temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or 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–CBOE–2023–022 on the subject line.

Paper Comments
- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090. All submissions should refer to File Number SR–CBOE–2023–022. 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 and arguments 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 Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to File Number SR–CBOE–2023–022 and should be submitted on or before June 7, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.

Sherry R. Haywood,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION


Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1, Consisting of Amendments to MSRB Rule G–40, on Advertising by Municipal Advisors, and MSRB Rule G–8, on Books and Records


I. Introduction


The original proposed rule change was published for comment in the Federal Register on February 14, 2023.3 The Commission received two comment letters on the original proposed rule change.4 On March 21, 2023, the MSRB granted an extension of time for the

6 See Letter to Secretary, Commission, from Salita Olgun, Interim Chief Regulatory Officer, MSRB, dated April 4, 2023 (the “MSRB Letter I”).
9 See Letter to Secretary, Commission, from Susan Gaffney, Executive Director, National Association of Municipal Advisors, dated April 26, 2023 (“NAMA Letter II”).
10 See Letter to Secretary, Commission, from Salita Olgun, Interim Chief Regulatory Officer, MSRB, dated April 28, 2023 (“MSRB Letter II”).
11 Notice, 88 FR at 9580.
12 17 CFR 275.206(4)–1.
13 15 U.S.C. 80b–1a–1 et seq.
15 Notice, 88 FR at 9580–81.

The MSRB stated that, consistent with its strategic goal to modernize its rulebook, the original proposed rule change would amend Rule G–40 to allow municipal advisors to use testimonials in certain circumstances.5 The MSRB stated that this change would better align Rule G–40 with, to the extent appropriate, the principles of MSRB Rule G–21 (“Rule G–21”), on advertising by brokers, dealers or municipal securities, as well as Rule 206(4)–1 under the Investment Advisers Act of 1940 (“Advisers Act”) 6 adopted in 2020 7 by the Commission.8 Specifically, the MSRB indicated the original proposed rule change would consist of amendments to Rule G–40 to: (i) permit municipal advisors to use testimonials in advertisements, subject to certain conditions; (ii) specify additional supervisory obligations with...
The MSRB stated that at that time, it expressed the view that a testimonial in a municipal advisor’s advertisement would present significant issues, including the possibility of being misleading.\(^{21}\) 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 (“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.\(^{22}\) The MSRB expressed that it believed that doing so would help ensure consistent regulation between regulated entities subject to a fiduciary standard, and that the MSRB determined to act consistently with the language of Initial Rule 206(4).\(^{23}\)

2. Testimonials Under Rule G–21

The MSRB stated that in establishing Rule G–40, it also sought, to the extent practicable, to harmonize with its existing rule governing the advertisements of dealers, Rule G–21.\(^{24}\)

The MSRB also wrote that, while not identical, the two MSRB rules are both based on principles of fair dealing and maintain rigorous content standards.\(^{25}\) However, the MSRB noted that Rule G–21 currently prohibits a municipal advisor from using a testimonial in an advertisement.\(^{26}\) The MSRB described that this prohibition is based in part on the fiduciary duty that a non-solicitor municipal advisor (as opposed to a dealer) owes its municipal entity clients.\(^{27}\)

The MSRB explained that Rule G–21 permits a dealer to use a testimonial in an advertisement if certain conditions are met.\(^{28}\) Specifically, the MSRB noted that, 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.\(^{29}\) Additionally, the MSRB stated that, 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.\(^{30}\)

3. Testimonials Under Advisers Act Rule 206(4)–1

The MSRB stated that in establishing Rule G–40 in 2018, it recognized that the Commission was considering modernizing the Initial IA Advertising Rule and noted that it would monitor developments related to the testimonial ban.\(^{31}\) The MSRB reiterated that, on December 22, 2020, the Commission adopted amendments to modernize and consolidate the Initial IA Advertising Rule and Rule 206(4)–3 of the Advisers Act (the “IA Solicitation Rule”)\(^{32}\) into one marketing rule for investment advisers, under the Advisers Act (the “Modernized IA Marketing Rule” or “IA Rule 206(4)–1”).\(^{33}\)

The MSRB indicated that when the Commission adopted the Modernized IA Marketing Rule, the Commission stated that this rule replaced 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.”\(^{34}\) The MSRB noted that 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


\(^{22}\) Notice, 88 FR at 9581; see also 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 1961 Advertising Rule to target advertising practices that the Commission believed were likely to be misleading. Notice, 88 FR at 9581 n.13.

\(^{23}\) Notice, 88 FR at 9581; see also Notice of Proposed Rule G–40, 83 FR at 5478 n. 26.

\(^{24}\) Notice, 88 FR at 9581.

\(^{25}\) Id.

\(^{26}\) Id., see generally Notice of Proposed MSRB Rule G–40.

\(^{27}\) Notice, 88 FR at 9581; see generally Rule G–21.

\(^{28}\) Notice, 88 FR at 9581; see also Rule 206(4)–3. The IA Solicitation Rule was adopted in 1979 “to help ensure clients are aware that paid solicitors who refer them to advisers have a conflict of interest.” See SEC 2020 Adopting Release, 86 FR at 13025.

\(^{29}\) Notice, 88 FR at 9581; see generally SEC 2020 Adopting Release. The Modernized IA Marketing Rule applies to any investment adviser registered or required to be registered with the Commission under section 203 of the Advisers Act that directly or indirectly disseminates an advertisement.


\(^{31}\) Notice, 88 FR at 9581; see also Rule G–21(a)(iii)(G)(1).

\(^{32}\) Notice, 88 FR at 9581; see also Rule G–21(a)(iii)(G)(2).

\(^{33}\) Notice, 88 FR at 9581; see also Notice of Proposed MSRB Rule G–40, 83 FR at 5487.

\(^{34}\) Notice, 88 FR at 9581; see also 17 CFR 275.206(4)–3. The IA Solicitation Rule was adopted in 1979 “to help ensure clients are aware that paid solicitors who refer them to advisers have a conflict of interest.” See SEC 2020 Adopting Release, 86 FR at 13025.

\(^{35}\) Notice, 88 FR at 9581; see also Notice of Proposed Rule G–40, 83 FR at 5478.
advertisements, which includes traditional referral and solicitation activity, subject to certain conditions. The MSRB stated that the Modernized IA Marketing Rule requires advertisements that include testimonials or endorsements to provide disclosures of certain information. The MSRB noted that all testimonials, including those that are compensated and uncompensated, are subject to oversight and compliance.

In light of the Commission’s adoption of the Modernized IA Marketing Rule, the MSRB stated that it conducted a review of Rule G–40 and filed the original proposed rule change to promote regulatory consistency among regulated entities subject to a fiduciary standard. The MSRB indicated that the original proposed rule change would permit municipal advisors to use testimonials in advertisements, subject to certain conditions, as discussed below.

B. Summary of the Original Proposed Rule Change

The MSRB stated that to promote regulatory consistency, where practicable, among Rule G–40, Rule G–21, and the SEC’s Modernized IA Marketing Rule, proposed amended Rule G–40 would permit the use of testimonials subject to disclosures and other tailored conditions. The MSRB further described that the original proposed rule change would not only align Rule G–40 with the analogous requirements for dealers under Rule G–21, but, because municipal advisors have a fiduciary duty to their clients, the original 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, according to the MSRB, the original proposed rule change would amend the content standards under Rule G–40(a)(iv) to permit municipal advisors to use testimonials in advertisements subject to certain conditions; amend the supervisory obligations under 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 Rule G–8 to include records to correspond with the current obligation under Rule G–40 to maintain records relating to the supervision of advertisements.

1. Rule G–40 Content Standards

The MSRB stated that Rule G–40 currently prohibits the use of testimonials in advertisements by municipal advisors. The MSRB explained that it is not proposing to alter the fundamental content standards of 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. The MSRB explained that, consistent with those standards, and recognizing the fiduciary duty owed by municipal advisors to their municipal entity clients, the MSRB proposed 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 Rule G–40, that testimonial advertisements could cause a municipal advisor’s advertisement to be misleading. The MSRB stated that, as proposed, 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.

The MSRB explained that 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. The MSRB stated that this obligation would standardize the content standard with that applicable to dealers’ use of testimonials under Rule G–21. The MSRB concluded that applying this standard to municipal advisors is consistent with the existing content standards of Rule G–40 established to prevent false or misleading advertisements and would promote regulatory consistency.

The MSRB stated that 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. Indirectly, publish, circulate or distribute an advertisement which refers directly or indirectly to a testimonial. See Amendment No. 1; Notice of Amendment No. 1, 88 FR at 21729.

The MSRB also removed language from the original proposed rule change that referred to the “advice, analysis or report or other services, rendered by the municipal advisor” and instead, uses “municipal advisory services” in the proposed definition of “testimonial” and elsewhere in the rule text. See Amendment No. 1; Notice of Amendment No. 1, 88 FR at 21729. The MSRB also clarified that a municipal advisor may only use a testimonial if the person or entity providing the testimonial has the knowledge and experience to make a statement concerning their experience with the municipal advisor or with the municipal advisory services rendered. See Amendment No. 1; Notice of Amendment No. 1, 88 FR at 21730.

This content standard in 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.” Notice, 88 FR at 9582 n. 33.

The MSRB added a Supplementary Material. 03 to Rule G–40 to clarify that in order for a requisite disclosure in an advertisement to be clear and prominent (including that a testimonial is a paid testimonial), the disclosure must be at least as prominent in the advertisement as the testimonial. According to the MSRB, this revision indicates that disclosures should appear close to the associated testimonial statement with the same prominence so that the statement and disclosures are read at the same time, rather than referring the reader to somewhere else in the advertisement. See Amendment No. 1; Notice of Amendment No. 1, 88 FR at 21730.
First, the MSRB explained that 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. The MSRB concluded that 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 MSRB also wrote that 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. The MSRB explained that 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 Rule G–21. The MSRB argued that requiring such disclosures is consistent with the existing content standards of Rule G–40 and would promote regulatory consistency.

Finally, the MSRB noted that 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. The MSRB wrote that, 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. The MSRB stated that this disclosure obligation parallels a disclosure obligation required of registered investment advisers under IA Rule 206(4)–1(b)(1)(iii). The MSRB explained 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) that the advertisement is fair and balanced and reduces the risk that the use of a testimonial could be misleading. Furthermore, the MSRB discussed that establishing the same disclosure obligation for municipal advisors under Rule G–40 promotes regulatory consistency, particularly among regulated entities subject to a fiduciary standard. The MSRB wrote that it expects this disclosure to be succinct.

Next, the MSRB explained that there are two broad categories of municipal advisors: (i) those that provide certain advice to or on behalf of a municipal entity or obligated person on behalf of certain third-party financial professionals, often referred to as solicitors; and (ii) those that undertake certain solicitations of a municipal entity or obligated person on behalf of certain third-party financial professionals. The MSRB stated that it understands that municipal entity clients generally do not accept compensation for testimonials and believes that the payment of more than de minimis amount of compensation during the preceding 12 months to a municipal entity client could present a potential conflict of interest. Therefore, according to the MSRB, the proposed Rule G–40(a)(iv)(G)(3) would prohibit a non-solicitor municipal advisor from paying more than de minimis amount of compensation for a testimonial.

The MSRB stated that, to avoid this concern and to avoid creating complexity in Rule G–40 by establishing different standards for obligated person clients of non-solicitor municipal advisors, it 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 MSRB noted that this 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 Advisers Act) on behalf of whom the municipal advisor undertakes, or has undertaken, a solicitation of a municipal entity or obligated person, as defined in Exchange Act Rule 15Ba1–1(n) subject to certain conditions.

2. Rule G–40 Supervisory Obligations

The MSRB identified that Rule G–40 currently requires that each advertisement subject to the requirements of the rule be approved in writing by a municipal advisor or its principal, as defined in MSRB Rule G–31(e)(i), prior to first use. The MSRB noted that the original 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 Rule G–40(a)(iv)(G). The MSRB wrote that this additional supervisory obligation is appropriate in allowing municipal advisors the use of testimonials in advertisements. The MSRB stated that 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 IA Rule 206(4)–1. The MSRB argued that establishing the same obligation for municipal advisors under...
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 Rule G–40.82 The MSRB concluded that this proposal would include not only a record of all advertisements, which is currently required under Rule G–40(e), but also, to align with the proposed amendments to 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 Rule G–40(a)(iii) and a record of any written agreement with a municipal advisor or investment adviser required under proposed 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.83

The MSRB argued that specifying these recordkeeping requirements would provide more certainty for municipal advisors with respect to their recordkeeping obligations.84 In addition, the MSRB stated that with the application of existing MSRB Rule G–9, which requires that municipal advisors generally preserve the books and records described in G–8(h) for a period of not less than five years, the proposed amendments to Rule G–8(h) would provide examining authorities beneficial information to assist in evaluating a municipal advisor’s compliance with Rule G–40.85 In addition, the MSRB wrote that the proposed amendment to 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.86

III. Description of Amendment No. 1

As described further below, the MSRB filed Amendment No. 1 to respond to comments on the original proposed rule change, relating to: (1) the definition of “testimonial”; (2) non-client testimonials; (3) solicitor municipal advisors; (4) social media guidance; and (5) other clarifications to rule text and design.87

A. Definition of Testimonial

The MSRB noted that a commenter suggested that the term “testimonial” be defined within the rule language itself.88 The MSRB responded, stating it would provide a definition of a “testimonial” in Rule G–40 to avoid confusion with the term “testimonial” as used in Rule 206–4(1)89 under the Advisers Act.90 Specifically, the MSRB defined “testimonial” in the amended Rule G–40(a)(iv)(G)(1) as “a statement of a person’s or entity’s experience concerning the municipal advisor or concerning the municipal advisory services rendered by the municipal advisor.”91 Furthermore, the MSRB also removed language from the original proposed rule change referring to the “advice, analysis, report, or other services rendered by the municipal advisor.”92 The MSRB concluded that replacing this language with “municipal advisory services” in the definition of “testimonial” (and elsewhere in the original proposed rule change’s rule text) provided greater clarity.93 The MSRB also made conforming numbering changes to the original proposed rule change’s Rule G–40 revisions to accommodate the addition of the definition of “testimonial” to amended Rule G–40(a)(iv)(G)(1).94

The MSRB stated that the revised rule text in amended Rule G–40(a)(iv)(G)(2) provides that, if a municipal advisor’s advertisement meets certain conditions, then a municipal advisor may, directly or indirectly, publish, circulate or distribute an advertisement which refers, directly or indirectly, to a testimonial.95 The MSRB wrote that this definition addresses a comment requesting that Rule G–40 include a definition of the term “testimonial,” but also a comment’s suggestion that the rule “include affirmative language that

74 Notice, 88 FR at 9584.
75 Notice, 88 FR at 9584; see also Rule G–40(a)(iii).
76 Notice, 88 FR at 9584.
77 Id.
78 Id.
79 Id.; see also Rule G–40(e).
80 Notice, 88 FR at 9584–85.
81 Notice, 88 FR at 9585.
82 Id.
83 Id.
84 Id.
85 Id. Municipal advisors are also subject to the recordkeeping requirements described in Exchange Act Rule 15Ba1–4(a)(1)–(6).
86 Notice, 88 FR at 9585; see also 17 CFR 240.15Ba1–8. Rule G–8 requires that municipal advisors make and keep current all books and records described in Exchange Act Rule 15Ba–18(a)(1)–(8).
87 Notice of Amendment No. 1, 88 FR at 21729.
88 Id.
89 17 CFR 275.206(4)–1(b)(1).
90 Notice of Amendment No. 1, 88 FR at 21729.
91 Id.
92 Id.
93 Id.
94 Id. The MSRB also added a cross-reference to the new definition of “testimonial” in the original proposed rule change’s Rule G–8. Notice of Amendment No. 1, 88 FR at 21729 n.16.
95 Notice of Amendment No. 1, 88 FR at 21729.
testimonials may be used if certain requirements are met.”96 The MSRB also deleted a redundant phrase later in this subsection; specifically, amended Rule G–40(a)(iv)(G–2[2][b][iv]) (“the paid testimonial must include”).97

B. Non-Client Testimonials

The MSRB noted that both commenters suggested that it would promote further harmonization with Rule G–21, on advertising by brokers, dealers, and municipal securities dealers, if municipal advisors were able to use testimonials by third parties.98 The MSRB stated that it would amend the original proposed rule change to permit municipal advisors to use testimonials from a third party, whether a person or entity, subject to the conditions set forth in proposed Amendment No. 1.99 The MSRB reasoned that, for example, analogous to Rule 206–4(1)100 under the Advisers Act,101 an advertisement of a municipal advisor that includes a testimonial would need to include a disclosure indicating whether the testimonial is from a current client or from someone who is not a current client.102 The MSRB wrote that it agreed with the Commission’s belief that this type of disclosure would provide important context for weighing the relevance of the testimonial.103

C. Solicitor Municipal Advisors

The MSRB stated that both commenters found the proposal to establish a different standard for the use of testimonials by solicitor municipal advisors confusing.104 In response, the MSRB revised the original proposed rule change to create uniformity in the criteria for the use of testimonials by all municipal advisors.105 Specifically, the MSRB removed proposed language that would have permitted, subject to certain conditions, a solicitor municipal advisor to pay more than $1000 in total value in cash or non-cash compensation during the preceding 12 months for a testimonial.106 Additionally, the MSRB eliminated the proposed language in the original proposed rule change in Rules G–40 and G–8 concerning additional records to be maintained by a solicitor municipal advisor related to such payments.107 The MSRB concluded that these revisions in Amendment No. 1 would prohibit any municipal advisor from providing any compensation to a person or entity, directly or indirectly, of more than $1000 in total value in cash or non-cash compensation during the preceding 12 months.108

D. Social Media Guidance

The MSRB wrote that both commenters suggested that the MSRB’s “FAQs regarding the Use of Social Media under Rule G–21, on Advertising by Brokers, Dealers or Municipal Securities Dealers, and Rule G–40, on Advertising by Municipal Advisors” (“social media guidance”)109 be updated to reflect the proposed amendments to Rule G–40.110 The MSRB responded by proposing to amend its social media guidance to reflect the proposed amendments to Rule G–40 (inter alia, allowing the use of testimonials in municipal advisor advertisements, subject to certain conditions).111 The MSRB explained that the current social media guidance notes that, by paying for or soliciting positive comments from a third party: (i) a municipal advisor would be deemed to be entangled with those comments, and (ii) the posting of those third-party comments on the municipal advisor’s social media page would be deemed to be an advertisement by the municipal advisor that contains a testimonial.112 The MSRB stated that such revisions to the social media guidance would make clear that the advertisement containing a testimonial would be permissible so long as the advertisement meets the requirements of Rule G–40 (including having the requisite disclosures).113 In addition, the MSRB noted that the revised social media guidance would make clear that if a municipal advisor did not pay, directly or indirectly, for a testimonial, but liked, shared, or commented on a post from a third-party, the municipal advisor would be deemed to have adopted those comments and the posting of those third party comments on the municipal advisor’s social media page would be deemed an advertisement that contains a testimonial.114 The MSRB concluded that the advertisement containing a testimonial would be permissible so long as the advertisement meets the requirements of Rule G–40 (including having the requisite disclosures).115 The MSRB also revised the social media guidance’s footnotes with updated citations and conforming numbering changes.116

E. Other Modifications to Rule Text

As discussed further below, the MSRB also proposed other textual changes in Amendment No. 1 to provide additional clarity and facilitate compliance.117

1. Language in Rule G–40 Regarding Use of a Testimonial

The MSRB stated that it revised the original proposed rule change to clarify that a municipal advisor may only use a testimonial if the person or entity providing the testimonial has the knowledge and experience to make a statement concerning their experience with the municipal advisor or with the municipal advisory services rendered by the municipal advisor.118

2. Supplementary Material .03 to Rule G–40

The MSRB added Supplementary Material .03 to Rule G–40 to the original proposed rule change, stating that this revision would clarify that, in order for a requisite disclosure in an advertisement to be clear and prominent (including that a testimonial is a paid testimonial), the disclosure must be at least as prominent in the advertisement as the testimonial.119 The MSRB also explained that this revision indicates that disclosures should appear close to the associated testimonial statement with the same prominence so that the statement and disclosures are read at the same time, rather than referring the reader to somewhere else in the advertisement to view the disclosures.120
IV. Summary of Comments Received to the Original Proposed Change and Amendment No. 1 and MSRB’s Responses

A. Comments Received in Response to the Original Proposed Rule Change

The Commission received two comment letters on the original proposed rule change, as well as response from the MSRB to the comment letters.

1. Definition of Testimonial

One commenter suggested that the term “testimonial” be defined within the rule language itself. The commenter wrote that, “While within a footnote in the Filing, endorsements are noted as being within the meaning of testimonial,” the MSRB does not fully explain what it “means by an endorsement in this context, which under the Investment Adviser Rule would consist of statements from persons other than a current client (but are not limited to past clients), or if/how it applies to municipal advisors.” The response, the MSRB stated that it specifically define the term “testimonial” for purposes of Rule G-40 to mean a statement of a person’s or entity’s experience concerning the municipal advisor or concerning the municipal advisory services rendered by the municipal advisor. In addition, the MSRB noted that the proposed rule text would specifically provide that if a municipal advisor’s advertisement meets certain conditions, then a municipal advisor may, directly or indirectly, publish, circulate or distribute an advertisement which refers, directly or indirectly, to a testimonial.

The MSRB responded that this not only addresses the comment requesting that Rule G-40 include a definition of the term “testimonial,” but also the commenter’s suggestion that the rule include affirmative language that testimonials may be used if certain requirements are met.

2. Non-Client Testimonials

Both commenters suggested that the proposal would promote further harmonization with Rule G-21, on advertising by brokers, dealers or municipal securities dealers, if municipal advisors were able to use testimonials by third parties. Specifically, one commenter stated that non-client testimonials/endorsements should be specifically allowed and the rule should also discuss the requirements and parameters for testimonials/endorsements from other parties and another discussed that municipal advisor testimonials by third parties should be permitted, in order to harmonize Rule G-40 with the Advisers Act as well as Rule G-21 covering brokers, dealers, and municipal securities dealers.

The MSRB responded that it was amending the original proposed rule change to permit municipal advisors to use testimonials from any third party, whether a person or entity, subject to the conditions set forth in Amendment No. 1. The MSRB explained, for example, that similar to IA Rule 206-4(1)(9), an advertisement of a municipal advisor that includes a testimonial would need to include a disclosure indicating whether the testimonial is from a current client or from someone that is not a current client. The MSRB added that it agreed with the Commission’s belief that this type of disclosure (in the context of testimonials pertaining to investment advisers) would provide important context for weighing the relevance of the testimonial.

3. Solicitor Municipal Advisors

Both commenters found the original proposed change to establish a different standard for the use of testimonials by solicitor municipal advisors to be confusing. Specifically, one commenter noted “[i]t is important for the Rule to be very clear on the requirements of municipal advisors (the vast majority of MAs) and solicitor municipal advisors, and separate the requirements for each” and another noted “MSRB Rule G-40 will be unnecessarily complicated by including solicitor municipal advisors.” In response to these comments, the MSRB stated that Amendment No. 1 harmonized the criteria for the use of testimonials by all municipal advisors, no longer making a distinction between the use of testimonials by solicitor municipal advisors and non-solicitor municipal advisors. As part of Amendment No. 1, the MSRB removed originally proposed language that would have permitted, subject to certain conditions, a solicitor municipal advisor to pay more than $1000 in total value in cash or non-cash compensation during the preceding 12 months for a testimonial. As a result, the MSRB noted that the proposed rule change would prohibit any municipal advisor from providing any compensation to a person or entity, directly or indirectly, of more than $1000 in total value in cash or non-cash compensation during the preceding 12-months.

Other Clarifications to Rule Text and Design

One commenter also suggested additional clarifications to the proposed text and design of Rule G-40, suggesting that such changes would be helpful to facilitate compliance, especially for small municipal advisor firms. For example, the commenter stated that the phrase “concerning the advice, analysis, report or other service rendered by the municipal advisor” is too broad and could be problematic. The MSRB responded that, to provide additional clarity and facilitate compliance, the MSRB had Amendment No. 1 remove that phrase and replace it with “concerning the municipal advisor or concerning the municipal advisory services rendered by the municipal advisor.” Additionally, the commenter wrote that the language that a person providing a testimonial must have the knowledge and experience to form a valid opinion is too absolute and does not exist in the investment adviser rulemaking. In response, the MSRB explained that while this standard may not exist in the Investment Adviser Marketing Rule, it does exist, to some degree, in Rule G-21.

The MSRB further noted that it could be misleading if a municipal advisor’s advertisement included a testimonial from a person or entity that has no knowledge or experience to make a statement as to their experience with the municipal advisor or the municipal advisory services rendered by the municipal advisor. To address the concern that the text of the rule could be interpreted as overly broad, the MSRB indicated that it proposed Amendment No. 1 to clarify that a municipal advisor may only use a testimonial if the person or entity providing the testimonial has the
knowledge and experience to make a statement concerning their experience with the municipal advisor or with the municipal advisory services rendered by the municipal advisor.142

One commenter also noted that the disclosure required for a paid testimonial should be in the same size font and location as the testimonial and not placed in a footnote.143 The MSRB responded that, in Amendment No. 1, Supplementary Material .03 to Rule G–40 would adopt a standard consistent with the views expressed by the SEC in adopting the Investment Adviser Marketing Rule.144 Specifically, according to the MSRB, Amendment No. 1 clarified that, for a requisite disclosure in an advertisement to be clear and prominent (including a disclosure that a testimonial is a paid testimonial), the disclosure must be at least as prominent in the advertisement as the testimonial.145 The MSRB added that disclosures should appear close to the associated testimonial statement with the same prominence so that the statement and disclosures are read at the same time, rather than referring the reader to somewhere else in the advertisement to view the disclosures.146

5. Social Media Guidance

Both commenters suggested that the MSRB’s “FAQs regarding the Use of Social Media under MSRB Rule G–21, on Advertising by Brokers, Dealers or Municipal Securities Dealers, and MSRB Rule G–40, on Advertising by Municipal Advisors” (“social media guidance”) be updated to reflect the proposed amendments to Rule G–40.147

The MSRB wrote that, in response to commenters, it drafted Amendment No. 1 to revise its social media guidance so that such guidance, as amended, incorporates the proposed amendments to Rule G–40, which would allow municipal advisors to use testimonials, subject to certain conditions, in their advertisements.148 The MSRB explained that its current social media guidance notes that by paying for or soliciting positive comments from a third party, a municipal advisor would be deemed to be entangled with those comments, and the posting of those third-party comments on the municipal advisor’s social media page would be deemed to be an advertisement by the municipal advisor that contains a testimonial.149 The MSRB argued that the updated guidance would make clear that the advertisement containing a testimonial would be permissible so long as the advertisement meets the requirements of Rule G–40, including having the requisite disclosures.150 The MSRB also noted that, in further response to comments, the updated guidance would make clear that if a municipal advisor did not pay, directly or indirectly, for a testimonial, but liked, shared, or commented on a post from a third party, the municipal advisor would be deemed to have adopted those comments and the posting of those third-party comments on the municipal advisor’s social media page would be deemed an advertisement that contains a testimonial.151 The MSRB explained that similarly, the advertisement containing a testimonial would be permissible so long as the advertisement meets the requirements of Rule G–40, including having the requisite disclosures.152

One commenter also requested additional amendments to the social media guidance, and noted that technology and social media have changed dramatically over the past few years, and SIFMA members feel it would be helpful for the MSRB to review the FAQs in light of these changes and the proposed amendments to MSRB Rule G–40.153 The MSRB responded that in initially developing its social media guidance, the MSRB’s goal was to align the FAQs with the social media guidance published by the SEC and FINRA, and not to create unnecessary inconsistencies between its guidance and similar guidance issued by other regulators that may be applicable to other aspects of the regulated entity’s business.154 The MSRB also noted that it believes that its social media guidance remains appropriately aligned with other regulators, and therefore, other than amendments to reflect proposed amendments to Rule G–40, the MSRB is not otherwise making substantive changes to its social media guidance.155 The MSRB also noted that in establishing Rule G–40, it developed compliance resources to help facilitate compliance156 and will undertake a review of these compliance resources to ensure that they undergo an update to reflect any amendments to Rule G–40.157 In doing so, the MSRB stated that it expects to engage with stakeholders in some capacity (e.g., via discussions with the MSRB’s Compliance Advisory Group and/or discussions with key stakeholders) to help ensure that the resources meet the needs of municipal advisors.158

B. Comment Received in Response to Amendment No. 1

The Commission received one comment letter on Amendment No. 1,159 as well as response from the MSRB to this comment letter,160 The commenter supported for Amendment No. 1, noting appreciation for the MSRB’s work in addressing concerns initially raised in response to the original proposed rule change.161 The commenter also requested that “the SEC approve the filing at its earliest convenience.”162 Additionally, the commenter encouraged the MSRB to work with market participants and look for ways to provide streamlined guidance that can be easily and readily utilized by municipal advisors.163 The MSRB responded to the comment that it appreciated the continued participation of commenters in the rulemaking process, and reiterated its commitment in its earlier response letter that the MSRB will continue to engage with stakeholders to support the implementation of the amendments to help municipal advisors understand the applicable obligations and facilitate compliance.164

V. Discussion of Commission’s Findings

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

In particular, the Commission believes that the proposed rule change is consistent with the provisions of section 15B(b)(2)(C), which provides, in the

142 See NAMA Letter I at 3.
143 MSRB Letter I at 4; see also SEC 2020 Adopting Release, 86 FR at 13048.
144 MSRB Letter I at 4–5.
145 Id. at 5.
146 See NAMA Letter I and SIFMA Letter.
147 MSRB Letter I at 5.
148 Id.
149 Id.
150 Id.
151 Id.
152 Id.
153 SIFMA Letter at 2.
154 MSRB Letter I at 6.
155 Id.
157 Id.
158 Id.
159 See NAMA Letter II.
160 See MSRB Letter II.
161 See NAMA Letter II.
162 Id. at 2.
163 Id.
164 MSRB Letter II at 2.
part, 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 Commission finds that the proposed rule change will: (i) prevent fraudulent and manipulative acts and practices; (ii) protect investors, municipal entities, obligated persons, and the public interest; (iii) promote just and equitable principles of trade; and (iv) foster cooperation and coordination with persons engaged in regulating transactions in municipal securities.

A. Prevent Fraudulent and Manipulative Acts and Practices

The Commission finds 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, permitting municipal advisors to use only testimonials that are consistent with these standards would help ensure that Rule G–40 continues to prevent fraudulent and manipulative acts and practices. The Commission further believes that the proposed amendment to 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 Rule G–40, which would further help prevent fraudulent and manipulative acts and practices.

B. Protect Investors, Municipal Entities, Obligated Persons, and the Public Interest

The Commission finds that the proposed 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. Municipal entities and obligated persons are the likely audience for municipal advisors’ testimonials. As such, the requisite disclosures would help ensure that the proposed rule change would further the protection of municipal entities, obligated persons, and the public interest.

The Commission further notes that the amendments to Rule G–40 are intended to align 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. Therefore, the Commission finds that the proposed rule change’s associated requirements for testimonials (like the Modernized IA Marketing Rule) are meant to protect potential clients from misleading advertisements. In this way, the Commission finds that the proposed amendments to Rule G–40 would enhance protections for potential recipients of municipal advisor testimonials, including issuers, obligated persons, and other market participants.

C. Promote Just and Equitable Principles of Trade

The Commission 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 alignment serves to provide regulatory consistency for entities that may be dually registered (e.g., as a municipal advisor and an investment advisor). By establishing a consistent regulatory standard for advertising across dealers, investment advisors, and municipal advisors, the Commission finds that the proposed rule change promotes more just and equitable principles of trade among these different market participants.

D. Foster Cooperation and Coordination With Persons Engaged in Regulating Transactions in Municipal Securities

Furthermore, the Commission believes the proposed rule change would foster coordination with persons engaged in regulating transactions in municipal securities. The amendments to Rule G–40 would more tightly align the content standards for Rule G–40 with the content standards of the SEC’s Modernized IA Marketing Rule. The proposed change thereby provides a more uniform standard for regulated entities subject to a fiduciary standard (i.e., investment advisors and municipal advisors). This uniformity allows the examining authorities to coordinate examinations of municipal advisors and municipal advisors dually registered as investment advisors more effectively. Moreover, the proposed rule change will allow examiners to compare content standard practices across all municipal advisors (regardless of dually register status) more clearly. As such, the Commission finds that the proposed rule change serves to foster greater cooperation and coordination among the examining authorities responsible for ensuring compliance with MSRB rules.

Section 15(b)(2)(C) of the 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 Act. In approving the proposed rule change, the Commission has considered the proposed rule change’s impact on efficiency, competition, and capital formation. The Commission does not believe the proposed rule change to amend Rule G–40 and Rule G–8 would impose any new burden on competition or have an impact on competition, as the proposed rule change would apply a similar regulatory regime to all municipal advisors. Further, the Commission believes that the proposed changes to Rules G–40 and 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. By aligning MSRB rules with the SEC’s Modernized IA Marketing Rule, as well as Rule G–21, the proposed amendments to Rules G–40 and 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 Commission also finds that the proposed rule change will not hinder capital formation, as the proposed amendments to Rule G–40 and Rule G–
SECURITIES AND EXCHANGE COMMISSION


Self-Regulatory Organizations; ICE Clear Credit LLC; Order Approving Proposed Rule Change Relating to British Pounds Sterling as Client-Related Margin


I. Introduction

On March 13, 2023, ICE Clear Credit LLC ("ICC") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(2) of the Securities Exchange Act of 1934 (the "Act") and Rule 19b–4 thereunder, a proposed rule change to accept British Pounds Sterling in satisfaction of client-related margin requirements. The proposed rule change was published for comment in the Federal Register on March 30, 2023. The Commission did not receive comments regarding the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

A. Background

ICC is registered with the Commission as a clearing agency for the purpose of clearing CDS contracts. ICC requires that its Clearing Participants post margin to collateralize their credit exposure to ICC, based on the size and risk of their cleared positions. On a daily basis, ICC determines margin requirements (i) for a Clearing Participant's own cleared positions (referred to as "house" positions) and (ii) for the cleared positions of its clients.

The proposed rule change relates to the second category, margin requirements for the cleared positions of clients. Specifically, the proposed rule change would allow Clearing Participants to use cash British pounds sterling ("GBP") to satisfy client-related margin requirements. Currently, a Clearing Participant may meet client-related margin requirements with US dollars, Euros, or US Treasuries. ICC previously accepted GBP in satisfaction of client-related margin requirements, but it revoked that option in 2017. ICC did so because no Clearing Participants posted GBP at that time, and ICC considered GBP a less liquid resource due to the potential need to convert it to other US dollars or Euros.

ICC has decided to once again accept GBP in satisfaction of client-related margin requirements. ICC is doing so in response to feedback from customers. Several UK and EU market participants have asked ICC for the ability to post GBP in addition to the asset types currently accepted by ICC.

In addition to satisfying the request of these customers, ICC believes that accepting GBP would overall better serve other UK and EU-based market participants. Such participants may be seeking an alternative CDS clearing service, given that ICE Clear Europe is intending to close its UK-based CDS clearing service in October of this year.

To carry out this change, ICC would amend the ICE Clear Credit Rulebook ("ICC Rules") and the ICE Clear Credit Treasury Operations Policies & Procedures ("Treasury Policy"), as described in detail below.

B. ICC Rules

Currently, Schedule 401 of the ICC Rules sets out the collateral that ICC accepts to satisfy client-related margin requirements. Schedule 401 describes this collateral in terms of the CDS contract for which the margin is required. Specifically, Schedule 401 categorizes the collateral as that which ICC accepts for client-related US-dollar denominated products and client-related Euro denominated products.

For each of those products, Schedule 401 requires that a Clearing Participant meet a certain percentage of the relevant margin requirement in particular collateral. Below is what Schedule 401 currently provides for client-related margin.

Client-Related Initial Margin Liquidity Requirements
Client-Related US Dollar Denominated Product Requirement

Client-Related Euro Denominated Product Requirement

<table>
<thead>
<tr>
<th>Asset Type</th>
<th>Minimum Percentage of Requirement</th>
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</thead>
<tbody>
<tr>
<td>US Dollar Denominated Assets (US Cash and/or US Treasuries)</td>
<td>65%</td>
</tr>
<tr>
<td>All Eligible Collateral (US Cash, Euro Cash, and/or US Treasuries)</td>
<td>+35% (for a total of 100%)</td>
</tr>
</tbody>
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6 Capitalized terms not otherwise defined herein have the meanings provided to them in the Rules or Treasury Policy, as applicable.
7 Currently, ICC only clears US-dollar denominated and Euro denominated products, and the proposed rule change would not alter this.