-40, 83 FR 5474, 5478 n.26, 5488 & n.119.

While not identical, the two MSRB rules are analogous in that they both are based on principles of fair dealing and maintain rigorous content standards. However, MSRB Rule G-40 currently prohibits a municipal advisor from using a testimonial in an advertisement. 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.¹⁵

MSRB Rule G-21 permits a dealer to use a testimonial in an advertisement if certain conditions are met. Specifically, if a dealer's advertisement contains a testimonial, then the person providing the testimonial concerning a technical aspect of investing must have the knowledge and experience to form a valid opinion.¹⁶ Additionally, if an advertisement contains a testimonial about the investment advice or investment performance of the dealer, the advertisement must prominently disclose (i) the fact that the testimonial may not be representative of the experience of other customers; (ii) the fact that the testimonial is no guarantee of future performance or success; and (iii) if more than \$100 in value is paid for the testimonial, the fact that it is a paid testimonial.¹⁷

3. Testimonials under Advisers Act Rule 206(4)-1

In establishing MSRB Rule G-40 in 2018, the MSRB recognized that the Commission was considering modernizing the Initial IA Advertising Rule and noted that it would monitor developments related to the testimonial ban.¹⁸ On December 22, 2020, the Commission adopted amendments to modernize and consolidate the Initial IA Advertising Rule and Rule 206(4)-3 of the Adviser's Act (the "IA Solicitation Rule")¹⁹ into one marketing rule for investment advisers, under the Advisers Act (the "Modernized IA Marketing Rule" or "SEC Rule 206(4)-1").²⁰ When adopting the Modernized IA Marketing Rule, the SEC noted that, among other things, it replaces the previous rule's "broadly drawn limitations with principles-based provisions designed to accommodate the continual evolution and interplay of technology and advice and includes

¹⁵ See generally Notice of Proposed MSRB Rule G-40.

¹⁶ MSRB Rule G-21(a)(iii)(G)(1).

¹⁷ MSRB Rule G-21(a)(iii)(G)(2).

¹⁸ Notice of Proposed MSRB Rule G-40, 83 FR 5474, 5487.

¹⁹ 17 CFR 275.206(4)-3. The IA Solicitation Rule was adopted in 1979 "to help ensure that clients are aware that paid solicitors who refer them to advisers have a conflict of interest." See SEC 2020 Adopting Release, 86 FR 13025.

²⁰ SEC 2020 Adopting Release. The Modernized IA Marketing Rule applies to any investment adviser registered or required to be registered with the Commission under §203 of the Advisers Act that directly or indirectly disseminates an advertisement.

tailored requirements for certain types of advertisements.”²¹ Significantly, the Modernized IA Marketing Rule replaced the prior ban on testimonials under the Initial IA Advertising Rule with a permissive use of testimonials and endorsements in advertisements,²² which includes traditional referral and solicitation activity, subject to certain conditions.²³

The Modernized IA Marketing Rule requires advertisements that include testimonials or endorsements to provide disclosures of certain information.²⁴ Specifically, the Modernized IA Marketing Rule requires that an investment adviser clearly and prominently disclose the following at the time the testimonial or endorsement is disseminated: (i) that the testimonial was given by a current client or investor or, if an endorsement, that the endorsement was given by a person other than a current client or investor; (ii) that cash or non-cash compensation was provided for the testimonial, if applicable; and (iii) a brief statement of any material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from the adviser’s relationship with such person.²⁵

In addition, disclosure of the material terms of any compensation arrangement and a description of any material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from the advisers’ relationship with such person and/or any compensation arrangement must be provided to the recipient(s) of the testimonial.²⁶ All testimonials, including those that are compensated and uncompensated are subject to oversight and compliance. Specifically, the investment adviser must have (i) a reasonable basis for believing that any testimonial or endorsement complies with the requirements of the rule, and (ii) a written

²¹ SEC Press Release, [SEC Adopts Modernized Marketing Rule for Investment Advisers](#), dated December 22, 2020.

²² A “testimonial” is a statement made by a current client or investor in a private fund advised by the investment adviser, whereas an “endorsement” is a statement made by a person other than a current client or investor in a private fund advised by the investment adviser. See 17 CFR 275.206(4)-1(e)(17) and 17 CFR 275.206(4)-1(e)(5).

²³ 17 CFR 275.206(4)-1(b) (relating to compensated testimonials and endorsements); see also 17 CFR 206(4)-1(e)(1)(ii) (defining the term “advertisement” to include compensated testimonials and endorsements). These conditions differ depending on whether the testimonial or endorsement is compensated or uncompensated. 17 CFR 275.206(4)-1(b)(4)(i) (exempting a testimonial or endorsement disseminated for no compensation or de minimis compensation from paragraphs 206(4)-1(b)(2)(ii) and (3).

²⁴ 17 CFR 275.206(4)-1(b)(1).

²⁵ 17 CFR 275.206(4)-1(b). See 17 CFR 275.206(4)-1(b)(4) discussing exemptions from the disclosure requirements.

²⁶ This includes a description of the compensation provided or to be provided, directly or indirectly, to the person for the testimonial or endorsement. 17 CFR 275.206(4)-1(b)(1).

agreement with any person giving a compensated testimonial or endorsement that describes the scope of the agreed upon activities. The requirement to have a written agreement only applies when the adviser is providing compensation for testimonials and endorsements is above the de minimis threshold (i.e., \$1,000 or less, or the equivalent value in non-cash compensation during the preceding twelve months).²⁷

In light of the Commission's adoption of the Modernized IA Marketing Rule, the MSRB has conducted a review of MSRB Rule G-40 and is filing the proposed rule change to promote regulatory consistency among regulated entities subject to a fiduciary standard. The proposed rule change would permit municipal advisors to use testimonials in advertisements, subject to certain conditions, as discussed below.²⁸

B. Summary of Proposed Amendments

To promote regulatory consistency, where practicable, among MSRB Rule G-40, MSRB Rule G-21, and the SEC's Modernized IA Marketing Rule, proposed amended MSRB Rule G-40 would permit the use of testimonials subject to disclosures and other tailored conditions. The proposed rule change would not only align MSRB Rule G-40 with the analogous requirements for dealers under MSRB Rule G-21, but, because municipal advisors have a fiduciary duty to their clients, the proposed rule change would also include certain provisions, tailored to apply to municipal advisors, which align with the SEC's Modernized IA Marketing Rule. Specifically, the proposed rule change would amend the content standards under MSRB Rule G-40(a)(iv) to permit municipal advisors to use testimonials in advertisements subject to certain conditions; amend the supervisory obligations under MSRB Rule G-40(c) to specify additional supervisory obligations with respect to the use of testimonials; modify the definition of municipal advisory client; and amend MSRB Rule G-8 to include records to correspond with the current obligation under MSRB Rule G-40 to maintain records relating to the supervision of advertisements.

1. MSRB Rule G-40 Content Standards

MSRB Rule G-40 currently prohibits the use of testimonials in advertisements by municipal advisors.²⁹ The MSRB is not proposing to alter the fundamental content standards of MSRB Rule G-40 that require advertisements to be based on the principles of fair dealing and good faith, be fair and balanced, and provide a sound basis for evaluating the facts and that the advertisements not make any false, exaggerated, unwarranted, promissory, or misleading

²⁷ 17 CFR 275.206(4)-1(b)(2).

²⁸ The term "testimonial" is not specifically defined in MSRB Rule G-21 or MSRB Rule G-40; based on the application of each rule, the term has been understood to include a statement given by a current client or person other than a current client and does not distinguish between a testimonial and an endorsement.

²⁹ MSRB Rule G-40(a)(iv)(G).

statement or claim.³⁰ Consistent with those standards, and recognizing the fiduciary duty owed by municipal advisors to their municipal entity clients, the MSRB is proposing to permit the use of testimonials in advertisements by municipal advisors subject to certain conditions that the MSRB believes would diminish the concern, expressed in establishing MSRB Rule G-40, that testimonials could cause a municipal advisor's advertisement to be misleading.³¹ Specifically, as proposed, MSRB Rule G-40(a)(iv)(G) would be amended to provide that municipal advisor advertisements that contain testimonials would be subject to additional content standards.

If a municipal advisor's advertisement contains a testimonial of any kind concerning the municipal advisor or concerning the advice, analysis, report, or other service rendered by the municipal advisor, the person making the testimonial would be required to have the knowledge and experience to form a valid opinion.³² This obligation would standardize the content standard with that applicable to dealers' use of testimonials under MSRB Rule G-21.³³ The MSRB believes applying this standard to municipal advisors is consistent with the existing content standards of MSRB Rule G-40 established to prevent false or misleading advertisements and would promote regulatory consistency.

If an advertisement contains a testimonial concerning the municipal advisor or concerning the advice, analysis, report, or other service rendered by the municipal advisor, that advertisement must include, clearly and prominently, disclosures designed to reduce the risk that the use of a testimonial in an advertisement could be misleading. First, the testimonial must include a clear and prominent disclosure that the person providing the testimonial is a current municipal advisory client or, if not currently a municipal advisory client, the timeframe, denoted by calendar year(s), during which the person was a municipal advisory client.³⁴ The MSRB believes that allowing the use of a testimonial only when the testimonial is from a current or former client reinforces the proposed requirement that the person providing the testimonial have the knowledge and experience to form a valid opinion and helps ensure that the municipal advisor's advertisement is fair and balanced. In addition, disclosing the time frame when a person providing a testimonial was a municipal advisory client would provide important context to help reduce the risk that the use of a testimonial could be misleading, which would benefit the

³⁰ MSRB Rule G-40(a)(iv)(A) - (F), G-40(a)(v) and G-40(b)(ii).

³¹ See Notice of Proposed MSRB Rule G-40, 83 FR 5474, 5487.

³² Proposed MSRB Rule G-40(a)(iv)(G)(1).

³³ This content standard in MSRB Rule G-21 currently aligns with the standard established in Rule 2210, Communications with the Public, of the Financial Industry Regulatory Authority ("FINRA"). Specifically, FINRA Rule 2210(d)(6)(A) provides that "if any testimonial in a communication concerns a technical aspect of investing, the person making the testimonial must have the knowledge and experience to form a valid opinion."

³⁴ Proposed MSRB Rule G-40(a)(iv)(G)(2)(a).

likely recipients of the advertisement (*i.e.*, municipal entities and obligated persons). The clear and prominent disclosure standard requires that the disclosures be included within the advertisement that includes the testimonial such that the testimonial and disclosures are read at the same time and improve the salience and impact of the disclosures.

The testimonial would also be required to include clear and prominent disclosures that the testimonial may not be representative of the experience of other clients,³⁵ that the testimonial is no guarantee of future performance or success,³⁶ and, if more than \$100 in total value in cash or non-cash compensation is paid for the testimonial, the fact that it is a paid testimonial.³⁷ Requiring municipal advisors that use testimonials to adhere to these disclosure requirements would harmonize the content standards with those applicable to dealers' use of testimonials under MSRB Rule G-21.³⁸ The MSRB believes requiring such disclosures is consistent with the existing content standards of MSRB Rule G-40 and would promote regulatory consistency.

Finally, the testimonial also would be required to include, clearly and prominently, a brief statement of any material conflicts of interest on the part of the person providing the testimonial resulting from the municipal advisor's relationship with such person. Recognizing the fiduciary duty owed by municipal advisors to their municipal entity clients, the MSRB considered the obligations of registered investment advisers, who, like municipal advisors, are subject to a fiduciary standard in determining the disclosures that would be appropriate for municipal advisors when using testimonials in advertisements. This disclosure obligation parallels a disclosure obligation required of registered investment advisers under SEC Rule 206(4)-1(b)(1)(iii). The MSRB believes that a brief statement of any material conflicts of interest on the part of the person providing the testimonial resulting from the municipal advisor's relationship with such person would result in information that informs the likely recipients of the advertisement (*i.e.*, municipal entities and obligated persons) which serves to ensure that the advertisement is fair and balanced and reduces the risk that the use of a testimonial could be misleading. Furthermore, the MSRB believes establishing the same disclosure obligation for municipal advisors under MSRB Rule G-40 promotes regulatory consistency, particularly among regulated entities subject to a fiduciary standard. To that end, the MSRB expects this disclosure to be succinct.³⁹

³⁵ Proposed MSRB Rule G-40(a)(iv)(G)(2)(b).

³⁶ Proposed MSRB Rule G-40(a)(iv)(G)(2)(c).

³⁷ Proposed Rule MSRB G-40(a)(iv)(G)(2)(d).

³⁸ These disclosure requirements in MSRB Rule G-21 currently align with the disclosure requirements in FINRA Rule 2210(d)(6)(B)(1) – (3).

³⁹ In adopting Rule 206(4)-1(b)(1)(iii), the SEC noted that “[s]imilar to the other disclosures subject to the clear and prominent standard, we expect this disclosure to be succinct. For example, it would be sufficient for an adviser to simply state that the testimonial or endorsement was provided by an affiliate of the adviser, or that the promoter is related to

There are two broad categories of municipal advisors⁴⁰ — those that provide certain advice to or on behalf of a municipal entity or obligated person and those that undertake certain solicitations of a municipal entity or obligated person on behalf of certain third-party financial professionals, often referred to as solicitors.⁴¹ The MSRB understands that municipal entity

the adviser, if this relationship is the source of the conflict.” SEC 2020 Adopting Release, 86 FR 13025.

⁴⁰ Section 15B(e)(4) of the Exchange Act (15 U.S.C. 78o-4(e)(4)) generally defines “municipal advisor” to mean a person (who is not a municipal entity or an employee of a municipal entity) that (i) provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or (ii) undertakes a solicitation of a municipal entity. Notwithstanding the omission of the term, “obligated person” in connection with the undertaking of a solicitation under Section 15B(e)(4)(A)(ii) of the Exchange Act (15 U.S.C. 78o-4(e)(4)(A)(ii)), the SEC has interpreted the definition of “municipal advisor” to include a person who engages in the solicitation of an obligated person acting in the capacity of an obligated person. See Exchange Act Release No. 70462 (September 20, 2013), 78 FR 67467, at notes 138 and 408 (November 12, 2013) (File No. S7-45-10) (“Order Adopting SEC Final MA Rule”). See also Exchange Act Rule 15Ba1-1(d)(1)(i) (17 CFR 240.15Ba1-1(d)(1)(i)).

⁴¹ Section 15B(e)(9) of the Exchange Act (15 U.S.C. 78o-4(e)(9)) generally defines “solicitation of a municipal entity or obligated person” to mean a direct or indirect communication with a municipal entity or obligated person made by a person, for direct or indirect compensation, on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser . . . that does not control, is not controlled by, or is not under common control with the person undertaking such solicitation for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person of a broker, dealer, municipal securities dealer, or municipal advisor for or in connection with municipal financial products, the issuance of municipal securities, or of an investment adviser to provide investment advisory services to or on behalf of a municipal entity. The SEC has interpreted this phrase generally in a manner similar to the statutory definition. However, it has also added two exceptions to the statutory definition for (i) advertising by a dealer, municipal advisor or investment adviser and (ii) solicitations of an obligated person where such obligated person is not acting in the capacity of an obligated person or the solicitation is not in connection with the issuance of municipal securities or with respect to municipal financial products. See Exchange Act Rule 15Ba1-1(n) (17 CFR 240.15Ba1-1(n)). Additionally, the SEC has exempted from the municipal advisor definition a person that undertakes a solicitation of a municipal entity or obligated person for the purpose of obtaining or retaining an engagement by a municipal entity or by an obligated person of a dealer or a municipal advisor for or in connection with municipal financial products that are investment strategies, to the extent

clients generally do not accept compensation for testimonials and believes that the payment of more than a de minimis amount (more than \$1000 in total value in cash or non-cash compensation during the preceding 12 months) to a municipal entity client could present a potential conflict of interest. Therefore, proposed MSRB Rule G-40(a)(iv)(G)(3) would prohibit a non-solicitor municipal advisor from paying more than a de minimis amount of compensation for a testimonial.

To avoid this concern and to avoid creating complexity in MSRB Rule G-40 by establishing different standards for obligated person clients of non-solicitor municipal advisors, the MSRB determined to prohibit non-solicitor municipal advisors from paying any compensation for a testimonial to a person, directly or indirectly, of more than \$1000 in total value in cash or non-cash compensation during the preceding 12 months. However, the proposed rule change would permit solicitor municipal advisors to pay such compensation to a municipal advisor, or an investment adviser (as defined under section 202 of the Investment Advisers Act of 1940) on behalf of whom the municipal advisor undertakes, or has undertaken, a solicitation of a municipal entity or obligated person, as defined in Rule 15Ba1-1(n)⁴² subject to certain conditions.

The first condition would require a solicitor municipal advisor to conclude, based on the exercise of reasonable diligence, that the municipal advisor or investment adviser who will provide the testimonial is currently registered with the Commission. The MSRB believes requiring a solicitor municipal advisor to determine that the municipal advisor or investment adviser providing the testimonial is registered with the Commission would establish a reasonable basis to believe that the entity providing the testimonial would not be the subject of a “disqualifying Commission action” or “disqualifying event” as those terms are defined in SEC Rule 206(4)-1(e)(3) and (4).⁴³ While this proposed requirement under MSRB Rule G-40 is

such investment strategies are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments. See Exchange Act Rule 15Ba1-1(d)(1) (17 CFR 240.15Ba1-1(d)(1)) and 15Ba1-1(d)(3)(viii) (17 CFR 240.15Ba1-1(d)(3)(viii)).

⁴² 17 CFR 240.15Ba1-1(n).

⁴³ SEC Rule 206(4)-1(e)(3) defines a “disqualifying Commission action” to mean a Commission opinion or order barring, suspending, or prohibiting the person from acting in any capacity under the Federal securities laws. SEC Rule 206(4)-1(e)(4) defines a “disqualifying event” as any of the following events that occurred within ten years prior to the person disseminating an endorsement or testimonial: (i) a conviction by a court of competent jurisdiction within the United States of any felony or misdemeanor involving conduct described in paragraph (2)(A) through (D) of section 203(e) of the Act; (ii) a conviction by a court of competent jurisdiction within the United States of engaging in any of the conduct specified in paragraphs (1), (5), or (6) of section 203(e) of the Act; (iii) the entry of any final order by any entity described in paragraph (9) of section 203(e) of the Act, or by the U.S. Commodity Futures Trading Commission or a self-regulatory

similar to a requirement imposed on investment advisers under the Modernized IA Marketing Rule, the requirement under MSRB Rule G-40 is tailored to solicitor municipal advisors with the recognition that the intended recipients of municipal advisors' advertisements are municipal entities and obligated persons.

The second condition would require a solicitor municipal advisor that compensates a municipal advisor or investment adviser, directly or indirectly, more than \$1000 in total value in cash or non-cash compensation during the preceding 12 months, to have a written agreement with the municipal advisor or investment adviser.⁴⁴ The written agreement would be required to describe the scope of the agreed-upon activities with respect to the testimonial and the terms of the compensation for those activities. The proposed obligation for a solicitor municipal advisor to have a written agreement with the municipal advisor or investment adviser that describes the scope of the agreed-upon activities with respect to the testimonial is akin to an obligation under the Modernized IA Marketing Rule.⁴⁵ The MSRB believes the proposed additional conditions that would permit solicitor municipal advisors to pay more than a de minimis amount of compensation to a municipal advisory client providing a testimonial would reduce the potential concerns raised by permitting a non-solicitor municipal advisor to pay more than a de minimis amount of compensation to municipal advisory clients.

2. MSRB Rule G-40 Supervisory Obligations

MSRB Rule G-40 currently requires that each advertisement subject to the requirements of the rule be approved in writing by a municipal advisor principal, as defined in MSRB Rule G-3(e)(i), prior to first use. The proposed rule change would broaden these supervisory obligations to require, with respect to an advertisement that includes a testimonial, that such approval be

organization (as defined in the Form ADV Glossary of Terms), of the type described in paragraph (9) of section 203(e) of the Act; (iv) the entry of an order, judgment or decree described in paragraph (4) of section 203(e) of the Act, and still in effect, by any court of competent jurisdiction within the United States; and (v) a Commission order that a person cease and desist from committing or causing a violation or future violation of (A) any scienter-based anti-fraud provision of the Federal securities laws, including without limitation section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. 77q(a)(1)), section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and § 240.10b-5 of this chapter, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(c)(1)), and section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6(1)), or any other rule or regulation thereunder; or (B) section 5 of the Securities Act of 1933 (15 U.S.C. 77e). 17 CFR 275.206(4)-1.

⁴⁴ As discussed below, MSRB Rule G-38 prohibits dealers from paying persons who are not affiliated with the dealers for a solicitation of municipal securities business on their behalf. As a result, the proposed rule change assumes that solicitor municipal advisors would not obtain testimonials from dealers since dealers are prohibited from paying solicitor municipal advisors for their solicitations.

⁴⁵ See SEC Rule 206(4)-1(b)(2)(ii), 17 CFR 275.206(4)-1(b)(2)(ii).

based on a reasonable belief that the testimonial complies with the requirements of proposed MSRB Rule G-40(a)(iv)(G). The MSRB believes this additional supervisory obligation is appropriate in allowing municipal advisors the use of testimonials in advertisements. This obligation would be consistent with the oversight obligation under the Modernized IA Marketing Rule that requires an investment adviser to have a reasonable basis for believing that a testimonial complies with the requirements of SEC Rule 206(4)-1.⁴⁶ The MSRB believes establishing the same obligation for municipal advisors under MSRB Rule G-40 would promote regulatory consistency, particularly among regulated entities subject to a fiduciary standard.

3. MSRB Rule G-40 Definitions

MSRB Rule G-40(a)(iii) currently defines “municipal advisory client,” for purposes of MSRB Rule G-40, to include either: a municipal entity or obligated person for whom the municipal advisor engages in municipal advisory activities, as defined in MSRB Rule G-42(f)(iv); or a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser (as defined under section 202 of the Investment Advisers Act of 1940) on behalf of whom the municipal advisor undertakes a solicitation of a municipal entity or obligated person, as defined in Rule 15Ba1-1(n), 17 CFR 240.15Ba1-1(n), under the Act.⁴⁷ However, MSRB Rule G-38 prohibits dealers from paying persons who are not affiliated with the dealers for a solicitation of municipal securities business on their behalf. Accordingly, to avoid confusion and promote standardization across MSRB rules, the proposed rule change would modify the definition of municipal advisory client. Specifically, as proposed, the amended definition would exclude a broker, dealer, and municipal securities dealer from the list of entities on behalf of whom the municipal advisor undertakes a solicitation of a municipal entity or obligated person.

4. Recordkeeping Requirements under Rule G-40 and G-8

MSRB Rule G-40 currently requires that each municipal advisor make and keep current in a separate file, records of all advertisements.⁴⁸ The proposed rule change would extend that obligation to include records of any payment made to a municipal advisory client for a testimonial. The proposed rule change also would make a conforming amendment to the recordkeeping obligations under MSRB Rule G-8(h) to add subparagraph (viii) to include records concerning compliance with MSRB Rule G-40.⁴⁹ Specifically, the proposed rule change would amend MSRB Rule G-8(h) to specify that every municipal advisor that is registered or required to be registered under Section 15B of the Act and the rules and regulations thereunder

⁴⁶ See SEC Rule 206(4)-1(b)(2)(i), 17 CFR 275.206(4)-1(b)(2)(i).

⁴⁷ MSRB Rule G-40(a)(iii).

⁴⁸ MSRB Rule G-40(e).

⁴⁹ Today the MSRB also filed a proposed rule change to adopt new MSRB Rule G-46, on duties of solicitor municipal advisors, and amend MSRB Rule G-8 by adding subparagraph (h)(ix) to include records concerning compliance with MSRB Rule G-46.

would be required to make and keep current the records specified under MSRB Rule G-40. This would, therefore, include not only a record of all advertisements, which is currently required under MSRB Rule G-40(e), but also, to align with the proposed amendments to MSRB Rule G-40(e), a record of any cash or non-cash compensation provided to a municipal advisory client, as that term is defined in MSRB Rule G-40(a)(iii) and a record of any written agreement with a municipal advisor or investment adviser required under proposed MSRB Rule G-40(a)(iv)(G)(3)(b), which is required to describe the scope of the agreed-upon activities with respect to the testimonial and the terms of the compensation for such.

The MSRB believes that specifying these recordkeeping requirements would provide more certainty for municipal advisors with respect to their recordkeeping obligations. In addition, with the application of existing MSRB Rule G-9, which requires that municipal advisors generally preserve the books and records described in Rule G-8(h) for a period of not less than five years, the proposed amendments to MSRB Rule G-8(h) would provide examining authorities beneficial information to assist in evaluating a municipal advisor's compliance with MSRB Rule G-40.⁵⁰ In addition, the proposed amendment to MSRB Rule G-8 would align with SEC recordkeeping requirements, which require a municipal advisor to make and keep true, accurate, and current certain books and records relating to its municipal advisory activities, including originals or copies of all written communications sent, by such municipal advisor (including inter-office memoranda and communications) relating to municipal advisory activities, regardless of the format of such communications.⁵¹

(b) Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2) of the Exchange Act,⁵² which provides that the Board shall propose and adopt rules to effect the purposes of this title with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers and advice provided to or on behalf of municipal entities or obligated persons by brokers, dealers, municipal securities dealers, and municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors.

⁵⁰ Municipal advisors are also subject to the recordkeeping requirements described in SEC Rule 15Ba1-8(a)(1)-(8) under the Act.

⁵¹ See Rule 15Ba1-8(a)(1)-(8), 240.15Ba1-8. MSRB Rule G-8 requires that municipal advisors make and keep current all books and records described in Rule 15Ba-18(a)(1)-(8) under the Act.

⁵² 15 U.S.C. 78o-4(b)(2).

Section 15B(b)(2)(C) of the Exchange Act⁵³ provides that the MSRB's rules shall 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.

The MSRB believes the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act⁵⁴ because proposed MSRB Rule G-40, while permitting the use of testimonials, would continue to: prevent fraudulent and manipulative acts and practices; protect municipal entities, obligated persons and the public interest; promote just and equitable principles of trade; remove impediments to and perfect the mechanism of a free and open market in municipal securities; and foster cooperation and coordination with regulators.

The MSRB believes that the proposed rule change would help prevent fraudulent and manipulative acts and practices. The proposed rule change does not alter the standards 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 and that the advertisements do not include any false, exaggerated, unwarranted, promissory or misleading statement or claim. As a result, the MSRB believes that permitting municipal advisors to use only testimonials that are consistent with these standards would help ensure that MSRB Rule G-40 continues to prevent fraudulent and manipulative acts and practices.

Proposed MSRB Rule G-40 also would protect municipal entities, obligated persons and the public interest. It would do so by ensuring that recipients of any advertisement containing a testimonial have the necessary context to evaluate the testimonial because the proposed rule change would only permit the use of testimonials if certain conditions are met, including that specified disclosures are made. Since municipal entities and obligated persons are the likely recipients of municipal advisor's testimonials, the MSRB believes that the requisite disclosures would help ensure that the proposed rule change would not result in an erosion of protection for municipal entities, obligated persons and the public interest.

The MSRB also believes that the proposed rule change would promote just and equitable principles of trade by aligning the advertising rule for municipal advisors, to the extent practicable, with the advertising rules for dealers and for investment advisers. This serves to provide regulatory consistency for entities that may be dually registered, for example as a municipal advisor and an investment adviser, and therefore promotes compliance with the advertising rules, which in turn serves to help prevent fraudulent and manipulative practices and protect municipal entities, obligated persons, and the public interest. Additionally, the MSRB believes that the proposed rule change may remove impediments to a free and open municipal

⁵³ 15 U.S.C. 78o-4(b)(2)(C).

⁵⁴ Id.

securities market by permitting municipal advisors to also use testimonials in advertisements, which could improve competition among municipal advisors by allowing another method for advertising.

In addition, the proposed rule change would foster coordination with persons engaged in regulating transactions in municipal securities. The amendments to MSRB Rule G-40 would more tightly align the content standards for MSRB Rule G-40 with the content standards of the SEC's Modernized IA Marketing Rule. Providing a more uniform standard for regulated entities subject to a fiduciary standard serves to foster greater cooperation and coordination among the examining authorities responsible for ensuring compliance with MSRB rules. The MSRB further believes that the proposed amendment to MSRB Rule G-8 (with the related application of existing MSRB Rule G-9 on records preservation) would help municipal advisors create an audit trail for compliance and, in turn, would assist examination and enforcement authorities in their examination for compliance with MSRB Rule G-40, which would further help prevent fraudulent and manipulative acts and practices.

Section 15B(b)(2)(L)(iv) of the Exchange Act⁵⁵ requires that rules adopted by the Board 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 entities, and obligated persons, provided that there is robust protection of investors against fraud. The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(L)(iv) of the Exchange Act⁵⁶ because the proposed rule change would allow the use of testimonials by all municipal advisors, including small municipal advisors. The use of testimonials in advertising would be subject to tailored obligations designed to impose only the necessary and appropriate regulatory burdens needed to promote compliance with the proposed rule change. The proposed rule change represents a balanced approach to prescriptive standards for those municipal advisors that choose to have the potential benefit of using testimonials in advertisements.

Additionally, the MSRB sought to harmonize standards, where applicable, between those applicable to solicitor municipal advisors, non-solicitor municipal advisors, dealers, and registered investment advisers such that those regulated entities that engage in conduct that would make them two or more of the above could leverage some of their existing processes to comply with relevant obligations under a comparable regulatory framework. Moreover, the MSRB believes that permitting municipal advisors to use a testimonial in an advertisement would be particularly helpful for small municipal advisors to highlight the services provided to other municipal advisory clients.

The MSRB also believes that the proposed rule change is consistent with Section 15B(b)(2)(G) of the Exchange Act,⁵⁷ which provides that the MSRB's rules shall prescribe

⁵⁵ 15 U.S.C. 78o-4(b)(2)(L)(iv).

⁵⁶ Id.

⁵⁷ 15 U.S.C. 78o-4(b)(2)(G).

records to be made and kept by municipal securities brokers, municipal securities dealers, and municipal advisors and the periods for which such records shall be preserved. The proposed rule change would require municipal advisors, consistent with current MSRB Rule G-40(e), to make and keep current a record of all advertisements and, consistent with proposed MSRB Rule G-40(e), a record of any payment made to a municipal advisory client, as that term is defined in MSRB Rule G-40(a)(iii) for a testimonial and a record of any written agreements required under proposed MSRB Rule G-40(a)(iv)(G)(3)(b). The MSRB believes that the proposed amendments to MSRB Rule G-8 related to recordkeeping (with the ensuing application of existing MSRB Rule G-9 on records preservation) would promote regulatory consistency and compliance as well as facilitate the examination for compliance with MSRB Rule G-40, other MSRB rules, and other applicable securities laws and regulations.

4. Self-Regulatory Organization's Statement on Burden on Competition

Section 15B(b)(2)(C) of the Exchange Act⁵⁸ requires that MSRB rules not be designed to impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The MSRB believes the proposed rule change to amend MSRB Rule G-40 and MSRB Rule G-8 would not impose any burden on competition and would not have an impact on competition, as the proposed rule change would apply a similar regulatory regime to all municipal advisors.

In accordance with the Board's policy on the use of economic analysis in rulemaking, the Board has reviewed proposed amended MSRB Rule G-40 and proposed amended MRB Rule G-8.⁵⁹ The MSRB believes that the proposed changes to MSRB Rule G-40 and MSRB Rule G-8 would promote regulatory consistency and would benefit municipal advisors by removing the prohibition that an advertisement does not refer, directly or indirectly, to any testimonial of any kind concerning the municipal advisors. The proposed amendments to MSRB Rule G-40 and MSRB Rule G-8, by design, would continue to prevent any fraudulent or manipulative practices, and therefore would protect issuers and investors, as municipal advisors could only include the usage of a testimonial as part of an advertisement if certain conditions are met, and if abiding by the standards of the advertising rule in general. In addition, by aligning MSRB rules with the SEC's Modernized IA Marketing Rule, as well as MSRB Rule G-21, the proposed amendments to MSRB Rule G-40 and MSRB Rule G-8 would also improve efficiency by providing regulatory consistency for regulated entities dually registered as a dealer and as a municipal advisor, or as an investment adviser registered with the SEC and as a municipal advisor. The MSRB therefore believes the proposed amendments to MSRB Rule G-40 and MSRB Rule G-8

⁵⁸ 15 U.S.C. 78o-4(b)(2)(C).

⁵⁹ Policy on the Use of Economic Analysis in MSRB Rulemaking is available at <http://msrb.org/Rules-and-Interpretations/Economic-Analysis-Policy.aspx>. In evaluating whether there was a burden on competition, the Board was guided by its principles that required the Board to consider costs and benefits of a rule change, its impact on capital formation and the main reasonable alternative regulatory approaches.

would promote competition and would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

(1) Necessity of the Amendments to MSRB Rule G-40 and MSRB Rule G-8

As part of the MSRB's strategic goal to modernize the MSRB Rulebook, the MSRB proposes to amend MSRB Rule G-40 on advertising by municipal advisors to permit municipal advisors to use testimonials in advertisements. As MSRB Rule G-40 is currently written, municipal advisors are prohibited from using testimonials. This was due to the MSRB modeling MSRB Rule G-40 on the original 1961 Initial IA Advertising Rule specifying that using a testimonial by an investment adviser would constitute a fraudulent, deceptive, or manipulative act, practice, or course of action. In December 2020, the SEC amended Rule 206(4)-1, establishing the Modernized IA Marketing Rule and reversed the prior ban on the use of testimonials for traditional referral and solicitation activity, subject to certain conditions.⁶⁰ At the time of the 1961 Initial IA Advertising Rule, the SEC explained that investment advisers had stricter standards of conduct than those for other commercial enterprises and that clients and prospective clients of investment advisers are frequently unsophisticated in investment matters.⁶¹ The advent of the internet and the growth of technological advances, in general, have made social media and websites key parts of commerce, including investment advisory services.⁶² To provide investment advisers with more flexibility, and to increase investors' awareness of service providers' offerings and potentially reduce investors' search costs for an adviser, the SEC amended the Initial IA Advertising Rule to reflect the common use of testimonials and to provide a principles-based regulatory approach.⁶³

For the reasons discussed above, the proposed amendments to MSRB Rule G-40 are intended to align MSRB Rule G-40's provision governing the use of testimonials by municipal advisors to the analogous requirements under the SEC's Modernized IA Marketing Rule, by prohibiting the use of testimonials in an advertisement unless a municipal advisor complies with disclosure and oversight provisions. The proposed amendments to MSRB Rule G-40 are intended to promote regulatory consistency for regulated entities dually registered as a dealer and as a municipal advisor, or as an investment adviser with the SEC and as a municipal advisor. Because municipal advisors have a fiduciary duty to their clients, the MSRB believes the associated requirements for using testimonials as part of the advertising, which are meant to protect potential issuer clients from misleading advertisements of municipal advisors, would

⁶⁰ See SEC 2020 Adopting Release.

⁶¹ See 1961 Advertising Rule Adopting Release.

⁶² See 84 FR 67518. "People continue to seek out and consider the views of others when making a multitude of transactions or decisions – from purchasing a coffee maker to finding the right medical expert to consult."

⁶³ See SEC 2020 Adopting Release.

ensure the proposed amendments to MSRB Rule G-40 would not result in an erosion of protections for issuers, obligated persons and other market participants.

(2) Baseline for Evaluation and Reasonable Alternative Approaches

To evaluate the potential impact of amending MSRB Rule G-40 and MSRB Rule G-8, a baseline or baselines must be established as a point of reference to compare the expected future state with the proposed change to MSRB Rule G-40 and MSRB Rule G-8. The economic impact of the proposed change is generally viewed as the difference between the baseline state and the expected state. The baseline is the current iteration of MSRB Rule G-40 and MSRB Rule G-8.

The MSRB has considered reasonable alternatives where applicable when considering the costs, benefits, and impact of a proposed amendment. One alternative would be to merge MSRB Rule G-40 with MSRB Rule G-21 on advertising for dealers. Consolidating advertising requirements for dealers and municipal advisors would provide the benefit of holding both groups to the same standards, including the usage of testimonials in advertisements. However, dealers and municipal advisors provide vastly different services because, unlike dealers, most municipal advisors have a fiduciary duty to their clients. As a result, the MSRB believes that there is a need for a separate municipal advisor advertising rule.⁶⁴ In addition, prioritizing harmonization solely within MSRB rules, as opposed to harmonization of MSRB rules with Commission rules, as appropriate, would still result in inconsistency in rule requirements as related to advertisements between municipal advisors and investment advisers, both of which are subject to a fiduciary standard.

As another alternative, the MSRB considered harmonizing MSRB Rule G-40 with FINRA Rule 2210(2)(6) on communications with the public, including the usage of testimonials. Harmonizing with FINRA rules would provide a benefit to dually registered entities with FINRA and the MSRB. This position has previously been proposed by SIFMA in response to MSRB's SEC filing on creating MSRB Rule G-40.⁶⁵ However, FINRA Rule 2210 governs a broker-dealer's communications, as opposed to a municipal advisor's communications. This alternative may still cause inconsistency and confusion for advisory entities that provide both investment advisory and municipal advisory services because they would need to follow two separate testimonial rules (the SEC's Modernized IA Marketing Rule and a FINRA-aligned MSRB Rule G-40), which may also result in more costs associated with compliance. For the reasons stated above, the current proposed amendments to MSRB Rule G-40, which are designed, to the extent practicable, to align with MSRB Rule G-21 and the SEC's Modernized IA Market Rule are deemed to be superior to the alternative of aligning with FINRA's rule requirements related to the use of testimonials by broker-dealers.

⁶⁴ See Response to Comments on File No. SR-MSRB-2014-08, February 5, 2015.
“...market for municipal advisory services is separate and distinct from the market for services of municipal securities brokers and dealers.”

⁶⁵ Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated February 28, 2018 (“SIFMA”).

(3) Benefits and Costs

The MSRB believes that the proposed amendments to MSRB Rule G-40 and MSRB Rule G-8, in aggregate, would benefit municipal advisors by allowing testimonials in their advertisements subject to certain requirements, which would provide municipal advisors another marketing method to solicit potential clients, subject to certain conditions. In addition, the proposed amendments to MSRB Rule G-40 and MSRB Rule G-8 would potentially reduce the compliance burden for regulated entities dually registered as a dealer and as a municipal advisor, or as an investment adviser with the SEC and as a municipal advisor by aligning MSRB Rule G-40 with the SEC's Modernized IA Marketing Rule, as well as with MSRB Rule G-21 as related to the usage of testimonials in advertisements.

The ability to provide testimonials in advertisements may benefit municipal advisors by allowing municipal advisors to show satisfied clients or other individuals willing to endorse their business practices. In addition, the MSRB believes the associated requirements for using testimonials as part of an advertisement, which are meant to protect potential issuer clients and obligated persons of municipal advisors, would help ensure the proposed amendments to MSRB Rule G-40 and MSRB Rule G-8 would not result in an erosion of protection for issuers, obligated persons and other market participants.

The MSRB believes that the proposed amendments to MSRB Rule G-40 and MSRB Rule G-8 would impose minor costs on municipal advisors. Municipal advisors would incur the upfront costs related to updating policies and procedures on using testimonials in advertising, which would be a one-time effort only. In addition, on an ongoing basis, there would be minor compliance costs to assure municipal advisors' adherence to the disclosure requirements and supervisory obligations when using testimonials in advertisements, which would likely be greater than the current ongoing compliance costs of ensuring no testimonial is included in an advertisement. If a municipal advisor opts to use testimonials in advertisements, there would also be a cost from the resultant recordkeeping obligations, recognizing that absent proposed amendments to MSRB Rule G-8, municipal advisors are subject to SEC recordkeeping requirements to make and keep records of all written communications received, and originals or copies of all written communications sent, by such municipal advisor relating to municipal advisory activities.⁶⁶

The MSRB estimates that the annual costs for fulfilling the requirements associated with the use of testimonials in advertisements would be no more than \$400 per municipal advisor per year, assuming each municipal advisor would use approximately five testimonials per year, based on the SEC's 2019 estimated ongoing costs for investment advisers using testimonials and endorsements.⁶⁷ The MSRB does not expect any of the cost components to be a major burden for

⁶⁶ See Rule 15Ba1-8(a)(1)-(8) and MSRB Rule G-8(h)(i).

⁶⁷ See SEC 2020 Adopting Release. In 2019, the Commission estimated that the aggregate internal cost of providing the disclosures associated with testimonials and endorsements

municipal advisors. Furthermore, individual municipal advisory firms may decide whether it is cost-effective to use testimonials in advertising when weighing against the associated requirements and the compliance costs, as the usage of testimonials is optional. It is expected that municipal advisors would only choose to include testimonials in their advertisements if the expected benefits exceed the expected costs of doing so.

(4) Effect on Competition, Efficiency and Capital Formation

The proposed amendments to MSRB Rule G-40 and MSRB Rule G-8 would be applicable to all municipal advisors and would help ensure that all regulated entities dually registered as a dealer and as a municipal advisor, or as an investment adviser with the SEC and as a municipal advisor, are subject to consistent standards on the use of testimonials in advertisements. The proposed amendments to MSRB Rule G-40 and MSRB Rule G-8 would therefore promote efficiency in the marketplace.

The MSRB believes that proposed amended MSRB Rule G-40 and MSRB Rule G-8 would not impose an unnecessary or inappropriate regulatory burden on small municipal advisory firms, as the potential benefits from using testimonials in advertising would be applicable to all municipal advisors and should be proportionate to each municipal advisory firm's business activities. The proposed amendments to MSRB Rule G-40 and MSRB Rule G-8 therefore should not negatively affect competition and capital formation; it may improve competition among municipal advisors by allowing another method for advertising. The MSRB believes that permitting municipal advisors to use a testimonial in an advertisement would be particularly helpful for small municipal advisors to highlight the services provided to other municipal advisory clients.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received on the proposed rule change.

6. Extension of Time Period for Commission Action

The MSRB does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.⁶⁸

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2) or Section 19(b)(7)(D)

Not applicable

would be \$337 per investment adviser per year, assuming each investment adviser would use approximately five testimonials or endorsements per year.

⁶⁸ 15 U.S.C. 78s(b)(2).

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notice Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervisions Act

Not applicable.

11. Exhibits

Exhibit 1 Completed Notice of Proposed Rule Change for Publication in the Federal Register

Exhibit 5 Text of Proposed Rule Change

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-_____ ; File No. SR-MSRB-2023-01)
Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a
Proposed Rule Change Consisting of Amendments to MSRB Rule G-40, on Advertising by
Municipal Advisors, and MSRB Rule G-8, on Books and Records

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on _____ the Municipal Securities Rulemaking Board (“MSRB” or “Board”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The MSRB filed with the Commission a proposed rule change consisting of amendments to MSRB Rule G-40, on advertising by municipal advisors. Specifically, the proposed rule change consists of amendments to MSRB Rule G-40 to (i) permit municipal advisors to use testimonials in advertisements, subject to certain conditions; (ii) specify additional supervisory obligations with respect to the use of testimonials; (iii) modify the definition of municipal advisory client to better align with MSRB Rule G-38, on solicitation of municipal securities business; (iv) specify the obligation to keep a record of any payment for a testimonial; and (v) create a conforming obligation under MSRB Rule G-8, on books and records to be made by

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

brokers, dealers, municipal securities dealers and municipal advisors, to include records to correspond with the current obligation under MSRB Rule G-40 to maintain records relating to the supervision of advertisements as well as the proposed obligation to maintain records of any payments for a testimonial (together “the proposed rule change”). The MSRB requests that the proposed rule change be approved with an implementation date to be announced by the MSRB in a regulatory notice published no later than one month following the Commission approval date, which implementation date shall be no later than three months following the Commission approval date.

The text of the proposed rule change is available on the MSRB’s website at <https://msrb.org/2023-SEC-Filings>, at the MSRB’s principal office, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the MSRB included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The MSRB has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Consistent with the MSRB’s strategic goal to modernize the MSRB Rulebook, the proposed rule change would amend MSRB Rule G-40 to allow municipal advisors to use testimonials in certain circumstances, which would better align MSRB Rule G-40 with, to the

extent appropriate, the principles of MSRB Rule G-21, on advertising by brokers, dealers or municipal securities, as well as Rule 206(4)-1³ under the Investment Advisers Act of 1940 (the “Advisers Act”)⁴ adopted by the Commission.⁵

Background

Advertisements under MSRB Rule G-40

In recognition of the fact that municipal advisors bear similarities with both brokers, dealers and municipal securities dealers (collectively and individually, “dealers”) and investment advisers and to promote regulatory consistency for regulated entities dually registered as a dealer and as a municipal advisor, or as an investment adviser registered with the SEC, the MSRB established advertising standards for municipal advisors in 2018.⁶ These advertising standards were developed by aligning with, to the extent practicable, the then existing standards for investment advisers under Rule 206(4)-1 and the then existing standards for dealers under MSRB Rule G-21.

MSRB Rule G-40 is designed to protect municipal entities, obligated persons and the general public by requiring a municipal advisor’s advertisement to adhere to specific content standards based on the principles of fair dealing and good faith. An advertisement is generally

³ 17 CFR 275.206(4)-1.

⁴ 15 U.S.C. 80b-1 et seq.

⁵ See Investment Advisers Act Release No. 5653 (Dec. 22, 2020), the adopting release for Investment Adviser Marketing (the “SEC 2020 Adopting Release”), 86 FR 13024-13147 (Mar. 5, 2021)).

⁶ See Exchange Act Release No. 83177 (May 7, 2018), 83 FR 21794 (May 10, 2018), approval of proposed rule change File No. SR-MSRB-2018-01 (“SEC approval order of MSRB Rule G-40”). The effective date for municipal advisors to comply with MSRB Rule G-40 was August 23, 2019.

defined in MSRB Rule G-40 to include any material published or used in any electronic or other public media, or any written or electronic promotional literature distributed or made generally available to municipal entities, obligated persons, municipal advisory clients or the public, including any notice, circular, report, market letter, form letter, telemarketing script, seminar text, press release concerning the services of the municipal advisor or the engagement of a municipal advisory client or reprint, or any excerpt of the foregoing or of a published article.⁷

MSRB Rule G-40 specifies content standards that require, among other things, that all advertisements by a municipal advisor be fair and balanced and provide a sound basis for evaluating the facts in regard to any particular municipal security or type of municipal security, municipal financial product, industry, or service.⁸ A municipal advisor may not make any false, exaggerated, unwarranted, promissory or misleading statement or claim in any advertisement or 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.⁹ Additionally, a municipal advisor is prohibited from publishing false or misleading advertisements concerning the services of the municipal advisor or the engagement of a municipal advisory client or concerning the facilities, services, or skills of any municipal advisor.¹⁰

In establishing MSRB Rule G-40, the MSRB determined to prohibit municipal advisors, directly or indirectly, from publishing, circulating or distributing any advertisement which refers,

⁷ See MSRB Rule G-40(a)(i).

⁸ See MSRB Rule G-40(a)(iv)(A).

⁹ See MSRB Rule G-40(a)(iv)(B).

¹⁰ See MSRB Rule G-40(a)(iv)(B).

directly or indirectly, to any testimonial of any kind concerning the municipal advisor or concerning the advice, analysis, report or other service rendered by the municipal advisor.¹¹ At that time, the MSRB expressed the view that a testimonial in a municipal advisor’s advertisement would present significant issues, including the possibility of being misleading.¹² As a basis for this view, the MSRB noted that the Commission had taken a similar position in adopting Advisers Act Rule 206(4)-1 in 1961 (the “Initial IA Advertising Rule” or “Initial Rule 206(4)-1”), determining that the use of a testimonial by an investment adviser would constitute a fraudulent, deceptive, or manipulative act, practice, or course of action.¹³ Believing that doing so would help ensure consistent regulation between regulated entities subject to a fiduciary standard, the MSRB determined to act consistently with the language of Initial Rule 206(4).¹⁴

Testimonials under MSRB Rule G-21

In establishing MSRB Rule G-40, the MSRB also sought, to the extent practicable, to harmonize with its existing rule governing the advertisements of dealers, MSRB Rule G-21. While not identical, the two MSRB rules are analogous in that they both are based on principles of fair dealing and maintain rigorous content standards. However, MSRB Rule G-40 currently prohibits a municipal advisor from using a testimonial in an advertisement. This prohibition is

¹¹ See MSRB Rule G-40(a)(iv)(G).

¹² See Exchange Act Release No. 82616 (Feb. 1, 2018), 83 FR 5474 (Feb. 7, 2018), notice of proposed rule change File No. SR-MSRB-2018-01) (“Notice of proposed Rule G-40”).

¹³ See Investment Advisers Act Release No. 121 (Nov. 1, 1961) (the “1961 Advertising Rule Adopting Release”), 26 FR 10548 (Nov. 9, 1961). The Commission adopted the Advertising Rule in 1961 to target advertising practices that the Commission believed were likely to be misleading.

¹⁴ See Notice of Proposed MSRB Rule G-40, 83 FR 5474, 5478 n.26, 5488 & n.119.

based in part on the fiduciary duty that a non-solicitor municipal advisor (as opposed to a dealer) owes its municipal entity clients.¹⁵

MSRB Rule G-21 permits a dealer to use a testimonial in an advertisement if certain conditions are met. Specifically, if a dealer's advertisement contains a testimonial, then the person providing the testimonial concerning a technical aspect of investing must have the knowledge and experience to form a valid opinion.¹⁶ Additionally, if an advertisement contains a testimonial about the investment advice or investment performance of the dealer, the advertisement must prominently disclose (i) the fact that the testimonial may not be representative of the experience of other customers; (ii) the fact that the testimonial is no guarantee of future performance or success; and (iii) if more than \$100 in value is paid for the testimonial, the fact that it is a paid testimonial.¹⁷

Testimonials under Advisers Act Rule 206(4)-1

In establishing MSRB Rule G-40 in 2018, the MSRB recognized that the Commission was considering modernizing the Initial IA Advertising Rule and noted that it would monitor developments related to the testimonial ban.¹⁸ On December 22, 2020, the Commission adopted amendments to modernize and consolidate the Initial IA Advertising Rule and Rule 206(4)-3 of the Adviser's Act (the "IA Solicitation Rule")¹⁹ into one marketing rule for investment advisers,

¹⁵ See generally Notice of Proposed MSRB Rule G-40.

¹⁶ MSRB Rule G-21(a)(iii)(G)(1).

¹⁷ MSRB Rule G-21(a)(iii)(G)(2).

¹⁸ Notice of Proposed MSRB Rule G-40, 83 FR 5474, 5487.

¹⁹ 17 CFR 275.206(4)-3. The IA Solicitation Rule was adopted in 1979 "to help ensure that clients are aware that paid solicitors who refer them to advisers have a conflict of interest." See SEC 2020 Adopting Release, 86 FR 13025.

under the Advisers Act (the “Modernized IA Marketing Rule” or “SEC Rule 206(4)-1”).²⁰ When adopting the Modernized IA Marketing Rule, the SEC noted that, among other things, it replaces the previous rule’s “broadly drawn limitations with principles-based provisions designed to accommodate the continual evolution and interplay of technology and advice and includes tailored requirements for certain types of advertisements.”²¹ Significantly, the Modernized IA Marketing Rule replaced the prior ban on testimonials under the Initial IA Advertising Rule with a permissive use of testimonials and endorsements in advertisements,²² which includes traditional referral and solicitation activity, subject to certain conditions.²³

The Modernized IA Marketing Rule requires advertisements that include testimonials or endorsements to provide disclosures of certain information.²⁴ Specifically, the Modernized IA Marketing Rule requires that an investment adviser clearly and prominently disclose the following at the time the testimonial or endorsement is disseminated: (i) that the testimonial was

²⁰ SEC 2020 Adopting Release. The Modernized IA Marketing Rule applies to any investment adviser registered or required to be registered with the Commission under §203 of the Advisers Act that directly or indirectly disseminates an advertisement.

²¹ SEC Press Release, [SEC Adopts Modernized Marketing Rule for Investment Advisers](#), dated December 22, 2020.

²² A “testimonial” is a statement made by a current client or investor in a private fund advised by the investment adviser, whereas an “endorsement” is a statement made by a person other than a current client or investor in a private fund advised by the investment adviser. See 17 CFR 275.206(4)-1(e)(17) and 17 CFR 275.206(4)-1(e)(5).

²³ 17 CFR 275.206(4)-1(b) (relating to compensated testimonials and endorsements); see also 17 CFR 206(4)-1(e)(1)(ii) (defining the term “advertisement” to include compensated testimonials and endorsements). These conditions differ depending on whether the testimonial or endorsement is compensated or uncompensated. 17 CFR 275.206(4)-1(b)(4)(i) (exempting a testimonial or endorsement disseminated for no compensation or de minimis compensation from paragraphs 206(4)-1(b)(2)(ii) and (3).

²⁴ 17 CFR 275.206(4)-1(b)(1).

given by a current client or investor or, if an endorsement, that the endorsement was given by a person other than a current client or investor; (ii) that cash or non-cash compensation was provided for the testimonial, if applicable; and (iii) a brief statement of any material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from the adviser's relationship with such person.²⁵

In addition, disclosure of the material terms of any compensation arrangement and a description of any material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from the advisers' relationship with such person and/or any compensation arrangement must be provided to the recipient(s) of the testimonial.²⁶ All testimonials, including those that are compensated and uncompensated are subject to oversight and compliance. Specifically, the investment adviser must have (i) a reasonable basis for believing that any testimonial or endorsement complies with the requirements of the rule, and (ii) a written agreement with any person giving a compensated testimonial or endorsement that describes the scope of the agreed upon activities. The requirement to have a written agreement only applies when the adviser is providing compensation for testimonials and endorsements is above the de minimis threshold (i.e., \$1,000 or less, or the equivalent value in non-cash compensation during the preceding twelve months).²⁷

²⁵ 17 CFR 275.206(4)-1(b). See 17 CFR 275.206(4)-1(b)(4) discussing exemptions from the disclosure requirements.

²⁶ This includes a description of the compensation provided or to be provided, directly or indirectly, to the person for the testimonial or endorsement. 17 CFR 275.206(4)-1(b)(1).

²⁷ 17 CFR 275.206(4)-1(b)(2).

In light of the Commission's adoption of the Modernized IA Marketing Rule, the MSRB has conducted a review of MSRB Rule G-40 and is filing the proposed rule change to promote regulatory consistency among regulated entities subject to a fiduciary standard. The proposed rule change would permit municipal advisors to use testimonials in advertisements, subject to certain conditions, as discussed below.²⁸

Summary of Proposed Amendments

To promote regulatory consistency, where practicable, among MSRB Rule G-40, MSRB Rule G-21, and the SEC's Modernized IA Marketing Rule, proposed amended MSRB Rule G-40 would permit the use of testimonials subject to disclosures and other tailored conditions. The proposed rule change would not only align MSRB Rule G-40 with the analogous requirements for dealers under MSRB Rule G-21, but, because municipal advisors have a fiduciary duty to their clients, the proposed rule change would also include certain provisions, tailored to apply to municipal advisors, which align with the SEC's Modernized IA Marketing Rule. Specifically, the proposed rule change would amend the content standards under MSRB Rule G-40(a)(iv) to permit municipal advisors to use testimonials in advertisements subject to certain conditions; amend the supervisory obligations under MSRB Rule G-40(c) to specify additional supervisory obligations with respect to the use of testimonials; modify the definition of municipal advisory client; and amend MSRB Rule G-8 to include records to correspond with the current obligation under MSRB Rule G-40 to maintain records relating to the supervision of advertisements.

MSRB Rule G-40 Content Standards

²⁸ The term "testimonial" is not specifically defined in MSRB Rule G-21 or MSRB Rule G-40; based on the application of each rule, the term has been understood to include a statement given by a current client or person other than a current client and does not distinguish between a testimonial and an endorsement.

MSRB Rule G-40 currently prohibits the use of testimonials in advertisements by municipal advisors.²⁹ The MSRB is not proposing to alter the fundamental content standards of MSRB Rule G-40 that require advertisements to be based on the principles of fair dealing and good faith, be fair and balanced, and provide a sound basis for evaluating the facts and that the advertisements not make any false, exaggerated, unwarranted, promissory, or misleading statement or claim.³⁰ Consistent with those standards, and recognizing the fiduciary duty owed by municipal advisors to their municipal entity clients, the MSRB is proposing to permit the use of testimonials in advertisements by municipal advisors subject to certain conditions that the MSRB believes would diminish the concern, expressed in establishing MSRB Rule G-40, that testimonials could cause a municipal advisor's advertisement to be misleading.³¹ Specifically, as proposed, MSRB Rule G-40(a)(iv)(G) would be amended to provide that municipal advisor advertisements that contain testimonials would be subject to additional content standards.

If a municipal advisor's advertisement contains a testimonial of any kind concerning the municipal advisor or concerning the advice, analysis, report, or other service rendered by the municipal advisor, the person making the testimonial would be required to have the knowledge and experience to form a valid opinion.³² This obligation would standardize the content standard with that applicable to dealers' use of testimonials under MSRB Rule G-21.³³ The MSRB

²⁹ MSRB Rule G-40(a)(iv)(G).

³⁰ MSRB Rule G-40(a)(iv)(A) - (F), G-40(a)(v) and G-40(b)(ii).

³¹ See Notice of Proposed MSRB Rule G-40, 83 FR 5474, 5487.

³² Proposed MSRB Rule G-40(a)(iv)(G)(1).

³³ This content standard in MSRB Rule G-21 currently aligns with the standard established in Rule 2210, Communications with the Public, of the Financial Industry Regulatory Authority ("FINRA"). Specifically, FINRA Rule 2210(d)(6)(A) provides that "if any

believes applying this standard to municipal advisors is consistent with the existing content standards of MSRB Rule G-40 established to prevent false or misleading advertisements and would promote regulatory consistency.

If an advertisement contains a testimonial concerning the municipal advisor or concerning the advice, analysis, report, or other service rendered by the municipal advisor, that advertisement must include, clearly and prominently, disclosures designed to reduce the risk that the use of a testimonial in an advertisement could be misleading. First, the testimonial must include a clear and prominent disclosure that the person providing the testimonial is a current municipal advisory client or, if not currently a municipal advisory client, the timeframe, denoted by calendar year(s), during which the person was a municipal advisory client.³⁴ The MSRB believes that allowing the use of a testimonial only when the testimonial is from a current or former client reinforces the proposed requirement that the person providing the testimonial have the knowledge and experience to form a valid opinion and helps ensure that the municipal advisor's advertisement is fair and balanced. In addition, disclosing the time frame when a person providing a testimonial was a municipal advisory client would provide important context to help reduce the risk that the use of a testimonial could be misleading, which would benefit the likely recipients of the advertisement (i.e., municipal entities and obligated persons). The clear and prominent disclosure standard requires that the disclosures be included within the

testimonial in a communication concerns a technical aspect of investing, the person making the testimonial must have the knowledge and experience to form a valid opinion.”

³⁴ Proposed MSRB Rule G-40(a)(iv)(G)(2)(a).

advertisement that includes the testimonial such that the testimonial and disclosures are read at the same time and improve the salience and impact of the disclosures.

The testimonial would also be required to include clear and prominent disclosures that the testimonial may not be representative of the experience of other clients,³⁵ that the testimonial is no guarantee of future performance or success,³⁶ and, if more than \$100 in total value in cash or non-cash compensation is paid for the testimonial, the fact that it is a paid testimonial.³⁷ Requiring municipal advisors that use testimonials to adhere to these disclosure requirements would harmonize the content standards with those applicable to dealers' use of testimonials under MSRB Rule G-21.³⁸ The MSRB believes requiring such disclosures is consistent with the existing content standards of MSRB Rule G-40 and would promote regulatory consistency.

Finally, the testimonial also would be required to include, clearly and prominently, a brief statement of any material conflicts of interest on the part of the person providing the testimonial resulting from the municipal advisor's relationship with such person. Recognizing the fiduciary duty owed by municipal advisors to their municipal entity clients, the MSRB considered the obligations of registered investment advisers, who, like municipal advisors, are subject to a fiduciary standard in determining the disclosures that would be appropriate for municipal advisors when using testimonials in advertisements. This disclosure obligation parallels a disclosure obligation required of registered investment advisers under SEC Rule 206(4)-

³⁵ Proposed MSRB Rule G-40(a)(iv)(G)(2)(b).

³⁶ Proposed MSRB Rule G-40(a)(iv)(G)(2)(c).

³⁷ Proposed Rule MSRB G-40(a)(iv)(G)(2)(d).

³⁸ These disclosure requirements in MSRB Rule G-21 currently align with the disclosure requirements in FINRA Rule 2210(d)(6)(B)(1) – (3).

1(b)(1)(iii). The MSRB believes that a brief statement of any material conflicts of interest on the part of the person providing the testimonial resulting from the municipal advisor's relationship with such person would result in information that informs the likely recipients of the advertisement (i.e., municipal entities and obligated persons) which serves to ensure that the advertisement is fair and balanced and reduces the risk that the use of a testimonial could be misleading. Furthermore, the MSRB believes establishing the same disclosure obligation for municipal advisors under MSRB Rule G-40 promotes regulatory consistency, particularly among regulated entities subject to a fiduciary standard. To that end, the MSRB expects this disclosure to be succinct.³⁹

There are two broad categories of municipal advisors⁴⁰ — those that provide certain advice to or on behalf of a municipal entity or obligated person and those that undertake certain

³⁹ In adopting Rule 206(4)-1(b)(1)(iii), the SEC noted that “[s]imilar to the other disclosures subject to the clear and prominent standard, we expect this disclosure to be succinct. For example, it would be sufficient for an adviser to simply state that the testimonial or endorsement was provided by an affiliate of the adviser, or that the promoter is related to the adviser, if this relationship is the source of the conflict.” SEC 2020 Adopting Release, 86 FR 13025.

⁴⁰ Section 15B(e)(4) of the Exchange Act (15 U.S.C. 78o-4(e)(4)) generally defines “municipal advisor” to mean a person (who is not a municipal entity or an employee of a municipal entity) that (i) provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or (ii) undertakes a solicitation of a municipal entity. Notwithstanding the omission of the term, “obligated person” in connection with the undertaking of a solicitation under Section 15B(e)(4)(A)(ii) of the Exchange Act (15 U.S.C. 78o-4(e)(4)(A)(ii)), the SEC has interpreted the definition of “municipal advisor” to include a person who engages in the solicitation of an obligated person acting in the capacity of an obligated person. See Exchange Act Release No. 70462 (September 20, 2013), 78 FR 67467, at notes 138 and 408 (November 12, 2013) (File No. S7-45-10) (“Order Adopting SEC Final MA Rule”). See also Exchange Act Rule 15Ba1-1(d)(1)(i) (17 CFR 240.15Ba1-1(d)(1)(i)).

solicitations of a municipal entity or obligated person on behalf of certain third-party financial professionals, often referred to as solicitors.⁴¹ The MSRB understands that municipal entity clients generally do not accept compensation for testimonials and believes that the payment of more than a de minimis amount (more than \$1000 in total value in cash or non-cash compensation during the preceding 12 months) to a municipal entity client could present a potential conflict of interest. Therefore, proposed MSRB Rule G-40(a)(iv)(G)(3) would prohibit a non-solicitor municipal advisor from paying more than a de minimis amount of compensation

⁴¹ Section 15B(e)(9) of the Exchange Act (15 U.S.C. 78o-4(e)(9)) generally defines “solicitation of a municipal entity or obligated person” to mean a direct or indirect communication with a municipal entity or obligated person made by a person, for direct or indirect compensation, on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser . . . that does not control, is not controlled by, or is not under common control with the person undertaking such solicitation for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person of a broker, dealer, municipal securities dealer, or municipal advisor for or in connection with municipal financial products, the issuance of municipal securities, or of an investment adviser to provide investment advisory services to or on behalf of a municipal entity. The SEC has interpreted this phrase generally in a manner similar to the statutory definition. However, it has also added two exceptions to the statutory definition for (i) advertising by a dealer, municipal advisor or investment adviser and (ii) solicitations of an obligated person where such obligated person is not acting in the capacity of an obligated person or the solicitation is not in connection with the issuance of municipal securities or with respect to municipal financial products. See Exchange Act Rule 15Ba1-1(n) (17 CFR 240.15Ba1-1(n)). Additionally, the SEC has exempted from the municipal advisor definition a person that undertakes a solicitation of a municipal entity or obligated person for the purpose of obtaining or retaining an engagement by a municipal entity or by an obligated person of a dealer or a municipal advisor for or in connection with municipal financial products that are investment strategies, to the extent such investment strategies are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments. See Exchange Act Rule 15Ba1-1(d)(1) (17 CFR 240.15Ba1-1(d)(1)) and 15Ba1-1(d)(3)(viii) (17 CFR 240.15Ba1-1(d)(3)(viii)).

for a testimonial.

To avoid this concern and to avoid creating complexity in MSRB Rule G-40 by establishing different standards for obligated person clients of non-solicitor municipal advisors, the MSRB determined to prohibit non-solicitor municipal advisors from paying any compensation for a testimonial to a person, directly or indirectly, of more than \$1000 in total value in cash or non-cash compensation during the preceding 12 months. However, the proposed rule change would permit solicitor municipal advisors to pay such compensation to a municipal advisor, or an investment adviser (as defined under section 202 of the Investment Advisers Act of 1940) on behalf of whom the municipal advisor undertakes, or has undertaken, a solicitation of a municipal entity or obligated person, as defined in Rule 15Ba1-1(n)⁴² subject to certain conditions.

The first condition would require a solicitor municipal advisor to conclude, based on the exercise of reasonable diligence, that the municipal advisor or investment adviser who will provide the testimonial is currently registered with the Commission. The MSRB believes requiring a solicitor municipal advisor to determine that the municipal advisor or investment adviser providing the testimonial is registered with the Commission would establish a reasonable basis to believe that the entity providing the testimonial would not be the subject of a “disqualifying Commission action” or “disqualifying event” as those terms are defined in SEC Rule 206(4)-1(e)(3) and (4).⁴³ While this proposed requirement under MSRB Rule G-40 is

⁴² 17 CFR 240.15Ba1-1(n).

⁴³ SEC Rule 206(4)-1(e)(3) defines a “disqualifying Commission action” to mean a Commission opinion or order barring, suspending, or prohibiting the person from acting in any capacity under the Federal securities laws. SEC Rule 206(4)-1(e)(4) defines a “disqualifying event” as any of the following events that occurred within ten years prior to the person disseminating an endorsement or testimonial: (i) a conviction by a court of

similar to a requirement imposed on investment advisers under the Modernized IA Marketing Rule, the requirement under MSRB Rule G-40 is tailored to solicitor municipal advisors with the recognition that the intended recipients of municipal advisors' advertisements are municipal entities and obligated persons.

The second condition would require a solicitor municipal advisor that compensates a municipal advisor or investment adviser, directly or indirectly, more than \$1000 in total value in cash or non-cash compensation during the preceding 12 months, to have a written agreement with the municipal advisor or investment adviser.⁴⁴ The written agreement would be required to describe the scope of the agreed-upon activities with respect to the testimonial and the terms of the compensation for those activities. The proposed obligation for a solicitor municipal advisor

competent jurisdiction within the United States of any felony or misdemeanor involving conduct described in paragraph (2)(A) through (D) of section 203(e) of the Act; (ii) a conviction by a court of competent jurisdiction within the United States of engaging in any of the conduct specified in paragraphs (1), (5), or (6) of section 203(e) of the Act; (iii) the entry of any final order by any entity described in paragraph (9) of section 203(e) of the Act, or by the U.S. Commodity Futures Trading Commission or a self-regulatory organization (as defined in the Form ADV Glossary of Terms), of the type described in paragraph (9) of section 203(e) of the Act; (iv) the entry of an order, judgment or decree described in paragraph (4) of section 203(e) of the Act, and still in effect, by any court of competent jurisdiction within the United States; and (v) a Commission order that a person cease and desist from committing or causing a violation or future violation of (A) any scienter-based anti-fraud provision of the Federal securities laws, including without limitation section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. 77q(a)(1)), section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and § 240.10b-5 of this chapter, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(c)(1)), and section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6(1)), or any other rule or regulation thereunder; or (B) section 5 of the Securities Act of 1933 (15 U.S.C. 77e). 17 CFR 275.206(4)-1.

⁴⁴ As discussed below, MSRB Rule G-38 prohibits dealers from paying persons who are not affiliated with the dealers for a solicitation of municipal securities business on their behalf. As a result, the proposed rule change assumes that solicitor municipal advisors would not obtain testimonials from dealers since dealers are prohibited from paying solicitor municipal advisors for their solicitations.

to have a written agreement with the municipal advisor or investment adviser that describes the scope of the agreed-upon activities with respect to the testimonial is akin to an obligation under the Modernized IA Marketing Rule.⁴⁵ The MSRB believes the proposed additional conditions that would permit solicitor municipal advisors to pay more than a de minimis amount of compensation to a municipal advisory client providing a testimonial would reduce the potential concerns raised by permitting a non-solicitor municipal advisor to pay more than a de minimis amount of compensation to municipal advisory clients.

MSRB Rule G-40 Supervisory Obligations

MSRB Rule G-40 currently requires that each advertisement subject to the requirements of the rule be approved in writing by a municipal advisor principal, as defined in MSRB Rule G-3(e)(i), prior to first use. The proposed rule change would broaden these supervisory obligations to require, with respect to an advertisement that includes a testimonial, that such approval be based on a reasonable belief that the testimonial complies with the requirements of proposed MSRB Rule G-40(a)(iv)(G). The MSRB believes this additional supervisory obligation is appropriate in allowing municipal advisors the use of testimonials in advertisements. This obligation would be consistent with the oversight obligation under the Modernized IA Marketing Rule that requires an investment adviser to have a reasonable basis for believing that a testimonial complies with the requirements of SEC Rule 206(4)-1.⁴⁶ The MSRB believes establishing the same obligation for municipal advisors under MSRB Rule G-40 would promote regulatory consistency, particularly among regulated entities subject to a fiduciary standard.

MSRB Rule G-40 Definitions

⁴⁵ See SEC Rule 206(4)-1(b)(2)(ii), 17 CFR 275.206(4)-1(b)(2)(ii).

⁴⁶ See SEC Rule 206(4)-1(b)(2)(i), 17 CFR 275.206(4)-1(b)(2)(i).

MSRB Rule G-40(a)(iii) currently defines “municipal advisory client,” for purposes of MSRB Rule G-40, to include either: a municipal entity or obligated person for whom the municipal advisor engages in municipal advisory activities, as defined in MSRB Rule G-42(f)(iv); or a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser (as defined under section 202 of the Investment Advisers Act of 1940) on behalf of whom the municipal advisor undertakes a solicitation of a municipal entity or obligated person, as defined in Rule 15Ba1-1(n), 17 CFR 240.15Ba1-1(n), under the Act.⁴⁷ However, MSRB Rule G-38 prohibits dealers from paying persons who are not affiliated with the dealers for a solicitation of municipal securities business on their behalf. Accordingly, to avoid confusion and promote standardization across MSRB rules, the proposed rule change would modify the definition of municipal advisory client. Specifically, as proposed, the amended definition would exclude a broker, dealer, and municipal securities dealer from the list of entities on behalf of whom the municipal advisor undertakes a solicitation of a municipal entity or obligated person.

Recordkeeping Requirements under Rule G-40 and G-8

MSRB Rule G-40 currently requires that each municipal advisor make and keep current in a separate file, records of all advertisements.⁴⁸ The proposed rule change would extend that obligation to include records of any payment made to a municipal advisory client for a testimonial. The proposed rule change also would make a conforming amendment to the recordkeeping obligations under MSRB Rule G-8(h) to add subparagraph (viii) to include

⁴⁷ MSRB Rule G-40(a)(iii).

⁴⁸ MSRB Rule G-40(e).

records concerning compliance with MSRB Rule G-40.⁴⁹ Specifically, the proposed rule change would amend MSRB Rule G-8(h) to specify that every municipal advisor that is registered or required to be registered under Section 15B of the Act and the rules and regulations thereunder would be required to make and keep current the records specified under MSRB Rule G-40. This would, therefore, include not only a record of all advertisements, which is currently required under MSRB Rule G-40(e), but also, to align with the proposed amendments to MSRB Rule G-40(e), a record of any cash or non-cash compensation provided to a municipal advisory client, as that term is defined in MSRB Rule G-40(a)(iii) and a record of any written agreement with a municipal advisor or investment adviser required under proposed MSRB Rule G-40(a)(iv)(G)(3)(b), which is required to describe the scope of the agreed-upon activities with respect to the testimonial and the terms of the compensation for such.

The MSRB believes that specifying these recordkeeping requirements would provide more certainty for municipal advisors with respect to their recordkeeping obligations. In addition, with the application of existing MSRB Rule G-9, which requires that municipal advisors generally preserve the books and records described in Rule G-8(h) for a period of not less than five years, the proposed amendments to MSRB Rule G-8(h) would provide examining authorities beneficial information to assist in evaluating a municipal advisor's compliance with MSRB Rule G-40.⁵⁰ In addition, the proposed amendment to MSRB Rule G-8 would align with SEC recordkeeping requirements, which require a municipal advisor to make and keep true,

⁴⁹ Today the MSRB also filed a proposed rule change to adopt new MSRB Rule G-46, on duties of solicitor municipal advisors, and amend MSRB Rule G-8 by adding subparagraph (h)(ix) to include records concerning compliance with MSRB Rule G-46.

⁵⁰ Municipal advisors are also subject to the recordkeeping requirements described in SEC Rule 15Ba1-8(a)(1)-(8) under the Act.

accurate, and current certain books and records relating to its municipal advisory activities, including originals or copies of all written communications sent, by such municipal advisor (including inter-office memoranda and communications) relating to municipal advisory activities, regardless of the format of such communications.⁵¹

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2) of the Exchange Act,⁵² which provides that the Board shall propose and adopt rules to effect the purposes of this title with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers and advice provided to or on behalf of municipal entities or obligated persons by brokers, dealers, municipal securities dealers, and municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors.

Section 15B(b)(2)(C) of the Exchange Act⁵³ provides that the MSRB's rules shall 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

⁵¹ See Rule 15Ba1-8(a)(1)-(8), 240.15Ba1-8. MSRB Rule G-8 requires that municipal advisors make and keep current all books and records described in Rule 15Ba-18(a)(1)-(8) under the Act.

⁵² 15 U.S.C. 78o-4(b)(2).

⁵³ 15 U.S.C. 78o-4(b)(2)(C).

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.

The MSRB believes the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act⁵⁴ because proposed MSRB Rule G-40, while permitting the use of testimonials, would continue to: prevent fraudulent and manipulative acts and practices; protect municipal entities, obligated persons and the public interest; promote just and equitable principles of trade; remove impediments to and perfect the mechanism of a free and open market in municipal securities; and foster cooperation and coordination with regulators.

The MSRB believes that the proposed rule change would help prevent fraudulent and manipulative acts and practices. The proposed rule change does not alter the standards 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 and that the advertisements do not include any false, exaggerated, unwarranted, promissory or misleading statement or claim. As a result, the MSRB believes that permitting municipal advisors to use only testimonials that are consistent with these standards would help ensure that MSRB Rule G-40 continues to prevent fraudulent and manipulative acts and practices.

Proposed MSRB Rule G-40 also would protect municipal entities, obligated persons and the public interest. It would do so by ensuring that recipients of any advertisement containing a testimonial have the necessary context to evaluate the testimonial because the proposed rule change would only permit the use of testimonials if certain conditions are met, including that specified disclosures are made. Since municipal entities and obligated persons are the likely recipients of municipal advisor's testimonials, the MSRB believes that the requisite disclosures

⁵⁴

Id.

would help ensure that the proposed rule change would not result in an erosion of protection for municipal entities, obligated persons and the public interest.

The MSRB also believes that the proposed rule change would promote just and equitable principles of trade by aligning the advertising rule for municipal advisors, to the extent practicable, with the advertising rules for dealers and for investment advisers. This serves to provide regulatory consistency for entities that may be dually registered, for example as a municipal advisor and an investment adviser, and therefore promotes compliance with the advertising rules, which in turn serves to help prevent fraudulent and manipulative practices and protect municipal entities, obligated persons, and the public interest. Additionally, the MSRB believes that the proposed rule change may remove impediments to a free and open municipal securities market by permitting municipal advisors to also use testimonials in advertisements, which could improve competition among municipal advisors by allowing another method for advertising.

In addition, the proposed rule change would foster coordination with persons engaged in regulating transactions in municipal securities. The amendments to MSRB Rule G-40 would more tightly align the content standards for MSRB Rule G-40 with the content standards of the SEC's Modernized IA Marketing Rule. Providing a more uniform standard for regulated entities subject to a fiduciary standard serves to foster greater cooperation and coordination among the examining authorities responsible for ensuring compliance with MSRB rules. The MSRB further believes that the proposed amendment to MSRB Rule G-8 (with the related application of existing MSRB Rule G-9 on records preservation) would help municipal advisors create an audit trail for compliance and, in turn, would assist examination and enforcement authorities in their

examination for compliance with MSRB Rule G-40, which would further help prevent fraudulent and manipulative acts and practices.

Section 15B(b)(2)(L)(iv) of the Exchange Act⁵⁵ requires that rules adopted by the Board 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 entities, and obligated persons, provided that there is robust protection of investors against fraud. The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(L)(iv) of the Exchange Act⁵⁶ because the proposed rule change would allow the use of testimonials by all municipal advisors, including small municipal advisors. The use of testimonials in advertising would be subject to tailored obligations designed to impose only the necessary and appropriate regulatory burdens needed to promote compliance with the proposed rule change. The proposed rule change represents a balanced approach to prescriptive standards for those municipal advisors that choose to have the potential benefit of using testimonials in advertisements.

Additionally, the MSRB sought to harmonize standards, where applicable, between those applicable to solicitor municipal advisors, non-solicitor municipal advisors, dealers, and registered investment advisers such that those regulated entities that engage in conduct that would make them two or more of the above could leverage some of their existing processes to comply with relevant obligations under a comparable regulatory framework. Moreover, the MSRB believes that permitting municipal advisors to use a testimonial in an advertisement

⁵⁵ 15 U.S.C. 78o-4(b)(2)(L)(iv).

⁵⁶ Id.

would be particularly helpful for small municipal advisors to highlight the services provided to other municipal advisory clients.

The MSRB also believes that the proposed rule change is consistent with Section 15B(b)(2)(G) of the Exchange Act,⁵⁷ which provides that the MSRB's rules shall prescribe records to be made and kept by municipal securities brokers, municipal securities dealers, and municipal advisors and the periods for which such records shall be preserved. The proposed rule change would require municipal advisors, consistent with current MSRB Rule G-40(e), to make and keep current a record of all advertisements and, consistent with proposed MSRB Rule G-40(e), a record of any payment made to a municipal advisory client, as that term is defined in MSRB Rule G-40(a)(iii) for a testimonial and a record of any written agreements required under proposed MSRB Rule G-40(a)(iv)(G)(3)(b). The MSRB believes that the proposed amendments to MSRB Rule G-8 related to recordkeeping (with the ensuing application of existing MSRB Rule G-9 on records preservation) would promote regulatory consistency and compliance as well as facilitate the examination for compliance with MSRB Rule G-40, other MSRB rules, and other applicable securities laws and regulations.

B. Self-Regulatory Organization's Statement on Burden on Competition

Section 15B(b)(2)(C) of the Exchange Act⁵⁸ requires that MSRB rules not be designed to impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The MSRB believes the proposed rule change to amend MSRB Rule G-40 and MSRB Rule G-8 would not impose any burden on competition and would not have an

⁵⁷ 15 U.S.C. 78o-4(b)(2)(G).

⁵⁸ 15 U.S.C. 78o-4(b)(2)(C).

impact on competition, as the proposed rule change would apply a similar regulatory regime to all municipal advisors.

In accordance with the Board's policy on the use of economic analysis in rulemaking, the Board has reviewed proposed amended MSRB Rule G-40 and proposed amended MRB Rule G-8.⁵⁹ The MSRB believes that the proposed changes to MSRB Rule G-40 and MSRB Rule G-8 would promote regulatory consistency and would benefit municipal advisors by removing the prohibition that an advertisement does not refer, directly or indirectly, to any testimonial of any kind concerning the municipal advisors. The proposed amendments to MSRB Rule G-40 and MSRB Rule G-8, by design, would continue to prevent any fraudulent or manipulative practices, and therefore would protect issuers and investors, as municipal advisors could only include the usage of a testimonial as part of an advertisement if certain conditions are met, and if abiding by the standards of the advertising rule in general. In addition, by aligning MSRB rules with the SEC's Modernized IA Marketing Rule, as well as MSRB Rule G-21, the proposed amendments to MSRB Rule G-40 and MSRB Rule G-8 would also improve efficiency by providing regulatory consistency for regulated entities dually registered as a dealer and as a municipal advisor, or as an investment adviser registered with the SEC and as a municipal advisor. The MSRB therefore believes the proposed amendments to MSRB Rule G-40 and MSRB Rule G-8 would promote competition and would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

⁵⁹ Policy on the Use of Economic Analysis in MSRB Rulemaking is available at <http://msrb.org/Rules-and-Interpretations/Economic-Analysis-Policy.aspx>. In evaluating whether there was a burden on competition, the Board was guided by its principles that required the Board to consider costs and benefits of a rule change, its impact on capital formation and the main reasonable alternative regulatory approaches.

Necessity of the Amendments to MSRB Rule G-40 and MSRB Rule G-8

As part of the MSRB's strategic goal to modernize the MSRB Rulebook, the MSRB proposes to amend MSRB Rule G-40 on advertising by municipal advisors to permit municipal advisors to use testimonials in advertisements. As MSRB Rule G-40 is currently written, municipal advisors are prohibited from using testimonials. This was due to the MSRB modeling MSRB Rule G-40 on the original 1961 Initial IA Advertising Rule specifying that using a testimonial by an investment adviser would constitute a fraudulent, deceptive, or manipulative act, practice, or course of action. In December 2020, the SEC amended Rule 206(4)-1, establishing the Modernized IA Marketing Rule and reversed the prior ban on the use of testimonials for traditional referral and solicitation activity, subject to certain conditions.⁶⁰ At the time of the 1961 Initial IA Advertising Rule, the SEC explained that investment advisers had stricter standards of conduct than those for other commercial enterprises and that clients and prospective clients of investment advisers are frequently unsophisticated in investment matters.⁶¹ The advent of the internet and the growth of technological advances, in general, have made social media and websites key parts of commerce, including investment advisory services.⁶² To provide investment advisers with more flexibility, and to increase investors' awareness of service providers' offerings and potentially reduce investors' search costs for an adviser, the SEC

⁶⁰ See SEC 2020 Adopting Release.

⁶¹ See 1961 Advertising Rule Adopting Release.

⁶² See 84 FR 67518. "People continue to seek out and consider the views of others when making a multitude of transactions or decisions – from purchasing a coffee maker to finding the right medical expert to consult."

amended the Initial IA Advertising Rule to reflect the common use of testimonials and to provide a principles-based regulatory approach.⁶³

For the reasons discussed above, the proposed amendments to MSRB Rule G-40 are intended to align MSRB Rule G-40's provision governing the use of testimonials by municipal advisors to the analogous requirements under the SEC's Modernized IA Marketing Rule, by prohibiting the use of testimonials in an advertisement unless a municipal advisor complies with disclosure and oversight provisions. The proposed amendments to MSRB Rule G-40 are intended to promote regulatory consistency for regulated entities dually registered as a dealer and as a municipal advisor, or as an investment adviser with the SEC and as a municipal advisor. Because municipal advisors have a fiduciary duty to their clients, the MSRB believes the associated requirements for using testimonials as part of the advertising, which are meant to protect potential issuer clients from misleading advertisements of municipal advisors, would ensure the proposed amendments to MSRB Rule G-40 would not result in an erosion of protections for issuers, obligated persons and other market participants.

Baseline for Evaluation and Reasonable Alternative Approaches

To evaluate the potential impact of amending MSRB Rule G-40 and MSRB Rule G-8, a baseline or baselines must be established as a point of reference to compare the expected future state with the proposed change to MSRB Rule G-40 and MSRB Rule G-8. The economic impact of the proposed change is generally viewed as the difference between the baseline state and the expected state. The baseline is the current iteration of MSRB Rule G-40 and MSRB Rule G-8.

⁶³ See SEC 2020 Adopting Release.

The MSRB has considered reasonable alternatives where applicable when considering the costs, benefits, and impact of a proposed amendment. One alternative would be to merge MSRB Rule G-40 with MSRB Rule G-21 on advertising for dealers. Consolidating advertising requirements for dealers and municipal advisors would provide the benefit of holding both groups to the same standards, including the usage of testimonials in advertisements. However, dealers and municipal advisors provide vastly different services because, unlike dealers, most municipal advisors have a fiduciary duty to their clients. As a result, the MSRB believes that there is a need for a separate municipal advisor advertising rule.⁶⁴ In addition, prioritizing harmonization solely within MSRB rules, as opposed to harmonization of MSRB rules with Commission rules, as appropriate, would still result in inconsistency in rule requirements as related to advertisements between municipal advisors and investment advisers, both of which are subject to a fiduciary standard.

As another alternative, the MSRB considered harmonizing MSRB Rule G-40 with FINRA Rule 2210(2)(6) on communications with the public, including the usage of testimonials. Harmonizing with FINRA rules would provide a benefit to dually registered entities with FINRA and the MSRB. This position has previously been proposed by SIFMA in response to MSRB's SEC filing on creating MSRB Rule G-40.⁶⁵ However, FINRA Rule 2210 governs a broker-dealer's communications, as opposed to a municipal advisor's communications. This alternative may still cause inconsistency and confusion for advisory entities that provide both investment

⁶⁴ See [Response to Comments on File No. SR-MSRB-2014-08, February 5, 2015](#).
“...market for municipal advisory services is separate and distinct from the market for services of municipal securities brokers and dealers.”

⁶⁵ Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated February 28, 2018 (“SIFMA”).

advisory and municipal advisory services because they would need to follow two separate testimonial rules (the SEC's Modernized IA Marketing Rule and a FINRA-aligned MSRB Rule G-40), which may also result in more costs associated with compliance. For the reasons stated above, the current proposed amendments to MSRB Rule G-40, which are designed, to the extent practicable, to align with MSRB Rule G-21 and the SEC's Modernized IA Market Rule are deemed to be superior to the alternative of aligning with FINRA's rule requirements related to the use of testimonials by broker-dealers.

Benefits and Costs

The MSRB believes that the proposed amendments to MSRB Rule G-40 and MSRB Rule G-8, in aggregate, would benefit municipal advisors by allowing testimonials in their advertisements subject to certain requirements, which would provide municipal advisors another marketing method to solicit potential clients, subject to certain conditions. In addition, the proposed amendments to MSRB Rule G-40 and MSRB Rule G-8 would potentially reduce the compliance burden for regulated entities dually registered as a dealer and as a municipal advisor, or as an investment adviser with the SEC and as a municipal advisor by aligning MSRB Rule G-40 with the SEC's Modernized IA Marketing Rule, as well as with MSRB Rule G-21 as related to the usage of testimonials in advertisements.

The ability to provide testimonials in advertisements may benefit municipal advisors by allowing municipal advisors to show satisfied clients or other individuals willing to endorse their business practices. In addition, the MSRB believes the associated requirements for using testimonials as part of an advertisement, which are meant to protect potential issuer clients and obligated persons of municipal advisors, would help ensure the proposed amendments to MSRB

Rule G-40 and MSRB Rule G-8 would not result in an erosion of protection for issuers, obligated persons and other market participants.

The MSRB believes that the proposed amendments to MSRB Rule G-40 and MSRB Rule G-8 would impose minor costs on municipal advisors. Municipal advisors would incur the upfront costs related to updating policies and procedures on using testimonials in advertising, which would be a one-time effort only. In addition, on an ongoing basis, there would be minor compliance costs to assure municipal advisors' adherence to the disclosure requirements and supervisory obligations when using testimonials in advertisements, which would likely be greater than the current ongoing compliance costs of ensuring no testimonial is included in an advertisement. If a municipal advisor opts to use testimonials in advertisements, there would also be a cost from the resultant recordkeeping obligations, recognizing that absent proposed amendments to MSRB Rule G-8, municipal advisors are subject to SEC recordkeeping requirements to make and keep records of all written communications received, and originals or copies of all written communications sent, by such municipal advisor relating to municipal advisory activities.⁶⁶

The MSRB estimates that the annual costs for fulfilling the requirements associated with the use of testimonials in advertisements would be no more than \$400 per municipal advisor per year, assuming each municipal advisor would use approximately five testimonials per year, based on the SEC's 2019 estimated ongoing costs for investment advisers using testimonials and endorsements.⁶⁷ The MSRB does not expect any of the cost components to be a major burden for

⁶⁶ See Rule 15Ba1-8(a)(1)-(8) and MSRB Rule G-8(h)(i).

⁶⁷ See SEC 2020 Adopting Release. In 2019, the Commission estimated that the aggregate internal cost of providing the disclosures associated with testimonials and endorsements

municipal advisors. Furthermore, individual municipal advisory firms may decide whether it is cost-effective to use testimonials in advertising when weighing against the associated requirements and the compliance costs, as the usage of testimonials is optional. It is expected that municipal advisors would only choose to include testimonials in their advertisements if the expected benefits exceed the expected costs of doing so.

Effect on Competition, Efficiency and Capital Formation

The proposed amendments to MSRB Rule G-40 and MSRB Rule G-8 would be applicable to all municipal advisors and would help ensure that all regulated entities dually registered as a dealer and as a municipal advisor, or as an investment adviser with the SEC and as a municipal advisor, are subject to consistent standards on the use of testimonials in advertisements. The proposed amendments to MSRB Rule G-40 and MSRB Rule G-8 would therefore promote efficiency in the marketplace.

The MSRB believes that proposed amended MSRB Rule G-40 and MSRB Rule G-8 would not impose an unnecessary or inappropriate regulatory burden on small municipal advisory firms, as the potential benefits from using testimonials in advertising would be applicable to all municipal advisors and should be proportionate to each municipal advisory firm's business activities. The proposed amendments to MSRB Rule G-40 and MSRB Rule G-8 therefore should not negatively affect competition and capital formation; it may improve competition among municipal advisors by allowing another method for advertising. The MSRB believes that permitting municipal advisors to use a testimonial in an advertisement would be

would be \$337 per investment adviser per year, assuming each investment adviser would use approximately five testimonials or endorsements per year.

particularly helpful for small municipal advisors to highlight the services provided to other municipal advisory clients.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period of up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove such proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-MSRB-2023-01 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

All submissions should refer to File Number SR-MSRB-2023-01. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 am and 3:00 pm. Copies of the filing also will be available for inspection and copying at the principal office of the MSRB. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MSRB-2023-01 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, pursuant to delegated authority.⁶⁸

Secretary

⁶⁸ 17 CFR 200.30-3(a)(12).

Rule G-40 Advertising by Municipal Advisors**(a) General Provisions.**

(i) – (ii) no change.

(iii) Definition of Municipal Advisory Client. For the purposes of this rule, the term municipal advisory client shall include either:

(A) a municipal entity or obligated person for whom the municipal advisor engages in municipal advisory activities, as defined in Rule G-42(f)(iv) or

(B) a [broker, dealer, municipal securities dealer,] municipal advisor, or investment adviser (as defined under section 202 of the Investment Advisers Act of 1940) on behalf of whom the municipal advisor undertakes a solicitation of a municipal entity or obligated person, as defined in Rule 15Ba1-1(n), 17 CFR 240.15Ba1-1(n), under the Act.

(iv) Content Standards.

(A)– (F) No change.

(G) [A municipal advisor shall not, directly or indirectly, publish, circulate or distribute any advertisement which refers, directly or indirectly, to any testimonial of any kind concerning the municipal advisor or concerning the advice, analysis, report, or other service rendered by the municipal advisor.]

(1) If an advertisement contains a testimonial of any kind concerning the municipal advisor or concerning the advice, analysis, report, or other service rendered by the municipal advisor, the person making the testimonial must have the knowledge and experience to form a valid opinion.

(2) If an advertisement contains a testimonial of any kind concerning the municipal advisor or concerning the advice, analysis, report, or other service rendered by the municipal advisor, that advertisement must clearly and prominently disclose the following:

(a) That the person providing the testimonial is a current municipal advisory client or, if not a current municipal advisory client, the timeframe, denoted by calendar year(s), that the person was a municipal advisory client.

(b) The fact that the testimonial may not be representative of the experience of other clients.

(c) The fact that the testimonial is no guarantee of future performance or success.

(d) If more than \$100 in total value in cash or non-cash compensation is paid for the testimonial, the fact that it is a paid testimonial; and the paid testimonial must include a brief statement by the municipal advisor of any material conflicts of interest on the part of the person providing the testimonial resulting from the municipal advisor's relationship with such person.

(3) A municipal advisor may not provide any compensation for a testimonial to a person, directly or indirectly, of more than \$1000 in total value in cash or non-cash compensation during the preceding 12 months, unless the testimonial is from a municipal advisor or an investment adviser (as defined under section 202 of the Investment Advisers Act of 1940) on behalf of whom the municipal advisor undertakes, or has undertaken, a solicitation of a municipal entity or obligated person, as defined in Rule 15Ba1-1(n), 17 CFR 240.15Ba1-1(n), under the Act and the municipal advisor:

(a) based on the exercise of reasonable diligence, concludes that the municipal advisor or investment adviser who will provide the testimonial is currently registered with the Commission; and

(b) has a written agreement with the municipal advisor or investment adviser that describes the scope of the agreed-upon activities with respect to the testimonial and the terms of the compensation for such.

(H) No change.

(v) No change.

(b) No change.

(c) Approval by Principal. Each advertisement subject to the requirements of this rule must be approved in writing by a municipal advisor principal, as defined in Rule G-3(e)(i), prior to first use and, with respect to an advertisement that includes a testimonial, such approval must also be based on a reasonable belief that the testimonial complies with the requirements under Rule G-40(a)(iv)(G).

(d) No change.

(e) Records. Each municipal advisor shall make and keep current in a separate file, records of all advertisements, records of any payment made to a municipal advisory client for a testimonial, and records of any written agreements required under Rule G-40(a)(iv)(G)(3)(b).

Supplementary Material

.01-.02 No change.

Rule G-8 Books and Records to be Made by Brokers, Dealers and Municipal Securities Dealers and Municipal Advisors

(a) - (g) No change.

(h) Municipal Advisor Records. Every municipal advisor that is registered or required to be registered under Section 15B of the Act and the rules and regulations thereunder shall make and keep current the following books and records:

(i) - (vii) No change.

(viii) Records Concerning Compliance with Rule G-40

(A) A record of all advertisements required by Rule G-40(e);

(B) A record of any cash or non-cash compensation provided to a Municipal Advisory Client, as that term is defined in Rule G-40(a)(iii), for a testimonial; and

(C) A record of any written agreement required under Rule G-40(a)(iv)(G)(3)(b).

Supplementary Material

.01-.02 No change.