“recoverable budget expenses” of the standard-setting body. Section 109(i) of SOX amends section 13(b)(2) of the Securities Exchange Act of 1934 to require issuers to pay the allocable share of a reasonable annual accounting support fee or fees, determined in accordance with section 109 of the Act.

On April 25, 2003, the Commission issued a policy statement concluding that the Financial Accounting Standards Board (“FASB”) and its parent organization, the Financial Accounting Foundation (“FAF”), satisfied the criteria for an accounting standard-setting body under the Act, and recognizing the FASB’s financial accounting and reporting standards as “generally accepted” under section 108 of the Act. Accordingly, the Commission undertook a review of the FASB’s accounting support fee for calendar year 2003. In connection with its review, the Commission also reviewed the budget for the FAF and the FASB for calendar year 2023. Section 109 of SOX provides that, in addition to the accounting support fee, the standard-setting body can have additional sources of revenue for its activities, such as earnings from sales of publications, provided that each additional source of revenue shall not jeopardize, in the judgment of the Commission, the actual or perceived independence of the standard setter. In this regard, the Commission also considered the interrelation of the operating budgets of the FAF, the FASB, and the Governmental Accounting Standards Board (“GASB”), the FASB’s sister organization, which sets accounting standards used by state and local government entities. The Commission has been advised by the FAF that neither the FAF, the FASB, nor the GASB accept contributions from the accounting profession.

The Commission understands that the Office of Management and Budget (“OMB”) has determined the FASB’s spending of the 2023 accounting support fee is sequestrable under the Budget Control Act of 2011. So long as sequestration is applicable, we anticipate that the FAF will work with the Commission and Commission staff as appropriate regarding its implementation of sequestration.

After its review, the Commission determined that the 2023 annual accounting support fee for the FASB is consistent with section 109 of the Act. Accordingly, it is ordered, pursuant to section 109 of SOX, that the FASB may act in accordance with this determination of the Commission.

By the Commission.
Vanessa A. Countryman,
Secretary.
[FR Doc. 2023–03077 Filed 2–13–23; 8:45 am]
BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

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

February 8, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”) and Rule 19b–4 thereunder, notice is hereby given that on January 31, 2023, 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; and (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.

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)–1 under the Investment

2 See Commission Statement of Policy
3 The Financial Accounting Foundation’s Board of Trustees approved the FAF’s budget on November 15, 2022. The FAF submitted the approved budget to the Commission on November 21, 2022.
7 17 CFR 275.206(4)–1.
8 17 CFR 275.206(4)–1.
Advisers Act of 1940 (the “Advisers Act”) adopted by the Commission.

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. 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 advisor, or reprint, or any excerpt of the seminar text, press release concerning the services of the municipal advisor or the engagement of a municipal advisor or any advertisement which refers, directly or indirectly, to any testimonial of any person providing the testimonial.7

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 deceptive, 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 IA 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 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”) 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

8 See MSRB Rule G–40(a)(i).
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 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 adviser’s 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

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 advisers 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 advisers have a fiduciary duty to their clients, the proposed rule change would also include certain provisions, tailored to apply to municipal advisers, 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 advisers 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

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 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.

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)(iii) (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)(ii) (exempting a testimonial or endorsement disseminated for no compensation or de minimis compensation from paragraphs 206(4)(1)(b)(2)(iii) and (3)).
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).
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.
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(b)(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.”
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 a current municipal advisory client, the timeframe, denoted by calendar year(s), during which the person was a municipal advisory client. 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 timeframe 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 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, that the testimonial is no guarantee of future performance or success, 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. 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. 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. There are two broad categories of municipal advisors — 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. 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 would 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 40(e)(4)(A)(iii), 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)(G), (F). 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)(1) (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 broker, dealer, municipal securities dealer, or municipal advisor for or in connection with municipal financial products, the issuance of municipal securities or 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 escrow investments. See Exchange Act Rule 15Ba1–1(d)(1)(i) (17 CFR 240.15Ba1–1(d)(1)(i)) and 15Ba1–1(d)(3)(viii) (17 CFR 240.15Ba1–1(d)(3)(viii)).
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) 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 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 subject of a “disqualifying Commission action” or “disqualifying event” as those terms are defined in SEC Rule 206(4)–1(e)(3) and (4). While this proposed rule change under MSRB Rule G–40 is 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 that describes 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. 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. 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

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(0)(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. 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. 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 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 original 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 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 Act 54 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 manipulativest 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 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

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 15Ba–1–8(a)(1)–(8) under the Act.

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


54 Id.
The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(G) of the Exchange Act, 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 Act 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 MSRB Rule G–8. 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 regulatory burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

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. 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. The advent of the internet and the growth of technological advances, in general, have made social

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.
60 See SEC 2020 Adopting Release.
media and websites key parts of commerce, including investment advisory services. 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.62

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 advisers 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.

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.

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 testimonial 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.

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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.
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 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 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 a.m. and 3:00 p.m. 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 March 7, 2023.

For the Commission, pursuant to delegated authority.68

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023–03059 Filed 2–13–23; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17767 and #17768; California Disaster Number CA–00368]

Presidential Declaration Amendment of a Major Disaster for Public Assistance Only for the State of California

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 2.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of California (FEMA–4683–DR), dated 01/26/2023.

Incident: Severe Winter Storms, Flooding, Landslides, and Mudslides.

Incident Period: 12/27/2022 through 01/31/2023.

DATES: Issued on 02/06/2023.

Physical Loan Application Deadline Date: 03/27/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 10/26/2023.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and

66 See Rule 15Ba1–8(a)(1)–(6) and MSRB Rule G–8(b)(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 would be $337 per investment adviser per year, assuming each investment adviser would use approximately five testimonials or endorsements per year.
