OMB APPROVAL
OMB Number: 3235-0045 Estimated average burden hours per response.....38

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 197

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

File No.* SR - 2018 - * 01
Amendment No. (req. for Amendments *)

Filing by Municipal Securities Rulemaking Board

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

Initial * ☑ Amendment * ☐ Withdrawal ☐

Section 19(b)(2) * ☑ Section 19(b)(3)(A) * ☐ Section 19(b)(3)(B) * ☐

Pilot ☐

Extension of Time Period for Commission Action * ☐

Date Expires *

Rule

- 19b-4(f)(1)
- 19b-4(f)(2)
- 19b-4(f)(3)
- 19b-4(f)(4)
- 19b-4(f)(5)
- 19b-4(f)(6)

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010

Section 806(e)(1) * ☐ Section 806(e)(2) * ☐

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934

Section 3C(b)(2) * ☐

Exhibit 2 Sent As Paper Document

Exhibit 3 Sent As Paper Document

Description

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

Proposed Rule Change Consisting of Amendments to Rule G-21, on Advertising, Proposed New Rule G-40, on Advertising by Municipal Advisors, and a Technical Amendment to Rule G-42, on Duties of Non-Solicitor Municipal Advisors

Contact Information

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

First Name * Pamela Last Name * Ellis

Title * Associate General Counsel

E-mail * pellis@msrb.org

Telephone * (202) 838-1500 Fax

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

Municipal Securities Rulemaking Board
has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date 01/18/2018

By Ronald W. Smith

(Name *)

(Title *)

Corporate Secretary

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

rsmith@msrb.org, rsmith@msrb.org

Required fields are shown with yellow backgrounds and asterisks.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

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

Form 19b-4 Information *

Add Remove View

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

Exhibit 1 - Notice of Proposed Rule Change *

Add Remove View

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

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

Add Remove View

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

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

Add Remove View

Exhibit Sent As Paper Document

☐

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

Exhibit 3 - Form, Report, or Questionnaire

Add Remove View

Exhibit Sent As Paper Document

☐

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

Exhibit 4 - Marked Copies

Add Remove View

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

Exhibit 5 - Proposed Rule Text

Add Remove View

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

Partial Amendment

Add Remove View

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

1. Text of the Proposed Rule Change

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"),[1] and Rule 19b-4 thereunder,[2] the Municipal Securities Rulemaking Board (the "MSRB" or "Board") is hereby filing with the Securities and Exchange Commission (the "Commission" or "SEC") a proposed rule change consisting of amendments to MSRB Rule G-21, on advertising ("proposed amended Rule G-21"), proposed new MSRB Rule G-40, on advertising by municipal advisors ("proposed Rule G-40"), and a technical amendment to MSRB Rule G-42, on duties of non-solicitor municipal advisors ("proposed amended Rule G-42," together with proposed amended Rule G-21 and proposed Rule G-40, the "proposed rule change"). The MSRB requests that the proposed rule change become effective nine months from the date of SEC approval.

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

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was adopted by the MSRB at its July 26-27, 2017 meeting. Questions about this filing may be directed to Pamela K. Ellis, Associate General Counsel, at 202.838.1500.

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

(a) Purpose

I. Background

A. Proposed amended Rule G-21

Rule G-21 is a core fair practice rule of the MSRB. Rule G-21 applies to all advertisements by dealers, as defined by Rule G-21(a)(i).[3] Rule G-21 became effective in 1978,

---

1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 An advertisement, as defined by Rule G-21(a)(i):

> means any material (other than listings of offerings) published or used in any electronic or other public media, or any written or electronic promotional

and has been amended several times since then as the MSRB has enhanced its rule book. More recently, in 2012, the MSRB issued a request for comment on its entire rule book.[4] In response, two market participants requested that the MSRB harmonize its advertising rules with FINRA Rule 2210, on communications with the public.[5] Market participants echoed those requests more generally in their latest responses to a 2016 request for comment on the MSRB's strategic priorities.[6] Further, and apart from the MSRB's requests for comment, the MSRB solicited input about possible amendments to Rule G-21 from market participants, including industry groups that represent dealers.[7]

After considering the important suggestions made by market participants, the MSRB prepared proposed amended Rule G-21 to, among other things:

- enhance the MSRB's fair-dealing provisions by promoting regulatory consistency among Rule G-21 and the advertising rules of other financial regulators; and

---

> literature distributed or made generally available to customers or the public, including any notice, circular, report, market letter, form letter, telemarketing script, seminar text, press release concerning the products or services of the broker, dealer or municipal securities dealer, or reprint, or any excerpt of the foregoing or of a published article.

As such, Rule G-21 not only applies to print advertisements, but also applies to an advertisement "published or used in any electronic or other public media," such as a social media post.

4 MSRB Notice 2012-63, Request for Comment on MSRB Rules and Interpretive Guidance (Dec. 18, 2012).

5 See Letter from David L. Cohen, Managing Director, Associate General Counsel, Securities Industry and Financial Markets Association, dated February 19, 2013, to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board; Letter from Gerald K. Mayfield, Senior Counsel, Wells Fargo & Company Law Department, dated February 19, 2013, to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board.

6 MSRB Notice 2016-25, MSRB Seeks Input on Strategic Priorities (Oct. 12, 2016); see Letter from Michael Decker, Managing Director, Securities Industry and Financial Markets Association, dated November 11, 2016, to Ronald W. Smith, Secretary, Municipal Securities Rulemaking Board; Letter from Robert J. McCarthy, Director of Regulatory Policy, Wells Fargo Advisors, LLC, dated November 11, 2016, to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board.

7 See MSRB Notice 2017-04, Request for Comment on Draft Amendments to MSRB Rule G-21, on Advertising, and on Draft Rule G-40, on Advertising by Municipal Advisors (Feb. 16, 2017).

- promote regulatory consistency between Rule G-21(a)(ii), the definition of "form letter," and FINRA Rule 2210's definition of "correspondence."

Proposed amended Rule G-21 also makes a technical amendment in paragraph (e) to streamline the rule.

Concurrent with its efforts to enhance Rule G-21 and promote regulatory consistency among Rule G-21 and the advertising rules of other financial regulators, the MSRB prepared proposed Rule G-40 to address advertising by municipal advisors.

B. Proposed Rule G-40

In August 2011, in the exercise of its new rulemaking authority over municipal advisors,[8] the MSRB solicited public comment on a proposal to amend Rule G-21 and Rule G-9, on preservation of records, and to issue an interpretive notice under Rule G-17, on conduct of municipal securities activities, to address advertising by municipal advisors.[9] However, the MSRB did not proceed beyond requesting comment. In anticipation of the SEC's adoption of its rules relating to municipal advisor registration, the MSRB determined to withdraw or otherwise re-examine and revisit its then pending rulemaking proposals, including the 2011 request for comment.

On September 20, 2013, the SEC adopted its final rules for municipal advisor registration that the SEC had proposed in 2010 (the "final rules").[10] Among other things, the final rules interpreted the statutory definition of the term "municipal advisor" under the Exchange Act and the statutory exclusions from that definition.[11] Since September 2013, the MSRB has re-examined and adopted revised proposals addressing many of the issues that were the subject of its previously withdrawn or suspended municipal advisor rulemaking proposals. With the benefit of the final rules and of the MSRB's development of its core regulatory framework for municipal advisors, the MSRB determined to revisit its approach to advertising by municipal advisors.

---

8 Pub. Law No. 111-203, 124 Stat. 1376 (2010).

9 MSRB Notice 2011-41, Request for Comment on Draft Amendments to MSRB Rule G-21 (on Advertising) and Draft Interpretive Notice Concerning the Application of MSRB Rule G-17 (on Fair Dealing) to Certain Communications (Aug. 10, 2011) ("2011 request for comment"). The draft amendments, among other things, would have extended Rule G-21 and its related recordkeeping requirements to municipal advisors. Further, the draft interpretive notice would have reminded dealers and municipal advisors that Rule G-17's fair practice requirements apply to all communications (written and oral), including the content of advertisements, sales or marketing communications and correspondence.

10 Exchange Act Release No. 70462 (Sept. 20, 2013), 78 FR 67468 (Nov. 12, 2013).

11 Rule 15Ba1-1(d), 17 CFR 240.15Ba1-1(d), under the Exchange Act.

To inform its approach, the MSRB solicited general input from market participants about the nature of municipal advisor advertising and about how municipal advisors use advertising. That outreach included industry groups that represent non-solicitor and/or solicitor municipal advisors. As a result of that outreach and the valuable input received from market participants, the MSRB developed proposed Rule G-40.

Proposed Rule G-40 would apply to advertising by municipal advisors. Similar to proposed amended Rule G-21, proposed Rule G-40 would:

- provide general provisions that define the terms "advertisement" and "form letter," and would set forth the general standards and content standards for advertisements;
- provide the definition of professional advertisements, and would define the standard for those advertisements; and
- would require the approval by a principal, in writing, before the first use of an advertisement.

Also, proposed Rule G-40, similar to proposed amended Rule G-21,[12] would apply to all advertisements by a municipal advisor, as defined in proposed Rule G-40(a)(i). However, unlike proposed amended Rule G-21, proposed Rule G-40 would contain certain substituted terms that are more relevant to municipal advisors, and proposed Rule G-40 would omit the three provisions in Rule G-21 that concern product advertisements (i.e., product advertisements, new issue product advertisements, and municipal fund securities product advertisements).

C. Technical Amendment to Rule G-42

Rule G-42(f)(iv) defines municipal advisory activities as "those activities that would cause a person to be a municipal advisor as defined in subsection (f)(iv) of this rule." The proposed rule change would provide a technical amendment to Rule G-42(f)(iv) to correct the cross-reference. Proposed amended Rule G-42 would replace the reference to subsection (f)(iv) in Rule G-42(f)(iv) with the intended reference to subsection (f)(iii). Rule G-42(f)(iii) defines the term "municipal advisor" for purposes of Rule G-42.

II. Proposed Amended Rule G-21

A. Enhancement of Fair Dealing Provisions and Promotion of Regulatory Consistency with Certain Standards of Other Financial Regulators

To enhance Rule G-21's fair dealing requirements, as well as to promote regulatory consistency among Rule G-21 and the advertising rules of other financial regulators, proposed amended Rule G-21 would provide more specific content standards. Proposed amended Rule G-21 also would include revisions to the rule's general standards for advertisements.

(i) Content standards

---

12 See supra note 3.

Proposed amended Rule G-21(a)(iii) would add content standards to make explicit many of the MSRB's fair dealing obligations that follow from the MSRB's requirements set forth in Rule G-21 and Rule G-17, on conduct of municipal securities and municipal advisory activities, and the interpretive guidance the MSRB has provided under those rules, and to specifically address them to advertising.[13] Proposed amended Rule G-21 would enhance Rule G-21's fair dealing provisions by requiring that:

- an advertisement be based on principles of fair dealing and good faith, be fair and balanced and provide a sound basis for evaluating the facts about any particular municipal security or type of municipal security, industry, or service, and that a dealer not omit any material fact or qualification if such omission, in light of the context presented, would cause the advertisement to be misleading;
- an advertisement not contain any false, exaggerated, unwarranted, promissory or misleading statement or claim;
- a dealer limit the types of information placed in a legend or footnote of an advertisement so as to not inhibit a customer's or potential customer's understanding of the advertisement;
- an advertisement provide statements that are clear and not misleading within the context that they are made, that the advertisement provide a balanced treatment of the benefits and risks, and that the advertisement is consistent with the risks inherent to the investment;
- a dealer consider the audience to which the advertisement will be directed and that the advertisement provide details and explanations appropriate to that audience;
- an advertisement not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast;[14] and
- an advertisement not include a testimonial unless it satisfies certain conditions.[15]

---

13 The proposed rule change would not supplant the MSRB's regulatory guidance provided under Rule G-17.

14 However, proposed amended Rule G-21(a)(iii)(F) would permit:

> (1) A hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of an investment; and
> (2) An investment analysis tool, or a written report produced by an investment analysis tool.

15 Proposed amended Rule G-21(a)(iii)(G) would provide:

> (1) If an advertisement contains a testimonial about a technical aspect of investing, the person making the testimonial must have the knowledge and experience to form a valid opinion;
> (2) If an advertisement contains a testimonial about the investment advice or investment performance of a broker, dealer or municipal securities dealer or its products, that advertisement must prominently disclose the following:

By so doing, proposed amended Rule G-21(a)(iii) would promote regulatory consistency with FINRA Rule 2210(d)(1)'s and FINRA Rule 2210(d)(6)'s content standards for advertisements. The other topics and standards addressed by other provisions of FINRA Rule 2210(d) have not been historically addressed by Rule G-21 and/or may not be relevant to the municipal securities market,[16] and the MSRB did not include those topics in the MSRB's request for comment on draft amendments to Rule G-21.[17]

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

(ii) General standards

Proposed amended Rule G-21(a)(iv), (b)(ii), and (c)(ii) would promote regulatory consistency among Rule G-21's general standard for advertisements, standard for professional advertisements, and standard for product advertisements (collectively, the "general standards") and the content standards of FINRA Rule 2210(d). Currently, Rule G-21's general standards prohibit a dealer, in part, from publishing or disseminating material that is "materially false or

---

(a) The fact that the testimonial may be not be representative of the experience of other customers.
(b) The fact that the testimonial is no guarantee of future performance or success.
(c) If more than $100 in value is paid for the testimonial, the fact that it is a paid testimonial.

16 Those other topics and standards addressed by FINRA Rule 2110(d) relate to: comparisons between investments or services (FINRA Rule 2210(d)(2)); disclosure of the member's name (FINRA Rule 2210(d)(3)); tax considerations (FINRA Rule 2210(d)(4)); disclosure of fees, expenses, and standardized performance relating to non-money market fund open-end investment company performance data (FINRA Rule 2210(d)(5)); recommendations (FINRA Rule 2210(d)(7)); BrokerCheck (FINRA Rule 2210(f)(8)); and prospectuses filed with the SEC (FINRA Rule 2210(d)(9)).

17 See MSRB Notice 2017-04 (Feb. 16, 2017) and discussion of the comments that the MSRB received in response to that request for comment under "Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others."

misleading." Proposed amended Rule G-21 would replace the phrase "materially false or misleading" with "any untrue statement of material fact" as well as add "or is otherwise false or misleading." The MSRB believes that this harmonization with FINRA Rule 2210(d) would be consistent with Rule G-21's current general standards and would ensure consistent regulation between similar regulated entities.

B. Reconcile the Definition of Form Letter with FINRA Rule 2210 Definition of Correspondence

Currently, Rule G-21(a)(ii) defines a "form letter," in part, as a written letter distributed to 25 or more persons. The analogous provision in FINRA's communications with the public rule to Rule G-21(a)(ii) is FINRA Rule 2210's definition of correspondence. FINRA Rule 2210(a)(2)'s definition of correspondence, however, defines "correspondence," in part, as written communications distributed to 25 or fewer retail investors. The MSRB understands that the one-person difference between Rule G-21 and FINRA Rule 2210 has created confusion and compliance challenges for dealers. To respond to this concern, proposed amended Rule G-21(a)(ii) would eliminate that one-person difference. Under proposed amended Rule G-21, a form letter, in part, would be defined as a written letter distributed to more than 25 persons.[18]

Supplementary Material .03 to proposed amended Rule G-21 would explain the term "person" when used in the context of a form letter under Rule G-21(a)(ii). Specifically, Supplementary Material .03 would explain that the number of "persons" is determined for the purposes of a response to a request for proposal ("RFP"), request for qualifications ("RFQ") or similar request at the entity level. Therefore, for example, if a dealer were to respond to an RFP from Big City Water Authority, Big City Water Authority would count as one person, no matter how many persons employed by Big City Water Authority reviewed the dealer's response to the RFP.

C. Technical Amendment

Proposed amended Rule G-21 would contain a technical amendment to Rule G-21(e). To streamline and clarify the MSRB's rules, the proposed rule change would delete references to the Financial Industry Regulatory Authority, Inc. in Rule G-21(e)(ii)(F) and Rule G-21(e)(vi) because, for example, reference to any applicable regulatory body is sufficient and no limitation to any more narrow subset is intended.

III. Proposed Rule G-40

Proposed Rule G-40, similar to Rule G-21, would set forth general provisions, address professional advertisements and require principal approval in writing for advertisements by municipal advisors before their first use. However, as discussed below, proposed Rule G-40 would not address product advertisements, as that term is defined in Rule G-21.

---

[18] Written letters or electronic mail messages distributed to 25 or fewer persons within any period of 90 consecutive days may be subject to the fundamental fair dealing obligations of Rule G-17.

A. General Provisions

Proposed Rule G-40(a) would define the terms advertisement, form letter and municipal advisory client, and would provide content and general standards for advertisements by a non-solicitor or a solicitor municipal advisor.

(i) Definitions

Advertisement. The term "advertisement" in proposed Rule G-40(a)(i) would parallel the term "advertisement" in proposed amended Rule G-21(a)(i), but would be tailored for municipal advisors. An advertisement would refer, in part, to any promotional literature distributed or made generally available to municipal entities, obligated persons, municipal advisory clients (discussed below), or the public by a municipal advisor.[19] Further, an advertisement would include the promotional literature used by a solicitor municipal advisor[20] to solicit a municipal entity or obligated person on behalf of the solicitor municipal advisor's municipal advisory client.

In addition, similar to proposed amended Rule G-21(a)(i), proposed Rule G-40(a)(i) would exclude certain types of documents from the definition of advertisement. The documents that would be excluded would be preliminary official statements, official statements, preliminary prospectuses, prospectuses, summary prospectuses or registration statements. These exclusions recognize the differences between the role of a dealer under Rule G-21 and the role of a solicitor municipal advisor under proposed Rule G-40. Nonetheless, as with Rule G-21, an abstract or summary of those documents or other such similar documents prepared by the municipal advisor would be considered an advertisement.

---

[19] An advertisement, as defined by proposed Rule G-40(a)(i) would mean:

> any material (other than listings of offerings) published or used in any electronic or other public media, or any written or electronic promotional literature distributed or made generally available to municipal entities, obligated persons, municipal advisory clients or the public, including any notice, circular, report, market letter, form letter, telemarketing script, seminar text, press release concerning the services of the municipal advisor or the engagement of a municipal advisory client (as defined in paragraph (a)(iii)(B)), or reprint, or any excerpt of the foregoing or of a published article. The term does not apply to preliminary official statements, official statements, preliminary prospectuses, prospectuses, summary prospectuses or registration statements, but does apply to abstracts or summaries of the foregoing and other such similar documents prepared by municipal advisors.

[20] A "solicitor municipal advisor," is a municipal advisor that engages in a solicitation of a municipal entity or obligated person, as defined in Rule 15Ba1-1(n) under the Exchange Act.

For example, a municipal advisor may assist with the preparation of an official statement. An official statement would be excluded from the definition of an advertisement. As such, under proposed Rule G-40(a)(i), the municipal advisor that assists with the preparation of an official statement generally would not be assisting with an advertisement and the municipal advisor's work on the official statement generally would not be subject to the requirements of proposed Rule G-40.

Form letter. The term "form letter" in proposed Rule G-40 would be identical to the definition of that term set forth in proposed amended Rule G-21(a)(ii). A form letter would be defined as any written letter or electronic mail message distributed to more than 25 persons within any period of 90 consecutive days.[21]

Similar to proposed amended Rule G-21, proposed Rule G-40 would include Supplementary Material .01 to clarify the number of "persons" for a response to an RFP, RFQ or similar request, when used in the context of a form letter under proposed Rule G-40(a)(ii), is determined at the entity level. Therefore, for example, if a municipal advisor were to respond to an RFP from Big City Water Authority, Big City Water Authority would count as one person, no matter how many persons employed by Big City Water Authority reviewed the municipal advisor's response to the RFP.

Municipal advisory client. Proposed Rule G-40(a)(iii), unlike Rule G-21, includes the definition of the term "municipal advisory client." The definition of municipal advisory client would be substantially similar in all material respects to the definition of that term as set forth in the recent amendments to Rule G-8, effective October 13, 2017, to address municipal advisory client complaint recordkeeping.[22] The definition of municipal advisory client would account for differences in the activities of non-solicitor and solicitor municipal advisors.

(ii) Content standards

---

21 See supra note 18.

22 Exchange Act Release No. 79801 (Jan. 13, 2017), 82 FR 7898 (Jan. 23, 2017) (SR-MSRB-2016-15). See MSRB Notice 2017-03, SEC Approves Extension of MSRB's Customer Complaint and Related Recordkeeping Rules to Municipal Advisors and the Modernization of Those Rules (Jan. 18, 2017). Specifically, Rule G-8(e)(ii) defines a municipal advisory client to include

> either a municipal entity or obligated person for whom the municipal advisor engages in municipal advisory activities as defined in Rule G-42(f)(iv), or a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser (as defined in 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.

Proposed Rule G-40(a)(iv) sets forth content standards for advertisements. Those content standards would be substantially similar in all material respects to the content standards set forth in proposed amended Rule G-21. Nonetheless, proposed Rule G-40 would replace certain terms used in proposed amended Rule G-21 with terms more applicable to municipal advisors. The MSRB believes that incorporating content standards for advertisements into proposed Rule G-40 would ensure consistent regulation between regulated entities in the municipal securities market, as well as promote regulatory consistency between dealer municipal advisors and non-dealer municipal advisors.

Specifically, proposed Rule G-40 would require that:

- an advertisement be based on the principles of fair dealing and good faith, be fair and balanced and provide a sound basis for evaluating the municipal security or type of municipal security, municipal financial product, industry, or service and that a municipal advisor not omit any material fact or qualification if such omission, in light of the context presented, would cause the advertisement to be misleading;
- an advertisement not contain any false, exaggerated, unwarranted, promissory or misleading statement or claim;
- a municipal advisor limit the types of information placed in a legend or footnote of an advertisement so as to not inhibit a municipal advisory client's or potential municipal advisory client's understanding of the advertisement;
- an advertisement provide statements that are clear and not misleading within the context that they are made, that the advertisement provides a balanced treatment of risks and potential benefits, and that the advertisement is consistent with the risks inherent to the municipal financial product or the issuance of the municipal security;
- a municipal advisor consider the audience to which the advertisement will be directed and that the advertisement provide details and explanations appropriate to that audience;
- an advertisement not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast;[23] and
- an advertisement not refer, directly or indirectly, to any testimonial of any kind concerning the municipal advisor or concerning the advice, analysis, report or other service of the municipal advisor.

By so doing, proposed Rule G-40's content generally would promote regulatory consistency with proposed amended Rule G-21.

However, unlike proposed amended Rule G-21, proposed Rule G-40 would prohibit 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

---

[23] However, proposed amended Rule G-40(a)(iv)(F) would permit:

> (1) A hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of a municipal financial product; and
> (2) An investment analysis tool, or a written report produced by an investment analysis tool.

municipal entity clients. The MSRB notes that investment advisers also are subject to fiduciary duty standards.

Similar to the concerns that the Commission has expressed about an advertisement by an investment adviser that contains a testimonial,[24] the MSRB believes that a testimonial in an advertisement by a municipal advisor would present significant issues, including the ability to be misleading. The MSRB notes that in adopting Rule 206(4)-1 under the Investment Advisers Act of 1940, as amended (the "Advisers Act"),[25] the rule that applies to advertisements by registered investment advisers, the SEC found that the use of testimonials in advertisements by an investment adviser was misleading.[26] Thus, Rule 206(4)-1 provides that the use of a testimonial by an investment adviser would constitute a fraudulent, deceptive, or manipulative act, practice, or course of action. To protect municipal entities and obligated persons, to help ensure consistent regulation between analogous regulated entities, and to help ensure a level playing field between

---

24 See infra note 26.

25 15 U.S.C. 80b-1.

26 Advisers Act Rule 206(4)-1, 17 CFR 275.206(4)-1, provides, in part, that it would be a fraudulent, deceptive, or manipulative act or course of business for an investment adviser to publish, circulate, or distribute an advertisement that refers to any testimonial concerning the investment adviser. See Advisers Act Release No. 121 (Nov. 2, 1961), 26 FR 10548, 10549 (Nov. 9, 1961) (prohibiting testimonials of any kind and finding that "such advertisements are misleading; by their very nature they emphasize the comments and activities favorable to the investment adviser and ignore those which are unfavorable. This is true even when the testimonials are unsolicited and are printed in full").

However, since the rule's adoption, the SEC staff has granted no-action relief on multiple occasions to permit certain communications to be used without those communications being considered testimonials. See, e.g., DALBAR, Inc. (publicly avail. Mar. 24, 1998) (providing no-action assurance relating to the use of DALBAR's ratings of investment advisers in advertisements) and Cambiar Investors, Inc. (publicly avail. Aug. 28, 1997) (providing no-action assurance relating to the investment adviser providing a list that identifies clients). Further, the SEC has announced that the Division of Investment Management is considering recommending to the Commission amendments to Advisers Act Rule 206(4)-1, 17 CFR 275.206(4)-1, to enhance marketing communications and practices by investment advisers as part of the Commission's long-term regulatory agenda published for the Fall 2017. The regulatory agenda is available at https://resources.regulations.gov/public/custom/jsp/navigation/main.jsp. The MSRB will monitor the Commission's action with regard to Advisers Act Rule 206(4)-1. However, at this time, the MSRB is neither providing interpretative guidance relating to the use of testimonials by municipal advisors nor adopting the SEC staff's guidance. See discussion under "Self-Regulatory Organization's Statement on the Proposed Rule Change Received from Members, Participants, or Others – Proposed Rule G-40 – Testimonials."

municipal advisors/investment advisers and other municipal advisors, proposed Rule G-40 would prohibit the use of testimonials by a municipal advisor.[27]

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

(iii) General standard for advertisements

Proposed Rule G-40(a)(v) would set forth a general standard with which a municipal advisor must comply for advertisements. That standard would require, in part, that a municipal advisor not publish or disseminate, or cause to be published or disseminated, any advertisement relating to municipal securities or municipal financial products that the municipal advisor knows or has reason to know contains any untrue statement of material fact or is otherwise false or misleading. The MSRB believes that the knowledge standard as the general standard for advertisements is appropriate. Thus, proposed Rule G-40 is similar to proposed amended Rule G-21(a)(iv) in all material respects, except proposed Rule G-40 substitutes "municipal advisor" for the term "dealer" and, consistent with Section 15B(e)(4) of the Exchange Act,[28] applies with regard to municipal financial products in addition to municipal securities.

B. Professional Advertisements

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

The strict liability standard for professional advertisements in proposed Rule G-40(b)(ii) is consistent with the MSRB's long-standing belief that a regulated entity should be strictly liable for an advertisement about its facilities, skills, or services, and that a knowledge standard is not

---

27 See discussion of testimonials in municipal advisor advertisements under "Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others," below.

28 15 U.S.C. 78o-4(e)(4).

appropriate.[29] The MSRB has held this belief since it developed its advertising rules for dealers over 40 years ago.[30] Thus, proposed Rule G-40(b) would be substantially similar in all material respects to proposed amended Rule G-21(b).

C. Principal Approval

Proposed Rule G-40(c) would require that each advertisement that is subject to proposed Rule G-40 be approved in writing by a municipal advisor principal before its first use.[31] Proposed Rule G-40(c) also would require that the municipal advisor keep a record of all such advertisements. Proposed Rule G-40(c) is similar in all material respects to proposed amended Rule G-21(f). If the SEC approves the proposed rule change, municipal advisors should update their supervisory and compliance procedures required by Rule G-44, on supervisory and compliance obligations of municipal advisors, to address compliance with proposed Rule G-40(c).

D. Product Advertisements

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

(b) Statutory Basis

Section 15B(b)(2) of the Exchange Act[32] provides that:

> [t]he 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

---

29 Notice of Filing of Fair Practice Rules, [1977-1987 Transfer Binder] Municipal Securities Rulemaking Board Manual (CCH) ¶10,030 at 10,376 (Sept. 20, 1977).

30 Id.

31 MSRB Rule G-3(e)(i), on professional qualifications, defines a municipal advisor principal as:

> a natural person associated with a municipal advisor who is qualified as a municipal advisor representative and is directly engaged in the management, direction or supervision of the municipal advisory activities of the municipal advisor and its associated persons.

32 15 U.S.C. 78o-4(b)(2).

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 Act[33] 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 that the proposed rule change is consistent with Sections 15B(b)(2)[34] and 15B(b)(2)(C)[35] of the Exchange Act. The proposed rule change would help prevent fraudulent and manipulative practices, promote just and equitable principles of trade, and protect investors, municipal entities, obligated persons and the public interest by enhancing the MSRB's advertising rules that apply to dealers and by establishing advertising rules that apply to municipal advisors.[36]

Rule G-21

The MSRB believes proposed amended Rule G-21, by design, would help prevent fraudulent and manipulative practices. Proposed amended Rule G-21 would require that advertisements be based on the principles of fair dealing and good faith, be fair and balanced, and provide a sound basis for evaluating the facts. A dealer would not be able to omit any material fact or qualification, if the omission, in light of the context of the material presented, would cause the advertisement to be misleading. Furthermore, dealers would be prohibited from making any false, exaggerated, unwarranted, promissory or misleading statement or claim in an advertisement. Dealers would be required to ensure that the statements that they make are clear and not misleading within the context in which they are made and that they provide a balanced treatment of risks and potential benefits. Dealers also would be limited in the types of information that could be placed in a legend or footnote in an advertisement, and dealers only could include a testimonial in an advertisement if certain conditions are met. Dealers would have to consider the nature of the audience to which the advertisement would be directed and would

---

33 15 U.S.C. 78o-4(b)(2)(C).

34 15 U.S.C. 78o-4(b)(2).

35 15 U.S.C. 78o-4(b)(2)(C).

36 The MSRB notes that the technical amendment to proposed amended Rule G-42 will assist municipal advisors by providing a clearer rule that addresses the duties of non-solicitor municipal advisors.

have to provide details and explanations appropriate to the audience. Further, dealers would be prohibited from indicating registration with the MSRB in an advertisement unless the advertisement complies with the applicable standards of all other Board rules and that neither states nor implies that the MSRB endorses dealer's business practices, selling methods, class or type of security offered or any specific security. The prescriptive nature of proposed amended Rule G-21 would provide clear guidelines for dealers to follow that would help prevent fraudulent and manipulative practices.

Moreover, because proposed amended Rule G-21 would promote regulatory consistency with certain of FINRA Rule 2210's content standards, standards to which many dealers are currently subject as FINRA member firms, dealers may more easily understand and comply with proposed amended Rule G-21. In turn, this compliance would help prevent fraudulent and manipulative practices because the requirements of proposed amended Rule G-21 (noted in the paragraph above) are in and of themselves designed to prevent fraudulent and manipulative practices.

Finally, proposed amended Rule G-21 would help prevent fraudulent and manipulative practices because it would promote more efficient inspections of dealer advertisements. Other financial regulators inspect and enforce the MSRB's rules. Proposed amended Rule G-21 would provide clear guidelines as to the content of what may appear in an advertisement which should facilitate an efficient inspection. Further, because Rule G-21 would help promote regulatory consistency with certain of FINRA Rule 2210's content standards, inspections staff may be well familiar with the proposed amended Rule G-21's requirements. See discussion under "Proposed Amended Rule G-21 – Enhancement of Fair Dealing Provisions and Promotion of Regulatory Consistency with Certain Standards of Other Financial Regulators – Content Standards" above. This familiarity with standards, as well as having clear advertising standards, might enable inspections staff to conduct a more efficient inspection of dealer advertisements. More efficient inspections of dealer advertisements, in turn, might result in inspections staff being able to determine whether there are any regulatory irregularities earlier during the inspection process.

Proposed amended Rule G-21, also would help promote just and equitable principles of trade, and would enhance the MSRB's fair dealing requirements. For the same reasons that the design of proposed amended Rule G-21 would help prevent fraudulent and manipulative practices, the prescriptive nature of the design of proposed amended Rule G-21 would provide clear guidelines for dealers to follow that would help promote just and equitable principles of trade.

Proposed amended Rule G-21 also would help protect investors and the public interest. For the same reasons that the design of proposed amended Rule G-21 would help prevent fraudulent and manipulative practices and promote just and equitable principles of trade, the clear, prescriptive requirements of proposed amended Rule G-21 would help ensure that advertisements would present a fair statement of the services, products, or municipal securities advertised. In turn, investors and the public would be able to have more confidence in the accuracy of the services, products, or municipal securities advertised, and perhaps would be more comfortable making decisions based on an advertisement. For municipal entities, for

example, this increased confidence in an advertisement may lead to a more efficient underwriter selection process.

Proposed Rule G-40

Proposed Rule G-40, by design, would help prevent fraudulent and manipulative practices. Proposed Rule G-40 would require 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. No municipal advisor would be able to omit any material fact or qualification if the omission, in light of the context of the material present, would cause the advertisement to be misleading. Furthermore, municipal advisors would be prohibited from making any false, exaggerated, unwarranted, promissory or misleading statement or claim in an advertisement. Municipal advisors would be required to ensure that the statements that they make are clear and not misleading within the context in which they are made and that they provide a balanced treatment of risks and potential benefits. Municipal advisors also would be limited in the types of information that could be placed in a legend or footnote in an advertisement, and would not be able to include a testimonial in an advertisement. Municipal advisors would have to consider the nature of the audience to which the advertisement would be directed and would have to provide details and explanations appropriate to the audience. Further, municipal advisors would be prohibited from indicating registration with the MSRB in an advertisement unless the advertisement complies with the applicable standards of all other Board rules and that neither states nor implies that the MSRB endorses the municipal advisor's business practices, services, skills or any specific type of municipal security or municipal financial product. The prescriptive nature of proposed Rule G-40 would provide clear guidelines for municipal advisors to follow that would help prevent fraudulent and manipulative practices.

Proposed Rule G-40 also would help prevent fraudulent and manipulative practices because proposed Rule G-40 would promote efficient inspections of municipal advisor advertisements. Other financial regulators inspect and enforce the MSRB's rules. Proposed Rule G-40 would provide clear guidelines as to the content of what may appear in an advertisement which should facilitate an efficient inspection of municipal advisor advertisements. More efficient inspections of municipal advisor advertisements, in turn, might result in inspections staff being able to more easily and readily determine whether there are any regulatory irregularities earlier during the inspection process.

Proposed Rule G-40 also would help promote just and equitable principles of trade. Proposed Rule G-40 would enhance the MSRB's fair dealing requirements by, for the first time, having specific requirements for municipal advisor advertising. As such, proposed Rule G-40 would promote regulatory consistency in the municipal securities market, and thus would help promote just and equitable principles of trade. Further, for the same reasons that the design of proposed Rule G-40 would help prevent fraudulent and manipulative practices, proposed Rule G-40's prescriptive and clear guidelines would help promote just and equitable principles of trade.

Proposed Rule G-40, also would help protect investors, municipal entities, obligated persons and the public interest. For the same reasons that the design of proposed Rule G-40

would help prevent fraudulent and manipulative practices and promote just and equitable principles of trade, the clear, prescriptive requirements of proposed Rule G-40 would help ensure that advertisements would present a fair statement of the municipal security or type of municipal security, municipal financial product, industry or service advertised. This, in turn, would help protect investors, municipal entities, obligated persons and the public interest. Further, investors, municipal entities, obligated persons and the public would be able to have more confidence in the accuracy of the advertisements, and perhaps would be more comfortable making decisions based, in part, on an advertisement.

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

Section 15B(b)(2)(C) of the Exchange Act[37] 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. In accordance with the Board's policy on the use of economic analysis in rulemaking, the Board has reviewed proposed amended Rule G-21 and proposed Rule G-40.[38]

A. Proposed Amended Rule G-21

The MSRB believes that, through promoting regulatory consistency of certain MSRB advertising standards with those of other financial regulators, proposed amended Rule G-21 may improve efficiency in the form of less unnecessary complexity for dealers and reduced burdens and compliance costs over time since additional regulatory consistency should assist dealers with developing uniform policies and procedures. This may also benefit both retail and institutional investors, where transparency, consistency, truthful and accurate information and ease of comparison of different financial services would be highly valued. The alternative of leaving Rule G-21 in its current state would mean that dealers that are registered both with the MSRB and FINRA would continue to face two sets of compliance requirements with additional costs and regulatory burdens.[39]

Since proposed amended Rule G-21 would establish more stringent and prescriptive advertising standards for dealers than are included in the baseline, which is current existing Rule G-21, the MSRB expects that dealers may experience increased costs because of the new requirements, especially for bank dealers that are not currently registered with FINRA.[40] These

---

37 15 U.S.C. 78o-4(b)(2)(C).

38 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.

39 The benefits of alignment with FINRA's rule, however, will not apply to those firms that are not dual-registrants.

40 In response to comments received by market participants related to the Request for Comment, the MSRB would permit the use of testimonials by dealers in advertisements

costs, however, can be mitigated through careful planning because the proposed rule change, if adopted, would have a nine-month implementation period during which the industry could adjust. The MSRB believes that much of the costs associated with proposed amended Rule G-21 would be up-front costs resulting from sunk investments in advertisements previously developed by dealers that would no longer be compliant upon effectiveness of the proposed rule change, as well as costs from initial compliance development such as updating or rewriting policies and procedures. For those dealers that are also registered with FINRA, those costs should not be significant, as much of proposed amended Rule G-21 would align with FINRA Rule 2210, a rule with which those dealers currently must comply.

On balance, the MSRB believes that proposed amended Rule G-21 would not impose an unreasonable burden on dealers, and the likely benefits, such as reduced unnecessary complexity and compliance standards that are more closely aligned with those of other financial regulators, would justify the associated costs in both the near and long term.

Since dealers currently are subject to advertising standards under the MSRB's rules, the MSRB believes that proposed amended Rule G-21 is unlikely to hinder capital formation. The MSRB believes that proposed amended Rule G-21 would not harm competition, and may indeed enhance competition by putting all competitors on an equal footing due to a uniform set of advertising standards for dual registrants that is more straightforward for the market and investors.

B. Proposed Rule G-40

Similar to Rule G-21, proposed Rule G-40 would be a core fair practice rule governing advertising by municipal advisors. As such, proposed Rule G-40 would help protect investors, municipal entities, obligated persons and the general public. Moreover, proposed Rule G-40 would help ensure consistent regulation between regulated entities in the municipal securities market as well as to promote regulatory consistency among dealer municipal advisors, non-dealer municipal advisors and municipal advisors that are also registered as investment advisers with the SEC.[41]

The MSRB believes that one benefit of proposed Rule G-40 may be more accurate information available to clients through advertising by municipal advisors, which, at the margin, may lead more informed decision-making related to municipal advisor selection.[42] As a result of

---

under the same limitations used in FINRA regulation. See "Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others" below.

41 For example, under Rule G-21 dealers are required to keep records of their advertisements and are prohibited from using false or misleading information in advertising.

42 Acacia indicated that many issuers hire municipal advisors through some type of competitive process and the provision of materials in response to such a solicitation should not be deemed an advertisement and the existing regulatory framework would

applying proposed Rule G-40's advertising standards, municipal entities and obligated persons may be able to more easily establish objective criteria to use in selecting municipal advisors and this may increase the likelihood that municipal advisors are hired because of their qualifications as opposed to other reasons. In addition, transparency, consistency, truthful and accurate information in advertising should benefit municipal entities and obligated persons in general and may lead to increased confidence in the municipal market.

The MSRB believes that much of the costs associated with proposed Rule G-40 would be up-front sunk costs resulting from investments in advertisements previously developed by municipal advisors that would no longer be compliant upon effectiveness of the proposed rule,[43] as well as from initial costs to establish compliant policies and procedures, although there would be some ongoing costs associated with principal approval and record-keeping requirements.[44] Since this is the first time that municipal advisors may be subject to such regulation, to ensure compliance with the advertising standards of proposed Rule G-40, municipal advisors may also incur costs by seeking advice from compliance or legal professionals when preparing advertising materials. In particular, regarding proposed Rule G-40's prohibition of municipal advisors use of testimonials in their advertisements, the MSRB believes firms that rely extensively on testimonials as their form of advertising would likely experience more transition costs than firms that presently either do not use testimonials or use testimonials only occasionally. While the MSRB acknowledges that there would be certain increased costs for municipal advisors that presently use testimonials in advertising, the benefits accrued to municipal entities and obligated persons, including increased likelihood of receiving accurate, non-misleading and objective information from advertisements, should exceed the costs over time.

The MSRB believes these costs should not be burdensome for small municipal advisory firms. For some one-time initial compliance costs, the MSRB believes that small municipal advisory firms may incur proportionally larger costs than larger firms. However, for many other ongoing costs, such as costs associated with principal approval and record-keeping requirements,

---

govern false and misleading statements in those materials. The MSRB agrees that materials submitted as part of a response to an RFP generally would not be considered as advertising; instead, proposed Rule G-40 focuses on materials provided generally to potential clients and the MSRB believes that accurate and truthful advertising would still be meaningful to decisions on selection and retention of municipal advisors. See "Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others" below.

43 As elaborated above, these costs can be mitigated through careful planning during the implementation period for the proposed rule change, if adopted, which would give the industry time to adjust.

44 See 3PM letter at 3-4, which describes potential compliance costs for solicitor municipal advisors associated with having a principal pre-approve a form letter prior to allowing their sales professionals to send out the form letter. See "Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others" below.

as well as sunk investments in advertisements previously developed but that would no longer be compliant, the costs should be proportionate to the size of the firm, assuming that small firms generally advertise less than larger firms. Thus, it is unlikely that proposed Rule G-40 would have an outsized impact on small firms.

On balance, the MSRB believes that proposed Rule G-40 would not impose an unreasonable burden on municipal advisors,[45] and the potential benefits would justify the associated costs in both the near and long term since the benefits of proposed Rule G-40 should exceed the costs over the long term.

The MSRB considered that the costs associated with proposed Rule G-40 may lead some municipal advisors to curtail their advertising expenditures and compete less aggressively through advertising.[46] On balance, the MSRB believes that the market for municipal advisory services is likely to remain competitive;[47] any potential negative impact on competition as a result of potential curtailment of advertising expenditures should be counteracted by the potential positive impact from improved advertising standards and more transparent and accurate information on municipal advisors.

The MSRB believes that proposed Rule G-40 should not hinder capital formation. As noted above, the better-quality information conveyed by municipal advisors through advertising that meets the standards of proposed Rule G-40 may lead to an improved municipal advisor selection process (as discussed above). One commenter noted that municipal advisors are typically selected through an RFP process rather than via advertising. However, if firms gained no advantage from advertising, it would be irrational and not in their best interest to advertise. Thus, the MSRB expects that advertising can influence the municipal advisor selection process even if only to raise awareness of a firm. If a final municipal advisor selection is determined exclusively via an RFP process, truthful and accurate advertising still could help issuers target

---

45 Acacia stated that proposed Rule G-40 "applies a regulatory burden and cost which is not proportional to the MSRB's stated goal of preventing misleading information to investors, issuers or obligated persons," but did not offer any quantitative information. See "Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others" below.

46 Also, at the margin, some municipal advisors may even determine to consolidate with other municipal advisors to benefit from economies of scale (e.g., by leveraging existing compliance resources of a larger firm) rather than to incur separately the costs associated with proposed Rule G-40. The MSRB, however, is skeptical about this scenario, as the potential costs of compliance with proposed Rule G-40 are not expected to be onerous.

47 3PM stated that proposed Rule G-40 would put solicitor municipal advisors at a disadvantage to solicitors who are not registered with the MSRB or working with municipal entities. However, unregistered solicitors are not within the MSRB's jurisdiction, and the rule proposal is intended to ensure fairness and accuracy in advertisements from all municipal advisors who render services to or initiate a solicitation from municipal entities.

their requests for proposals to firms the issuer expects to be sufficiently qualified thereby enhancing the selection process through gains in efficiency.

Finally, transparency, consistency, truthful and accurate information in advertising may increase the willingness of municipal entities and obligated persons to use municipal advisors.[48] This, in turn, may contribute to a more efficient capital formation process as municipal entities and obligated persons may make more informed decisions as to the structure, timing, terms and other similar matters, related to issuances of municipal securities and municipal financial products.

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

The MSRB sought public comment on the draft amendments to Rule G-21 and new draft Rule G-40.[49] In response to that Request for Comment, the MSRB received 11 comment letters.[50] Commenters generally expressed support for the proposed rule change, but also expressed various concerns and suggested certain revisions.

---

48 The MSRB is planning to examine the frequency with which issuers use municipal advisors over time in a retrospective analysis of the municipal advisor regulatory framework in the future.

49 MSRB Notice 2017-04 (Feb. 16, 2017) (the "Request for Comment").

50 Letter from Noreen P. White, Co-President, and Kim M. Whelan, Co-President, Acacia Financial Group, Inc., dated April 7, 2017 ("Acacia"); Letter from Mike Nicholas, Chief Executive Officer, Bond Dealers of America, dated March 24, 2017 ("BDA"); Letter from Norman L. Ashkenas, Chief Compliance Officer, Fidelity Brokerage Services, LLC, Richard J. O'Brien, Chief Compliance Officer, National Financial Services, LLC, and Jason Linde, Chief Compliance Officer, Fidelity Investments Institutional Services Company, LLC, dated March 24, 2017 ("Fidelity"); Letter from David T. Bellaire, Esq., Executive Vice President & General Counsel, Financial Services Institute, dated March 24, 2017 ("FSI"); Letter from Laura D. Lewis, Principal, Lewis Young Robertson & Burningham, Inc., dated March 24, 2017 ("Lewis Young"); Letter from Susan Gaffney, Executive Director, National Association of Municipal Advisors, dated March 24, 2017 ("NAMA"); Letter from Leo Karwejna, Chief Compliance Officer, Cheryl Maddox, General Counsel, and Catherine Humphrey-Bennett, Municipal Advisory Compliance Officer, Public Financial Management, Inc. and PFM Financial Advisors LLC, dated March 23, 2017 ("PFM"); Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated March 24, 2017 ("SIFMA"); Letter from Paul Curley, Director of College Savings Research, Strategic Insight, dated May 16, 2017 ("SI"); Letter from Donna DiMaria, Chairman of the Board of Directors and Chair of the 3PM Regulatory Committee, Third Party Marketers Association, dated March 23, 2017 ("3PM"); and Letter from Robert J. McCarthy, Director, Regulatory Policy, Wells Fargo Advisors, dated March 24, 2017 ("Wells Fargo").

Below, the MSRB discusses the comments received relating to proposed amended Rule G-21. Following that discussion, the MSRB discusses the comments received relating to proposed Rule G-40.

I. Proposed Amended Rule G-21

The MSRB received five comment letters that focused on the draft amendments to Rule G-21 (other than Rule G-21(e)).[51] Commenters focused on harmonization with FINRA Rule 2210, additional exclusions from the definition of an advertisement, hypothetical illustrations, hyperlinks, coordination between self-regulatory organizations ("SROs"), and jurisdictional guidance under Rule G-21 relating to dealer/municipal advisors. The comments ranged from strong support for the draft amendments as set forth in the Request for Comment[52] to the suggestion that the Board should simply incorporate FINRA Rule 2210 by reference into Rule G-21.[53]

A. Harmonization with FINRA Rule 2210

Commenters supported the draft amendment's harmonization with FINRA Rule 2210. In fact, FSI provided its strong support for the draft amendments to Rule G-21, as drafted.[54] Nevertheless, some other commenters suggested that the draft amendments to Rule G-21 could be harmonized more with FINRA Rule 2210 by adopting that rule's (i) definition of communications and the distinctions in FINRA Rule 2210 that follow from that definition[55] and

---

During the period in which the MSRB considered the comments received in response to the Request for Comment, the Board concluded to separately propose the amendments to Rule G-21(e). The SEC approved those amendments on August 18, 2017, and the amendments became effective on November 18, 2017. See Exchange Act Release No. 81432 (Aug. 18, 2017), 82 FR 40199 (Aug. 24, 2017) (SR-MSRB-2017-04). Fidelity, FSI, SIFMA and SI addressed the draft amendments to Rule G-21(e) in their letters to the MSRB. The MSRB discussed those comments in SR-MSRB-2017-04, and generally will not discuss those comments as part of this proposed rule change.

51 See BDA, Fidelity, FSI, SIFMA and Wells Fargo letters. To the extent that the five commenters that focused on draft Rule G-40 provided comments relevant to the draft amendments to Rule G-21, those comments are also included in the discussion below.

52 FSI letter at 2.

53 SIFMA letter at 2.

54 FSI letter at 2.

55 See BDA, SIFMA, and 3PM letters.

(ii) use of testimonials,[56] or by incorporating FINRA Rule 2210 by reference into Rule G-21.[57] Further, one commenter suggested that because of the harmonization with FINRA Rule 2210, the definitions and product advertisement and professional advertisement sections could be deleted from Rule G-21 and Rule G-40.[58]

(i) Definition of Communications

BDA, SIFMA, and 3PM suggested that the MSRB further harmonize Rule G-21 with FINRA Rule 2210 by adopting FINRA Rule 2210's definition of "communications" and the distinctions in the rule that follow from that definition. In particular, commenters favored the harmonization with FINRA Rule 2210's communications definition because institutional communications would no longer be subject to pre-approval by a principal. BDA, SIFMA, and 3PM submitted that, if the MSRB were to do so, dealers then could apply common approval processes for institutional communications across all asset classes.[59]

However, FINRA's regulation of advertising differs significantly from the MSRB's advertising regulation. FINRA Rule 2210 defines "communications" as consisting of correspondence, retail communications, and institutional communications.[60] Based on the type of

---

56 See BDA, Fidelity, SIFMA, and Wells Fargo letters.

57 SIFMA letter at 2.

58 BDA letter.

59 See BDA letter; SIFMA letter at 5; and 3PM letter at 7-8. See also SIFMA letter at 8 ("SIFMA strongly supports the harmonization of draft Rule G-40 with FINRA Rule 2210 with respect to the categorization of communications"); 3PM letter at 4 (stating that the MSRB "should also consider segregating advertisements by investor group as well for solicitor municipal advisors"); 3PM letter at 4 ("we believe that the MSRB should also consider segregating advertisements by investor group as well for solicitor municipal advisors").

BDA stated that, if the MSRB has a rule that applies different definitions and different sets of responsibilities and does not differentiate between communications sent to retail and institutional customers, the MSRB will have created an increased regulatory burden along with considerable confusion for broker-dealers. While the MSRB appreciates BDA's concerns, Rule G-21 currently applies different standards and responsibilities than what is currently required by FINRA Rule 2210. For example, Rule G-21 currently requires pre-approval by a principal of all advertisements, including advertisements that would be considered institutional communications under FINRA Rule 2210. Other than permitting testimonials in advertisements subject to certain conditions, the MSRB has determined not to revise the draft amendments to Rule G-21 to reflect BDA's suggestion that the MSRB more fully harmonize Rule G-21 with FINRA Rule 2210.

60 See FINRA Rule 2210(a)(1).

communication, FINRA Rule 2210 then may require pre-approval by a principal before the communication's first use and the filing of the communication with FINRA's advertising regulation department for review either a certain number of days before or within a certain number of days after first use.[61]

Moreover, the MSRB, unlike FINRA, does not require the filing of advertisements with the MSRB before first use and the MSRB does not review advertisements. Rather, and since the MSRB approved its advertising rules in 1978, [62] the MSRB has relied upon its core fair dealing principles set forth in its advertising rules and the important supervisory function of principal pre-approval to regulate advertisements by dealers.[63] The MSRB continues to believe that it is important that a principal pre-approve an advertisement regardless of the intended recipient of the advertisement. Therefore, the Board determined not to revise the draft amendments to Rule G-21 to reflect commenters' suggestions about adopting FINRA Rule 2210's definition of communications and the distinctions that result from that definition.

(ii) Use of testimonials

BDA, Fidelity, SIFMA, and Wells Fargo urged the Board to permit testimonials in dealer advertising to better harmonize Rule G-21 with FINRA Rule 2210.[64] Commenters argued that to do otherwise would result in confusion and an inconsistent "patchwork" approach to dealer rules and that regulatory harmonization and consistency between MSRB and FINRA rules are paramount.[65] Further, SIFMA, Fidelity, and Wells Fargo believed that the protections set forth in

---

61 See FINRA Rule 2210(b) and (c) (generally requiring pre-approval by a principal of the member before the earlier of the retail communication's first use or the filing of the advertisement with FINRA – correspondence and institutional communications are not subject to member pre-approval and filing with FINRA; however, there must be supervisory policies and procedures in place relating to such communications).

62 The Board originally had three rules that addressed advertising – Rule G-21, Rule G-33 (relating to advertisements for new issues) and Rule G-34 (relating to advertisements for products). In 1980, the Board merged Rules G-33 and G-34 into Rule G-21. See Notice of Approval of Amendments to the Board's Advertising Rules (Nov. 21, 1980) CCH MSRB Manual ¶ 10,167 at 10,599.

63 See, e.g., supra note 29 at 10,371.

64 BDA letter, Fidelity letter at 5-6, SIFMA letter at 6-7, and Wells Fargo letter at 2-3.

65 See, e.g., BDA letter and SIFMA letter at 6. See also 3PM letter at 6 (the prohibition on the use of testimonial in an advertisement would create an issue for "municipal advisors that are registered with both the MSRB and FINRA . . . [w]hile we are not necessarily against the notion of adhering to the strictest standard, this approach does require additional compliance and oversight resources to be dedicated to a function and ultimately results in additional cost to the municipal advisor"). The MSRB does not

FINRA Rule 2210 relating to testimonials[66] were strong enough for retail communications to investors, including investors who are seniors.[67] Fidelity suggested that the MSRB engage with FINRA to determine whether FINRA Rule 2210(d)(6) adequately protects investors who are seniors.[68] After carefully considering commenters' suggestions, as well as consulting with FINRA staff, the Board determined to revise the draft amendments to Rule G-21. The proposed rule change would permit dealer advertisements, but not municipal advisor advertisements (discussed below), to contain testimonials under the same conditions as are currently set forth in FINRA Rule 2210(d)(6).

(iii) Incorporation of FINRA Rule 2210 by reference

SIFMA commented that, while it supported the MSRB's efforts to level the playing field between dealers and municipal advisors, the better way to level that playing field, as well as to promote harmonization with FINRA's rules, is for the Board to incorporate FINRA Rule 2210 by reference into the MSRB's rules.[69] SIFMA stated that, since Rule G-21 was adopted in 1978,

---

address 3PM's interpretation of FINRA rules and the issue of the ability of an associated person to like or recommend items on social media platforms.

66 FINRA Rule 2210(d)(6) provides:

> (A) 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.
> (B) Retail communications or correspondence providing any testimonial concerning the investment advice or investment performance of a member or its products must prominently disclose the following:
>
> > (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.
> > (iii) If more than $100 in value is paid for the testimonial, the fact that it is a paid testimonial.

67 See SIFMA letter at 6; Fidelity letter at 7-8; Wells Fargo letter at 2-3.

68 Fidelity letter at 7-8.

69 SIFMA letter at 2-3. SIFMA also stated that the MSRB should consider all the exceptions and guidance in FINRA Rule 2210(d) regarding content standards and that SIFMA and its members feel very strongly about these exceptions, particularly Rule 2210(d)(6), on testimonials, FINRA Rule 2210(d)(7), on recommendations, and FINRA Rule 2210(d)(9), on prospectuses, including private placement memoranda. SIFMA letter at 5. The MSRB's considerations of testimonials is discussed above under "Proposed Amended Rule G-21 – Harmonization with FINRA Rule 2210 – Use of testimonials."

Rule G-21 has not been regularly or uniformly harmonized with what is now FINRA Rule 2210 and that this discordance has led to confusion among all market participants and regulatory risk for dealers.[70]

Nevertheless, SIFMA did not propose that the MSRB incorporate FINRA Rule 2210 in its entirety by reference into Rule G-21. Rather, SIFMA submitted that certain provisions of FINRA Rule 2210(c) relating to the filing of advertisements with FINRA and the review procedures for those advertisements were unnecessary and burdensome and should not be included. Similarly, SIFMA proposed that provisions in FINRA Rule 2210(e) relating to the limitations on the use of FINRA's name and any other corporate name owned by FINRA be exempted from the incorporation by reference of FINRA Rule 2210 into Rule G-21.

Further, SIFMA recognized that there may be a need for certain MSRB regulation of dealer and municipal advisor advertising. SIFMA stated that "[w]ith respect to advertising or public communications for most municipal securities products (except for municipal advisory business and municipal fund securities), we feel there is no compelling reason to establish a different rule set than that which exists under FINRA Rule 2210."[71]

As discussed under "Background" above, Rule G-21 is one of the MSRB's core fair practice rules that has been in effect since 1978. In proposing those rules, the MSRB stated the purpose of the fair practice rules "is to codify basic standards of fair and ethical business conduct for municipal securities professionals."[72] After carefully considering SIFMA's suggestions,

---

The MSRB's considerations of private placement memoranda are discussed below under "Potential Additional Exclusions from the Definition of Advertisement – Private Placement Memoranda." SIFMA did not provide further details about its suggestion concerning recommendations. At this time, the MSRB has determined not to include revisions to the draft amendments to Rule G-21 in the proposed rule change to address SIFMA's suggestion about recommendations. See also BDA letter ("[t]here is no compelling policy reason to have different communication standards for municipal securities and corporate securities"); and Lewis Young letter ("we suggest you eliminate the current provisions related to advertising of Rule G-21 on broker/dealer activities otherwise governed by both G-17 and G-42 and that you not impose a Rule G-40 on non-broker/dealer advisors").

70 SIFMA letter at 2.

71 SIFMA letter at 9. 3PM had a somewhat analogous view to that of SIFMA's about the Request for Comment. 3PM noted that most solicitor municipal advisors that are members of 3PM are also members of FINRA. 3PM submitted that the Board should focus on municipal advisor firms that have no regulatory oversight rather than layering additional compliance regulations and costs on solicitor municipal advisors. 3PM letter at 13.

72 See supra note 29 at 10,371.

including the recognition of the important differences between the corporate and municipal securities markets, the MSRB determined not to incorporate FINRA Rule 2210 by reference into Rule G-21. Further, the MSRB notes that if the MSRB were to incorporate FINRA Rule 2210 by reference and if FINRA or its staff were to provide an interpretation of FINRA Rule 2210, the Board automatically would be adopting that interpretation without considering the interpretation's ramifications for the unique municipal securities market. In addition, there are municipal securities dealers that are not members of FINRA. Those dealers may not have the necessary notice of FINRA's rule interpretations.

(iv) Definition of standards for product and professional advertisements

BDA suggested that the definitions of standards for product advertisements and professional advertisements were made redundant by the general and content standards in the draft amendments to Rule G-21 and draft Rule G-40, and that the provisions should be deleted to signify that these types of communications are covered by the draft amendments to Rule G-21 and draft Rule G-40.[73] Although the provisions in the draft amendments to Rule G-21 and draft Rule G-40 are analogous to the current provisions in Rule G-21, there are differences in those provisions. For example, Rule G-21(b) contains a strict liability standard relating to the publication or dissemination of professional advertisements. Since the MSRB first proposed Rule G-21, the MSRB has believed that "a strict standard of responsibility for securities professionals [is necessary] to assure that their advertisements are accurate."[74] After careful consideration, the MSRB has determined at this time not to delete the standards for product and professional advertisements.

B. Potential Additional Exclusions from the Definition of Advertisement

Commenters suggested additional exclusions from the definition of an advertisement. Those exclusions related to private placement memoranda[75] and responses to RFPs or RFQs.[76]

(i) Private placement memoranda

BDA and SIFMA suggested that as part of its harmonization effort, the MSRB should

---

73 BDA letter. See also SIFMA letter at 4 (strongly supporting the removal of the definition of "advertisement," "form letter," and "professional advertisement" in favor of harmonizing with FINRA Rule 2210's three categories of communications, and stating that "[h]armonization of the MSRB and FINRA rules would also necessitate the removal of the confusing and duplicative definition of 'product advertisement'").

74 See supra note 29 at 10,376.

75 See BDA letter and SIFMA letter at 5.

76 See, e.g., BDA letter and SIFMA letter at 5-6.

exclude private placement memoranda from the definition of advertisement.[77] BDA noted those materials are frequently used as offering memoranda and thus should be excluded from the definition of advertisement alongside preliminary offering statements.[78]

The MSRB believes, however, that such an exclusion would cause disharmonization with FINRA Rule 2210. FINRA Rule 2210 does not provide a similar exclusion from the definition of a communication. After careful consideration, the Board determined not to revise the draft amendments to Rule G-21 to reflect commenters' suggestion.

(ii) Response to an RFP or RFQ

BDA and SIFMA commented that the Board should amend Rule G-21 (Acacia, BDA, SIFMA, NAMA and PFM also made similar comments with respect to draft Rule G-40) to exclude a response to an RFP or RFQ from the definition of advertisement.[79] Commenters submitted that it was not appropriate for the MSRB to regulate responses to requests for proposals or qualifications the same way that the MSRB regulates "retail communications" – i.e., possibly requiring principal approval in writing before sending the response to the RFP or RFQ to an issuer. The MSRB agrees. In the Request for Comment, the MSRB noted that a response to an RFP or RFQ would be excluded from regulation under the draft amendments to Rule G-21 and draft Rule G-40 because the response would be excluded from the definition of a form letter. Nevertheless, commenters stated that they did not believe that exclusion was sufficient, and stated that such responses to RFPs and RFQs should be explicitly excluded from the definition of advertisement.[80] In particular, SIFMA expressed concern about the number of employees at a municipal securities issuer who may review an RFP or RFQ, and stated that it should not matter how many employees at such an issuer review the responses to an RFP and RFQ.

To ensure that the definition of form letter is interpreted as intended, the proposed rule change includes Supplementary Material .03 to Rule G-21 and Supplementary Material .01 to proposed Rule G-40. This supplementary material explains that an entity that receives a response to an RFP, RFQ or similar request would count as one "person" for the purposes of the definition of a form letter no matter the number of employees of the entity who may review the response. Other than the supplementary material, the Board determined that no other revisions to the draft amendments to Rule G-21 or to draft Rule G-40 were necessary to address commenters' concerns about RFPs and RFQs.

---

77 Similarly, 3PM stated that, "[g]iven the nature of a private placement memorandum for private issuers, we do not believe these documents should be classified as an advertisement and should be excepted from the rule as are preliminary official statements, official statements, preliminary prospectuses, summary prospectuses or registration statements." See 3PM letter at 11.

78 See BDA letter.

79 See Acacia letter, BDA letter, SIFMA letter at 6, NAMA letter at 2, and PFM letter at 2.

80 Id.

C. Hypothetical Illustrations

The Request for Comment noted that FINRA had recently requested comment on draft amendments to FINRA Rule 2210 to create an exception to the rule's prohibition on projecting performance to permit a firm to distribute a customized hypothetical investment planning illustration that includes the projected performance of an investment strategy. In part, in the interest of potential harmonization, the MSRB asked whether it should consider a similar proposal. Fidelity, SIFMA, and Wells Fargo commented that the MSRB should include a similar exception in the draft amendments to Rule G-21 and in draft Rule G-40.[81]

The comment period on FINRA's draft amendments to FINRA Rule 2210 closed March 27, 2017, and FINRA is still considering the comments that it received.[82] The Board determined that it would be premature to include provisions to address FINRA's draft amendments to Rule 2210 in the proposed rule change before FINRA determines how to proceed with those draft amendments. The MSRB will continue to monitor the FINRA initiative.

D. Hyperlinks

The amendments to Rule G-21(e), effective November 18, 2017, clarify that a hyperlink can be used for an investor to obtain more current municipal fund security performance information. Fidelity suggested that the MSRB expand the use of hyperlinks more broadly and in other advertising contexts outside of municipal fund security performance advertisements.[83] The MSRB appreciates Fidelity's suggestion, but at this time, has determined to not expand the use of hyperlinks in other types of advertisements.

E. Coordination between Self-Regulatory Organizations

Fidelity encouraged the MSRB to review existing and upcoming FINRA guidance concerning communications with the public and to engage with FINRA directly during the rulemaking process.[84] The MSRB agrees with this approach and notes that it has directly engaged with FINRA during this particular rulemaking process, and regularly coordinates with FINRA as well as other financial regulators on rulemaking and other matters. As noted in the

---

81 See Fidelity letter at 4, SIFMA letter at 7, and Wells Fargo letter at 3. See also 3PM letter at 5 (stating that institutional investors should be permitted to receive materials with projected or targeted returns).

82 FINRA received 21 comment letters in response to Regulatory Notice 17-06, FINRA Requests Comment on Proposed Amendments to Rules Governing Communications with the Public.

83 See Fidelity letter at 3.

84 Id. at 2-3.

Request for Comment, the MSRB reviews the rulemaking proposals of FINRA as well as those of other financial regulators.[85]

F. Dealer/Municipal Advisor Jurisdictional Guidance

Commenters suggested that the MSRB provide guidance and/or exemptions from Rule G-21 for dealer/municipal advisors. Specifically, SIFMA suggested that the MSRB amend Rule G-21 to clarify that the activities of dealer/municipal advisors are governed by draft Rule G-40 when those dealer/municipal advisors are engaging in municipal advisor advertising.[86] Lewis Young had a somewhat analogous comment. Lewis Young suggested that the MSRB "eliminate the current provisions related to advertising of Rule G-21 on broker/dealer activities otherwise governed by both G-17 and G-42 and that you not impose a Rule G-40 on non-broker/dealer advisors."[87] Although such clarifications relating to dealer/municipal advisors under Rule G-21 may be beneficial in the future, the MSRB's regulatory scheme relating to municipal advisors is not yet complete. The MSRB believes that its regulation of financial advisory activities (as an element of municipal securities activity) should remain in place at least until a more complete regulatory framework for municipal advisors is in effect.[88] Thus, after careful consideration of commenters' suggestions, the Board determined not to further revise the draft amendments to Rule G-21 to reflect commenters' suggestions.

II. Proposed Rule G-40

The MSRB received five comment letters that focused on draft Rule G-40.[89] The comments concerned (i) the ability of the MSRB to regulate advertising by municipal advisors through other MSRB rules without draft Rule G-40, (ii) the definition of municipal advisory client, (iii) revisions to draft Rule G-40's content standards, (iv) the adoption of the relief that SEC staff provided to investment advisers relating to testimonials in advertisements, (v) principal pre-approval, and (vi) guidance relating to municipal advisor websites and the use of social media. The comments ranged from strong support for draft Rule G-40 as set forth in the

---

85 Request for Comment at 21.

86 SIFMA letter at 8.

87 Lewis Young letter.

88 The MSRB has long regulated the activities of financial advisors. See, e.g., Rule G-23, on activities of financial advisors. Rule G-23 was adopted as part of the Board's fair practice rules to codify basic standards of fair and ethical business conduct for dealers. Rule G-23 does not prescribe normative standards for dealer/municipal advisor conduct. Rather, as a conflicts of interest rule, it prohibits activities that would be in conflict with the ethical duties the dealer owes in its capacity as a financial advisor to its municipal issuer client. This approach to Rule G-23 has remained unchanged.

89 See Acacia, Lewis Young, NAMA, PFM and 3PM letters.

Request for Comment[90] to the view that there is no need for draft Rule G-40 because of other MSRB rules.[91]

A. Ability to Regulate Municipal Advisor Advertising through Other Rules

Seeming to rely on the fiduciary duty requirements imposed on certain municipal advisors as well as the fair dealing requirements imposed on all municipal advisors, Acacia, Lewis Young, and NAMA submitted that the protections offered by Rule G-17 provide sufficient investor protection from misleading statements such that draft Rule G-40 is not necessary.[92] Further, Lewis Young explained that Rule G-42 "imposes a high level of probity and care upon advisors" and that "in cases (rare) in which unsophisticated municipal issuers may be duped or deceived by an unscrupulous municipal advisor's 'advertising' communication, we suggest that Rule G-17 and Rule G-42 provide ample scope for enforcement."[93]

To rely on Rule G-17 to regulate municipal advisor advertising would create an unlevel playing field. This unlevel playing field would be between municipal advisors (subject to Rule G-17, but not Rule G-21) and dealers (subject to both Rules G-17 and G-21) and among municipal advisors that are not registered as dealers and municipal advisors that are also registered as dealers or investment advisers (subject to Rule G-21 and FINRA Rule 2210 or Advisers Act Rule 206(4)-1, as relevant).[94] Advertisements by dealers and investment advisers

---

90 FSI letter at 3 ("FSI strongly supports further harmonization of regulatory requirements through the adoption of Rule G-40").

91 See Acacia letter at 1; Lewis Young letter; NAMA letter at 1.

92 Acacia letter at 1 ("we agree with other commenters that this rule is unnecessary . . .[t]he core rules of G-17 coupled with G-42 and the fiduciary duty required under Dodd-Frank provides ample regulation to prevent false or misleading statements by municipal advisors"); Lewis Young letter (further suggesting that the MSRB should eliminate the "current provisions related to advertising of Rule G-21 on broker/dealer activities otherwise governed by both Rule G-17 and Rule G-42 and that you [the MSRB] not impose a Rule G-40 on non-broker/dealer advisors"); NAMA letter at 1 ("we respectfully request that the Proposed Rule G-40 be withdrawn as the same results of ensuring falsehood or misleading statements are not used in advertising for MA professional services can already be found in Rule G-17").

93 Lewis Young letter; see Acacia letter at 1.

Lewis Young also suggested that "an alternative would be a principles based 'truth in advertising' version of G-40 which could be written in one or two sentences. Rule G-21 could be correspondingly simplified."

94 17 CFR 275.206(4)-1. Registered investment advisers, like non-solicitor municipal advisors, are subject to fiduciary standards, and also are subject to advertising rules under the Advisers Act.

are regulated by advertising regulations that are separate from the other regulations to which dealers or investment advisers are subject.

Further, Rule G-42 applies only to non-solicitor municipal advisors; Rule G-42 excludes solicitor municipal advisors from the rule's scope. Lewis Young's comments fail to address how reliance on Rule G-42 would address advertising by solicitor municipal advisors that are not subject to Rule G-42. Moreover, other commenters submitted that having a separate rule to address advertising by municipal advisors would be helpful.[95]

After careful consideration, the MSRB determined to address advertising by municipal advisors through proposed Rule G-40.

B. Definition of Municipal Advisory Client

3PM provided a "technical interpretation of the definition of 'municipal advisory client'" and suggested that the protections that would be provided by draft Rule G-40 may not be broad enough to protect municipal entities and obligated persons when they are solicited on behalf of third-parties by municipal advisors ("solicitor municipal advisors").[96] In particular, 3PM suggested that the definition of municipal advisory client was too narrow, and that the definition should be expanded to include the municipal entity or obligated person that is the subject of the solicitation by a solicitor municipal advisor.[97] The MSRB agrees in substance with the comment and has intended throughout that the protections of draft Rule G-40 would apply to municipal entities and obligated persons under the definition of an advertisement. For clarification, the MSRB has revised the definition of an advertisement to ensure that the definition will be interpreted as intended. Under proposed Rule G-40(a)(i), an advertisement would explicitly include promotional literature distributed to municipal entities or obligated persons by a solicitor municipal advisor on behalf of the solicitor municipal advisor's municipal advisory client.

C. Definition of Advertisement

Rule 15Ba1-1(d)(1)(ii) under the Exchange Act excludes the provision of general information from the type of advice that would require a municipal advisor to register with the

---

95 See, e.g., SIFMA letter at 1 ("[w]e agree that the MSRB should have two rules on public communications, and we believe the rules should be divided based on activity, not by registration category"); and 3PM letter at 8-9 ("[i]n 3PM's opinion, the rules for municipal advisors are already confusing enough given different requirements for solicitor and non-solicitor municipal advisors. Including municipal advisor advertising within the body of G-21 would only complicate the issue further. We believe the municipal advisor rules should remain as Rule G-40, separate from G-21").

96 3PM letter at 2.

97 Id.

SEC.[98] SEC staff, in its Responses to Frequently Asked Questions, provided further information about those exclusions in its answer to "Question 1.1: The General Information Exclusion from Advice versus Recommendations."[99] NAMA and PFM submitted that those general exclusions from the term "advice" that would permit a municipal advisor to not register with the SEC should equally apply as exclusions to the MSRB's draft municipal advisor advertising rule.[100]

The purpose of draft Rule G-40, in part, is to ensure that municipal advisor advertising does not contain any untrue statement of material fact and is not otherwise false or misleading. Regardless of whether certain information rises to the level of advice, that information may be advertising used to market to potential clients, which the MSRB believes should be covered by draft Rule G-40. Further, as noted by FSI, maintaining regulatory consistency between draft Rule G-40 and the draft amendments to Rule G-21 is important. [101] Among other things, FSI noted that regulatory consistency enhances the potential for compliance with draft Rule G-40 because dually regulated entities will comply with consistent standards, and can reduce regulatory

---

98 17 CFR 240.15Ba1-(d)(1)(ii).

99 According to the SEC staff, examples of that general information include:

> (a) information regarding a person's professional qualifications and prior experience (e.g., lists, descriptions, terms, or other information regarding prior experience on completed transactions involving municipal financial products or issuances of municipal securities); (b) general market and financial information (e.g., market statistics regarding issuance activity for municipal securities or current market interest rates or index rates for different types of bonds or categories of credits); (c) information regarding a financial institution's currently-available investments (e.g., the terms, maturities, and interest rates at which the financial institution offers these investments) or price quotes for investments available for purchase or sale in the market that meet criteria specified by a municipal entity or obligated person; (d) factual information describing various types of debt financing structures (e.g., fixed rate debt, variable rate debt, general obligation debt, debt secured by various types of revenues, or insured debt), including a comparison of the general characteristics, risks, advantages, and disadvantages of these debt financing structures; and (e) factual and educational information regarding various government financing programs and incentives (e.g., programs that promote energy conservation and the use of renewable energy).

Registration of Municipal Advisors Frequently Asked Questions, Office of Municipal Securities, U.S. Securities and Exchange Commission, last updated on May 19, 2014, available at https://www.sec.gov/info/municipal/mun-advisors-faqs.shtml.

100 NAMA letter at 2; PFM letter at 2.

101 FSI letter at 3.

arbitrage.[102] After considering commenters' suggestions, the Board determined not to include additional exceptions from the definition of an advertisement in proposed Rule G-40.

D. Draft Rule G-40's Content Standards

i. Content standards, in general

NAMA, PFM and 3PM generally requested that draft Rule G-40 be revised to provide more definitive content standards.[103] In particular, NAMA and PFM stated that the content standards in draft Rule G-40 should reflect a clearer separation between the content standards applicable to product advertisements and the content standards applicable to professional advertisements. NAMA and PFM suggested that this separation was important because the clear majority of municipal advisors only engage in professional services advertising.[104] In addition, PFM stated that Sections (D), (E), and (F) of draft Rule G-40 should not be included in draft Rule G-40 as "these provisions are more directly related to advertisements for products distributed by brokers, dealers, or municipal securities dealers, and should not be construed as necessary to administer to the types of services that municipal advisors may provide."[105]

The Board appreciates and considered commenters' suggestions. With regard to the suggestions about refining draft Rule G-40's content standards, the MSRB believes that those content standards are clear as drafted. Moreover, as the MSRB's regulatory regime relating to municipal advisors is not yet complete, the MSRB believes that, at this point, having different content standards based on the type of advertisement by the municipal advisor would not be warranted.[106] Further, having content standards in proposed Rule G-40 that are similar to those in proposed amended Rule G-21 may enhance the ability of dually registered dealers and municipal

---

102 Id.

103 See NAMA letter at 3; PFM letter at 3; and 3PM letter at 4-5.

104 See NAMA letter at 3; PFM letter at 3 ("we believe that the MSRB should provide a clearer demarcation between the content standards for advertising products within the regulatory conventions set for broker-dealers . . . and the standards for advertising municipal advisory services more akin to regulatory conventions set for registered investment advisors [sic] who are also subject to a fiduciary standard (generally 'professional advertising') because our experience clearly shows that the vast majority of municipal advisors predominately engage in the latter type of advertising").

105 PFM letter at 4.

106 The MSRB generally believes that regulation of financial advisory activity (as an element of municipal securities activity) should remain in place until a more complete regulatory framework for municipal advisory activity is in effect. Also, there may be some areas of financial advisory activity that are not clearly within the scope of SEC-defined municipal advisory activity. See supra note 88.

advisors to comply with MSRB rules.[107] After careful consideration, the Board determined not to revise draft Rule G-40 in response to commenters' suggestions.

ii. Content standard about non-security product advertisements

The MSRB sought comment about whether the MSRB should provide guidance about municipal advisors that market non-security products, such as software programs, to their municipal advisory clients. Commenters generally responded that such guidance may be helpful, but generally either did not provide further information or cautioned that there should be a nexus between the product advertisement and municipal advisory activity for draft Rule G-40 to apply.[108]

The MSRB agrees that there should be a nexus between the product advertisement and the municipal advisory activity for proposed Rule G-40 to apply. The MSRB believes that when a municipal advisor publishes an advertisement about its municipal advisory services and that advertisement also markets a non-municipal security product that is related to the municipal advisory services, the municipal advisor should consider whether the entire advertisement and not just the portion of the advertisement addressing municipal advisory services, is consistent with all MSRB rules, including Rule G-17, proposed Rule G-40, Rule G-42 and Rule G-8, on books and records to be made by brokers, dealers, municipal securities dealers and municipal advisors.

E. Testimonials

---

107 The MSRB notes that approximately a quarter of municipal advisory firms are also registered as broker-dealers.

108 See NAMA letter at 2 (submitting that "[i]f the MSRB has identified any meaningful subset of MAs that advertise products, then a separate section should apply solely to product advertisements"); SIFMA letter at 8-9 (submitting that the MSRB should address content standards for municipal advisor product advertisements only to the extent such advertisements relate to municipal advisory activities such as the sale of software by a municipal advisor to assist its clients with municipal securities transactions); 3PM letter at 10 ("[w]e believe that guidance regarding advertisements of non-security products should only be put in place for firms who are also conducting a security business and who have 'municipal advisory clients' that they plan to send non-security advertisements to. Firms who have "municipal advisory clients [sic] that they are also soliciting on behalf of non-security products should be required to advise the buyers in the municipal entity of the arrangements that already exist with a municipal advisor"); but see Acacia letter at 2 ("[t]he MSRB would be over reaching if it attempted to regulate the use of non-security products. While there may be a subset of advisors who engage in this activity, we can see no nexus for the MSRB to become involved in non-security related regulations"). In response to Acacia's concerns, the MSRB notes that it is not suggesting that the MSRB regulate the use of non-security products by a municipal advisor. Rather, the MSRB was seeking comment about municipal advisors that may market non-security products along with their municipal advisory services.

BDA, NAMA, PFM, SIFMA, 3PM and Wells Fargo commented on draft Rule G-40(iv)(G) that would prohibit a municipal advisor from using testimonials in its advertisements.[109] Their comments ranged from the view that the MSRB's prohibition on the use of testimonials in municipal advisor advertisements is not warranted[110] to the view that, while the prohibition on the use of testimonials may be warranted, the MSRB should consider either the narrowing of that prohibition[111] or the potential costs that would be associated with that prohibition.[112]

Specifically, BDA stated that the "MSRB's prohibition on testimonials in . . . Rule G-40 is [not] warranted."[113] SIFMA, while appearing to agree with BDA's comment, also suggested that draft Rule G-40 be harmonized with FINRA Rule 2210(d)(6) which permits testimonials in advertisements by dealers, subject to certain conditions (see discussion above under Rule G-21 comments).

NAMA, PFM and Wells Fargo stated that, if draft Rule G-40 were to prohibit testimonials by municipal advisors, the MSRB should provide relief from that prohibition. Commenters suggested that the MSRB narrow that prohibition either by adopting the SEC staff's definition of a testimonial that is applicable to investment advisers,[114] by adopting certain SEC staff no-action guidance relating to the use of testimonials by investment advisers,[115] or by completely adopting the substantial SEC staff guidance that relates to use of testimonials by investment advisers[116] that was set forth in an SEC Division of Investment Management guidance update.[117]

---

109 BDA letter; NAMA letter at 3; PFM letter at 4-5; SIFMA letter at 6-7; 3PM letter at 6; and Wells Fargo letter at 3.

110 See, e.g., BDA letter.

111 See, e.g., PFM letter at 4-5.

112 3PM letter at 6.

113 BDA letter.

114 See NAMA letter at 3; PFM letter at 4-5.

115 See PFM letter at 4-5.

116 See Wells Fargo letter at 3.

117 IM Guidance Update No. 2014-04 (March 2014).

The Board considered commenters' suggestions, and recognizes the interpretive guidance provided by the SEC staff relating to testimonials.[118] Nevertheless, as discussed in the Request for Comment, the MSRB believes that a testimonial presents significant issues, including the ability to be misleading. Also noted in the Request for Comment, the MSRB recognizes that other comparable financial regulations, such as Rule 206(4)-1 under the Advisers Act, also prohibit advisers from including testimonials in advertisements (investment advisers, like non-solicitor municipal advisors, are subject to fiduciary standards).

Further, although the MSRB appreciates commenters' suggestions, the guidance related to the testimonial ban under the Advisers Act rule is SEC staff guidance, not guidance issued by the Commission.[119] The MSRB, however, will monitor developments relating to the testimonial ban under Rule 206(4)-1. In addition, as noted under "Self-Regulatory Organization's Statement on Burden on Competition" above, while the MSRB acknowledges that there will be certain increased costs for municipal advisors relating to compliance and supervision, the MSRB believes the benefits accrued to municipal entities and obligated persons from more accurate and objective information should exceed the costs over time. After careful consideration, the Board determined not to revise draft Rule G-40 to reflect commenters' suggestions.

F. Principal Pre-Approval

BDA argued that principal pre-approval was not needed or could be limited to certain types of advertisements.[120] BDA stated that clients of municipal advisors are institutions, and that as institutions, they do not need many of the "mechanistic protections applicable to dealer relationships with retail investors."[121] BDA submitted that it "does not believe that a principal needs to approve every advertisement."[122] BDA, however, did not discuss the types of advertisements that a principal would need to approve.

An important part of the MSRB's mission is to protect state and local governments and other municipal entities. It is, in part, because of that mission that the MSRB developed draft Rule G-40. The MSRB has long believed that principal pre-approval of advertisements is an essential part of an effective supervisory process. See discussion under "Harmonization with FINRA Rule 2210" above. After careful consideration, the MSRB determined not to revise draft Rule G-40 in response to BDA's suggestion.

---

118 See supra note 26.

119 The MSRB notes that there are additional challenges if the MSRB were to adopt SEC staff guidance. Those challenges include monitoring SEC staff guidance and ensuring municipal advisors that are not also registered as investment advisers have notice of any changes to the SEC staff guidance. See supra note 26.

120 BDA letter.

121 Id.

122 Id.

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

Commenters requested more specific guidance about the content posted on a municipal advisor's website and about the use of social media by a municipal advisor. In particular, Acacia, NAMA, and PFM requested guidance about whether material posted on a municipal advisor's website would constitute an advertisement under proposed Rule G-40.[123] In response, the MSRB notes that proposed Rule G-40(a)(i) defines an advertisement, in part, as any "material . . . published or used in any electronic or other public media . . . ." As such, proposed Rule G-40 would apply to any material posted on a municipal advisor's website or more generally, on any website, if that material comes within the definition of an advertisement as set forth in proposed Rule G-40(a)(i).

In addition, NAMA and PFM requested guidance on the use of social media.[124] The MSRB appreciates commenters' requests, and currently is studying whether to provide such guidance. As part of that consideration, the MSRB is reviewing the guidance concerning the use of social media provided by other financial regulators.[125]

6. Extension of Time Period for Commission Action

The MSRB does not consent at this time to an extension of the time period for

---

123 Acacia letter; NAMA letter at 3; PFM letter at 5; but see SIFMA letter at 6 ("[t]he amendments to Rule G-21 and draft Rule G-40(c) apply to advertisements, regardless of whether electronic or other public media is used with those advertisements. As such, we feel no additional guidance by the MSRB is needed regarding the use of social media by a dealer or municipal advisor at this time").

124 NAMA letter at 3; PFM letter at 5; but see Fidelity letter at 4 ("MSRB Rule G-21 applies to advertisements, regardless of whether electronic or other public media, including social media, is used with those advertisements") and SIFMA letter at 6 ("[t]he amendments to Rule G-21 and draft Rule G-40(c) apply to advertisements, regardless of whether electronic or other public media is used with those advertisements. As such, we feel no additional guidance by the MSRB is needed regarding the use of social media by a dealer or municipal advisor at this time").

125 See Fidelity letter at 5 ("[o]n the topic of social media, FINRA has provided guidance on the application of its rules governing communications with the public to social media sites . . . . For example, we understand that FINRA is currently working on a new social media Q&A . . . .); SIFMA letter at 6 ("[w]e believe that FINRA is currently working on guidance regarding social media. In line with our earlier comments, we feel the MSRB should ascribe to this guidance or clearly articulate why it is not appropriate in this market"). The MSRB believes that SIFMA's comments relate to FINRA Regulatory Notice 17-18, Guidance on Social Networking Websites and Business Communications (Apr. 2017).

Commission action specified in Section 19(b)(2) of the Exchange Act.[126]

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

Not applicable.

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

Not applicable.

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

Not applicable.

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

Not applicable.

11. Exhibits

Exhibit 1	Completed Notice of Proposed Rule Change for Publication in the Federal Register
Exhibit 2	Notice Requesting Comment and Comment Letters
Exhibit 5	Text of Proposed Rule Change

126 15 U.S.C. 78s(b)(2).

EXHIBIT 1

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

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change Consisting of Amendments to Rule G-21, on Advertising, Proposed New Rule G-40, on Advertising by Municipal Advisors, and a Technical Amendment to Rule G-42, on Duties of Non-Solicitor Municipal Advisors

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Exchange Act" or "Act")[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on the Municipal Securities Rulemaking Board (the "MSRB" or "Board") filed with the Securities and Exchange Commission (the "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 consisting of amendments to MSRB Rule G-21, on advertising ("proposed amended Rule G-21"), proposed new MSRB Rule G-40, on advertising by municipal advisors ("proposed Rule G-40"), and a technical amendment to MSRB Rule G-42, on duties of non-solicitor municipal advisors ("proposed amended Rule G-42," together with proposed amended Rule G-21 and proposed Rule G-40, the "proposed rule change"). The MSRB requests that the proposed rule change become effective nine months from the date of SEC approval.

---

1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

The text of the proposed rule change is available on the MSRB's website at www.msrb.org/Rules-and-Interpretations/SEC-Filings/2018-Filings.aspx, 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

Background

A. Proposed amended Rule G-21

Rule G-21 is a core fair practice rule of the MSRB. Rule G-21 applies to all advertisements by dealers, as defined by Rule G-21(a)(i).[3] Rule G-21 became effective in 1978,

---

[3] An advertisement, as defined by Rule G-21(a)(i):

> means any material (other than listings of offerings) published or used in any electronic or other public media, or any written or electronic promotional literature distributed or made generally available to customers or the public, including any notice, circular, report, market letter, form letter, telemarketing script, seminar text, press release concerning the products or services of the broker, dealer or municipal securities dealer, or reprint, or any excerpt of the foregoing or of a published article.

As such, Rule G-21 not only applies to print advertisements, but also applies to an advertisement "published or used in any electronic or other public media," such as a social media post.

and has been amended several times since then as the MSRB has enhanced its rule book. More recently, in 2012, the MSRB issued a request for comment on its entire rule book.[4] In response, two market participants requested that the MSRB harmonize its advertising rules with FINRA Rule 2210, on communications with the public.[5] Market participants echoed those requests more generally in their latest responses to a 2016 request for comment on the MSRB's strategic priorities.[6] Further, and apart from the MSRB's requests for comment, the MSRB solicited input about possible amendments to Rule G-21 from market participants, including industry groups that represent dealers.[7]

After considering the important suggestions made by market participants, the MSRB prepared proposed amended Rule G-21 to, among other things:

- enhance the MSRB's fair-dealing provisions by promoting regulatory consistency among Rule G-21 and the advertising rules of other financial regulators; and
- promote regulatory consistency between Rule G-21(a)(ii), the definition of "form letter,"

---

4 MSRB Notice 2012-63, Request for Comment on MSRB Rules and Interpretive Guidance (Dec. 18, 2012).

5 See Letter from David L. Cohen, Managing Director, Associate General Counsel, Securities Industry and Financial Markets Association, dated February 19, 2013, to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board; Letter from Gerald K. Mayfield, Senior Counsel, Wells Fargo & Company Law Department, dated February 19, 2013, to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board.

6 MSRB Notice 2016-25, MSRB Seeks Input on Strategic Priorities (Oct. 12, 2016); see Letter from Michael Decker, Managing Director, Securities Industry and Financial Markets Association, dated November 11, 2016, to Ronald W. Smith, Secretary, Municipal Securities Rulemaking Board; Letter from Robert J. McCarthy, Director of Regulatory Policy, Wells Fargo Advisors, LLC, dated November 11, 2016, to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board.

7 See MSRB Notice 2017-04, Request for Comment on Draft Amendments to MSRB Rule G-21, on Advertising, and on Draft Rule G-40, on Advertising by Municipal Advisors (Feb. 16, 2017).

and FINRA Rule 2210's definition of "correspondence."

Proposed amended Rule G-21 also makes a technical amendment in paragraph (e) to streamline the rule.

Concurrent with its efforts to enhance Rule G-21 and promote regulatory consistency among Rule G-21 and the advertising rules of other financial regulators, the MSRB prepared proposed Rule G-40 to address advertising by municipal advisors.

B. Proposed Rule G-40

In August 2011, in the exercise of its new rulemaking authority over municipal advisors,[8] the MSRB solicited public comment on a proposal to amend Rule G-21 and Rule G-9, on preservation of records, and to issue an interpretive notice under Rule G-17, on conduct of municipal securities activities, to address advertising by municipal advisors.[9] However, the MSRB did not proceed beyond requesting comment. In anticipation of the SEC's adoption of its rules relating to municipal advisor registration, the MSRB determined to withdraw or otherwise re-examine and revisit its then pending rulemaking proposals, including the 2011 request for comment.

On September 20, 2013, the SEC adopted its final rules for municipal advisor registration

---

8 Pub. Law No. 111-203, 124 Stat. 1376 (2010).

9 MSRB Notice 2011-41, Request for Comment on Draft Amendments to MSRB Rule G-21 (on Advertising) and Draft Interpretive Notice Concerning the Application of MSRB Rule G-17 (on Fair Dealing) to Certain Communications (Aug. 10, 2011) ("2011 request for comment"). The draft amendments, among other things, would have extended Rule G-21 and its related recordkeeping requirements to municipal advisors. Further, the draft interpretive notice would have reminded dealers and municipal advisors that Rule G-17's fair practice requirements apply to all communications (written and oral), including the content of advertisements, sales or marketing communications and correspondence.

that the SEC had proposed in 2010 (the "final rules").[10] Among other things, the final rules interpreted the statutory definition of the term "municipal advisor" under the Exchange Act and the statutory exclusions from that definition.[11] Since September 2013, the MSRB has re-examined and adopted revised proposals addressing many of the issues that were the subject of its previously withdrawn or suspended municipal advisor rulemaking proposals. With the benefit of the final rules and of the MSRB's development of its core regulatory framework for municipal advisors, the MSRB determined to revisit its approach to advertising by municipal advisors.

To inform its approach, the MSRB solicited general input from market participants about the nature of municipal advisor advertising and about how municipal advisors use advertising. That outreach included industry groups that represent non-solicitor and/or solicitor municipal advisors. As a result of that outreach and the valuable input received from market participants, the MSRB developed proposed Rule G-40.

Proposed Rule G-40 would apply to advertising by municipal advisors. Similar to proposed amended Rule G-21, proposed Rule G-40 would:

- provide general provisions that define the terms "advertisement" and "form letter," and would set forth the general standards and content standards for advertisements;
- provide the definition of professional advertisements, and would define the standard for those advertisements; and
- would require the approval by a principal, in writing, before the first use of an advertisement.

---

10 Exchange Act Release No. 70462 (Sept. 20, 2013), 78 FR 67468 (Nov. 12, 2013).

11 Rule 15Ba1-1(d), 17 CFR 240.15Ba1-1(d), under the Exchange Act.

Also, proposed Rule G-40, similar to proposed amended Rule G-21,[12] would apply to all advertisements by a municipal advisor, as defined in proposed Rule G-40(a)(i). However, unlike proposed amended Rule G-21, proposed Rule G-40 would contain certain substituted terms that are more relevant to municipal advisors, and proposed Rule G-40 would omit the three provisions in Rule G-21 that concern product advertisements (i.e., product advertisements, new issue product advertisements, and municipal fund securities product advertisements).

C. Technical Amendment to Rule G-42

Rule G-42(f)(iv) defines municipal advisory activities as "those activities that would cause a person to be a municipal advisor as defined in subsection (f)(iv) of this rule." The proposed rule change would provide a technical amendment to Rule G-42(f)(iv) to correct the cross-reference. Proposed amended Rule G-42 would replace the reference to subsection (f)(iv) in Rule G-42(f)(iv) with the intended reference to subsection (f)(iii). Rule G-42(f)(iii) defines the term "municipal advisor" for purposes of Rule G-42.

Proposed Amended Rule G-21

A. Enhancement of Fair Dealing Provisions and Promotion of Regulatory Consistency with Certain Standards of Other Financial Regulators

To enhance Rule G-21's fair dealing requirements, as well as to promote regulatory consistency among Rule G-21 and the advertising rules of other financial regulators, proposed amended Rule G-21 would provide more specific content standards. Proposed amended Rule G-21 also would include revisions to the rule's general standards for advertisements.

(i) Content standards

Proposed amended Rule G-21(a)(iii) would add content standards to make explicit many

---

12 See supra note 3.

of the MSRB's fair dealing obligations that follow from the MSRB's requirements set forth in Rule G-21 and Rule G-17, on conduct of municipal securities and municipal advisory activities, and the interpretive guidance the MSRB has provided under those rules, and to specifically address them to advertising.[13] Proposed amended Rule G-21 would enhance Rule G-21's fair dealing provisions by requiring that:

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

---

13 The proposed rule change would not supplant the MSRB's regulatory guidance provided under Rule G-17.

- an advertisement not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast;[14] and
- an advertisement not include a testimonial unless it satisfies certain conditions.[15]

By so doing, proposed amended Rule G-21(a)(iii) would promote regulatory consistency with FINRA Rule 2210(d)(1)'s and FINRA Rule 2210(d)(6)'s content standards for advertisements. The other topics and standards addressed by other provisions of FINRA Rule 2210(d) have not been historically addressed by Rule G-21 and/or may not be relevant to the municipal securities market,[16] and the MSRB did not include those topics in the MSRB's request for comment on

---

14 However, proposed amended Rule G-21(a)(iii)(F) would permit:

> (1) A hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of an investment; and
> (2) An investment analysis tool, or a written report produced by an investment analysis tool.

15 Proposed amended Rule G-21(a)(iii)(G) would provide:

> (1) If an advertisement contains a testimonial about a technical aspect of investing, the person making the testimonial must have the knowledge and experience to form a valid opinion;
> (2) If an advertisement contains a testimonial about the investment advice or investment performance of a broker, dealer or municipal securities dealer or its products, that advertisement must prominently disclose the following:
>
> > (a) The fact that the testimonial may be not be representative of the experience of other customers.
> > (b) The fact that the testimonial is no guarantee of future performance or success.
> > (c) If more than $100 in value is paid for the testimonial, the fact that it is a paid testimonial.

16 Those other topics and standards addressed by FINRA Rule 2110(d) relate to: comparisons between investments or services (FINRA Rule 2210(d)(2)); disclosure of the member's name (FINRA Rule 2210(d)(3)); tax considerations (FINRA Rule 2210(d)(4)); disclosure of fees, expenses, and standardized performance relating to non-money market fund open-end investment company performance data (FINRA Rule 2210(d)(5));

draft amendments to Rule G-21.[17]

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

(ii) General standards

Proposed amended Rule G-21(a)(iv), (b)(ii), and (c)(ii) would promote regulatory consistency among Rule G-21's general standard for advertisements, standard for professional advertisements, and standard for product advertisements (collectively, the "general standards") and the content standards of FINRA Rule 2210(d). Currently, Rule G-21's general standards prohibit a dealer, in part, from publishing or disseminating material that is "materially false or misleading." Proposed amended Rule G-21 would replace the phrase "materially false or

---

recommendations (FINRA Rule 2210(d)(7)); BrokerCheck (FINRA Rule 2210(f)(8)); and prospectuses filed with the SEC (FINRA Rule 2210(d)(9)).

17 See MSRB Notice 2017-04 (Feb. 16, 2017) and discussion of the comments that the MSRB received in response to that request for comment under "Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others."

misleading" with "any untrue statement of material fact" as well as add "or is otherwise false or misleading." The MSRB believes that this harmonization with FINRA Rule 2210(d) would be consistent with Rule G-21's current general standards and would ensure consistent regulation between similar regulated entities.

B. Reconcile the Definition of Form Letter with FINRA Rule 2210 Definition of Correspondence

Currently, Rule G-21(a)(ii) defines a "form letter," in part, as a written letter distributed to 25 or more persons. The analogous provision in FINRA's communications with the public rule to Rule G-21(a)(ii) is FINRA Rule 2210's definition of correspondence. FINRA Rule 2210(a)(2)'s definition of correspondence, however, defines "correspondence," in part, as written communications distributed to 25 or fewer retail investors. The MSRB understands that the one-person difference between Rule G-21 and FINRA Rule 2210 has created confusion and compliance challenges for dealers. To respond to this concern, proposed amended Rule G-21(a)(ii) would eliminate that one-person difference. Under proposed amended Rule G-21, a form letter, in part, would be defined as a written letter distributed to more than 25 persons.[18]

Supplementary Material .03 to proposed amended Rule G-21 would explain the term "person" when used in the context of a form letter under Rule G-21(a)(ii). Specifically, Supplementary Material .03 would explain that the number of "persons" is determined for the purposes of a response to a request for proposal ("RFP"), request for qualifications ("RFQ") or similar request at the entity level. Therefore, for example, if a dealer were to respond to an RFP from Big City Water Authority, Big City Water Authority would count as one person, no matter

---

[18] Written letters or electronic mail messages distributed to 25 or fewer persons within any period of 90 consecutive days may be subject to the fundamental fair dealing obligations of Rule G-17.

how many persons employed by Big City Water Authority reviewed the dealer's response to the RFP.

C. Technical Amendment

Proposed amended Rule G-21 would contain a technical amendment to Rule G-21(e). To streamline and clarify the MSRB's rules, the proposed rule change would delete references to the Financial Industry Regulatory Authority, Inc. in Rule G-21(e)(ii)(F) and Rule G-21(e)(vi) because, for example, reference to any applicable regulatory body is sufficient and no limitation to any more narrow subset is intended.

Proposed Rule G-40

Proposed Rule G-40, similar to Rule G-21, would set forth general provisions, address professional advertisements and require principal approval in writing for advertisements by municipal advisors before their first use. However, as discussed below, proposed Rule G-40 would not address product advertisements, as that term is defined in Rule G-21.

A. General Provisions

Proposed Rule G-40(a) would define the terms advertisement, form letter and municipal advisory client, and would provide content and general standards for advertisements by a non-solicitor or a solicitor municipal advisor.

(i) Definitions

Advertisement. The term "advertisement" in proposed Rule G-40(a)(i) would parallel the term "advertisement" in proposed amended Rule G-21(a)(i), but would be tailored for municipal advisors. An advertisement would refer, in part, to any promotional literature distributed or made generally available to municipal entities, obligated persons, municipal advisory clients (discussed

below), or the public by a municipal advisor.[19] Further, an advertisement would include the promotional literature used by a solicitor municipal advisor[20] to solicit a municipal entity or obligated person on behalf of the solicitor municipal advisor's municipal advisory client.

In addition, similar to proposed amended Rule G-21(a)(i), proposed Rule G-40(a)(i) would exclude certain types of documents from the definition of advertisement. The documents that would be excluded would be preliminary official statements, official statements, preliminary prospectuses, prospectuses, summary prospectuses or registration statements. These exclusions recognize the differences between the role of a dealer under Rule G-21 and the role of a solicitor municipal advisor under proposed Rule G-40. Nonetheless, as with Rule G-21, an abstract or summary of those documents or other such similar documents prepared by the municipal advisor would be considered an advertisement.

For example, a municipal advisor may assist with the preparation of an official statement. An official statement would be excluded from the definition of an advertisement. As such, under proposed Rule G-40(a)(i), the municipal advisor that assists with the preparation of an official

---

19 An advertisement, as defined by proposed Rule G-40(a)(i) would mean:

> any material (other than listings of offerings) published or used in any electronic or other public media, or any written or electronic promotional literature distributed or made generally available to municipal entities, obligated persons, municipal advisory clients or the public, including any notice, circular, report, market letter, form letter, telemarketing script, seminar text, press release concerning the services of the municipal advisor or the engagement of a municipal advisory client (as defined in paragraph (a)(iii)(B)), or reprint, or any excerpt of the foregoing or of a published article. The term does not apply to preliminary official statements, official statements, preliminary prospectuses, prospectuses, summary prospectuses or registration statements, but does apply to abstracts or summaries of the foregoing and other such similar documents prepared by municipal advisors.

20 A "solicitor municipal advisor," is a municipal advisor that engages in a solicitation of a municipal entity or obligated person, as defined in Rule 15Ba1-1(n) under the Exchange Act.

statement generally would not be assisting with an advertisement and the municipal advisor's work on the official statement generally would not be subject to the requirements of proposed Rule G-40.

Form letter. The term "form letter" in proposed Rule G-40 would be identical to the definition of that term set forth in proposed amended Rule G-21(a)(ii). A form letter would be defined as any written letter or electronic mail message distributed to more than 25 persons within any period of 90 consecutive days.[21]

Similar to proposed amended Rule G-21, proposed Rule G-40 would include Supplementary Material .01 to clarify the number of "persons" for a response to an RFP, RFQ or similar request, when used in the context of a form letter under proposed Rule G-40(a)(ii), is determined at the entity level. Therefore, for example, if a municipal advisor were to respond to an RFP from Big City Water Authority, Big City Water Authority would count as one person, no matter how many persons employed by Big City Water Authority reviewed the municipal advisor's response to the RFP.

Municipal advisory client. Proposed Rule G-40(a)(iii), unlike Rule G-21, includes the definition of the term "municipal advisory client." The definition of municipal advisory client would be substantially similar in all material respects to the definition of that term as set forth in the recent amendments to Rule G-8, effective October 13, 2017, to address municipal advisory client complaint recordkeeping.[22] The definition of municipal advisory client would account for

---

21 See supra note 18.

22 Exchange Act Release No. 79801 (Jan. 13, 2017), 82 FR 7898 (Jan. 23, 2017) (SR-MSRB-2016-15). See MSRB Notice 2017-03, SEC Approves Extension of MSRB's Customer Complaint and Related Recordkeeping Rules to Municipal Advisors and the Modernization of Those Rules (Jan. 18, 2017). Specifically, Rule G-8(e)(ii) defines a municipal advisory client to include

differences in the activities of non-solicitor and solicitor municipal advisors.

(ii) Content standards

Proposed Rule G-40(a)(iv) sets forth content standards for advertisements. Those content standards would be substantially similar in all material respects to the content standards set forth in proposed amended Rule G-21. Nonetheless, proposed Rule G-40 would replace certain terms used in proposed amended Rule G-21 with terms more applicable to municipal advisors. The MSRB believes that incorporating content standards for advertisements into proposed Rule G-40 would ensure consistent regulation between regulated entities in the municipal securities market, as well as promote regulatory consistency between dealer municipal advisors and non-dealer municipal advisors.

Specifically, proposed Rule G-40 would require that:

- an advertisement be based on the principles of fair dealing and good faith, be fair and balanced and provide a sound basis for evaluating the municipal security or type of municipal security, municipal financial product, industry, or service and that a municipal advisor not omit any material fact or qualification if such omission, in light of the context presented, would cause the advertisement to be misleading;
- an advertisement not contain any false, exaggerated, unwarranted, promissory or misleading statement or claim;
- a municipal advisor limit the types of information placed in a legend or footnote of an

---

> either a municipal entity or obligated person for whom the municipal advisor engages in municipal advisory activities as defined in Rule G-42(f)(iv), or a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser (as defined in 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.

advertisement so as to not inhibit a municipal advisory client's or potential municipal advisory client's understanding of the advertisement;

- an advertisement provide statements that are clear and not misleading within the context that they are made, that the advertisement provides a balanced treatment of risks and potential benefits, and that the advertisement is consistent with the risks inherent to the municipal financial product or the issuance of the municipal security;
- a municipal advisor consider the audience to which the advertisement will be directed and that the advertisement provide details and explanations appropriate to that audience;
- an advertisement not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast;[23] and
- an advertisement not refer, directly or indirectly, to any testimonial of any kind concerning the municipal advisor or concerning the advice, analysis, report or other service of the municipal advisor.

By so doing, proposed Rule G-40's content generally would promote regulatory consistency with proposed amended Rule G-21.

However, unlike proposed amended Rule G-21, proposed Rule G-40 would prohibit 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. The MSRB notes that investment advisers also are subject to fiduciary duty standards.

---

[23] However, proposed amended Rule G-40(a)(iv)(F) would permit:

> (1) A hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of a municipal financial product; and
> (2) An investment analysis tool, or a written report produced by an investment analysis tool.

Similar to the concerns that the Commission has expressed about an advertisement by an investment adviser that contains a testimonial,[24] the MSRB believes that a testimonial in an advertisement by a municipal advisor would present significant issues, including the ability to be misleading. The MSRB notes that in adopting Rule 206(4)-1 under the Investment Advisers Act of 1940, as amended (the "Advisers Act"),[25] the rule that applies to advertisements by registered investment advisers, the SEC found that the use of testimonials in advertisements by an investment adviser was misleading.[26] Thus, Rule 206(4)-1 provides that the use of a testimonial

---

24 See infra note 26.

25 15 U.S.C. 80b-1.

26 Advisers Act Rule 206(4)-1, 17 CFR 275.206(4)-1, provides, in part, that it would be a fraudulent, deceptive, or manipulative act or course of business for an investment adviser to publish, circulate, or distribute an advertisement that refers to any testimonial concerning the investment adviser. See Advisers Act Release No. 121 (Nov. 2, 1961), 26 FR 10548, 10549 (Nov. 9, 1961) (prohibiting testimonials of any kind and finding that "such advertisements are misleading; by their very nature they emphasize the comments and activities favorable to the investment adviser and ignore those which are unfavorable. This is true even when the testimonials are unsolicited and are printed in full").

However, since the rule's adoption, the SEC staff has granted no-action relief on multiple occasions to permit certain communications to be used without those communications being considered testimonials. See, e.g., DALBAR, Inc. (publicly avail. Mar. 24, 1998) (providing no-action assurance relating to the use of DALBAR's ratings of investment advisers in advertisements) and Cambiar Investors, Inc. (publicly avail. Aug. 28, 1997) (providing no-action assurance relating to the investment adviser providing a list that identifies clients). Further, the SEC has announced that the Division of Investment Management is considering recommending to the Commission amendments to Advisers Act Rule 206(4)-1, 17 CFR 275.206(4)-1, to enhance marketing communications and practices by investment advisers as part of the Commission's long-term regulatory agenda published for the Fall 2017. The regulatory agenda is available at https://resources.regulations.gov/public/custom/jsp/navigation/main.jsp. The MSRB will monitor the Commission's action with regard to Advisers Act Rule 206(4)-1. However, at this time, the MSRB is neither providing interpretative guidance relating to the use of testimonials by municipal advisors nor adopting the SEC staff's guidance. See discussion under "Self-Regulatory Organization's Statement on the Proposed Rule Change Received from Members, Participants, or Others – Proposed Rule G-40 – Testimonials."

by an investment adviser would constitute a fraudulent, deceptive, or manipulative act, practice, or course of action. To protect municipal entities and obligated persons, to help ensure consistent regulation between analogous regulated entities, and to help ensure a level playing field between municipal advisors/investment advisers and other municipal advisors, proposed Rule G-40 would prohibit the use of testimonials by a municipal advisor.[27]

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

(iii) General standard for advertisements

Proposed Rule G-40(a)(v) would set forth a general standard with which a municipal advisor must comply for advertisements. That standard would require, in part, that a municipal advisor not publish or disseminate, or cause to be published or disseminated, any advertisement relating to municipal securities or municipal financial products that the municipal advisor knows or has reason to know contains any untrue statement of material fact or is otherwise false or

---

[27] See discussion of testimonials in municipal advisor advertisements under "Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others," below.

misleading. The MSRB believes that the knowledge standard as the general standard for advertisements is appropriate. Thus, proposed Rule G-40 is similar to proposed amended Rule G-21(a)(iv) in all material respects, except proposed Rule G-40 substitutes "municipal advisor" for the term "dealer" and, consistent with Section 15B(e)(4) of the Exchange Act,[28] applies with regard to municipal financial products in addition to municipal securities.

B. Professional Advertisements

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

The strict liability standard for professional advertisements in proposed Rule G-40(b)(ii) is consistent with the MSRB's long-standing belief that a regulated entity should be strictly liable for an advertisement about its facilities, skills, or services, and that a knowledge standard is not appropriate.[29] The MSRB has held this belief since it developed its advertising rules for dealers over 40 years ago.[30] Thus, proposed Rule G-40(b) would be substantially similar in all material respects to proposed amended Rule G-21(b).

---

28 15 U.S.C. 78o-4(e)(4).

29 Notice of Filing of Fair Practice Rules, [1977-1987 Transfer Binder] Municipal Securities Rulemaking Board Manual (CCH) ¶10,030 at 10,376 (Sept. 20, 1977).

30 Id.

C. Principal Approval

Proposed Rule G-40(c) would require that each advertisement that is subject to proposed Rule G-40 be approved in writing by a municipal advisor principal before its first use.[31] Proposed Rule G-40(c) also would require that the municipal advisor keep a record of all such advertisements. Proposed Rule G-40(c) is similar in all material respects to proposed amended Rule G-21(f). If the SEC approves the proposed rule change, municipal advisors should update their supervisory and compliance procedures required by Rule G-44, on supervisory and compliance obligations of municipal advisors, to address compliance with proposed Rule G-40(c).

D. Product Advertisements

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

2. Statutory Basis

Section 15B(b)(2) of the Exchange Act[32] provides that:

> [t]he 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

---

31 MSRB Rule G-3(e)(i), on professional qualifications, defines a municipal advisor principal as:

> a natural person associated with a municipal advisor who is qualified as a municipal advisor representative and is directly engaged in the management, direction or supervision of the municipal advisory activities of the municipal advisor and its associated persons.

32 15 U.S.C. 78o-4(b)(2).

> 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 Act[33] 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 that the proposed rule change is consistent with Sections 15B(b)(2)[34] and 15B(b)(2)(C)[35] of the Exchange Act. The proposed rule change would help prevent fraudulent and manipulative practices, promote just and equitable principles of trade, and protect investors, municipal entities, obligated persons and the public interest by enhancing the MSRB's advertising rules that apply to dealers and by establishing advertising rules that apply to municipal advisors.[36]

Rule G-21

The MSRB believes proposed amended Rule G-21, by design, would help prevent fraudulent and manipulative practices. Proposed amended Rule G-21 would require that advertisements be based on the principles of fair dealing and good faith, be fair and balanced,

---

33 15 U.S.C. 78o-4(b)(2)(C).

34 15 U.S.C. 78o-4(b)(2).

35 15 U.S.C. 78o-4(b)(2)(C).

36 The MSRB notes that the technical amendment to proposed amended Rule G-42 will assist municipal advisors by providing a clearer rule that addresses the duties of non-solicitor municipal advisors.

and provide a sound basis for evaluating the facts. A dealer would not be able to omit any material fact or qualification, if the omission, in light of the context of the material presented, would cause the advertisement to be misleading. Furthermore, dealers would be prohibited from making any false, exaggerated, unwarranted, promissory or misleading statement or claim in an advertisement. Dealers would be required to ensure that the statements that they make are clear and not misleading within the context in which they are made and that they provide a balanced treatment of risks and potential benefits. Dealers also would be limited in the types of information that could be placed in a legend or footnote in an advertisement, and dealers only could include a testimonial in an advertisement if certain conditions are met. Dealers would have to consider the nature of the audience to which the advertisement would be directed and would have to provide details and explanations appropriate to the audience. Further, dealers would be prohibited from indicating registration with the MSRB in an advertisement unless the advertisement complies with the applicable standards of all other Board rules and that neither states nor implies that the MSRB endorses dealer's business practices, selling methods, class or type of security offered or any specific security. The prescriptive nature of proposed amended Rule G-21 would provide clear guidelines for dealers to follow that would help prevent fraudulent and manipulative practices.

Moreover, because proposed amended Rule G-21 would promote regulatory consistency with certain of FINRA Rule 2210's content standards, standards to which many dealers are currently subject as FINRA member firms, dealers may more easily understand and comply with proposed amended Rule G-21. In turn, this compliance would help prevent fraudulent and manipulative practices because the requirements of proposed amended Rule G-21 (noted in the

paragraph above) are in and of themselves designed to prevent fraudulent and manipulative practices.

Finally, proposed amended Rule G-21 would help prevent fraudulent and manipulative practices because it would promote more efficient inspections of dealer advertisements. Other financial regulators inspect and enforce the MSRB's rules. Proposed amended Rule G-21 would provide clear guidelines as to the content of what may appear in an advertisement which should facilitate an efficient inspection. Further, because Rule G-21 would help promote regulatory consistency with certain of FINRA Rule 2210's content standards, inspections staff may be well familiar with the proposed amended Rule G-21's requirements. See discussion under "Proposed Amended Rule G-21 – Enhancement of Fair Dealing Provisions and Promotion of Regulatory Consistency with Certain Standards of Other Financial Regulators – Content Standards" above. This familiarity with standards, as well as having clear advertising standards, might enable inspections staff to conduct a more efficient inspection of dealer advertisements. More efficient inspections of dealer advertisements, in turn, might result in inspections staff being able to determine whether there are any regulatory irregularities earlier during the inspection process.

Proposed amended Rule G-21, also would help promote just and equitable principles of trade, and would enhance the MSRB's fair dealing requirements. For the same reasons that the design of proposed amended Rule G-21 would help prevent fraudulent and manipulative practices, the prescriptive nature of the design of proposed amended Rule G-21 would provide clear guidelines for dealers to follow that would help promote just and equitable principles of trade.

Proposed amended Rule G-21 also would help protect investors and the public interest. For the same reasons that the design of proposed amended Rule G-21 would help prevent

fraudulent and manipulative practices and promote just and equitable principles of trade, the clear, prescriptive requirements of proposed amended Rule G-21 would help ensure that advertisements would present a fair statement of the services, products, or municipal securities advertised. In turn, investors and the public would be able to have more confidence in the accuracy of the services, products, or municipal securities advertised, and perhaps would be more comfortable making decisions based on an advertisement. For municipal entities, for example, this increased confidence in an advertisement may lead to a more efficient underwriter selection process.

Proposed Rule G-40

Proposed Rule G-40, by design, would help prevent fraudulent and manipulative practices. Proposed Rule G-40 would require 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. No municipal advisor would be able to omit any material fact or qualification if the omission, in light of the context of the material present, would cause the advertisement to be misleading. Furthermore, municipal advisors would be prohibited from making any false, exaggerated, unwarranted, promissory or misleading statement or claim in an advertisement. Municipal advisors would be required to ensure that the statements that they make are clear and not misleading within the context in which they are made and that they provide a balanced treatment of risks and potential benefits. Municipal advisors also would be limited in the types of information that could be placed in a legend or footnote in an advertisement, and would not be able to include a testimonial in an advertisement. Municipal advisors would have to consider the nature of the audience to which the advertisement would be directed and would have to provide details and explanations appropriate to the audience. Further, municipal advisors would be

prohibited from indicating registration with the MSRB in an advertisement unless the advertisement complies with the applicable standards of all other Board rules and that neither states nor implies that the MSRB endorses the municipal advisor's business practices, services, skills or any specific type of municipal security or municipal financial product. The prescriptive nature of proposed Rule G-40 would provide clear guidelines for municipal advisors to follow that would help prevent fraudulent and manipulative practices.

Proposed Rule G-40 also would help prevent fraudulent and manipulative practices because proposed Rule G-40 would promote efficient inspections of municipal advisor advertisements. Other financial regulators inspect and enforce the MSRB's rules. Proposed Rule G-40 would provide clear guidelines as to the content of what may appear in an advertisement which should facilitate an efficient inspection of municipal advisor advertisements. More efficient inspections of municipal advisor advertisements, in turn, might result in inspections staff being able to more easily and readily determine whether there are any regulatory irregularities earlier during the inspection process.

Proposed Rule G-40 also would help promote just and equitable principles of trade. Proposed Rule G-40 would enhance the MSRB's fair dealing requirements by, for the first time, having specific requirements for municipal advisor advertising. As such, proposed Rule G-40 would promote regulatory consistency in the municipal securities market, and thus would help promote just and equitable principles of trade. Further, for the same reasons that the design of proposed Rule G-40 would help prevent fraudulent and manipulative practices, proposed Rule G-40's prescriptive and clear guidelines would help promote just and equitable principles of trade.

Proposed Rule G-40, also would help protect investors, municipal entities, obligated persons and the public interest. For the same reasons that the design of proposed Rule G-40 would help prevent fraudulent and manipulative practices and promote just and equitable principles of trade, the clear, prescriptive requirements of proposed Rule G-40 would help ensure that advertisements would present a fair statement of the municipal security or type of municipal security, municipal financial product, industry or service advertised. This, in turn, would help protect investors, municipal entities, obligated persons and the public interest. Further, investors, municipal entities, obligated persons and the public would be able to have more confidence in the accuracy of the advertisements, and perhaps would be more comfortable making decisions based, in part, on an advertisement.

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

Section 15B(b)(2)(C) of the Exchange Act[37] 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. In accordance with the Board's policy on the use of economic analysis in rulemaking, the Board has reviewed proposed amended Rule G-21 and proposed Rule G-40.[38]

Proposed Amended Rule G-21

The MSRB believes that, through promoting regulatory consistency of certain MSRB advertising standards with those of other financial regulators, proposed amended Rule G-21 may improve efficiency in the form of less unnecessary complexity for dealers and reduced burdens

---

37 15 U.S.C. 78o-4(b)(2)(C).

38 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.

and compliance costs over time since additional regulatory consistency should assist dealers with developing uniform policies and procedures. This may also benefit both retail and institutional investors, where transparency, consistency, truthful and accurate information and ease of comparison of different financial services would be highly valued. The alternative of leaving Rule G-21 in its current state would mean that dealers that are registered both with the MSRB and FINRA would continue to face two sets of compliance requirements with additional costs and regulatory burdens.[39]

Since proposed amended Rule G-21 would establish more stringent and prescriptive advertising standards for dealers than are included in the baseline, which is current existing Rule G-21, the MSRB expects that dealers may experience increased costs because of the new requirements, especially for bank dealers that are not currently registered with FINRA.[40] These costs, however, can be mitigated through careful planning because the proposed rule change, if adopted, would have a nine-month implementation period during which the industry could adjust. The MSRB believes that much of the costs associated with proposed amended Rule G-21 would be up-front costs resulting from sunk investments in advertisements previously developed by dealers that would no longer be compliant upon effectiveness of the proposed rule change, as well as costs from initial compliance development such as updating or rewriting policies and procedures. For those dealers that are also registered with FINRA, those costs should not be

---

39 The benefits of alignment with FINRA's rule, however, will not apply to those firms that are not dual-registrants.

40 In response to comments received by market participants related to the Request for Comment, the MSRB would permit the use of testimonials by dealers in advertisements under the same limitations used in FINRA regulation. See "Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others" below.

significant, as much of proposed amended Rule G-21 would align with FINRA Rule 2210, a rule with which those dealers currently must comply.

On balance, the MSRB believes that proposed amended Rule G-21 would not impose an unreasonable burden on dealers, and the likely benefits, such as reduced unnecessary complexity and compliance standards that are more closely aligned with those of other financial regulators, would justify the associated costs in both the near and long term.

Since dealers currently are subject to advertising standards under the MSRB's rules, the MSRB believes that proposed amended Rule G-21 is unlikely to hinder capital formation. The MSRB believes that proposed amended Rule G-21 would not harm competition, and may indeed enhance competition by putting all competitors on an equal footing due to a uniform set of advertising standards for dual registrants that is more straightforward for the market and investors.

Proposed Rule G-40

Similar to Rule G-21, proposed Rule G-40 would be a core fair practice rule governing advertising by municipal advisors. As such, proposed Rule G-40 would help protect investors, municipal entities, obligated persons and the general public. Moreover, proposed Rule G-40 would help ensure consistent regulation between regulated entities in the municipal securities market as well as to promote regulatory consistency among dealer municipal advisors, non-dealer municipal advisors and municipal advisors that are also registered as investment advisers with the SEC.[41]

---

41 For example, under Rule G-21 dealers are required to keep records of their advertisements and are prohibited from using false or misleading information in advertising.

The MSRB believes that one benefit of proposed Rule G-40 may be more accurate information available to clients through advertising by municipal advisors, which, at the margin, may lead more informed decision-making related to municipal advisor selection.[42] As a result of applying proposed Rule G-40's advertising standards, municipal entities and obligated persons may be able to more easily establish objective criteria to use in selecting municipal advisors and this may increase the likelihood that municipal advisors are hired because of their qualifications as opposed to other reasons. In addition, transparency, consistency, truthful and accurate information in advertising should benefit municipal entities and obligated persons in general and may lead to increased confidence in the municipal market.

The MSRB believes that much of the costs associated with proposed Rule G-40 would be up-front sunk costs resulting from investments in advertisements previously developed by municipal advisors that would no longer be compliant upon effectiveness of the proposed rule,[43] as well as from initial costs to establish compliant policies and procedures, although there would be some ongoing costs associated with principal approval and record-keeping requirements.[44]

---

42 Acacia indicated that many issuers hire municipal advisors through some type of competitive process and the provision of materials in response to such a solicitation should not be deemed an advertisement and the existing regulatory framework would govern false and misleading statements in those materials. The MSRB agrees that materials submitted as part of a response to an RFP generally would not be considered as advertising; instead, proposed Rule G-40 focuses on materials provided generally to potential clients and the MSRB believes that accurate and truthful advertising would still be meaningful to decisions on selection and retention of municipal advisors. See "Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others" below.

43 As elaborated above, these costs can be mitigated through careful planning during the implementation period for the proposed rule change, if adopted, which would give the industry time to adjust.

44 See 3PM letter at 3-4, which describes potential compliance costs for solicitor municipal advisors associated with having a principal pre-approve a form letter prior to allowing

Since this is the first time that municipal advisors may be subject to such regulation, to ensure compliance with the advertising standards of proposed Rule G-40, municipal advisors may also incur costs by seeking advice from compliance or legal professionals when preparing advertising materials. In particular, regarding proposed Rule G-40's prohibition of municipal advisors use of testimonials in their advertisements, the MSRB believes firms that rely extensively on testimonials as their form of advertising would likely experience more transition costs than firms that presently either do not use testimonials or use testimonials only occasionally. While the MSRB acknowledges that there would be certain increased costs for municipal advisors that presently use testimonials in advertising, the benefits accrued to municipal entities and obligated persons, including increased likelihood of receiving accurate, non-misleading and objective information from advertisements, should exceed the costs over time.

The MSRB believes these costs should not be burdensome for small municipal advisory firms. For some one-time initial compliance costs, the MSRB believes that small municipal advisory firms may incur proportionally larger costs than larger firms. However, for many other ongoing costs, such as costs associated with principal approval and record-keeping requirements, as well as sunk investments in advertisements previously developed but that would no longer be compliant, the costs should be proportionate to the size of the firm, assuming that small firms generally advertise less than larger firms. Thus, it is unlikely that proposed Rule G-40 would have an outsized impact on small firms.

---

their sales professionals to send out the form letter. See "Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others" below.

On balance, the MSRB believes that proposed Rule G-40 would not impose an unreasonable burden on municipal advisors,[45] and the potential benefits would justify the associated costs in both the near and long term since the benefits of proposed Rule G-40 should exceed the costs over the long term.

The MSRB considered that the costs associated with proposed Rule G-40 may lead some municipal advisors to curtail their advertising expenditures and compete less aggressively through advertising.[46] On balance, the MSRB believes that the market for municipal advisory services is likely to remain competitive;[47] any potential negative impact on competition as a result of potential curtailment of advertising expenditures should be counteracted by the potential positive impact from improved advertising standards and more transparent and accurate information on municipal advisors.

The MSRB believes that proposed Rule G-40 should not hinder capital formation. As noted above, the better-quality information conveyed by municipal advisors through advertising

---

45 Acacia stated that proposed Rule G-40 "applies a regulatory burden and cost which is not proportional to the MSRB's stated goal of preventing misleading information to investors, issuers or obligated persons," but did not offer any quantitative information. See "Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others" below.

46 Also, at the margin, some municipal advisors may even determine to consolidate with other municipal advisors to benefit from economies of scale (e.g., by leveraging existing compliance resources of a larger firm) rather than to incur separately the costs associated with proposed Rule G-40. The MSRB, however, is skeptical about this scenario, as the potential costs of compliance with proposed Rule G-40 are not expected to be onerous.

47 3PM stated that proposed Rule G-40 would put solicitor municipal advisors at a disadvantage to solicitors who are not registered with the MSRB or working with municipal entities. However, unregistered solicitors are not within the MSRB's jurisdiction, and the rule proposal is intended to ensure fairness and accuracy in advertisements from all municipal advisors who render services to or initiate a solicitation from municipal entities.

that meets the standards of proposed Rule G-40 may lead to an improved municipal advisor selection process (as discussed above). One commenter noted that municipal advisors are typically selected through an RFP process rather than via advertising. However, if firms gained no advantage from advertising, it would be irrational and not in their best interest to advertise. Thus, the MSRB expects that advertising can influence the municipal advisor selection process even if only to raise awareness of a firm. If a final municipal advisor selection is determined exclusively via an RFP process, truthful and accurate advertising still could help issuers target their requests for proposals to firms the issuer expects to be sufficiently qualified thereby enhancing the selection process through gains in efficiency.

Finally, transparency, consistency, truthful and accurate information in advertising may increase the willingness of municipal entities and obligated persons to use municipal advisors.[48] This, in turn, may contribute to a more efficient capital formation process as municipal entities and obligated persons may make more informed decisions as to the structure, timing, terms and other similar matters, related to issuances of municipal securities and municipal financial products.

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

The MSRB sought public comment on the draft amendments to Rule G-21 and new draft Rule G-40.[49] In response to that Request for Comment, the MSRB received 11 comment

---

48 The MSRB is planning to examine the frequency with which issuers use municipal advisors over time in a retrospective analysis of the municipal advisor regulatory framework in the future.

49 MSRB Notice 2017-04 (Feb. 16, 2017) (the "Request for Comment").

letters.[50] Commenters generally expressed support for the proposed rule change, but also expressed various concerns and suggested certain revisions.

Below, the MSRB discusses the comments received relating to proposed amended Rule G-21. Following that discussion, the MSRB discusses the comments received relating to proposed Rule G-40.

I. Proposed Amended Rule G-21

---

50 Letter from Noreen P. White, Co-President, and Kim M. Whelan, Co-President, Acacia Financial Group, Inc., dated April 7, 2017 ("Acacia"); Letter from Mike Nicholas, Chief Executive Officer, Bond Dealers of America, dated March 24, 2017 ("BDA"); Letter from Norman L. Ashkenas, Chief Compliance Officer, Fidelity Brokerage Services, LLC, Richard J. O'Brien, Chief Compliance Officer, National Financial Services, LLC, and Jason Linde, Chief Compliance Officer, Fidelity Investments Institutional Services Company, LLC, dated March 24, 2017 ("Fidelity"); Letter from David T. Bellaire, Esq., Executive Vice President & General Counsel, Financial Services Institute, dated March 24, 2017 ("FSI"); Letter from Laura D. Lewis, Principal, Lewis Young Robertson & Burningham, Inc., dated March 24, 2017 ("Lewis Young"); Letter from Susan Gaffney, Executive Director, National Association of Municipal Advisors, dated March 24, 2017 ("NAMA"); Letter from Leo Karwejna, Chief Compliance Officer, Cheryl Maddox, General Counsel, and Catherine Humphrey-Bennett, Municipal Advisory Compliance Officer, Public Financial Management, Inc. and PFM Financial Advisors LLC, dated March 23, 2017 ("PFM"); Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated March 24, 2017 ("SIFMA"); Letter from Paul Curley, Director of College Savings Research, Strategic Insight, dated May 16, 2017 ("SI"); Letter from Donna DiMaria, Chairman of the Board of Directors and Chair of the 3PM Regulatory Committee, Third Party Marketers Association, dated March 23, 2017 ("3PM"); and Letter from Robert J. McCarthy, Director, Regulatory Policy, Wells Fargo Advisors, dated March 24, 2017 ("Wells Fargo").

During the period in which the MSRB considered the comments received in response to the Request for Comment, the Board concluded to separately propose the amendments to Rule G-21(e). The SEC approved those amendments on August 18, 2017, and the amendments became effective on November 18, 2017. See Exchange Act Release No. 81432 (Aug. 18, 2017), 82 FR 40199 (Aug. 24, 2017) (SR-MSRB-2017-04). Fidelity, FSI, SIFMA and SI addressed the draft amendments to Rule G-21(e) in their letters to the MSRB. The MSRB discussed those comments in SR-MSRB-2017-04, and generally will not discuss those comments as part of this proposed rule change.

The MSRB received five comment letters that focused on the draft amendments to Rule G-21 (other than Rule G-21(e)).[51] Commenters focused on harmonization with FINRA Rule 2210, additional exclusions from the definition of an advertisement, hypothetical illustrations, hyperlinks, coordination between self-regulatory organizations ("SROs"), and jurisdictional guidance under Rule G-21 relating to dealer/municipal advisors. The comments ranged from strong support for the draft amendments as set forth in the Request for Comment[52] to the suggestion that the Board should simply incorporate FINRA Rule 2210 by reference into Rule G-21.[53]

A. Harmonization with FINRA Rule 2210

Commenters supported the draft amendment's harmonization with FINRA Rule 2210. In fact, FSI provided its strong support for the draft amendments to Rule G-21, as drafted.[54] Nevertheless, some other commenters suggested that the draft amendments to Rule G-21 could be harmonized more with FINRA Rule 2210 by adopting that rule's (i) definition of communications and the distinctions in FINRA Rule 2210 that follow from that definition[55] and (ii) use of testimonials,[56] or by incorporating FINRA Rule 2210 by reference into Rule G-21.[57]

---

51 See BDA, Fidelity, FSI, SIFMA and Wells Fargo letters. To the extent that the five commenters that focused on draft Rule G-40 provided comments relevant to the draft amendments to Rule G-21, those comments are also included in the discussion below.

52 FSI letter at 2.

53 SIFMA letter at 2.

54 FSI letter at 2.

55 See BDA, SIFMA, and 3PM letters.

56 See BDA, Fidelity, SIFMA, and Wells Fargo letters.

57 SIFMA letter at 2.

Further, one commenter suggested that because of the harmonization with FINRA Rule 2210, the definitions and product advertisement and professional advertisement sections could be deleted from Rule G-21 and Rule G-40.[58]

(i) Definition of Communications

BDA, SIFMA, and 3PM suggested that the MSRB further harmonize Rule G-21 with FINRA Rule 2210 by adopting FINRA Rule 2210's definition of "communications" and the distinctions in the rule that follow from that definition. In particular, commenters favored the harmonization with FINRA Rule 2210's communications definition because institutional communications would no longer be subject to pre-approval by a principal. BDA, SIFMA, and 3PM submitted that, if the MSRB were to do so, dealers then could apply common approval processes for institutional communications across all asset classes.[59]

---

58 BDA letter.

59 See BDA letter; SIFMA letter at 5; and 3PM letter at 7-8. See also SIFMA letter at 8 ("SIFMA strongly supports the harmonization of draft Rule G-40 with FINRA Rule 2210 with respect to the categorization of communications"); 3PM letter at 4 (stating that the MSRB "should also consider segregating advertisements by investor group as well for solicitor municipal advisors"); 3PM letter at 4 ("we believe that the MSRB should also consider segregating advertisements by investor group as well for solicitor municipal advisors").

BDA stated that, if the MSRB has a rule that applies different definitions and different sets of responsibilities and does not differentiate between communications sent to retail and institutional customers, the MSRB will have created an increased regulatory burden along with considerable confusion for broker-dealers. While the MSRB appreciates BDA's concerns, Rule G-21 currently applies different standards and responsibilities than what is currently required by FINRA Rule 2210. For example, Rule G-21 currently requires pre-approval by a principal of all advertisements, including advertisements that would be considered institutional communications under FINRA Rule 2210. Other than permitting testimonials in advertisements subject to certain conditions, the MSRB has determined not to revise the draft amendments to Rule G-21 to reflect BDA's suggestion that the MSRB more fully harmonize Rule G-21 with FINRA Rule 2210.

However, FINRA's regulation of advertising differs significantly from the MSRB's advertising regulation. FINRA Rule 2210 defines "communications" as consisting of correspondence, retail communications, and institutional communications.[60] Based on the type of communication, FINRA Rule 2210 then may require pre-approval by a principal before the communication's first use and the filing of the communication with FINRA's advertising regulation department for review either a certain number of days before or within a certain number of days after first use.[61]

Moreover, the MSRB, unlike FINRA, does not require the filing of advertisements with the MSRB before first use and the MSRB does not review advertisements. Rather, and since the MSRB approved its advertising rules in 1978, [62] the MSRB has relied upon its core fair dealing principles set forth in its advertising rules and the important supervisory function of principal pre-approval to regulate advertisements by dealers.[63] The MSRB continues to believe that it is important that a principal pre-approve an advertisement regardless of the intended recipient of the advertisement. Therefore, the Board determined not to revise the draft amendments to Rule

---

60 See FINRA Rule 2210(a)(1).

61 See FINRA Rule 2210(b) and (c) (generally requiring pre-approval by a principal of the member before the earlier of the retail communication's first use or the filing of the advertisement with FINRA – correspondence and institutional communications are not subject to member pre-approval and filing with FINRA; however, there must be supervisory policies and procedures in place relating to such communications).

62 The Board originally had three rules that addressed advertising – Rule G-21, Rule G-33 (relating to advertisements for new issues) and Rule G-34 (relating to advertisements for products). In 1980, the Board merged Rules G-33 and G-34 into Rule G-21. See Notice of Approval of Amendments to the Board's Advertising Rules (Nov. 21, 1980) CCH MSRB Manual ¶ 10,167 at 10,599.

63 See, e.g., supra note 29 at 10,371.

G-21 to reflect commenters' suggestions about adopting FINRA Rule 2210's definition of communications and the distinctions that result from that definition.

(ii) Use of testimonials

BDA, Fidelity, SIFMA, and Wells Fargo urged the Board to permit testimonials in dealer advertising to better harmonize Rule G-21 with FINRA Rule 2210.[64] Commenters argued that to do otherwise would result in confusion and an inconsistent "patchwork" approach to dealer rules and that regulatory harmonization and consistency between MSRB and FINRA rules are paramount.[65] Further, SIFMA, Fidelity, and Wells Fargo believed that the protections set forth in FINRA Rule 2210 relating to testimonials[66] were strong enough for retail communications to

---

64 BDA letter, Fidelity letter at 5-6, SIFMA letter at 6-7, and Wells Fargo letter at 2-3.

65 See, e.g., BDA letter and SIFMA letter at 6. See also 3PM letter at 6 (the prohibition on the use of testimonial in an advertisement would create an issue for "municipal advisors that are registered with both the MSRB and FINRA . . . [w]hile we are not necessarily against the notion of adhering to the strictest standard, this approach does require additional compliance and oversight resources to be dedicated to a function and ultimately results in additional cost to the municipal advisor"). The MSRB does not address 3PM's interpretation of FINRA rules and the issue of the ability of an associated person to like or recommend items on social media platforms.

66 FINRA Rule 2210(d)(6) provides:

> (A) 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.
> (B) Retail communications or correspondence providing any testimonial concerning the investment advice or investment performance of a member or its products must prominently disclose the following:
>
> > (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.
> > (iii) If more than $100 in value is paid for the testimonial, the fact that it is a paid testimonial.

investors, including investors who are seniors.[67] Fidelity suggested that the MSRB engage with FINRA to determine whether FINRA Rule 2210(d)(6) adequately protects investors who are seniors.[68] After carefully considering commenters' suggestions, as well as consulting with FINRA staff, the Board determined to revise the draft amendments to Rule G-21. The proposed rule change would permit dealer advertisements, but not municipal advisor advertisements (discussed below), to contain testimonials under the same conditions as are currently set forth in FINRA Rule 2210(d)(6).

(iii) Incorporation of FINRA Rule 2210 by reference

SIFMA commented that, while it supported the MSRB's efforts to level the playing field between dealers and municipal advisors, the better way to level that playing field, as well as to promote harmonization with FINRA's rules, is for the Board to incorporate FINRA Rule 2210 by reference into the MSRB's rules.[69] SIFMA stated that, since Rule G-21 was adopted in 1978,

---

67 See SIFMA letter at 6; Fidelity letter at 7-8; Wells Fargo letter at 2-3.

68 Fidelity letter at 7-8.

69 SIFMA letter at 2-3. SIFMA also stated that the MSRB should consider all the exceptions and guidance in FINRA Rule 2210(d) regarding content standards and that SIFMA and its members feel very strongly about these exceptions, particularly Rule 2210(d)(6), on testimonials, FINRA Rule 2210(d)(7), on recommendations, and FINRA Rule 2210(d)(9), on prospectuses, including private placement memoranda. SIFMA letter at 5. The MSRB's considerations of testimonials is discussed above under "Proposed Amended Rule G-21 – Harmonization with FINRA Rule 2210 – Use of testimonials." The MSRB's considerations of private placement memoranda are discussed below under "Potential Additional Exclusions from the Definition of Advertisement – Private Placement Memoranda." SIFMA did not provide further details about its suggestion concerning recommendations. At this time, the MSRB has determined not to include revisions to the draft amendments to Rule G-21 in the proposed rule change to address SIFMA's suggestion about recommendations. See also BDA letter ("[t]here is no compelling policy reason to have different communication standards for municipal securities and corporate securities"); and Lewis Young letter ("we suggest you eliminate the current provisions related to advertising of Rule G-21 on broker/dealer activities

Rule G-21 has not been regularly or uniformly harmonized with what is now FINRA Rule 2210 and that this discordance has led to confusion among all market participants and regulatory risk for dealers.[70]

Nevertheless, SIFMA did not propose that the MSRB incorporate FINRA Rule 2210 in its entirety by reference into Rule G-21. Rather, SIFMA submitted that certain provisions of FINRA Rule 2210(c) relating to the filing of advertisements with FINRA and the review procedures for those advertisements were unnecessary and burdensome and should not be included. Similarly, SIFMA proposed that provisions in FINRA Rule 2210(e) relating to the limitations on the use of FINRA's name and any other corporate name owned by FINRA be exempted from the incorporation by reference of FINRA Rule 2210 into Rule G-21.

Further, SIFMA recognized that there may be a need for certain MSRB regulation of dealer and municipal advisor advertising. SIFMA stated that "[w]ith respect to advertising or public communications for most municipal securities products (except for municipal advisory business and municipal fund securities), we feel there is no compelling reason to establish a different rule set than that which exists under FINRA Rule 2210."[71]

As discussed under "Background" above, Rule G-21 is one of the MSRB's core fair practice rules that has been in effect since 1978. In proposing those rules, the MSRB stated the

---

otherwise governed by both G-17 and G-42 and that you not impose a Rule G-40 on non-broker/dealer advisors").

70 SIFMA letter at 2.

71 SIFMA letter at 9. 3PM had a somewhat analogous view to that of SIFMA's about the Request for Comment. 3PM noted that most solicitor municipal advisors that are members of 3PM are also members of FINRA. 3PM submitted that the Board should focus on municipal advisor firms that have no regulatory oversight rather than layering additional compliance regulations and costs on solicitor municipal advisors. 3PM letter at 13.

purpose of the fair practice rules "is to codify basic standards of fair and ethical business conduct for municipal securities professionals."[72] After carefully considering SIFMA's suggestions, including the recognition of the important differences between the corporate and municipal securities markets, the MSRB determined not to incorporate FINRA Rule 2210 by reference into Rule G-21. Further, the MSRB notes that if the MSRB were to incorporate FINRA Rule 2210 by reference and if FINRA or its staff were to provide an interpretation of FINRA Rule 2210, the Board automatically would be adopting that interpretation without considering the interpretation's ramifications for the unique municipal securities market. In addition, there are municipal securities dealers that are not members of FINRA. Those dealers may not have the necessary notice of FINRA's rule interpretations.

(iv) Definition of standards for product and professional advertisements

BDA suggested that the definitions of standards for product advertisements and professional advertisements were made redundant by the general and content standards in the draft amendments to Rule G-21 and draft Rule G-40, and that the provisions should be deleted to signify that these types of communications are covered by the draft amendments to Rule G-21 and draft Rule G-40.[73] Although the provisions in the draft amendments to Rule G-21 and draft Rule G-40 are analogous to the current provisions in Rule G-21, there are differences in those provisions. For example, Rule G-21(b) contains a strict liability standard relating to the

---

72 See supra note 29 at 10,371.

73 BDA letter. See also SIFMA letter at 4 (strongly supporting the removal of the definition of "advertisement," "form letter," and "professional advertisement" in favor of harmonizing with FINRA Rule 2210's three categories of communications, and stating that "[h]armonization of the MSRB and FINRA rules would also necessitate the removal of the confusing and duplicative definition of 'product advertisement'").

publication or dissemination of professional advertisements. Since the MSRB first proposed Rule G-21, the MSRB has believed that "a strict standard of responsibility for securities professionals [is necessary] to assure that their advertisements are accurate."[74] After careful consideration, the MSRB has determined at this time not to delete the standards for product and professional advertisements.

B. Potential Additional Exclusions from the Definition of Advertisement

Commenters suggested additional exclusions from the definition of an advertisement. Those exclusions related to private placement memoranda[75] and responses to RFPs or RFQs.[76]

(i) Private placement memoranda

BDA and SIFMA suggested that as part of its harmonization effort, the MSRB should exclude private placement memoranda from the definition of advertisement.[77] BDA noted those materials are frequently used as offering memoranda and thus should be excluded from the definition of advertisement alongside preliminary offering statements.[78]

The MSRB believes, however, that such an exclusion would cause disharmonization with FINRA Rule 2210. FINRA Rule 2210 does not provide a similar exclusion from the definition of

---

74 See supra note 29 at 10,376.

75 See BDA letter and SIFMA letter at 5.

76 See, e.g., BDA letter and SIFMA letter at 5-6.

77 Similarly, 3PM stated that, "[g]iven the nature of a private placement memorandum for private issuers, we do not believe these documents should be classified as an advertisement and should be excepted from the rule as are preliminary official statements, official statements, preliminary prospectuses, summary prospectuses or registration statements." See 3PM letter at 11.

78 See BDA letter.

a communication. After careful consideration, the Board determined not to revise the draft amendments to Rule G-21 to reflect commenters' suggestion.

(ii) Response to an RFP or RFQ

BDA and SIFMA commented that the Board should amend Rule G-21 (Acacia, BDA, SIFMA, NAMA and PFM also made similar comments with respect to draft Rule G-40) to exclude a response to an RFP or RFQ from the definition of advertisement.[79] Commenters submitted that it was not appropriate for the MSRB to regulate responses to requests for proposals or qualifications the same way that the MSRB regulates "retail communications" – i.e., possibly requiring principal approval in writing before sending the response to the RFP or RFQ to an issuer. The MSRB agrees. In the Request for Comment, the MSRB noted that a response to an RFP or RFQ would be excluded from regulation under the draft amendments to Rule G-21 and draft Rule G-40 because the response would be excluded from the definition of a form letter. Nevertheless, commenters stated that they did not believe that exclusion was sufficient, and stated that such responses to RFPs and RFQs should be explicitly excluded from the definition of advertisement.[80] In particular, SIFMA expressed concern about the number of employees at a municipal securities issuer who may review an RFP or RFQ, and stated that it should not matter how many employees at such an issuer review the responses to an RFP and RFQ.

To ensure that the definition of form letter is interpreted as intended, the proposed rule change includes Supplementary Material .03 to Rule G-21 and Supplementary Material .01 to proposed Rule G-40. This supplementary material explains that an entity that receives a response to an RFP, RFQ or similar request would count as one "person" for the purposes of the definition

---

79 See Acacia letter, BDA letter, SIFMA letter at 6, NAMA letter at 2, and PFM letter at 2.

80 Id.

of a form letter no matter the number of employees of the entity who may review the response. Other than the supplementary material, the Board determined that no other revisions to the draft amendments to Rule G-21 or to draft Rule G-40 were necessary to address commenters' concerns about RFPs and RFQs.

C. Hypothetical Illustrations

The Request for Comment noted that FINRA had recently requested comment on draft amendments to FINRA Rule 2210 to create an exception to the rule's prohibition on projecting performance to permit a firm to distribute a customized hypothetical investment planning illustration that includes the projected performance of an investment strategy. In part, in the interest of potential harmonization, the MSRB asked whether it should consider a similar proposal. Fidelity, SIFMA, and Wells Fargo commented that the MSRB should include a similar exception in the draft amendments to Rule G-21 and in draft Rule G-40.[81]

The comment period on FINRA's draft amendments to FINRA Rule 2210 closed March 27, 2017, and FINRA is still considering the comments that it received.[82] The Board determined that it would be premature to include provisions to address FINRA's draft amendments to Rule 2210 in the proposed rule change before FINRA determines how to proceed with those draft amendments. The MSRB will continue to monitor the FINRA initiative.

D. Hyperlinks

---

81 See Fidelity letter at 4, SIFMA letter at 7, and Wells Fargo letter at 3. See also 3PM letter at 5 (stating that institutional investors should be permitted to receive materials with projected or targeted returns).

82 FINRA received 21 comment letters in response to Regulatory Notice 17-06, FINRA Requests Comment on Proposed Amendments to Rules Governing Communications with the Public.

The amendments to Rule G-21(e), effective November 18, 2017, clarify that a hyperlink can be used for an investor to obtain more current municipal fund security performance information. Fidelity suggested that the MSRB expand the use of hyperlinks more broadly and in other advertising contexts outside of municipal fund security performance advertisements.[83] The MSRB appreciates Fidelity's suggestion, but at this time, has determined to not expand the use of hyperlinks in other types of advertisements.

E. Coordination between Self-Regulatory Organizations

Fidelity encouraged the MSRB to review existing and upcoming FINRA guidance concerning communications with the public and to engage with FINRA directly during the rulemaking process.[84] The MSRB agrees with this approach and notes that it has directly engaged with FINRA during this particular rulemaking process, and regularly coordinates with FINRA as well as other financial regulators on rulemaking and other matters. As noted in the Request for Comment, the MSRB reviews the rulemaking proposals of FINRA as well as those of other financial regulators.[85]

F. Dealer/Municipal Advisor Jurisdictional Guidance

Commenters suggested that the MSRB provide guidance and/or exemptions from Rule G-21 for dealer/municipal advisors. Specifically, SIFMA suggested that the MSRB amend Rule G-21 to clarify that the activities of dealer/municipal advisors are governed by draft Rule G-40 when those dealer/municipal advisors are engaging in municipal advisor advertising.[86] Lewis

---

83 See Fidelity letter at 3.

84 Id. at 2-3.

85 Request for Comment at 21.

86 SIFMA letter at 8.

Young had a somewhat analogous comment. Lewis Young suggested that the MSRB "eliminate the current provisions related to advertising of Rule G-21 on broker/dealer activities otherwise governed by both G-17 and G-42 and that you not impose a Rule G-40 on non-broker/dealer advisors."[87] Although such clarifications relating to dealer/municipal advisors under Rule G-21 may be beneficial in the future, the MSRB's regulatory scheme relating to municipal advisors is not yet complete. The MSRB believes that its regulation of financial advisory activities (as an element of municipal securities activity) should remain in place at least until a more complete regulatory framework for municipal advisors is in effect.[88] Thus, after careful consideration of commenters' suggestions, the Board determined not to further revise the draft amendments to Rule G-21 to reflect commenters' suggestions.

II. Proposed Rule G-40

The MSRB received five comment letters that focused on draft Rule G-40.[89] The comments concerned (i) the ability of the MSRB to regulate advertising by municipal advisors through other MSRB rules without draft Rule G-40, (ii) the definition of municipal advisory client, (iii) revisions to draft Rule G-40's content standards, (iv) the adoption of the relief that SEC staff provided to investment advisers relating to testimonials in advertisements, (v)

---

87 Lewis Young letter.

88 The MSRB has long regulated the activities of financial advisors. See, e.g., Rule G-23, on activities of financial advisors. Rule G-23 was adopted as part of the Board's fair practice rules to codify basic standards of fair and ethical business conduct for dealers. Rule G-23 does not prescribe normative standards for dealer/municipal advisor conduct. Rather, as a conflicts of interest rule, it prohibits activities that would be in conflict with the ethical duties the dealer owes in its capacity as a financial advisor to its municipal issuer client. This approach to Rule G-23 has remained unchanged.

89 See Acacia, Lewis Young, NAMA, PFM and 3PM letters.

principal pre-approval, and (vi) guidance relating to municipal advisor websites and the use of social media. The comments ranged from strong support for draft Rule G-40 as set forth in the Request for Comment[90] to the view that there is no need for draft Rule G-40 because of other MSRB rules.[91]

A. Ability to Regulate Municipal Advisor Advertising through Other Rules

Seeming to rely on the fiduciary duty requirements imposed on certain municipal advisors as well as the fair dealing requirements imposed on all municipal advisors, Acacia, Lewis Young, and NAMA submitted that the protections offered by Rule G-17 provide sufficient investor protection from misleading statements such that draft Rule G-40 is not necessary.[92] Further, Lewis Young explained that Rule G-42 "imposes a high level of probity and care upon advisors" and that "in cases (rare) in which unsophisticated municipal issuers may be duped or deceived by an unscrupulous municipal advisor's 'advertising' communication, we suggest that Rule G-17 and Rule G-42 provide ample scope for enforcement."[93]

---

90 FSI letter at 3 ("FSI strongly supports further harmonization of regulatory requirements through the adoption of Rule G-40").

91 See Acacia letter at 1; Lewis Young letter; NAMA letter at 1.

92 Acacia letter at 1 ("we agree with other commenters that this rule is unnecessary . . .[t]he core rules of G-17 coupled with G-42 and the fiduciary duty required under Dodd-Frank provides ample regulation to prevent false or misleading statements by municipal advisors"); Lewis Young letter (further suggesting that the MSRB should eliminate the "current provisions related to advertising of Rule G-21 on broker/dealer activities otherwise governed by both Rule G-17 and Rule G-42 and that you [the MSRB] not impose a Rule G-40 on non-broker/dealer advisors"); NAMA letter at 1 ("we respectfully request that the Proposed Rule G-40 be withdrawn as the same results of ensuring falsehood or misleading statements are not used in advertising for MA professional services can already be found in Rule G-17").

93 Lewis Young letter; see Acacia letter at 1.

To rely on Rule G-17 to regulate municipal advisor advertising would create an unlevel playing field. This unlevel playing field would be between municipal advisors (subject to Rule G-17, but not Rule G-21) and dealers (subject to both Rules G-17 and G-21) and among municipal advisors that are not registered as dealers and municipal advisors that are also registered as dealers or investment advisers (subject to Rule G-21 and FINRA Rule 2210 or Advisers Act Rule 206(4)-1, as relevant).[94] Advertisements by dealers and investment advisers are regulated by advertising regulations that are separate from the other regulations to which dealers or investment advisers are subject.

Further, Rule G-42 applies only to non-solicitor municipal advisors; Rule G-42 excludes solicitor municipal advisors from the rule's scope. Lewis Young's comments fail to address how reliance on Rule G-42 would address advertising by solicitor municipal advisors that are not subject to Rule G-42. Moreover, other commenters submitted that having a separate rule to address advertising by municipal advisors would be helpful.[95]

After careful consideration, the MSRB determined to address advertising by municipal advisors through proposed Rule G-40.

Lewis Young also suggested that "an alternative would be a principles based 'truth in advertising' version of G-40 which could be written in one or two sentences. Rule G-21 could be correspondingly simplified."

94 17 CFR 275.206(4)-1. Registered investment advisers, like non-solicitor municipal advisors, are subject to fiduciary standards, and also are subject to advertising rules under the Advisers Act.

95 See, e.g., SIFMA letter at 1 ("[w]e agree that the MSRB should have two rules on public communications, and we believe the rules should be divided based on activity, not by registration category"); and 3PM letter at 8-9 ("[i]n 3PM's opinion, the rules for municipal advisors are already confusing enough given different requirements for solicitor and non-solicitor municipal advisors. Including municipal advisor advertising within the body of G-21 would only complicate the issue further. We believe the municipal advisor rules should remain as Rule G-40, separate from G-21").

B. Definition of Municipal Advisory Client

3PM provided a "technical interpretation of the definition of 'municipal advisory client'" and suggested that the protections that would be provided by draft Rule G-40 may not be broad enough to protect municipal entities and obligated persons when they are solicited on behalf of third-parties by municipal advisors ("solicitor municipal advisors").[96] In particular, 3PM suggested that the definition of municipal advisory client was too narrow, and that the definition should be expanded to include the municipal entity or obligated person that is the subject of the solicitation by a solicitor municipal advisor.[97] The MSRB agrees in substance with the comment and has intended throughout that the protections of draft Rule G-40 would apply to municipal entities and obligated persons under the definition of an advertisement. For clarification, the MSRB has revised the definition of an advertisement to ensure that the definition will be interpreted as intended. Under proposed Rule G-40(a)(i), an advertisement would explicitly include promotional literature distributed to municipal entities or obligated persons by a solicitor municipal advisor on behalf of the solicitor municipal advisor's municipal advisory client.

C. Definition of Advertisement

Rule 15Ba1-1(d)(1)(ii) under the Exchange Act excludes the provision of general information from the type of advice that would require a municipal advisor to register with the SEC.[98] SEC staff, in its Responses to Frequently Asked Questions, provided further information about those exclusions in its answer to "Question 1.1: The General Information Exclusion from

---

96 3PM letter at 2.

97 Id.

98 17 CFR 240.15Ba1-(d)(1)(ii).

Advice versus Recommendations."[99] NAMA and PFM submitted that those general exclusions from the term "advice" that would permit a municipal advisor to not register with the SEC should equally apply as exclusions to the MSRB's draft municipal advisor advertising rule.[100]

The purpose of draft Rule G-40, in part, is to ensure that municipal advisor advertising does not contain any untrue statement of material fact and is not otherwise false or misleading. Regardless of whether certain information rises to the level of advice, that information may be advertising used to market to potential clients, which the MSRB believes should be covered by draft Rule G-40. Further, as noted by FSI, maintaining regulatory consistency between draft Rule

---

99 According to the SEC staff, examples of that general information include:

> (a) information regarding a person's professional qualifications and prior experience (e.g., lists, descriptions, terms, or other information regarding prior experience on completed transactions involving municipal financial products or issuances of municipal securities); (b) general market and financial information (e.g., market statistics regarding issuance activity for municipal securities or current market interest rates or index rates for different types of bonds or categories of credits); (c) information regarding a financial institution's currently-available investments (e.g., the terms, maturities, and interest rates at which the financial institution offers these investments) or price quotes for investments available for purchase or sale in the market that meet criteria specified by a municipal entity or obligated person; (d) factual information describing various types of debt financing structures (e.g., fixed rate debt, variable rate debt, general obligation debt, debt secured by various types of revenues, or insured debt), including a comparison of the general characteristics, risks, advantages, and disadvantages of these debt financing structures; and (e) factual and educational information regarding various government financing programs and incentives (e.g., programs that promote energy conservation and the use of renewable energy).

Registration of Municipal Advisors Frequently Asked Questions, Office of Municipal Securities, U.S. Securities and Exchange Commission, last updated on May 19, 2014, available at https://www.sec.gov/info/municipal/mun-advisors-faqs.shtml.

100 NAMA letter at 2; PFM letter at 2.

G-40 and the draft amendments to Rule G-21 is important. [101] Among other things, FSI noted that regulatory consistency enhances the potential for compliance with draft Rule G-40 because dually regulated entities will comply with consistent standards, and can reduce regulatory arbitrage.[102] After considering commenters' suggestions, the Board determined not to include additional exceptions from the definition of an advertisement in proposed Rule G-40.

D. Draft Rule G-40's Content Standards

i. Content standards, in general

NAMA, PFM and 3PM generally requested that draft Rule G-40 be revised to provide more definitive content standards.[103] In particular, NAMA and PFM stated that the content standards in draft Rule G-40 should reflect a clearer separation between the content standards applicable to product advertisements and the content standards applicable to professional advertisements. NAMA and PFM suggested that this separation was important because the clear majority of municipal advisors only engage in professional services advertising.[104] In addition, PFM stated that Sections (D), (E), and (F) of draft Rule G-40 should not be included in draft Rule G-40 as "these provisions are more directly related to advertisements for products

---

101 FSI letter at 3.

102 Id.

103 See NAMA letter at 3; PFM letter at 3; and 3PM letter at 4-5.

104 See NAMA letter at 3; PFM letter at 3 ("we believe that the MSRB should provide a clearer demarcation between the content standards for advertising products within the regulatory conventions set for broker-dealers . . . and the standards for advertising municipal advisory services more akin to regulatory conventions set for registered investment advisors [sic] who are also subject to a fiduciary standard (generally 'professional advertising') because our experience clearly shows that the vast majority of municipal advisors predominately engage in the latter type of advertising").

distributed by brokers, dealers, or municipal securities dealers, and should not be construed as necessary to administer to the types of services that municipal advisors may provide."[105]

The Board appreciates and considered commenters' suggestions. With regard to the suggestions about refining draft Rule G-40's content standards, the MSRB believes that those content standards are clear as drafted. Moreover, as the MSRB's regulatory regime relating to municipal advisors is not yet complete, the MSRB believes that, at this point, having different content standards based on the type of advertisement by the municipal advisor would not be warranted.[106] Further, having content standards in proposed Rule G-40 that are similar to those in proposed amended Rule G-21 may enhance the ability of dually registered dealers and municipal advisors to comply with MSRB rules.[107] After careful consideration, the Board determined not to revise draft Rule G-40 in response to commenters' suggestions.

ii. Content standard about non-security product advertisements

The MSRB sought comment about whether the MSRB should provide guidance about municipal advisors that market non-security products, such as software programs, to their municipal advisory clients. Commenters generally responded that such guidance may be helpful, but generally either did not provide further information or cautioned that there should be a nexus

---

105 PFM letter at 4.

106 The MSRB generally believes that regulation of financial advisory activity (as an element of municipal securities activity) should remain in place until a more complete regulatory framework for municipal advisory activity is in effect. Also, there may be some areas of financial advisory activity that are not clearly within the scope of SEC-defined municipal advisory activity. See supra note 88.

107 The MSRB notes that approximately a quarter of municipal advisory firms are also registered as broker-dealers.

between the product advertisement and municipal advisory activity for draft Rule G-40 to apply.[108]

The MSRB agrees that there should be a nexus between the product advertisement and the municipal advisory activity for proposed Rule G-40 to apply. The MSRB believes that when a municipal advisor publishes an advertisement about its municipal advisory services and that advertisement also markets a non-municipal security product that is related to the municipal advisory services, the municipal advisor should consider whether the entire advertisement and not just the portion of the advertisement addressing municipal advisory services, is consistent with all MSRB rules, including Rule G-17, proposed Rule G-40, Rule G-42 and Rule G-8, on books and records to be made by brokers, dealers, municipal securities dealers and municipal advisors.

E. Testimonials

---

108 See NAMA letter at 2 (submitting that "[i]f the MSRB has identified any meaningful subset of MAs that advertise products, then a separate section should apply solely to product advertisements"); SIFMA letter at 8-9 (submitting that the MSRB should address content standards for municipal advisor product advertisements only to the extent such advertisements relate to municipal advisory activities such as the sale of software by a municipal advisor to assist its clients with municipal securities transactions); 3PM letter at 10 ("[w]e believe that guidance regarding advertisements of non-security products should only be put in place for firms who are also conducting a security business and who have 'municipal advisory clients' that they plan to send non-security advertisements to. Firms who have "municipal advisory clients [sic] that they are also soliciting on behalf of non-security products should be required to advise the buyers in the municipal entity of the arrangements that already exist with a municipal advisor"); but see Acacia letter at 2 ("[t]he MSRB would be over reaching if it attempted to regulate the use of non-security products. While there may be a subset of advisors who engage in this activity, we can see no nexus for the MSRB to become involved in non-security related regulations"). In response to Acacia's concerns, the MSRB notes that it is not suggesting that the MSRB regulate the use of non-security products by a municipal advisor. Rather, the MSRB was seeking comment about municipal advisors that may market non-security products along with their municipal advisory services.

BDA, NAMA, PFM, SIFMA, 3PM and Wells Fargo commented on draft Rule G-40(iv)(G) that would prohibit a municipal advisor from using testimonials in its advertisements.[109] Their comments ranged from the view that the MSRB's prohibition on the use of testimonials in municipal advisor advertisements is not warranted[110] to the view that, while the prohibition on the use of testimonials may be warranted, the MSRB should consider either the narrowing of that prohibition[111] or the potential costs that would be associated with that prohibition.[112]

Specifically, BDA stated that the "MSRB's prohibition on testimonials in . . . Rule G-40 is [not] warranted."[113] SIFMA, while appearing to agree with BDA's comment, also suggested that draft Rule G-40 be harmonized with FINRA Rule 2210(d)(6) which permits testimonials in advertisements by dealers, subject to certain conditions (see discussion above under Rule G-21 comments).

NAMA, PFM and Wells Fargo stated that, if draft Rule G-40 were to prohibit testimonials by municipal advisors, the MSRB should provide relief from that prohibition. Commenters suggested that the MSRB narrow that prohibition either by adopting the SEC staff's definition of a testimonial that is applicable to investment advisers,[114] by adopting certain SEC

---

109 BDA letter; NAMA letter at 3; PFM letter at 4-5; SIFMA letter at 6-7; 3PM letter at 6; and Wells Fargo letter at 3.

110 See, e.g., BDA letter.

111 See, e.g., PFM letter at 4-5.

112 3PM letter at 6.

113 BDA letter.

114 See NAMA letter at 3; PFM letter at 4-5.

staff no-action guidance relating to the use of testimonials by investment advisers,[115] or by completely adopting the substantial SEC staff guidance that relates to use of testimonials by investment advisers[116] that was set forth in an SEC Division of Investment Management guidance update.[117]

The Board considered commenters' suggestions, and recognizes the interpretive guidance provided by the SEC staff relating to testimonials.[118] Nevertheless, as discussed in the Request for Comment, the MSRB believes that a testimonial presents significant issues, including the ability to be misleading. Also noted in the Request for Comment, the MSRB recognizes that other comparable financial regulations, such as Rule 206(4)-1 under the Advisers Act, also prohibit advisers from including testimonials in advertisements (investment advisers, like non-solicitor municipal advisors, are subject to fiduciary standards).

Further, although the MSRB appreciates commenters' suggestions, the guidance related to the testimonial ban under the Advisers Act rule is SEC staff guidance, not guidance issued by the Commission.[119] The MSRB, however, will monitor developments relating to the testimonial ban under Rule 206(4)-1. In addition, as noted under "Self-Regulatory Organization's Statement on Burden on Competition" above, while the MSRB acknowledges that there will be certain

---

115 See PFM letter at 4-5.

116 See Wells Fargo letter at 3.

117 IM Guidance Update No. 2014-04 (March 2014).

118 See supra note 26.

119 The MSRB notes that there are additional challenges if the MSRB were to adopt SEC staff guidance. Those challenges include monitoring SEC staff guidance and ensuring municipal advisors that are not also registered as investment advisers have notice of any changes to the SEC staff guidance. See supra note 26.

increased costs for municipal advisors relating to compliance and supervision, the MSRB believes the benefits accrued to municipal entities and obligated persons from more accurate and objective information should exceed the costs over time. After careful consideration, the Board determined not to revise draft Rule G-40 to reflect commenters' suggestions.

F. Principal Pre-Approval

BDA argued that principal pre-approval was not needed or could be limited to certain types of advertisements.[120] BDA stated that clients of municipal advisors are institutions, and that as institutions, they do not need many of the "mechanistic protections applicable to dealer relationships with retail investors."[121] BDA submitted that it "does not believe that a principal needs to approve every advertisement."[122] BDA, however, did not discuss the types of advertisements that a principal would need to approve.

An important part of the MSRB's mission is to protect state and local governments and other municipal entities. It is, in part, because of that mission that the MSRB developed draft Rule G-40. The MSRB has long believed that principal pre-approval of advertisements is an essential part of an effective supervisory process. See discussion under "Harmonization with FINRA Rule 2210" above. After careful consideration, the MSRB determined not to revise draft Rule G-40 in response to BDA's suggestion.

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

Commenters requested more specific guidance about the content posted on a municipal advisor's website and about the use of social media by a municipal advisor. In particular, Acacia,

---

120 BDA letter.

121 Id.

122 Id.

NAMA, and PFM requested guidance about whether material posted on a municipal advisor's website would constitute an advertisement under proposed Rule G-40.[123] In response, the MSRB notes that proposed Rule G-40(a)(i) defines an advertisement, in part, as any "material . . . published or used in any electronic or other public media . . . ." As such, proposed Rule G-40 would apply to any material posted on a municipal advisor's website or more generally, on any website, if that material comes within the definition of an advertisement as set forth in proposed Rule G-40(a)(i).

In addition, NAMA and PFM requested guidance on the use of social media.[124] The MSRB appreciates commenters' requests, and currently is studying whether to provide such guidance. As part of that consideration, the MSRB is reviewing the guidance concerning the use of social media provided by other financial regulators.[125]

---

123 Acacia letter; NAMA letter at 3; PFM letter at 5; but see SIFMA letter at 6 ("[t]he amendments to Rule G-21 and draft Rule G-40(c) apply to advertisements, regardless of whether electronic or other public media is used with those advertisements. As such, we feel no additional guidance by the MSRB is needed regarding the use of social media by a dealer or municipal advisor at this time").

124 NAMA letter at 3; PFM letter at 5; but see Fidelity letter at 4 ("MSRB Rule G-21 applies to advertisements, regardless of whether electronic or other public media, including social media, is used with those advertisements") and SIFMA letter at 6 ("[t]he amendments to Rule G-21 and draft Rule G-40(c) apply to advertisements, regardless of whether electronic or other public media is used with those advertisements. As such, we feel no additional guidance by the MSRB is needed regarding the use of social media by a dealer or municipal advisor at this time").

125 See Fidelity letter at 5 ("[o]n the topic of social media, FINRA has provided guidance on the application of its rules governing communications with the public to social media sites . . . . For example, we understand that FINRA is currently working on a new social media Q&A . . . .); SIFMA letter at 6 ("[w]e believe that FINRA is currently working on guidance regarding social media. In line with our earlier comments, we feel the MSRB should ascribe to this guidance or clearly articulate why it is not appropriate in this market"). The MSRB believes that SIFMA's comments relate to FINRA Regulatory Notice 17-18, Guidance on Social Networking Websites and Business Communications (Apr. 2017).

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 e-mail to rule-comments@sec.gov. Please include File Number SR-MSRB-2018-01 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-2018-01. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all

comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 am and 3:00 pm. Copies of the filing also will be available for inspection and copying at the principal office of the MSRB. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MSRB-2018-01 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, pursuant to delegated authority.[126]

Secretary

[126] 17 CFR 200.30-3(a)(12).

MSRB
Municipal Securities Rulemaking Board

Regulatory Notice

2017-04

Publication Date
February 16, 2017

Stakeholders
Municipal Securities Dealers, Municipal Advisors

Notice Type
Request for Comment

Comment Deadline
March 24, 2017

Category
Fair Practice

Affected Rules
Rule G-21

Request for Comment on Draft Amendments to MSRB Rule G-21, on Advertising, and on Draft Rule G-40, on Advertising by Municipal Advisors

Overview

The Municipal Securities Rulemaking Board (MSRB) is requesting comment on draft amendments to MSRB Rule G-21, on advertising, and on new draft MSRB Rule G-40, on advertising by municipal advisors.[1] The draft amendments to Rule G-21, applicable to brokers, dealers and municipal securities dealers (collectively, "dealers") would update as well as harmonize Rule G-21 with certain provisions of the advertising rules of other financial regulators. Further, consistent with the MSRB's regulation of dealers under Rule G-21, draft Rule G-40 would address advertising by municipal advisors.

Comments should be submitted no later than March 24, 2017, and may be submitted in electronic or paper form. Comments may be submitted electronically by clicking here. Comments submitted in paper form should be sent to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board, 1300 I Street, NW, Suite 1000, Washington, DC 20005. All comments will be available for public inspection on the MSRB's website.[2]

[1] At this juncture, the MSRB is requesting comment on the draft amendments to Rule G-21 and on draft Rule G-40. The MSRB may or may not determine to proceed beyond requesting comment. *See* discussion on Draft Rule G-40 below. Further, as with any potential rulemaking, the MSRB may revise the potential rulemaking that it may file with the Securities and Exchange Commission (SEC) from the draft amendments to Rule G-21 and draft Rule G-40 set forth in this request for comment. The MSRB may make those revisions in response to comments from market participants or otherwise.

[2] Comments generally are posted on the MSRB's website without change. For example, personal identifying information such as name, address, telephone number, or email address will not be edited from submissions. Therefore, commenters should only submit information that they wish to make available publicly.

Questions about this notice should be directed to Pamela K. Ellis, Associate General Counsel, or Meghan Burns, Economic Researcher, at 202-838-1500.

Background

Draft Amendments to Rule G-21

Rule G-21 is a core fair practice rule of the MSRB Rule G-21 applies to all advertisements by dealers, as defined by Rule G-21(a)(i).[3] Rule G-21 became effective in 1978, and has been amended several times since then as the MSRB has enhanced its rule book.

More recently, in 2012, the MSRB issued a request for comment on its entire rule book.[4] In response, two market participants requested that the MSRB harmonize its advertising rules with FINRA Rule 2210, on communications with the public.[5] Market participants echoed those requests more generally in their latest responses to a request for comment on the MSRB's strategic priorities.[6] Further, and apart from the MSRB's requests for comment, the

---

[3] An advertisement, as defined by Rule G-21:

> means any material (other than listings of offerings) published or used in any electronic or other public media, or any written or electronic promotional literature distributed or made generally available to customers or the public, including any notice, circular, report, market letter, form letter, telemarketing script, seminar text, press release concerning the products or services of the broker, dealer or municipal securities dealer, or reprint, or any excerpt of the foregoing or of a published article.

As such, Rule G-21 not only applies to print advertisements, but also applies to an advertisement "published or used in any electronic or other public media," such as a social media post.

[4] MSRB Notice 2012-63, Request for Comment on MSRB Rules and Interpretive Guidance (Dec. 18, 2012).

[5] *See* Letter from David L. Cohen, Managing Director, Associate General Counsel, Securities Industry and Financial Markets Association, dated February 19, 2013, to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board; Letter from Gerald K. Mayfield, Senior Counsel, Wells Fargo & Company Law Department, dated February 19, 2013, to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board.

[6] MSRB Notice 2016-25, MSRB Seeks Input on Strategic Priorities (Oct. 12, 2016); *see* Letter from Michael Decker, Managing Director, Securities Industry and Financial Markets Association, dated November 11, 2016, to Ronald W. Smith, Secretary, Municipal Securities Rulemaking Board; Letter from Robert J. McCarthy, Director of Regulatory Policy, Wells

MSRB solicited input about possible amendments to Rule G-21 from market participants, including industry groups that represent dealers.

After considering the important suggestions made by market participants, the MSRB prepared draft amendments to Rule G-21. These draft amendments, among other things:

- Enhance the MSRB's fair-dealing provisions by harmonizing Rule G-21 with the advertising rules of other financial regulators;
- Update Rule G-21(e), on municipal fund security product advertisements; and
- Harmonize Rule G-21(a)(ii), the definition of "form letter," with FINRA Rule 2210's definition of "correspondence."[7]

Concurrent with its efforts to enhance, update and harmonize Rule G-21, the MSRB prepared new draft Rule G-40 to address advertising by municipal advisors.

Draft Rule G-40

In August 2011, in the exercise of its new rulemaking authority over municipal advisors,[8] the MSRB solicited public comment on a proposal to amend Rule G-21 and MSRB Rule G-9, on preservation of records, and to issue an interpretive notice under MSRB Rule G-17, on conduct of municipal securities activities, to address advertising by municipal advisors.[9] However, the MSRB did not proceed beyond requesting comment. In anticipation of the SEC's adoption of its rules relating to municipal advisor registration, the MSRB determined to withdraw or otherwise re-examine and revisit its then pending rulemaking proposals, including the 2011 request for comment.

Fargo Advisors, LLC, dated November 11, 2016, to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board.

[7] The draft amendments also include several technical changes, such as substituting FINRA for NASD.

[8] Pub. Law No. 111-203, 124 Stat. 1376 (2010) (the "Dodd-Frank Act").

[9] MSRB Notice 2011-41 (Aug. 10, 2011) ("2011 request for comment"). The draft amendments, among other things, would have extended Rule G-21 and its related recordkeeping requirements to municipal advisors. Further, the draft interpretive notice would have reminded dealers and municipal advisors that Rule G-17's fair practice requirements apply to all communications (written and oral), including the content of advertisements, sales or marketing communications and correspondence.

On September 20, 2013, the SEC adopted its final rules for municipal advisor registration that the SEC had proposed in 2011 (the "final rules"). Among other things, the final rules interpreted the statutory definition of the term "municipal advisor" under the Securities Exchange Act of 1934 (the "Exchange Act") and the statutory exclusions from that definition.[10]

Since September 2013, the MSRB has re-examined and adopted revised proposals addressing many of the issues that were the subject of its previously withdrawn municipal advisor rulemaking proposals. With the benefit of the final rules and of the MSRB's development of its core regulatory framework for municipal advisors, the MSRB has determined to revisit its approach to advertising by municipal advisors.

To inform its approach, the MSRB solicited general input from market participants about the nature of municipal advisor advertising and about how municipal advisors use advertising. That outreach included industry groups that represent non-solicitor and/or solicitor municipal advisors. As a result of that outreach and the valuable input received from market participants, the MSRB developed draft Rule G-40.

Draft Rule G-40 applies to advertising by non-solicitor and solicitor municipal advisors. Similar to Rule G-21, draft Rule G-40:

- Provides general provisions that define the terms "advertisement" and "form letter," and sets forth the general standards and content standards for advertisements;
- Provides the definition of professional advertisements, and defines the standard for those advertisements; and
- Requires the approval by a principal, in writing, before the first use of an advertisement.

Also, similar to Rule G-21, draft Rule G-40 applies to all advertisements by a municipal advisor, as defined in draft Rule G-40(a)(i).[11] However, unlike Rule G-21, draft Rule G-40 contains certain substituted terms that are more relevant to municipal advisors, and draft Rule G-40, at this request for comment juncture, omits the three provisions in Rule G-21 (Rule G-21(c)-(e)) that concern product advertisements.

---

[10] Rule 15Ba1-1(d), 17 CFR 240.15Ba1-1(d), under the Exchange Act.

[11] *See supra* note 3.

Draft Amendments to Rule G-21

Enhancement of Fair Dealing Provisions and Harmonization with the Advertising Rules of Other Financial Regulators

To enhance Rule G-21's fair dealing requirements, as well as to harmonize Rule G-21 with the advertising rules of other financial regulators, the draft amendments to Rule G-21 include content standards and amendments to Rule G-21's general standards for advertisements.

(i) *Content standards*

The draft amendments to Rule G-21 add content standards in subparagraph (a)(iii) to make explicit many of the MSRB's fair dealing obligations that follow from the MSRB's requirements set forth in Rule G-21 and Rule G-17, on conduct of municipal securities and municipal advisory activities, and the interpretive guidance the MSRB has provided under those rules, and to specifically address them to advertising. The draft amendments enhance Rule G-21's fair dealing provisions by, among other things, requiring that (i) an advertisement be fair and balanced and provide a sound basis for evaluating the municipal security, (ii) an advertisement not contain any false, exaggerated, unwarranted, promissory or misleading statement or claim, (iii) a dealer limit the types of information placed in footnotes, (iv) an advertisement provide a balanced treatment of the benefits and risks associated with a municipal security, (v) a dealer consider the audience to which the advertisement will be directed and that the advertisement provide details and explanations appropriate to that audience, and (vi) an advertisement not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast.[12] By so doing, draft Rule G-21(a)(iii) harmonizes Rule G-21 with certain of FINRA Rule 2210's content standards for advertisements.[13]

---

[12] However, draft Rule G-21(a)(iii)(F) does not prohibit:

> (1) A hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of an investment; and
>
> (2) An investment analysis tool, or a written report produced by an investment analysis tool.

[13] *See* FINRA Rule 2210(d)(1).

Further, draft Rule G-21(a)(iii) prohibits dealers from using testimonials in advertisements. The MSRB believes, at this juncture, that the use of a testimonial by a dealer presents significant issues – including the potential for the testimonial to mislead investors who may not be fully aware of the facts and circumstances that led to the testimonial. An important part of the MSRB's mission is to protect investors. Many investors in municipal securities are senior investors,[14] who may not appreciate the limits of a testimonial, even if certain limits are disclosed. Consistent with the MSRB's mission to protect investors, including senior investors, draft Rule G-21(a)(iii)(G) prohibits the use of testimonials by dealers.

Draft Rule G-21(a)(iii) also expands upon the guidance provided by MSRB Rule A-12, on registration. Rule A-12(e) permits a dealer to state that it is MSRB registered in its advertising, including on its website. Draft Rule G-21(a)(iii)(H) continues to permit a dealer to state that it is MSRB registered. However, draft Rule G-21(a)(iii)(H) provides that a dealer shall only state in an advertisement that it is MSRB registered as long as, among other things, the advertisement complies with the applicable standards of all other MSRB rules and neither states nor implies that the MSRB endorses, indemnifies, or guarantees the dealer's business practices, selling methods, the type of security offered, or the security offered. Draft Rule G-21(a)(iii)(H) harmonizes Rule G-21, as applicable, with FINRA Rule 2210(e), on analogous limitations on the use of FINRA's name and any other corporate name owned by FINRA.

(ii) *General standards*

The draft amendments to subparagraphs (a)(iv), (b)(ii), and (c)(ii) of Rule G-21 harmonize Rule G-21's general standard for advertisements, standard for professional advertisements, and standard for product advertisements (collectively, the "general standards") with the content standards of FINRA Rule 2210(d). Currently, Rule G-21's general standards prohibit a dealer, in part, from publishing or disseminating material that is "materially false or misleading." The draft amendments replace the phrase "materially false or misleading" with "any untrue statement of material fact" as well as add "or is otherwise false or misleading." The MSRB believes that this harmonization with FINRA Rule 2210(d) is consistent with Rule G-21's current general standards and would ensure consistent regulation between similar regulated entities.

[14] *See* Daniel Bergstresser and Randolph Cohen, Changing Patterns in Household Ownership of Municipal Debt: Evidence from the 1989-2013 Surveys of Consumer Finances (July 2015) (finding that, in part, from 1989-2013, the average age of a municipal bond investor was 61, and 85 year-olds held a significant portion of all outstanding municipal bonds).

Update Rule G-21(e), on Municipal Fund Security Product Advertisements

The MSRB last amended Rule G-21, effective in 2007, to address municipal fund security product advertisements. Many of the provisions in Rule G-21(e), municipal fund security product advertisements, are based, in part, on the SEC's advertising rules for registered investment companies, such as mutual funds. Since 2007, the SEC has amended those advertising rules.[15] The draft amendments to Rule G-21(e) incorporate certain of the provisions included in the SEC's amendments to its registered investment company advertising rules. In particular, the draft amendments to Rule G-21(e) replace the money market mutual fund disclosure required by current Rule G-21 with a modified version of the money market mutual fund disclosure currently required by SEC rules.

In addition, Rule G-21(e)(i)(A)(2) requires that certain advertisements of municipal fund securities contain additional disclosures. The draft amendments to Rule G-21 enhance those disclosures as they relate to 529 college savings plans in subparagraph (b) by expanding the disclosure about the other state benefits that are available only for investments in such state's qualified tuition program.

Further, Rule G-21 currently requires that more current performance data be available through a toll-free telephone number or through a website. The draft amendments to Rule G-21(e) clarify that the advertisement may contain a hyperlink to the website that contains the updated performance data.

Draft Supplementary Material .01 defines the term investment option as used in Rule G-21(e). Investment option has the same meaning as the term is defined in Rule G-45(d)(iv).

Harmonize the Definition of Form Letter with FINRA Rule 2210 Definition of Correspondence

Currently, Rule G-21 defines a form letter, in part, as a written letter distributed to 25 or more persons. FINRA Rule 2210(a)(2)'s definition of

[15] For example, since 2007, the SEC has twice amended Rule 482 under the Securities Act of 1933. *See* Securities Act Release No. 9616 (Jul. 23, 2014), 79 FR 47736 (Aug. 14, 2014) (in part, amending Rule 482 to address money market fund reform); Securities Act Release No. 8998 (Jan. 13, 2009), 74 FR 4546 (Jan. 26, 2009) (in part, revising Rule 482 to clarify that the rule does not apply to a summary prospectus or to a communication that is not deemed a prospectus under Section 2(a)(10) of the Securities Act of 1933).

correspondence, however, defines correspondence, in part, as written communications distributed to 25 or fewer persons. The MSRB understands that the one-person difference between Rule G-21 and FINRA Rule 2210 has created confusion and compliance challenges for dealers. To respond to this concern, the draft amendments to Rule G-21 eliminate that one-person difference. Under the draft amendments to Rule G-21, a form letter, in part, is defined as a written letter distributed to more than 25 persons.[16]

Draft Rule G-40

Draft Rule G-40, similar to Rule G-21, sets forth general provisions, addresses professional advertisements and requires principal approval for advertisements by municipal advisors. However, as discussed below, draft Rule G-40 does not address product advertisements, as that term is defined in Rule G-21.

General Provisions

Draft Rule G-40(a) defines the terms advertisement, form letter and municipal advisory client, and provides content and general standards for advertisements by a non-solicitor or a solicitor municipal advisor.

(i) *Definitions*

Advertisement. The term "advertisement" in draft Rule G-40(a)(i) parallels the term "advertisement" in the draft amendments to Rule G-21(a)(i), but is tailored for municipal advisors. An advertisement refers, in part, to any promotional literature distributed or made generally available to a "municipal advisory client" (discussed below) by a municipal advisor. In addition, similar to the draft amendments to Rule G-21(a)(i), Rule G-40(a)(i) excludes certain types of documents from the definition of advertisement. Those documents are preliminary official statements, official statements, preliminary prospectuses, summary prospectuses or registration statements. Nonetheless, as with Rule G-21, an abstract or summary of those documents or other such similar documents prepared by the municipal advisor is considered an advertisement.

For example, a municipal advisor may assist with the preparation of an official statement. An official statement is excluded from the definition of an advertisement. As such, under draft Rule G-40(a)(i), the municipal advisor that assists with the preparation of an official statement generally would not

[16] Written letters or electronic mail messages distributed to 25 or fewer persons within any period of 90 consecutive days may be subject to the fundamental fair dealing obligations of Rule G-17.

be assisting with an advertisement as the municipal advisor's work on the official statement generally would not be subject to the requirements of draft Rule G-40.

Form letter. The term "form letter" is identical to the definition of that term set forth in the draft amendments to Rule G-21(a)(ii). A form letter means any written letter or electronic mail message distributed to more than 25 persons within any period of 90 consecutive days.[17]

For example, a municipal advisor may respond to a request for proposals or qualifications from a municipal entity or obligated person for services in connection with a municipal financial product or the issuance of municipal securities. That response, however, most likely, would not be an advertisement under draft Rule G-40. The response to a request for proposals or qualifications, most likely, would not be made generally available to municipal advisory clients or to the public. More likely, the response for proposals or qualifications would be made to one person or to a discreet number of persons that are no more than 25 persons so that the response would not be a form letter as defined by draft Rule G-40(a)(ii).

Municipal advisory client. Draft Rule G-40(a)(iii), unlike Rule G-21, includes the definition of the term "municipal advisory client." The definition of municipal advisory client is identical to the definition of that term as set forth in the recent amendments to Rule G-8, effective October 13, 2017, to address municipal advisory client complaint recordkeeping.[18] The definition of municipal advisory client accounts for differences in the activities of non-solicitor and solicitor municipal advisors.[19]

(ii) *Content standards*

Draft Rule G-40(a)(iv) sets forth content standards for advertisements. Those content standards are substantially similar in all material respects to the content standards set forth in Rule G-21 and the draft amendments thereto. Nonetheless, draft Rule G-40 replaces certain terms used in the draft

[17] *See id.*

[18] Exchange Act Release No. 79801 (Jan. 13, 2017), 82 FR 7898 (Jan. 23, 2017). *See* MSRB Notice 2017-03, SEC Approves Extension of MSRB's Customer Complaint and Related Recordkeeping Rules to Municipal Advisors and the Modernization of Those Rules (Jan. 18, 2017).

[19] Draft Rule G-40(a)(iv)'s content standards also include terms to address the activities of solicitor municipal advisors.

amendments to Rule G-21 with terms more applicable to municipal advisors. The MSRB believes that incorporating content standards for advertisements into draft Rule G-40 will ensure consistent regulation between regulated entities in the municipal market, as well as to level the playing field between dealer municipal advisors and non-dealer municipal advisors.

Draft Rule G-40 prohibits a municipal advisor from using a testimonial in an advertisement. As discussed above with respect to the draft amendments to Rule G-21, the MSRB believes that a testimonial presents significant issues, including the ability to mislead an investor. The Board notes that in adopting Rule 206(4)-1 under the Investment Advisers Act of 1940, as amended (the "Advisers Act"), the rule that applies to advertisements by registered investment advisers, the SEC found that the use of testimonials in advertisements by an investment adviser was misleading.[20] Thus, Rule 206(4)-1 provides that the use of a testimonial by an investment adviser would constitute a fraudulent, deceptive, or manipulative act, practice, or course of action. To ensure consistent regulation between similar regulated entities, as well as to help ensure a level playing field between municipal advisors/investment advisers and other municipal advisors, draft Rule G-40 prohibits the use of testimonials by a municipal advisor.

(iii) *General standard for advertisements*

Draft Rule G-40(a)(v) sets forth a general standard that a municipal advisor must follow for advertisements. That standard requires, in part, that a municipal advisor not publish or disseminate any advertisement relating to municipal securities or municipal financial products that the municipal advisor knows or has reason to know contains any untrue statement of material fact or is otherwise false or misleading. The draft rule, is similar to the draft amendments to Rule G-21(a)(iv) in all material respects, except draft Rule G-40 substitutes "municipal advisor" for the term "dealer" and, consistent with Section 15B(e)(4) of the Exchange Act, applies to municipal financial products in addition to municipal securities.

[20] Advisers Act Rule 206(4)-1, 17 CFR 275.206(4)-1, provides, in part, that it would be a fraudulent, deceptive, or manipulative act or course of business for an investment adviser to publish, circulate, or distribute an advertisement that refers to any testimonial concerning the investment adviser. *See* Advisers Act Release No. 121 (Nov. 2, 1961), 26 FR 10548, 10549 (Nov. 9, 1961) (prohibiting testimonials of any kind and finding that "such advertisements are misleading; by their very nature they emphasize the comments and activities favorable to the investment adviser and ignore those which are unfavorable. This is true even when the testimonials are unsolicited and are printed in full.").

Professional Advertisements

Draft Rule G-40(b) defines the term "professional advertisement" and provides the standard for such advertisements. A professional advertisement, in part, is an advertisement concerning the services with respect to the municipal advisory activities of the municipal advisor. Draft Rule G-40(b) provides, in part, that a municipal advisor shall not publish or disseminate any professional advertisement that contains any untrue statement of material fact or is otherwise false or misleading.

Draft Rule G-40(b) is substantially similar in all material respects to the draft amendments to Rule G-21(b), and retains the long-standing strict liability standard for professional advertisements set forth in Rule G-21.[21] The MSRB continues to believe that such standard is appropriate for a professional advertisement, including for municipal advisors, because the advertisement relates by definition to the firm's "facilities, services or skills."

Principal Approval

Draft Rule G-40(c) requires that each advertisement that is subject to draft Rule G-40 be approved in writing by a municipal advisor principal before its first use.[22] Draft Rule G-40(c) also requires that the municipal advisor keep a record of all such advertisements. Draft Rule G-40(c) is similar in all material respects to Rule G-21(f). The MSRB anticipates that the supervisory and compliance procedures required by Rule G-44, on supervisory and compliance obligations of municipal advisors, will address draft Rule G-40(c).

Product Advertisements

Draft Rule G-40 omits the provisions set forth in Rule G-21 regarding product advertisements, new issue product advertisements, and municipal fund security product advertisements. The MSRB believes, at this juncture, that municipal advisors most likely do not prepare such advertisements.[23]

---

[21] Notice of Filing of Fair Practice Rules, [1977-1987 Transfer Binder] Municipal Securities Rulemaking Board Manual (CCH) ¶10,030, at 10,376 (Sept. 20, 1977).

[22] MSRB Rule G-3(e)(i), on professional qualifications, defines a municipal advisor principal as:

> a natural person associated with a municipal advisor who is qualified as a municipal advisor representative and is directly engaged in the management, direction or supervision of the municipal advisory activities of the municipal advisor and its associated persons.

[23] The MSRB notes that the Guide to Broker-Dealer Registration, Division of Trading and Markets, U.S. Securities and Exchange Commission (Apr. 2008) available at

Nonetheless, as set forth below, the MSRB is seeking public comment from municipal advisors about their role with regard to product advertisements.

Economic Analysis

1. **The need for the draft rule and how the draft rule will meet that need**

Draft Amendments to Rule G-21

Rule G-21 applies to all advertisements by dealers, as defined by Rule G-21(a)(i). The draft amendments to Rule G-21 harmonize certain of the MSRB's advertising standards with those of other regulators, namely FINRA, to eliminate compliance burdens and costs on dealers, as well as unnecessary confusion for those dealers. The harmonization is also intended to benefit retail and institutional investors, where transparency, consistency, and ease of comparison of different financial products would be highly valued.

In addition, the draft amendments update the disclosure required in particular municipal fund security advertisements, such as 529 college savings plan advertisements, to harmonize that disclosure with disclosure required by the recent amendments made by the SEC to certain of its advertising rules.

Draft Rule G-40

By subjecting municipal advisors to regulation, Congress contemplated them being regulated in comparable fashion to other entities and persons in the financial services sector. The Advisers Act gives the SEC authority to regulate advertising by registered investment advisors.[24] FINRA has standards for communications with the public by broker-dealers.[25] The CFTC also has

---

https://www.sec.gov/divisions/marketreg/bdguide.htm provides that an individual and business may need to register as a broker if those persons "market or effect transactions in insurance products that are securities, such as variable annuities, or other investment products that are securities."

[24] Investment adviser advertising, including performance advertising, is principally regulated at the federal level under the general antifraud provision of the Advisers Act – Section 206 – and Rule 206(4)-1 thereunder.

[25] See FINRA Rule 2210 on advertising regulation.

advertising standards for commodity trading advisors (CTAs).[26] Prior to the enactment of the Dodd-Frank Act, municipal advisors were largely unregulated as to their municipal advisory activities.[27] The Dodd-Frank Act amended the Exchange Act, in part, to establish a federal regulatory regime for municipal advisors and that grants the MSRB certain regulatory authority over municipal advisors. In addition, Congress contemplated comparable regulation designed to prevent acts, practices, or courses of business by municipal advisors that are inconsistent with accepted standards for regulating other entities or persons in the financial services sector. Therefore, advertising standards for municipal advisors are needed to ensure consistency in application of advertising standards in the financial services sector.

Relatedly, the need for draft Rule G-40 also arises from the fact that investment advisers, some of which are also municipal advisors, are subject to advertising standards under the SEC rules. In the absence of an advertising rule applicable to all municipal advisors, some municipal advisors (that are also investment advisers) would be at a competitive disadvantage as compared to municipal advisors who are not also acting as investment advisers. Presently, dealer-municipal advisors experience a similar disadvantage. Thus, draft Rule G-40 applies to all advertisements by a municipal advisor, as defined in draft Rule G-40(a)(i).

2. Relevant baselines against which the likely economic impact of elements of the draft amendments to Rule G-21 and draft Rule G-40 can be measured

In considering the economic consequences of implementing the draft amendments to Rule G-21 and draft Rule G-40, the MSRB has defined and analyzed several baselines to serve as points of reference. Given that the request for comment contains different elements, the MSRB has considered a separate baseline for the different elements. The purpose of the baselines is to compare the expected state with the proposal in effect to the baseline state prior to the rule and amendments taking effect. The economic impact

[26] CFTC Rule 4.41 prohibits CTAs from advertising in a manner that employs any fraudulent device or involves any transaction or course of business that operates as a fraud or deceit upon any existing or prospective pool participant or client. Rule 4.41 expressly applies to "any publication, distribution or broadcast of any report, letter, circular, memorandum, publication, writing, advertisement or other literature or advice, including the texts of standardized oral presentations and of radio, television, seminar or similar mass media presentations."

[27] Only certain MSRB rules applied to a subset of municipal advisors consisting of dealers acting as financial advisors in connection with new issues of municipal securities.

of the draft amendments or draft rule is the difference between these two states.

Baseline for Amendments to Rule G-21
For the draft amendments to Rule G-21, the relevant baseline is the existing Rule G-21, which sets out standards of advertising conduct and content for dealers. The costs and benefits of the draft amendments to Rule G-21 for dealers are considered against this baseline.

Baseline for Draft Rule G-40
The MSRB considers a relevant baseline for the advertising standards set out by draft Rule G-40 for municipal advisors to be Rule G-17. That rule, as amended in 2010, requires municipal advisors to deal fairly with all persons and not engage in any deceptive, dishonest, or unfair practice. Draft Rule G-40 reiterates that the obligations of a municipal advisor for fair dealing extend to advertising conduct and content.

A subset of municipal advisors that are also dealers are subject to existing Rule G-21 which establishes advertising standards for dealers. For this group, the current version of Rule G-21 serves as a baseline for advertising standards to the extent that their presently regulated dealer activities are also now defined as municipal advisory activities. This baseline could change if, as expected, Rule G-21 is amended.

Another baseline for the standards under draft Rule G-40 is the current state law on advertising standards. To the extent that municipal advisors are subject to advertising laws of at least some states the MSRB regards these laws as a baseline.

In addition, municipal advisors that are also registered as investment advisers are subject to advertising standards under this regulatory regime that can serve as baseline requirements for that subset of the municipal advisor population.

3. Identifying and evaluating reasonable alternative regulatory approaches

The MSRB policy on economic analysis in rulemaking addresses the identification and evaluation of reasonable regulatory alternatives.

Amendments to Rule G-21
The MSRB considered as an alternative to the draft amendments leaving Rule G-21 in its current state and not harmonizing the rule with FINRA Rule 2210. In that case, dual registrants would continue to face two separate rules,

which could cause compliance burdens and costs, as well as unnecessary confusion.

As to the updating of the disclosure required in particular municipal fund security advertisements, an alternative of no updates to that disclosure would fail to eliminate the inconsistency between MSRB's amended Rule G-21 and certain of the SEC's advertising rules.

Rule G-40

One alternative to draft Rule G-40 would be for the MSRB not to engage in additional rulemaking, and thus, not establish guidance with respect to advertising content and conduct for municipal advisors. Under this alternative, the needs of municipal advisors for guidance on advertising content and conduct would go unmet.

Another alternative is for the MSRB to use a solely principles-based approach to its rulemaking on this subject. Under this approach, the regulatory objectives would be specified but individual firms would be free to select the means used to meet these objectives. Employing a solely principles-based approach, however, might provide insufficient guidance on meeting the advertising standards for municipal advisors that are comparable to the standards applied to other persons and entities in the financial services sector as contemplated under the Dodd-Frank Act. The MSRB believes, at this request for comment stage, that the advertising standards articulated in draft Rule G-40, although some are relatively more prescriptive, provide balanced and useful guidance. In addition, this balanced approach serves to minimize the risks attendant to the framework of municipal securities regulation by multiple enforcement organizations.

The MSRB invites public comment to suggest alternatives, as well as comments on the potential costs and benefits of alternative approaches.

4. Assessing the benefits and costs, both quantitative and qualitative, and the main alternative regulatory approaches

Below, the MSRB preliminarily addresses the likely costs and benefits of draft Rule G-40 against the context of the economic baselines discussed above, primarily in terms of the specific changes from the baseline and, to some degree, in terms of the potential overall impact on the markets for dealer and municipal advisory services. In considering these costs, benefits, and impacts, reasonable alternatives are addressed, where applicable.

At the outset, the MSRB notes it is currently unable to quantify the economic effects of the proposed amendments to Rule G-21 and draft Rule G-40

because the information necessary to provide reasonable estimates is not available. For example, with regard to draft Rule G-40, the MSRB observes that there is little publicly available information on a detailed breakdown of incremental expense items as reported by the municipal advisory industry. In addition, estimating the costs for municipal advisory firms to comply with draft Rule G-40 is hampered by the fact that these costs depend on the business activities and size of these municipal advisory firms, which can vary greatly. Given the limitations on the MSRB's ability to conduct a quantitative assessment of the costs and benefits associated with draft Rule G-40, the Board has thus far considered these costs and benefits primarily in qualitative terms.

Proposed Amendments to Rule G-21: Benefits, Costs, and Effect on Competition, Efficiency and Capital Formation

Benefits

The proposed amendments to existing Rule G-21 are, in part, a response to requests from the industry. The MSRB believes that, through harmonization among regulators, dealers may experience less potential confusion among similar regulations or reduced compliance costs. Investors should benefit from better information in the form of more truthful and accurate advertising, including updated requirements for certain municipal fund security advertisements.

The rule harmonization may also benefit both retail and institutional investors, where transparency, consistency, and ease of comparison of different financial products would be highly valued.

Costs

Our analysis does not consider all the costs associated with the rule, but instead focuses on the incremental costs attributable to the draft amendment requirements that exceed the baseline state. The costs associated with the baseline are in effect subtracted from the costs associated with the draft amendments to Rule G-21 to isolate the costs attributable to the incremental requirements because of the draft amendments.

Since the proposed amendments to existing Rule G-21 establish more stringent and prescriptive advertising standards for dealers than are included in the baseline, the MSRB expects that dealers may experience increased costs because of the new requirements. However, efficiency gains resulting from harmonization may offset costs associated with more prescriptive standards. Furthermore, the MSRB believes that much of the costs associated with both draft amendments to Rule G-21 (as well as draft Rule G-

40) will be up-front costs resulting from investments in advertisements that are no longer compliant. These costs can be mitigated by setting a future effective date for the rule changes, if adopted.

Effect on Competition, Efficiency and Capital Formation

Since dealers are already subject to advertising standards, the MSRB believes, at this request for comment stage, that the proposed amendments are unlikely to hinder capital formation and may improve efficiency through harmonization with other regulatory regimes. The MSRB believes that the proposed amendments will not harm competition, and may indeed enhance competition due to a uniform set of advertising standards for dual registrants that is more transparent for the market and investors.

Proposed Rule G-40: Benefits, Costs, and Effect on Competition, Efficiency, and Capital Formation

Benefits

The MSRB believes that draft Rule G-40 would result in several benefits by enhancing protections to issuers and obligated persons engaging municipal advisors and to investors in municipal issues by providing guidance to municipal advisors for applying advertising standards that are consistent with standards for other persons and entities in the financial services industry, including the municipal securities industry.

The MSRB believes that one benefit of draft Rule G-40 may follow from the increased level and accuracy of information available to clients through advertising by municipal advisors relative to the baseline, which may lead to an improvement in the selection of municipal advisors. As a result of applying draft Rule G-40's advertising standards, municipal entities and obligated persons may be able to more easily establish objective criteria to use in selecting municipal advisors and may increase the likelihood that municipal advisors are hired because of their qualifications as opposed to other reasons.

Draft Rule G-40 should also result in improved quality-based competition among municipal advisors to the extent that the clients of municipal advisors rely on information from advertising in the municipal advisor selection process.

Costs

The Board recognizes that municipal advisors would incur costs to meet the standards of conduct and content contained in draft Rule G-40. These costs may include additional compliance costs. However, as elaborated above, the MSRB believes that much of the costs associated with both draft Rule G-40

(as well as the draft amendments to Rule G-21) will be up-front costs resulting from investments in advertisements that are no longer compliant. These costs can be mitigated by setting a future effective date for the rule changes, if adopted. However, there will be some ongoing costs associated with sign-off (for new advertisements) and record-keeping requirements.

To ensure compliance with the advertising standards of draft Rule G-40, municipal advisors may incur costs by seeking advice from compliance professionals when preparing advertising materials. The magnitude of these additional costs is not quantifiable using available data and the Board seeks public comment on this cost component.

The MSRB believes that any increase in municipal advisory fees attributable to the additional costs of draft Rule G-40 compared with the baseline state will be, in the aggregate, minimal and that the cost per municipal advisory firm will be spread across the number of advisory engagements for each firm. The MSRB recognizes, however, that for smaller municipal advisors with fewer clients, the cost of compliance with draft Rule G-40's standards of conduct and duties may represent a greater percentage of annual revenues, and thus, such advisors may be more likely to pass those costs along to their advisory clients.

The MSRB recognizes that, because of these costs, some municipal advisors may decide to curtail their advertising activities or pass the costs on to municipal entities and obligated persons in the form of higher fees.

The MSRB has also considered the possibility that some compliance costs could be greater in the absence of draft Rule G-40. Municipal advisors are currently subject to Rule G-17 and any associated enforcement actions. By articulating advertising standards, draft Rule G-40 should reduce possible confusion and uncertainty about what is "fair dealing" as its applies to advertising content and conduct. Therefore, draft Rule G-40 may reduce certain costs of compliance that might have otherwise been incurred by allowing municipal advisors to more quickly and accurately determine compliance requirements.

Effect on Competition, Efficiency and Capital Formation

The MSRB considered that the costs associated with draft Rule G-40 relative to the relevant baseline may lead some municipal advisors to curtail their advertising expenditures and compete less aggressively through advertising. At the margin, some municipal advisors may determine to consolidate with other municipal advisors to benefit from economies of scale (*e.g.*, by leveraging existing compliance resources of a larger firm) rather than to incur separately the costs associated with draft Rule G-40. The MSRB believes that

the market for municipal advisory services is likely to remain competitive despite the potential curtailment of advertising expenditures, or the potential consolidation of some municipal advisors, or the potential deterring of some new entrants into the market.

As we have noted above, the better-quality information conveyed by municipal advisors through advertising that meets the standards of draft Rule G-40 (relative to the relevant baseline) may lead to an improved municipal advisor selection process which may increase the willingness of municipal entities and obligated persons to use municipal advisors. This, in turn, may contribute to a more efficient capital formation process as municipal entities and obligated persons may make different decisions about issuance relative to other financing options.

In addition, investment advisers, some of which are also municipal advisors, are subject to advertising standards under SEC rules. In the absence of advertising standards applicable to all municipal advisors, those municipal advisors that are also investment advisers or dealers are at a competitive disadvantage as compared to municipal advisors that are not also acting as investment advisers or dealers.

Request for Comment

The MSRB seeks public comment on the following questions, as well as on any other topic raised in this request. The MSRB particularly welcomes statistical, empirical, and other data from commenters that may support their views and/or support or refute the views, assumptions, or issues raised in this request for comment.

- The draft amendments to Rule G-21 and draft new Rule G-40 incorporate and/or harmonize the provisions of those rules with certain provisions of the advertising rules of other financial regulators. Are there other provisions of the advertising rules of those financial regulators which the MSRB should consider either incorporating into MSRB rules or with which the MSRB should consider harmonizing its advertising rules?

- The MSRB drafted a new rule, draft Rule G-40, to address advertising by a municipal advisor. An alternative approach would be to address municipal advisor advertising in Rule G-21. Would the current approach of having a new rule, or an alternative approach including all advertising provisions in one rule, be preferable?

- The draft amendments to Rule G-21 permit hyperlinks to obtain more current municipal fund security performance information. Are there other areas where the MSRB should consider expressly permitting the use of a hyperlink in an advertisement?

- In 2016, the first programs designed to implement the Stephen A. Beck, Jr., Achieving a Better Life Experience Act of 2014 (ABLE) became operational. As ABLE programs continue to develop and become operational, is there more specific guidance that the MSRB should consider providing under Rule G-21 or draft Rule G-40 to address ABLE programs?

- What role, if any, do municipal advisors have with the development or distribution of municipal security product advertisements, new issue product advertisements, and/or municipal fund security product advertisements?

- A municipal advisor may market non-security products, such as a software program, to its municipal advisory clients. Draft Rule G-40(a) applies to any material (other than listings of offerings) published or used in any electronic or other public media, or any written or electronic promotional literature distributed or made generally available to 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 reprint, or any excerpt of the foregoing or of a published article. Nonetheless, should draft Rule G-40 specifically address advertisements relating to non-security products, such as any software program, that the municipal advisor may market to its municipal advisory clients?

- Rule G-21 and draft Rule G-40 apply to advertisements, regardless of whether electronic or other public media is used with those advertisements. As such, Rule G-21 and draft Rule G-40 apply to an advertisement on social media. Nonetheless, should the MSRB consider specific guidance about the use of social media by a dealer or a municipal advisor? If so, what guidance would be helpful?

- The draft amendments to Rule G-21 and draft Rule G-40 prohibit a dealer or municipal advisor from using an advertisement that, in part, predicts or projects performance, but does not prohibit the use of an investment analysis tool. How often are such tools used? Should the

MSRB consider additional guidance about the definition of an investment analysis tool and about the use of such tools?

- Rule G-21 and draft Rule G-40 do not except a private placement memorandum from the definition of an advertisement. Should the MSRB consider providing guidance about (i) a dealer's potential recommendation of a private placement, (ii) a dealer's or municipal advisor's potential role in a private placement, such as with the preparation of a private placement memorandum, and/or (iii) dealer and municipal advisor supervisory obligations concerning private placements?

- FINRA recently requested comment on proposed amendments to FINRA Rule 2210. Those amendments would create an exception to the rule's prohibition on projecting performance to permit a firm to distribute a customized hypothetical investment planning illustration that includes the projected performance of an asset allocation or other investment strategy. How often do dealers or municipal advisors create such illustrations? Should the MSRB consider such an exception in the draft amendments to Rule G-21 and in draft new Rule G-40?

- Are there data or studies relevant to the evaluation of the per firm cost of implementing the draft amendments to Rule G-21 and draft Rule G-40?

- What is the likely impact of the draft amendments to Rule G-21 and draft Rule G-40 on competition, efficiency and capital formation?

February 16, 2017

* * * * *

Text of Draft Amendments*

Rule G-21: Advertising by Brokers, Dealers or Municipal Securities Dealers

(a) *General Provisions*.

(i) *Definition of "Advertisement."* For purposes of this rule, the term "advertisement" means any material (other than listings of offerings) published or used in any electronic or other public media, or any written or electronic promotional literature distributed or made generally available to customers or the public, including any notice, circular, report, market letter, form letter, telemarketing script, seminar text, press release concerning the products or services of the broker, dealer or municipal securities dealer, or reprint, or any excerpt of the foregoing or of a published article. The term does not apply to preliminary official statements or official statements, but does apply to abstracts or summaries of ~~official statements, offering circulars~~ the foregoing and other such similar documents prepared by brokers, dealers or municipal securities dealers.

(ii) *Definition of "Form Letter."* For purposes of this rule, the term "form letter" means any written letter or electronic mail message distributed to ~~25 or more~~ more than 25 persons within any period of 90 consecutive days.

(iii) *Content Standards.*

(A) All advertisements by a broker, dealer or municipal securities dealer must be based on the principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular municipal security or type of municipal security, industry or service.

(B) No broker, dealer or municipal securities dealer may make any false, exaggerated, unwarranted, promissory or misleading statement or claim in any advertisement.

(C) A broker, dealer or municipal securities dealer may place information in a legend or footnote only in the event that such placement would not inhibit a customer's understanding of the advertisement.

(D) A broker, dealer or municipal securities dealer must ensure that statements are clear and not misleading within the context in which they are made, and that they provide balanced treatment of risks and potential benefits. An advertisement must be consistent with the risks inherent to the investment.

* Underlining indicates new language; strikethrough denotes deletions.

(E) A broker, dealer or municipal securities dealer must consider the nature of the audience to which the advertisement will be directed and must provide details and explanations appropriate to the audience.

(F) An advertisement may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast; provided, however, that this paragraph (a)(iii)(F) does not prohibit:

(1) A hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of an investment; and

(2) An investment analysis tool, or a written report produced by an investment analysis tool.

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

(H) A broker, dealer or municipal securities dealer may indicate registration with the Municipal Securities Rulemaking Board in any advertisement that complies with the applicable standards of all other Board rules and that neither states nor implies that the Municipal Securities Rulemaking Board or any other corporate name or facility owned by the Municipal Securities Rulemaking Board, or any other regulatory organization endorses, indemnifies, or guarantees the broker, dealer or municipal securities dealer's business practices, selling methods, the class or type of securities offered, or any specific security.

~~(iii)~~(iv) *General Standard for Advertisements*. Subject to the further requirements of this rule relating to professional advertisements and product advertisements, no broker, dealer or municipal securities dealer shall publish or disseminate, or cause to be published or disseminated, any advertisement relating to municipal securities that such broker, dealer or municipal securities dealer knows or has reason to know ~~is materially~~ contains any untrue statement of material fact or is otherwise false or misleading.

(b) *Professional Advertisements*.

(i) No change.

(ii) *Standard for Professional Advertisements.* No broker, dealer or municipal securities dealer shall publish or disseminate, or cause to be published or disseminated, any professional advertisement that ~~is materially~~ contains any untrue statement of material fact or is otherwise false or misleading.

(c) *Product Advertisements.*

(i) No change.

(ii) *Standard for Product Advertisements.* No broker, dealer or municipal securities dealer shall publish or disseminate, or cause to be published or disseminated, any product advertisement that such broker, dealer~~,~~ or municipal securities dealer knows or has reason to know ~~is materially~~ contains any untrue statement of material fact or is otherwise false or misleading and, to the extent applicable, that is not in compliance with section (d) or (e) hereof.

(d) No change.

(e) *Municipal Fund Security Product Advertisements*. In addition to the requirements of section (c), all product advertisements for municipal fund securities shall be subject to the following requirements:

(i) No change.

(A) No change.

(1) No change.

(2) *additional disclosures for identified products* – that refers by name (including marketing name) to any municipal fund security, issuer of municipal fund securities, state or other governmental entity that sponsors the issuance of municipal fund securities, or to any securities held as assets of municipal fund securities or to any issuer thereof, must include the following disclosures, as applicable:

(a) No change.

(b) if the advertisement relates to municipal fund securities issued by a qualified tuition program under Internal Revenue Code Section 529, a statement to the effect that an investor should consider, before investing, whether the investor's or designated beneficiary's home state offers any state tax or other state benefits such as financial aid, scholarship funds, and protection from creditors that are only available for investments in such state's qualified tuition program; provided, however, that this statement shall not be required for any advertisement relating to municipal fund securities of a specific state if such advertisement is sent to, or is otherwise distributed through means that are reasonably likely to result in the advertisement being received by, only residents of such state and is not otherwise published or disseminated by the broker, dealer or municipal securities dealer to any of its affiliates, the issuer or any of the issuer's agents with the expectation or

understanding that such other parties will otherwise publish or disseminate such advertisement; and

(c) if the advertisement is for a municipal fund security that has an investment option that the issuer holds out as having the characteristics of a money market fund:

(i) and that money market fund is not a government money market fund, as defined in Rule 2a-7(a)(16), 17 CFR 270.2a-7(a)(16), under the Investment Company Act of 1940 or a retail money market fund, as defined in Rule 2a-7(a)(25), 17 CFR 270.2a-7(a)(25), under the Investment Company Act of 1940, statements to the effect that:

You could lose money by investing in this investment option. Because the share price of the money market fund in which your investment option invests (the "underlying fund") will fluctuate, when you redeem your units in that investment option, those units may be worth more or less than what you originally paid for them. The underlying fund may impose a fee upon sale of those shares or may temporarily suspend the ability of the investment option to redeem shares if the underlying fund's liquidity falls below required minimums because of market conditions or other factors. An investment in the investment option is not insured or guaranteed by the Federal Deposit Insurance Corporation or any other government agency. The underlying fund's sponsor has no legal obligation to provide financial support to the underlying fund, and you should not expect that the sponsor will provide financial support to the underlying fund at any time.

(ii) and that money market fund is a government money market fund, as defined in Rule 2a-7(a)(16), 17 CFR 270.2a-7(a)(16), under the Investment Company Act of 1940 or a retail money market fund, as defined in Rule 2a-7(a)(25), 17 CFR 270.2a-7(a)(25), under the Investment Company Act of 1940, and that is subject to the requirements of Rule 2a-7(c)(2)(i) and/or (ii), 17 CFR 270.2a-7(c)(2)(i) and/or (i), under the Investment Company Act of 1940 (or is not subject to the requirements of Rule 2a-7(c)(2)(i) and/or (ii), 17 CFR 270.2a-7(c)(2)(i) and/or (ii), pursuant to Rule 2a-7(c)(2)(iii), 17 CFR 270.2a-7(c)(2)(iii), under the Investment Company Act of 1940, but has chosen to rely on the ability to impose liquidity fees and suspend redemptions consistent with the requirements of Rule 2a-7(c)(2)(i) and/or (ii), 17 CFR 270.2a-7(c)(2)(i) and/or (ii), under the Investment Company Act of 1940), statements to the effect that:

> You could lose money by investing in this investment option. Although the money market fund in which your investment option invests (the "underlying fund") seeks to preserve the value of its shares at $1.00 per share, the underlying fund cannot guarantee it will do so. The underlying fund may impose a fee upon the investment option's redemption of the underlying fund's shares or the underlying fund may temporarily suspend the investment option's ability to redeem its shares if the underlying fund's liquidity falls below required minimums because of market conditions or other factors. An investment in the investment option is not insured or guaranteed by the Federal Deposit Insurance Corporation or any other government agency. The underlying fund's sponsor has no legal obligation to provide financial support to the underlying fund, and you should not expect that the sponsor will provide financial support to the underlying fund at any time.

(iii) and that money market fund is a government money market fund, as defined in Rule 2a-7(a)(16), 17 CFR 270.2a-7(a)(16), under the Investment Company Act of 1940, that is not subject to the requirements of Rule 2a-7(c)(2)(i) and/or (ii), 17 CFR 17 CFR 270.2a-7(c)(2)(i) and/or (i), under the Investment Company Act of 1940, pursuant to Rule 2a-7(c)(2)(iii), 17 CFR 270.2a-7(c)(2)(iii), under the Investment Company Act of 1940, and that has not chosen to rely on the ability to impose liquidity fees and suspend redemptions consistent with the requirements of Rule 2a-7(c)(2)(i) and/or (ii), 17 CFR 270.2a-7(c)(2)(i) and/or (ii), under the Investment Company Act of 1940, a statement to the effect that:

> You could lose money by investing in this investment option. Although the money market fund in which your investment option invests (the "underlying fund") seeks to preserve its value at $1.00 per share, the underlying fund cannot guarantee it will do so. An investment in this investment option is not insured or guaranteed by the Federal Deposit Insurance Corporation or any other government agency. The underlying fund's sponsor has no legal obligation to provide financial support to the underlying fund, and you should not expect that the sponsor will provide financial support to the underlying fund at any time.

~~, statements to the effect that an investment in the security is not insured or guaranteed by the Federal Deposit Insurance Corporation or any other government agency (unless such guarantee is provided by or on behalf of such issuer) and, if the security is held out as maintaining a stable net asset value, that although the issuer seeks to preserve the value of the investment at $1.00 per share or such other applicable fixed share price, it is possible to lose money by investing in the security.~~

(3) *additional disclosures concerning performance* – that includes performance data must include:

(a) a legend disclosing that the performance data included in the advertisement represents past performance; that past performance does not guarantee future results; that the investment return and the value of the investment will fluctuate so that an investor's ~~shares~~ units, when redeemed, may be worth more or less than their original cost; and that current performance may be lower or higher than the performance data included in the advertisement. Unless the advertisement includes total return quotations current to the most recent month ended seven business days prior to the date of any use of the advertisement, the legend must also identify either a toll-free (or collect) telephone number or ~~a~~ website (that may be hyperlinked) where an investor may obtain total return quotations current to the most recent month-end for which such total return, or all information required for the calculation of such total return, is available, however an investment option that invests in a money market fund that is a government money market fund, as defined in Rule 2a-7(a)(16), 17 CFR 270.2a-7(a)(16), under the Investment Company Act of 1940 or a retail money market fund, as defined in Rule 2a-7(a)(25), 17 CFR 270.2a-7(a)(25), under the Investment Company Act of 1940 may omit the disclosure about principal value fluctuation;

(b) No change.

(c) to the extent that such performance data relates to municipal fund ~~securities~~ security investment options that are not held out as having the characteristics of a money market fund and to the extent applicable, the total annual operating expense ratio of such municipal fund ~~securities~~ security investment options (calculated in the same manner as the total annual fund operating expenses required to be included in the registration statement for a registered investment company, subject to paragraph (e)(ii)(A) hereof), gross of any fee waivers or expense reimbursements.

(4) No change.

(B) No change.

(ii) *Performance Data*. Each product advertisement that includes performance data relating to municipal fund securities must present performance data in the format, and calculated pursuant to the methods, prescribed in paragraph (d) of Securities Act Rule 482 (or, in the case of a municipal fund security that the issuer holds out as having the characteristics of a money market fund, paragraph (e) of Securities Act Rule 482) and, to the extent applicable, subparagraph (e)(i)(A)(4) of this rule, provided that:

(A) - (E) No change.

(F) *applicability with respect to underlying assets* – notwithstanding any of the foregoing, this subsection (e)(ii) shall apply solely to the calculation of performance relating to municipal fund securities and does not apply to, or limit the applicability of any rule of the Commission, ~~NASD~~ FINRA or any other regulatory body relating to, the calculation of performance for any security held as an underlying asset of the municipal fund securities.

(iii) – (v) No change.

(vi) *Underlying Registered Securities*. If an advertisement for a municipal fund security provides specific details of a security held as an underlying asset of the municipal fund security, the details included in the advertisement relating to such underlying security must be presented in a manner that would be in compliance with any Commission or ~~NASD~~ FINRA advertising rules that would be applicable if the advertisement related solely to such underlying security; provided that details of the underlying security must be accompanied by any further statements relating to such details as are necessary to ensure that the inclusion of such details does not cause the advertisement to be false or misleading with respect to the municipal fund securities advertised. This subsection does not limit the applicability of any rule of the Commission, ~~NASD~~ FINRA or any other regulatory body relating to advertisements of securities other than municipal fund securities, including advertisements that contain information about such other securities together with information about municipal securities.

(vii) No change.

(f) No change.

---Supplementary Material:

.01 Investment Option. As used in Rule G-21(e), the term investment option shall have the same meaning as defined in Rule G-45(d)(vi).

* * * * *

Rule G-40: Advertising by Municipal Advisors

(a) *General Provisions*.

(i) *Definition of "Advertisement."* For purposes of this rule, the term "advertisement" means any material (other than listings of offerings) published or used in any electronic or other public media, or any written or electronic promotional literature distributed or made generally available to 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 reprint, or any excerpt of the foregoing or of a published article. The term does not apply to preliminary official statements, official statements, preliminary prospectuses, prospectuses, summary prospectuses or registration statements, but does apply to abstracts or summaries of the foregoing and other such similar documents prepared by municipal advisors.

(ii) *Definition of "Form Letter."* For purposes of this rule, the term "form letter" means any written letter or electronic mail message distributed to more than 25 persons within any period of 90 consecutive days.

(iii) *Definition of Municipal Advisory Client.* For the purposes of this rule, the term municipal advisory client shall include either a municipal entity or obligated person for whom the municipal advisor engages in municipal advisory activities as defined in Rule G-42(f)(iv), or a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser (as defined under section 202 of the Investment Advisers Act of 1940) on behalf of whom the municipal advisor undertakes a solicitation of a municipal entity or obligated person, as defined in Rule 15Ba1-1(n), 17 CFR 240.15Ba1-1(n), under the Act.

(iv) *Content Standards.*

(A) All advertisements by a municipal advisor, must be based on the principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular municipal security or type of municipal security, municipal financial product, industry, or service.

(B) No municipal advisor may make any false, exaggerated, unwarranted, promissory or misleading statement or claim in any advertisement.

(C) A municipal advisor may place information in a legend or footnote only in the event that such placement would not inhibit a municipal advisory client's understanding of the advertisement.

(D) A municipal advisor must ensure that statements are clear and not misleading within the context in which they are made, and that they provide balanced treatment of risks and potential benefits. An advertisement must be consistent with the risks inherent to the municipal financial product or the issuance of the municipal security.

(E) A municipal advisor must consider the nature of the audience to which the advertisement will be directed and must provide details and explanations appropriate to the audience.

(F) An advertisement may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast; provided, however, that this paragraph (a)(iv)(F) does not prohibit:

(1) A hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of a municipal financial product; and

(2) An investment analysis tool, or a written report produced by an investment analysis tool.

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

(H) A municipal advisor may indicate registration with the Municipal Securities Rulemaking Board in any advertisement that complies with the applicable standards of all other rules of the Board and that neither states nor implies that the Municipal Securities Rulemaking Board or any other corporate name or facility owned by the Municipal Securities Rulemaking Board, or any other regulatory organization endorses, indemnifies, or guarantees the municipal advisor's business practices, services, skills, or any specific municipal security or municipal financial product.

(v) *General Standard for Advertisements*. Subject to the further requirements of this rule relating to professional advertisements, no municipal advisor shall publish or disseminate, or cause to be published or disseminated, any advertisement relating to municipal securities or municipal financial products that such municipal advisor knows or has reason to know contains any untrue statement of material fact or is otherwise false or misleading.

(b) *Professional Advertisements*.

(i) *Definition of "Professional Advertisement."* The term "professional advertisement" means any advertisement concerning the facilities, services or skills with respect to the municipal advisory activities of the municipal advisor or of another municipal advisor.

(ii) *Standard for Professional Advertisements*. No municipal advisor shall publish or disseminate, or cause to be published or disseminated, any professional advertisement that contains any untrue statement of material fact or is otherwise false or misleading.

(c) *Approval by Principal*. Each advertisement subject to the requirements of this rule must be approved in writing by a municipal advisor principal prior to first use. Each municipal advisor shall make and keep current in a separate file records of all such advertisements.

ALPHABETICAL LIST OF COMMENT LETTERS ON NOTICE 2017-04 (FEBRUARY 16, 2017)

1. Acacia Financial Group, Inc.: Letter from Noreen P. White, Co-President, and Kim M. Whelan, Co-President, dated April 7, 2017

2. Bond Dealers of America: Letter from Mike Nicholas, Chief Executive Officer, dated March 24, 2017

3. Fidelity Investments: Letter from Norman L. Ashkenas, Chief Compliance Officer, Fidelity Brokerage Services, LLC, Richard J. O'Brien, Chief Compliance Officer, National Financial Services, LLC, and Jason Linde, Chief Compliance Officer, Fidelity Investments Institutional Services Company, LLC, dated March 24, 2017

4. Financial Services Institute: Letter from David T. Bellaire, Executive Vice President and General Counsel, dated March 24, 2017

5. Lewis Young Robertson & Burningham, Inc.: Letter from Laura D. Lewis, Principal, dated March 24, 2017

6. National Association of Municipal Advisors: Letter from Susan Gaffney, Executive Director, dated March 24, 2017

7. PFM: Letter from Leo Karwejna, Chief Compliance Officer, Cheryl Maddox, General Counsel, and Catherine Humphrey-Bennett, Municipal Advisory Compliance Officer, dated March 23, 2017

8. Securities Industry and Financial Markets Association: Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, dated March 24, 2017

9. Strategic Insight: Letter from Paul Curley, Director of College Savings Research, dated May 16, 2017

10. Third Party Marketers Association: Letter from Donna DiMaria, Chairman of the Board of Directors and Chair of the 3PM Regulatory Committee, dated March 23, 2017

11. Wells Fargo Advisors: Letter from Robert J. McCarthy, Director of Regulatory Policy, dated March 24, 2017

ACACIA
FINANCIAL GROUP, INC.

601 Route 73 North
Suite 206
Marlton, NJ 08053
(856) 234-2266 Phone
(856) 234-6697 Fax

April 7, 2017

VIA ELECTRONIC MAIL
Mr. Ronald W. Smith, Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street, NW
Suite 1000
Washington, DC 20005

Re: Regulatory Notice 2017-04, Request for Comment on Draft Amendments to MSRB Rule G-21 on Advertising and on Draft MSRB Rule G-40 on Advertising by Municipal advisors

Dear Mr. Smith:

Acacia Financial Group, Inc. is a national financial advisory firm that serves high profile issuers, local small issuers and infrequent issuers. We are supportive of establishing a regulatory regime for municipal advisors, however, with respect to Rule G-40, we agree with other commenters that this rule is unnecessary and applies a regulatory burden and cost which is not proportional to the MSRB's stated goal of preventing misleading information to investors, issuers or obligated persons. The core rules of G-17 coupled with G-42 and the fiduciary duty required under Dodd-Frank provides ample regulation to prevent false or misleading statements by municipal advisors.

In an attempt to have parallel rules for broker-dealers and municipal advisors, the MSRB is needlessly drafting a rule which is more applicable to the selling of municipal financial products rather than municipal advisor services. For example, almost all prospective clients will receive materials regarding our "firm resume" containing our qualifications and services, resumes of professionals, case studies and tailored financial analysis. This is the same material provided to prospective clients through their procurement process which could include a formal RFQ/RFP/RFI process or an informal request for information on the firm. The existing regulatory framework would clearly govern false or misleading statements in those materials.

If the MSRB wants to pursue the regulation of advertisements by municipal advisors, then more thought needs to be given as to what constitutes an advertisement and it needs to be targeted to the professional services provided by Municipal advisors as opposed to the selling of municipal financial products. Municipal advisors make recommendations on the use of various financial products, however, G-42 would govern this activity. Any rule on advertisements should clearly differentiate between these items.

In reconsidering G-40, we would recommend the exclusion of responses to both formal and informal requests for information, proposals and qualifications, client lists, case studies, resumes, tailored financial analysis and factual information regarding types of financing products and general market conditions. Additionally, clarification would be needed regarding the materials noted above as whether if provided to clients, as opposed to prospective clients, if they would constitute advertisements. An argument could be made that providing refunding analyses, factual information on types of financing vehicles and the pros

and cons of such instruments would not and should not constitute advertisements and the recommendations made by advisors as noted previously would be covered by G-42. Finally, as many municipal advisors have web sites, guidance would need to be given as to how G-40 would apply, if at all to the materials posted.

In the comment notice, there were several questions raised and the following addresses some of those areas:

Role of municipal advisors in the development or distribution of municipal security product advertisements, new issue product advertisements and or municipal fund security product advertisements: Municipal advisors advise clients on the use of various securities and do not advertise these products and generally have no role in development of advertisements used to sell these products.

Marketing of non-security products: The MSRB would be over reaching if it attempted to regulate the use of non-security products. While there may be a subset of advisors who engage in this activity, we can see no nexus for the MSRB to become involved in non-security related regulations.

G-40 benefits in municipal advisor selection: In the notice, the MSRB states its belief that advertising regulations will improve the selection process of municipal advisors. We disagree with this statement as numerous issuers hire municipal advisors through some type of competitive process and we believe the provision of materials in response to such a solicitation should not be deemed an advertisement and such materials are already governed by existing rules.

As a former member of the MSRB who was an active participant in the drafting of the first set of rules for municipal advisors that were subsequently withdrawn, I would urge the Board to focus on the unique services provided by advisors. The effort to level the playing field or to automatically subject non-dealer municipal advisors to the same rules as broker dealers does not acknowledge the differences between the roles broker dealers and municipal advisors play in the financial markets. Simply duplicating rules in an effort to minimize the disruption to the existing compliance regimes of broker-dealers is not an appropriate metric for rulemaking. I would urge the Board to craft regulations with an eye to the services provided, recognizing the best way to level the playing field is adopting rules that accurately reflect these roles.

Sincerely,

Noreen P. White
Co-President

Kim M. Whelan
Co-President

BDA Bond Dealers of America

1909 K Street NW • Suite 510
Washington, DC 20006
202.204.7900
www.bdamerica.org

March 24, 2017

Submitted Electronically

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street NW
Washington, DC 20005

RE: Request for Comment on Draft Amendments to MSRB Rule G-21 on Advertisements and Proposed MSRB Rule G-40 for Municipal Advisor Advertisements (2017-14)

Dear Mr. Smith:

On behalf of the Bond Dealers of America ("BDA"), I am pleased to submit this letter in response to the MSRB's request for comment on proposed draft amendments to MSRB Rule G-21 on Advertisements and on proposed MSRB Rule G-40 on Municipal Advisor Advertisements. The BDA supports harmonization of MSRB rules with FINRA rules to create compliance clarity and efficiencies. This request for comment outlines a confusing approach that harmonizes G-21 with FINRA 2210 in some areas while harmonizing Rule G-21 and G-40 with existing SEC rules applicable to investment advisers in other areas. The BDA believes that the MSRB should revise both rules by tightly conforming Rule G-21 to FINRA 2210 and changing Rule G-40 to tailor it to the context of the municipal advisory relationship.

BDA disagrees with how MSRB conceptualizes harmonization.

We disagree with the order of priority that the MSRB places on harmonization. The MSRB has chosen to prioritize the harmonization of MSRB G-21, applicable to broker-dealers with MSRB G-40, which is applicable to municipal advisors. However, MSRB G-40 contains some elements of SEC rules applicable to investment advisers. These elements, including the prohibition on testimonials, are not found in FINRA 2210, the existing broker-dealer rule for communication with the public applicable to the corporate securities market. This has led to the odd result that dealers in the municipal securities market will need to live under a different regime than dealers in the corporate securities market.

BDA members believe that proper harmonization of the two broker-dealer regimes is essential. When MSRB rules applicable to dealers do not harmonize with FINRA rules, it imposes a significant compliance burden on dealers to create two compliance regimes that become easy to confuse and time consuming to implement and enforce. The BDA believes that the MSRB needs to harmonize Rule G-21 with FINRA 2210.

MSRB should publish a request for comment that more fully harmonizes MSRB G-21 with the FINRA 2210 framework.

The primary reason why the BDA does not support the proposed amendments to MSRB Rule G-21 is that the MSRB sought to primarily harmonize the rule with new Rule G-40 instead of FINRA 2210, which governs a wide range of communications with the public. For BDA members, there are two essential parts of harmonization with FINRA 2210. In order for harmonization of MSRB rules with FINRA rules to be successful, MSRB must follow this framework.

1. FINRA 2210 is focused on three categories of communication with the public as outlined by FINRA 12-29.[1] These categories are: institutional communication, retail communication, and correspondence.
2. The requirements of the FINRA 2210 rules are dependent on who, in terms of retail versus institutional, receives the communication. Additionally, with respect to rules applicable to correspondence, the applicability of the rule is dependent on how many ***retail*** investors receive the correspondence within a 30 calendar-day period.

If MSRB has a rule that applies different definitions and different sets of responsibilities to municipal securities and does not differentiate between communications sent to retail and institutional customers, it will have created a new and unnecessarily increased regulatory burden along with considerable confusion for broker-dealers.

BDA urges the MSRB to strike the definition of "advertisement" as a part of harmonizing with FINRA 2210.

BDA notes that the definition of "advertisement" only exists in MSRB Rule G-21 and that the MSRB's definition of "form letter" differs in crucial ways from FINRA's definition of "correspondence". BDA believes, as part of harmonization, that the MSRB should take the following actions as it tailors its communication rules to focus on the three categories of communication in FINRA 2210: retail, institutional, and correspondence.

[1] http://www.finra.org/sites/default/files/NoticeDocument/p127014.pdf

1. Strike the definition of "Advertisement": MSRB should pursue harmonization with FINRA 2210 and the materials that are included and excluded from the scope of the rule should be addressed in the section of the rule specifically dealing with what retail communications should be required to be pre-approved by a principal.
2. The definition of "Form Letter" should be amended to focus exclusively on retail communications.
3. The definitions of standards for "Product Advertisement" and "Professional Advertisement" are made redundant by the inclusion of the proposed general and content standards of proposed G-21 and G-40. These provisions should be deleted to signify that these types of communications are covered by the general and content standards of the proposed rule.

BDA believes that only retail communication should require pre-approval by a principal. Correspondence and institutional communication should be exempt from the pre-approval requirements.

BDA members strongly urge the MSRB to follow the existing framework of FINRA 2210. The FINRA framework requires pre-approval by a principal or supervisory analyst of retail communications prior to first use. However, FINRA appropriately does not apply the same standard to institutional communications.

BDA urges the MSRB to create institutional standards that are harmonized with the existing framework of FINRA 2210, which requires a firm to have written supervisory procedures that establish guidelines for the review of institutional communications designed to ensure compliance with applicable standards. Furthermore, FINRA 2210 requires that documented and supervised personnel education policies are in place to ensure member firm personnel are informed of the communication standards when pre-review of institutional communications is not required by the firm.

BDA believes that, just like free writing prospectuses are excluded from FINRA 2210, investor roadshows and similar materials should be excluded from the scope of Rule G-21. The exclusion should also include other common materials not intended as advertisements, such as RFPs and RFQs sent to issuers.

As a part of its harmonization effort, the MSRB should exclude materials that are comparable to offering materials that accompany preliminary official statements, such as investor roadshow presentations and other similar materials information. In addition, there are several other materials that should be excluded. First, private placement memorandum and limited offering memorandum are frequently used as offering memoranda and thus should be excluded alongside preliminary official statements.

Second, both underwriters and municipal advisors respond to RFPs and RFQs and those responses may be made public and could fall into the current definition of "form letter". BDA does not believe it is appropriate to regulate responses to RFPs and RFQs in the same way as retail communications, requiring principal approval for each RFP and RFQ response that is sent to an issuer. The MSRB should follow the framework of FINRA 2210, which defines "correspondence" as a communication to 25 or more retail investors. The MSRB notes in the request for comment that if 25 or more persons receive the response, it would meet the definition of "form letter". BDA does not believe that is appropriate. Responses to RFQs and RFPs should be explicitly excluded from the coverage of both Rule G-21 and G-40.

If the MSRB choses to not harmonize the definition of "form letter" with the FINRA 2210 definition of "correspondence", the BDA recommends that the MSRB clearly define that a response to an RFP or RFQ sent to one issuer is not a "form letter" irrespective of how many employees of that one issuer, including 25 or more employees, subsequently receive the response.

BDA does not think MSRB's prohibition on testimonials in both Rule G-21 and Rule G-40 is warranted.

FINRA 2210 does not prohibit testimonials and BDA members do not see any broad-based investor protection rationale to prohibit testimonials for municipal securities. MSRB should include the same disclosure provisions as FINRA 2210, which rely on disclosure of potential conflicts related to testimonials. Furthermore, BDA does not believe that because the average age of a municipal bond investor is 61, as MSRB notes in footnote 14, that means that the average municipal bond investor lacks the cognitive ability to understand a testimonial or its associated disclosures.

Additionally, BDA notes that prohibiting testimonials would harmonize with existing rules applicable to investment advisers, not existing broker-dealer regulations. It is unclear why the MSRB would pursue this policy. It is confusing and naturally inconsistent to pursue a patchwork approach that takes portions of FINRA rules applicable to broker-dealers along with SEC rules applicable to investment advisers and label that approach harmonization.

BDA does not think the MSRB's inclusion of a principal approval requirement in Rule G-40 makes sense given the context of the municipal advisory relationship.

By definition, all clients of municipal advisors are institutions and do not need many of the mechanistic protections applicable to dealer relationships with retail investors. This is a point where harmonization with Rule G-21 (and SEC investment

adviser rules) does not make sense. Municipal advisory firms should be required to develop policies and procedures and be required to educate and train their municipal advisory professionals. But given the audience of advertisements by municipal advisors, the BDA does not believe that a principal needs to approve every advertisement.

* * *

In conclusion, while the BDA appreciate the MSRB's efforts to harmonize its rules with FINRA's rules, it cautions MSRB that harmonization that results in differing standards harms dealers. There is no compelling policy reason to have different communication standards for municipal securities and corporate securities. BDA urges MSRB to focus on full harmonization between Rule G-21 and FINRA 2210.

Thank you for the opportunity to provide these comments.

Sincerely,

Mike Nicholas
Chief Executive Officer

March 24, 2017

Submitted electronically

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street, NW, Suite 1000
Washington, DC 20005

Re: MSRB Regulatory Notice 2017-04: Request for Comment on Draft Amendments to MSRB Rule G-21, on Advertising, and on Draft Rule G-40, on Advertising by Municipal Advisors

Dear Mr. Smith:

Fidelity Investments[1] ("Fidelity") appreciates the opportunity to respond to the Municipal Securities Rulemaking Board's ("MSRB's") Regulatory Notice 2017-04 (the "Proposal").[2] Among other items, the Proposal would update, as well as harmonize, MSRB Rule G-21, applicable to brokers, dealers and municipal securities dealers (collectively, "dealers"), with certain provisions of the advertising rules of other financial regulators, notably the SEC and FINRA.

Fidelity submits this letter on behalf of several affiliated Fidelity broker-dealers[3] that advertise municipal bonds and municipal fund securities through 529 programs managed by Fidelity.[4] Fidelity has also been selected as the ABLE Program Manager for the Massachusetts ABLE Program and anticipates advertising this new product once it is available. Thus, Fidelity's comments reflect the views of multiple broker-dealers that advertise municipal products across different programs that will be affected by the Proposal.

---

[1] Fidelity is one of the world's largest providers of financial services. Fidelity provides investment management, retirement planning, portfolio guidance, brokerage, benefits outsourcing and many other financial products and services to more than 20 million individuals and institutions, as well as through 10,000 financial intermediary firms.

[2] *See* MSRB Regulatory Notice 2017-04; *Request for Comment on Draft Amendments to MSRB Rule G-21, on Advertising, and on Draft Rule G-40, on Advertising by Municipal Advisors* (January 2017) *available at* http://www.msrb.org/~/media/Files/Regulatory-Notices/RFCs/2017-04.ashx?n=1 Unless otherwise defined in this letter, capitalized terms have the meanings ascribed to them in the Proposal.

[3] Fidelity Brokerage Services, LLC, National Financial Services LLC, and Fidelity Investments Institutional Services Company are affiliates of Fidelity Investments and MSRB, SEC and FINRA registered broker-dealers.

[4] Fidelity manages The UNIQUE College Investing Plan, U. Fund College Investing Plan, Delaware College Investment Plan, and Fidelity Arizona College Savings Plan which are offered by the state of New Hampshire, Massachusetts Educational Financing Authority, the state of Delaware, and the Arizona Commission for Postsecondary Education, respectively.

Fidelity fully supports MSRB efforts to harmonize certain provisions of its advertising requirements with those of other financial regulators, including FINRA and the SEC. Retail investors benefit from consistent disclosures across similar products. Moreover, given the large segment of dealers that are registered with both the MSRB and FINRA, harmonization of certain FINRA and MSRB advertising rules will promote efficiencies at member firms. Our comments include the following points:

EXECUTIVE SUMMARY

- The MSRB should review and endeavor to adopt FINRA rules and guidance under FINRA Rule 2210, in particular FINRA guidance on hyperlinks, investment analysis tools, and social media;

- The MSRB should permit the use of testimonials in dealer communications; and

- The MSRB should consider additional ways to stay engaged on current methods by which dealers communicate with their customers.

Each of these points is discussed in further detail below.

The MSRB should review and endeavor to adopt FINRA interpretations under FINRA Rule 2210.

Because municipal and municipal fund securities are regulated by the MSRB, their sales material must comply with MSRB rules, including MSRB Rule G-21, concerning dealer advertisements. Additionally, certain sales materials for municipal fund securities must comply with the advertising rules of the SEC and FINRA, including FINRA Rule 2210. Thus, in creating a communication that references municipal securities and/or municipal fund securities, dealers who are registered with both the MSRB and FINRA must consult at minimum, three different rule sets (MSRB, FINRA, SEC) to ensure that their communications are compliant. In practice this can result in advertisements that are short on substantive content, but lengthy in regulatory disclosures.

We acknowledge challenges in designing rules that are consistent across regulators, dealers, and similar products, but believe that retail investors and market participants are well served by rules that are uniform in design and approach. This is particularly true in the area of public communications which are by their nature intended to advertise and help educate investors about specific products.

To help make regulations more efficient and effective, we encourage the MSRB to review existing and upcoming FINRA guidance concerning communications with the public and where at all possible adopt this guidance as their own. We encourage the MSRB to engage with FINRA during the rulemaking process or comment on FINRA proposals directly, so that

potential MSRB concerns and questions can be addressed.[5] Coordinated SRO regulation of dealer communications with the public is a more efficient and effective form of regulation than two different set of regulations governing similar content.

Moreover, greater alignment of FINRA and MSRB advertising rules will help facilitate compliance across MSRB and FINRA registered firms through the creation of common standards. In contrast, to the extent that the MSRB does not adopt particular FINRA guidance or rules regarding communications with the public, we urge the MSRB to clearly articulate its reasons for not doing so, and publicize this difference to dealer firms. Our comments that follow emphasize this approach.

Hyperlinks

In our experience, simple, clear communications help empower investors to make investing decisions that are in their best interest. Too much information can overwhelm investors, leading to confusions and/or inaction. Clear communications increase a retail investor's ability to make informed investment decisions, particularly if the information is packaged in a format and context that is understandable and actionable by the average investor.

The draft amendments to Rule G-21 would permit the use of hyperlinks to obtain more current municipal fund security performance information. We fully support these draft amendments and believe that hyperlinks are a commonly used method of communication, well understood by investors, through which investors can obtain additional details on facts that matter to them.

We also encourage the MSRB to permit the use of hyperlinks more broadly and in other advertising contexts outside of municipal fund security performance information. For example, the MSRB should allow dealers to provide hyperlinks to EMMA as a way to convey more information to retail investors outside of the four corners of an advertisement. As the official repository for information on virtually all municipal bonds and municipal fund securities, EMMA contains a significant amount of detailed information for investors. Moreover, based on MSRB improvements to the site, EMMA has been designed as an easy to navigate site.

We also foresee that ABLE Program communications will have some additional complexities, which will result in significantly more disclosure in these advertisements. For example, ABLE Program advertisements will likely reference disability benefits and governmental programs, and the ability for dealers' to include hyperlinks to certain external governmental sources (*i.e.*, the Social Security Administration or Internal Revenue Service) would be helpful to dealers while also providing guidance to prospective and current customers on where to find more information on these important and complicated topics.

[5] We similarly encourage FINRA to work with the MSRB on MSRB proposals concerning communications with the public, and also look to the SEC to help coordinate rules governing communications with the public between FINRA and the MSRB.

Lastly, over the past few years, FINRA has been more receptive to the use of hyperlinks in member firm communications. We encourage the MSRB to consider ascribing to FINRA interpretations regarding hyperlinks as FINRA continues to develop guidance on this topic, and to work with FINRA so these interpretations reflect MSRB input.

Investment Analysis Tools

The draft amendments to Rule G-21 prohibit a dealer from using an advertisement that, in part, predicts or projects performance, but do not prohibit the use of an investment analysis tool. We support MSRB advertising rules that permit the use of investment analysis tools under certain conditions.

Investment analysis planning tools can help retail investors in a number of ways. For example, in the college planning context, such tools can help investors determine their savings goals and how much they will need to save to reach them; how inflation could increase the cost of college; and what the investor's savings might be worth when it's time for college. The use of investment analysis in these tools, typically through Monte Carlo simulation, can help investors understand a range of potential outcomes and how uncertainty affects planning for future college expenses.

FINRA rules permit the presentation of projections in certain contexts. FINRA Rule 2210 provides a limited exception to FINRA's general prohibition against predictions or projections of performance for investment analysis tools and hypothetical illustrations of mathematical principals, among other areas. Moreover, as the MSRB references in the Proposal, FINRA has issued a request for comment on a new exception to FINRA Rule 2210 which would permit a firm to distribute a customized hypothetical investment planning illustration that includes the projected performance of an asset allocation or other investment strategy subject to specified conditions, but would not permit performance projections of individual securities.[6]

We encourage the MSRB to review and adopt FINRA guidance on predictions and projections. If the MSRB is attempting to harmonize certain of its advertising rules to those of FINRA, we do not see the need for a different regulatory approach on this particular topic.

Social Media

MSRB Rule G-21 applies to advertisements, regardless of whether electronic or other public media, including social media, is used with those advertisements. The MSRB has not yet issued specific guidance on the use of social media by MSRB registered dealers and we agree that such guidance would be helpful. Dealers can use social media in many different ways to communicate with retail investors, and regulatory guidance on this topic can help ensure that dealers are using social media pursuant to guidelines established by the MSRB.

---

[6] *See* FINRA Regulatory Notice 17-06 *Communications with the Public, FINRA Requests Comment on Proposed Amendments to Rules Governing Communications with the Public.* (February 2017) available at: http://finra.complinet.com/net_file_store/new_rulebooks/r/e/Regulatory-Notice-17-06.pdf

In recent years, different financial regulators have considered and provided guidance on the application of their communications rules to new technologies. This is often an iterative process as new technologies continue to develop and their application to communication rules needs to be continuously assessed. On the topic of social media, FINRA has provided guidance on the application of its rules governing communications with the public to social media sites and has provided periodic clarification concern application of these rules to new technologies. For example, we understand that FINRA is currently working on a new social media Q & A that will permit the use of hyperlinks to layer disclosure. We encourage the MSRB to review this guidance with FINRA prior to its public release to address any MSRB concerns with the goal of its wholesale application to municipal securities and municipal fund securities.

Testimonials.

Draft Rule G-21(a)(iii) prohibits dealers from using testimonials in advertisements. The MSRB states that "the use of a testimonial by a dealer presents significant issues – including the potential for the testimonial to mislead investors who may not be fully aware of the facts and circumstances that led to the testimonial" and further notes that "Many investors in municipal securities are senior investors, who may not appreciate the limits of a testimonial, even if certain limits are disclosed."[7]

We do not understand the MSRB's blanket prohibition on testimonials in dealer advertising, particularly given the Proposal's intent to harmonize certain provisions of Rule G-21 with FINRA and SEC rules. FINRA allows testimonials in their communications with the public under certain circumstances[8] and the SEC has provided guidance that allows investment advisers to use testimonials in certain contexts.[9] Moreover, both FINRA and the SEC have articulated a clear priority to address concerns specific to senior investors.[10]

If the MSRB has investor protection concerns with the use of testimonials in dealer advertisements, we believe that there are more targeted and tailored ways to address these

---

[7] The Proposal at page 6.

[8] FINRA Rule 2210(d)(6)(A) currently provides that, if any testimonial in a communication with the public concerns a technical aspect of investing, the person making the testimonial must have the knowledge and experience to form a valid opinion. FINRA Rule 2210(d)(6)(B) requires any advertisement or sales literature that includes a testimonial concerning the investment advice or investment performance of a firm or its products to prominently disclose the fact that: (i) the testimonial may not be representative of the experience of other customers; (ii) 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.

[9] Securities and Exchange Commission Division of Investment Management Guidance Update 2014-04 *Guidance on the Testimonial Rule and Social Media* (March 2014) *available at*: https://www.sec.gov/investment/im-guidance-2014-04.pdf

[10] For example, the SEC recently approved a FINRA proposed rule change to amend FINRA Rule 4512 (Customer Account Information) and adopt FINRA Rule 2165 (Financial Exploitation of Specified Adults). Securities and Exchange Commission Release No. 34-79964 (February 3, 2017) *available at*: https://www.sec.gov/rules/sro/finra/2017/34-79964.pdf

concerns than through a blanket prohibition on the use of testimonials. For example, the MSRB might allow the use of testimonials in dealer advertisements but place restrictions and requirements on their use, much like FINRA Rule 2210(d)(6). Also, since many municipal fund security communications by a dealer registered with FINRA and the MSRB must be filed with FINRA and reviewed by FINRA staff, the MSRB might consider a pilot program with FINRA to determine if dealer advertisements using testimonials appropriately address the MSRB's investor protection concerns. Regardless of the specific approach taken, we urge the MSRB to reconsider its prohibition on the use of testimonials in dealer advertisements.

The Need for Continued Industry Outreach.

Given the pace of growth in different methods of communication, we encourage the MSRB to consider different ways in which it can stay informed on new communications technologies.

To this end, we observe that from time to time regulators create advisory committees on specific topics to help keep apprised of emerging areas. Advisory committees are typically comprised of a cross section of market participants and are typically charged with providing the regulator diverse perspectives on specific topics as well as advice and recommendations on matters related to those topics. For example, FINRA has a member firm committee on communications with the public. To continue to understand market developments the MSRB might similarly consider forming a committee that would meet periodically and be charged with providing recommendations to the MSRB on municipal and municipal fund security communications topics. Fidelity is fortunate to have a number of qualified professionals available to offer perspectives to the MSRB in this area and if the MSRB creates an advisory committee on communications with the public, we would be honored to serve in any manner the MSRB believes appropriate.

The MSRB might also look to ways to partner with FINRA on topics concerning communications with the public. Given the large number of dealer firms that are both MSRB and FINRA registered and that advertise municipal and municipal fund security products, a coordinated and collaborative approach to regulating dealer communications with the public would work to the benefit of regulators, dealers, and retail investors.

* * * * *

Fidelity thanks the MSRB for considering our comments. We would be pleased to provide any further information and respond to any questions that you may have.

Sincerely,

Norman L. Ashkenas
Chief Compliance Officer
Fidelity Brokerage Services, LLC

Richard J. O'Brien
Chief Compliance Officer
National Financial Services, LLC

Jason Linde
Chief Compliance Officer
Fidelity Investments Institutional Services Company, LLC

cc:

Ms. Lynette Kelly, Executive Director, MSRB
Mr. Robert Fippinger, Chief Legal Officer
Mr. Michael Post, General Counsel – Regulatory Affairs
Ms. Pamela K. Ellis, Associate General Counsel

Mr. Robert Cook, FINRA
Mr. Joseph Price, FINRA
Mr. Thomas Pappas, FINRA

Ms. Heather Seidel, Acting Director, Division of Trading and Markets, SEC
Mr. Gary Goldsholle, Deputy Director, Division of Trading and Markets, SEC
Mr. David Shillman, Associate Director, Division of Trading and Markets, SEC
Ms. Jessica S. Kane, Director, Office of Municipal Securities, SEC

FINANCIAL SERVICES INSTITUTE

VOICE OF INDEPENDENT FINANCIAL SERVICES FIRMS AND INDEPENDENT FINANCIAL ADVISORS

VIA ELECTRONIC MAIL

March 24, 2017

Ronald W. Smith, Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street NW
Washington, DC 20005

Re: File Number 2017-04 Request for Comment on Draft Amendments to MSRB Rule G-21 (Advertising) and on Draft Rule G-40 (Advertising by Municipal Advisors)

Dear Secretary Smith:

On February 16, 2017, the Municipal Securities Rulemaking Board (MSRB) announced proposed draft amendments to MSRB Rule G-21 and new draft MSRB Rule G-40 (Proposed Rule).[1] The Proposed Rule would update, as well as harmonize, Rule G-21 with certain provisions of the advertising rules of other financial regulators. Further, consistent with the MSRB's regulation of dealers under Rule G-21, draft Rule G-40 would address advertising by municipal advisors.

The Financial Services Institute[2] (FSI) appreciates the opportunity to comment on this important proposal. We support the Proposed Rule both for its content and because it serves to further harmonize rules applicable to our members across regulatory jurisdictions.

Background on FSI Members

The independent financial services community has been an important and active part of the lives of American investors for more than 40 years. In the US, there are approximately 167,000 independent financial advisors, which account for approximately 64.5% percent of all producing registered representatives.[3] These financial advisors are self-employed independent contractors, rather than employees of the Independent Broker-Dealers (IBD).

FSI's IBD member firms provide business support to independent financial advisors in addition to supervising their business practices and arranging for the execution and clearing of customer transactions. Independent financial advisors are small-business owners with strong ties to

[1] See Proposed Rule, *available at*, http://www.msrb.org/~/media/Files/Regulatory-Notices/RFCs/2017-04.ashx

[2] The Financial Services Institute (FSI) is an advocacy association comprised of members from the independent financial services industry, and is the only organization advocating solely on behalf of independent financial advisors and independent financial services firms. Since 2004, through advocacy, education and public awareness, FSI has been working to create a healthier regulatory environment for these members so they can provide affordable, objective financial advice to hard-working Main Street Americans.

[3] The use of the term "financial advisor" or "advisor" in this letter is a reference to an individual who is a registered representative of a broker-dealer, an investment adviser representative of a registered investment adviser firm, or a dual registrant. The use of the term "investment adviser" or "adviser" in this letter is a reference to a firm or individual registered with the SEC or state securities division as an investment adviser.

their communities and know their clients personally. These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans. Their services include financial education, planning, implementation, and investment monitoring. Due to their unique business model, FSI member firms and their affiliated financial advisors are especially well positioned to provide Main Street Americans with the financial advice, products, and services necessary to achieve their investment goals.

FSI members make substantial contributions to our nation's economy. According to Oxford Economics, FSI members nationwide generate $48.3 billion of economic activity. This activity, in turn, supports 482,100 jobs including direct employees, those employed in the FSI supply chain, and those supported in the broader economy. In addition, FSI members contribute nearly $6.8 billion annually to federal, state, and local government taxes. FSI members account for approximately 8.4% of the total financial services industry contribution to U.S. economic activity.[4]

Discussion

FSI appreciates the opportunity to comment on the Proposed Rule. FSI commends MSRB for taking efforts to update their rules and in the process, harmonize this rule with other regulator's similar rules.

I. FSI strongly supports efforts to harmonize Rule G-21 with other financial regulations

The Proposed Rule would harmonize Rule G-21 with the advertising rules under FINRA Rule 2210, Communications with the Public. Specifically, Rule G-21(a)(ii), harmonizes the definition of "form letter," with FINRA Rule 2210's definition of "correspondence." Currently, Rule G-21 defines a form letter, in part, as a written letter distributed to 25 or more persons. FINRA Rule 2210(a)(2)'s definition of correspondence, however, defines correspondence, in part, as written communications distributed to 25 or fewer persons. The MSRB has acknowledged that the one-person difference between Rule G-21 and FINRA Rule 2210 has created confusion and compliance challenges for dealers. To respond to this concern, the Proposed Rule eliminated that one-person difference and a form letter, in part, is defined as a written letter distributed to more than 25 persons.[5] The Proposed Rule also amends Rule G-21(e) to incorporate the provisions included in the SEC's amendments to its registered investment company advertising rules.[6] The draft amendments to Rule G-21(e) replace the money market mutual fund disclosure required by current Rule G-21 with a modified version of the money market mutual fund disclosure currently required by SEC rules.[7]

---

[4] Oxford Economics for the Financial Services Institute, The Economic Impact of FSI's Members (2016).

[5] See Proposed Rules, available at, http://www.msrb.org/~/media/Files/Regulatory-Notices/RFCs/2017-04.ashx

[6] The SEC has been making amendments to their advertisement rules many times over, for example, since 2007, the SEC has twice amended Rule 482 under the Securities Act of 1933. See Securities Act Release No. 9616 (Jul. 23, 2014), 79 FR 47736 (Aug. 14, 2014) (in part, amending Rule 482 to address money market fund reform); Securities Act Release No. 8998 (Jan. 13, 2009), 74 FR 4546 (Jan. 26, 2009) (in part, revising Rule 482 to clarify that the rule does not apply to a summary prospectus or to a communication that is not deemed a prospectus under Section 2(a)(10) of the Securities Act of 1933)

[7] See Proposed Rules, available at, http://www.msrb.org/~/media/Files/Regulatory-Notices/RFCs/2017-04.ashx

II. FSI strongly supports further harmonization of regulatory requirements through the adoption of Rule G-40

Draft Rule G-40(b) is substantially similar in all material respects to the draft amendments to Rule G-21(b), and retains the long-standing strict liability standard for professional advertisements set forth in Rule G-21. This is consistent with FINRA Rule 2210. The liability standard, as amended in 2010, requires municipal advisors to deal fairly with all persons and not engage in any deceptive, dishonest, or unfair practice.[8] Draft Rule G- 40 reiterates that the obligations of a municipal advisor for fair dealing extend to advertising conduct and content.[9] The regulatory consistency will benefit FSI members in removing the burden of complying with two separate inconsistent rule requirements and eliminating any unnecessary confusion as they tailor their compliance to a single consistent standard. The consistency in regulations has the additional important benefit to investors. When firms are confident that they are complying with industry regulations and requirements, this allows them to focus their resources in other areas and streamlines their operations. Furthermore, FSI strongly supports regulatory harmonization because greater coordination and cooperation amongst the regulators increases regulatory transparency, reduces regulatory arbitrage, promotes product innovation, and increases confidence in our markets. As such, FSI strongly supports MSRB's efforts to develop consistent advertising requirements.

Conclusion

We are committed to constructive engagement in the regulatory process and welcome the opportunity to work with MSRB on this and other important regulatory efforts.

Thank you for considering FSI's comments. Should you have any questions, please contact me at (202) 803-6061.

Respectfully submitted,

David T. Bellaire, Esq.
Executive Vice President & General Counsel

[8] See MSRB Rule G-17, available at http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-17.aspx

[9] See Proposed Rules, available at, http://www.msrb.org/~/media/Files/Regulatory-Notices/RFCs/2017-04.ashx

LEWIS YOUNG
ROBERTSON & BURNINGHAM, INC.
AN INDEPENDENT MUNICIPAL FINANCIAL ADVISORY
AND CONSULTING FIRM

March 24, 2017

Ronald W. Smith
Corporate Secretary Municipal Securities Rulemaking Board
1300 I St. NW
Washington, DC 20005

Re: MSRB Notice 2017-4, Request for Comment on Revised Draft MSRB Rule G-40 and Draft Revisions to Rule G-21

Ladies & Gentlemen:

Lewis Young Robertson & Burningham ("LYRB") is pleased to submit comments on the above-referenced Notice.

LYRB is an independent financial advisory firm which has elected, since its inception 21 years ago, to be regulated as a broker dealer and, therefore, has been and remains subject to MSRB regulations. We are now also registered as a municipal advisor with the Securities and Exchange Commission and the MSRB.

LYRB does not underwrite or purchase securities for our own account or for sale to others nor do we carry customer account of any kind. We do not participate as a co-manager or member of selling groups and do not act as a remarketing agent. We are a major financial advisor in the State of Utah and work in some other states as well. LYRB has acted as a financial advisor on hundreds of transactions with a volume of over $8 billion. These transactions run the gamut from small to large, and include general obligation bonds, various types of revenue and tax backed bonds, revenue and bond anticipation notes, and taxable and tax-exempt (including Build America Bonds) bonds in both fixed rate and variable rate structures.

We have numerous comments to and objections to the regulatory regime proposed by draft Rule G-40.

First, the statutory basis for regulation is the Dodd Frank Act. This imposes a fiduciary standard on all municipal advisors. This generic level of regulation, as explicated by Rule G-42, already imposes a high level of probity and care upon advisors. In the context of the realities of the municipal advisory business set out

GATEWAY PLAZA BUILDING
41 NORTH RIO GRANDE, SUITE 101
SALT LAKE CITY, UTAH 84101
TELEPHONE 801.596.0700
TOLL FREE 800.581.1100
FAX 801.596.2800
WWW.LEWISYOUNG.COM

in the next paragraph, no further specific regulation of "advertising" is needed or useful.

Second, the "target market" of municipal advisors is radically different from the base market of a Broker/Dealer. Municipal Advisors sell no investments to unsophisticated customers to whom they owe no fiduciary duty. Consumers of our services are relatively sophisticated and rarely, if ever, make their selection of an advisor based in whole or even in small part upon generic advertising. There is therefore little scope to usefully regulate, only burdens of compliance to impose.

Third, you make much of a "level playing field" as to "advertising" between (regulated) Broker/Dealer municipal advisors and (presently unregulated) non-dealer advisors. This point has some merit. To the extent it does, we suggest you turn your energies to exempting all broker/dealer activities governed by Rule G-42 from the broker/dealer advertising rules, rather than needlessly imposing such rules where they are not needed in the name of a "level playing field". This would get the playing field "level" without adding regulation.

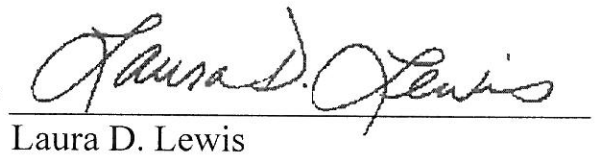
Fourth, in cases (rare) in which unsophisticated municipal issuers may be duped or deceived by an unscrupulous municipal advisor's "advertising" communication, we suggest that Rule G-17 and Rule G-42 provide ample scope for enforcement. This approach would avoid all the compliance costs imposed on by proposed Rule G-40 and relieve those currently imposed by G-21 on activities to which they have little connection.

Fifth, an illustrative anecdote: some years ago one of our senior advisors, then working for a large broker/dealer, prepared a presentation for an individual school district client, specifically tailored to that client's debt. This material was to be presented to the school board in a "power point" presentation on a screen in a public meeting and could in no way be considered "advertising" in any usual sense. That firm's compliance department insisted that because of the potential "general public" audience who *might* attend the school board meeting and therefore *could* see this presentation, it "might" be advertising and should be vetted by the compliance department before it could be shown. This imposed costs, not to mention incongruities. To begin with, the compliance department was not competent to evaluate the material they were asked to "review", as their expertise was in rules, not issuing general obligation school bonds. Second, this meant the presentation slides had to be completed three days earlier than would otherwise be required so they could be "reviewed". This imposed cost and inconvenience on the advisor and the firm to no useful public purpose.

In conclusion, we suggest you eliminate the current provisions related to advertising of Rule G-21 on broker/dealer activities otherwise governed by both G-17 and G-42 and that you not impose a Rule G-40 on non-broker/dealer advisors.

If that is unsatisfactory to you, an alternative would be a principles based "truth in advertising" version of G-40 which could be written in one or two sentences. Rule G-21 could be correspondingly simplified.

Lewis Young Robertson & Burningham, Inc.

By 

Laura D. Lewis
Principal

NATIONAL ASSOCIATION OF MUNICIPAL ADVISORS

March 24, 2017

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street, NW, Suite 1000
Washington, DC 20005

RE: MSRB Notice 2017-04

Dear Mr. Smith:

The National Association of Municipal Advisors (NAMA) appreciates the opportunity to respond to the MSRB's Request for Comment on Draft Rule G-40, Advertising by Municipal Advisors. NAMA represents Municipal Advisory Firms and Municipal Advisors (MA) from across the country and serves to promote and provide educational efforts, and assist its members navigate through the federal regulatory and municipal marketplace landscapes.

NAMA supports the general intent of the proposal to protect the public, and potential MA clients, from being misled by MA advertisements. However, this general point is already covered in Rule G-17 (Conduct of Municipal Securities and Municipal Advisory Activities - *In the conduct of its municipal securities or municipal advisory activities, each broker, dealer, municipal securities dealer, and municipal advisor shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice.*), making this present proposal unnecessary.

The unnecessary nature of the proposal is further underscored because the answer to the MSRB's question if MAs have any role "with the development or distribution of municipal security product advertisements, new issue product advertisements, and/or municipal fund security product advertisements" is "no." The proposed rulemaking contains many provisions that are framed for advertising of securities or "products" offered by underwriters and investment advisors to retail customers, rather than speaking to the *services performed* by municipal advisors to issuer clients.

It is also worth commenting that while respecting the MSRB's work and goals to regulate broker/dealers and municipal advisors impartially and in most ways equally to avoid harm to investors and issuers respectively, the need to automatically develop rules for MAs to mirror current broker/dealer rules should not be done just for the sake of doing so and is not proper rationale for regulation under the *Exchange Act*. While some MSRB Rules such as G-20 and G-37 certainly should apply in the same fashion to both broker/dealers and MAs, the proposed rules on advertising cannot be as easily applied to different types of professionals and actually creates a wholly unnecessary rule in the proposed Rule G-40.

Therefore, we respectfully request that the Proposed Rule G-40 be withdrawn as the same results of ensuring falsehood or misleading statements are not used in advertising for MA professional services can already be found in Rule G-17. The MSRB could further explore the application of advertising for MA services under Rule G-

17, with additional guidance or FAQs to ensure that MAs have a full understanding of the broad scope and reach of Rule G-17 related to the services that they offer and perform.

If the MSRB chooses to not withdraw proposed Rule G-40, then we would strongly suggest that significant changes be made to the proposal. First, there are numerous areas where clarifications are needed, as noted below. Second, the focus of the rulemaking should apply to professional advertisements for MA services. If the MSRB has identified any meaningful subset of MAs that advertise products, then a separate section should apply solely to product advertisements. We have noted below how the Rulemaking could be bifurcated to better acknowledge different types of advertising.

For further presentation of our comments, please see Attachment A, which provides a redline of the proposal with NAMA's suggestions.

Suggestions for Additional Exclusions and Clarifications

SEC Rule "General Information Exclusions" Should be Excluded from the Definition of Advertising. The items discussed in the clauses (a), (b), (d) and (e), of the "general information exclusions" listed in the MA Rule FAQ[i], should not be considered advertising within MSRB rulemaking, and be included as an exemption in section (a)(i):

- *(a)information regarding a person's professional qualifications and prior experience (e.g., lists, descriptions, terms, or other information regarding prior experience on completed transactions involving municipal financial products or issuances of municipal securities); (b) general market and financial information (e.g., market statistics regarding issuance activity for municipal securities or current market interest rates or index rates for different types of bonds or categories of credits); (c) information regarding a financial institution's currently-available investments (e.g., the terms, maturities, and interest rates at which the financial institution offers these investments) or price quotes for investments available for purchase or sale in the market that meet criteria specified by a municipal entity or obligated person; (d) factual information describing various types of debt financing structures (e.g., fixed rate debt, variable rate debt, general obligation debt, debt secured by various types of revenues, or insured debt), including a comparison of the general characteristics, risks, advantages, and disadvantages of these debt financing structures; and (e) factual and educational information regarding various government financing programs and incentives (e.g., programs that promote energy conservation and the use of renewable energy).*

RFPs/RFQs Should Be Excluded from the Definition of Advertisements. The Rule should make clear that responses to RFPs, RFQs, and similar types of documents do not fall into the advertising category. While the Notice refers to this notion, the proposed rule does not encompass all types of responses an MA may provide to an issuer's request, and these should be a specific exemption within the Rule itself, in (a)(i).

Client Lists Should Be Excluded From the Definition of Advertisements, per SEC Guidance for Investment Advisors. The SEC has stated that client lists may be used within certain parameters, for Investment Advisors. We request that the MSRB allow client lists to be used by MAs in accordance with this guidance.

- *The staff has stated that an advertisement that contains a partial client list that does no more than identify certain clients of the adviser cannot be viewed either as a statement of a client's experience with, or endorsement of, the investment 206(4)-1(a)(5) depending on the facts and circumstances.* (https://www.sec.gov/investment/im-guidance-2014-04.pdf)

Testimonials Should Be Defined as Noted in the SEC No Action Letter Related to this Same Issue for Investment Advisors.

- *See DALBAR, Inc., SEC No-Action Letter (pub. avail. Mar. 24, 1998) ("Although the term 'testimonial' is not defined in Rule 206(4)-1, we consistently have interpreted that term to include a statement of a client's experience with, or endorsement of, an investment adviser.").*

Case Studies Should be Excluded from the Definition of Advertising. We request that Case Studies bearing factual information, without discussion by a client of experience with or endorsement of an MA, should be permissible. This would allow MAs to provide information about their experiences in the MA services field to assist with the public's and potential client's understanding of their background.

Specific Guidance Needed Related to the Application of the Rulemaking for MA Firm Websites. Most MA Firms do not use common forms of advertising but rather use web sites to explain and promote their services. FAQs or guidance on how Rule G-40 would apply to this most commonly used platform, would be essential to ensure compliance with the rulemaking.

Specific Guidance Needed for Use of Social Media Platforms. The MSRB should also provide guidance or FAQs on how the proposed rule would apply to the use of "LinkedIn" and other social media platforms.

General Guidance on the Application of Rule G-40 on Advertisements of Professional Advertisements for MA Services. In addition to the two areas notes above where specific guidance is necessary, the MSRB should also develop more general guidance on the application of the Rule to professional advertisements for MA services.

(iv) Content Standards

Delete Provision Already Covered in MSRB Rule G-17. Most of the language in the Content Standards section of the proposal is repetitive to the overriding principle that MAs must not provide misleading information to the public, which is part of MSRB Rule G-17. Therefore, we suggest that (A) be deleted from this proposal.

There Should Be a Clear Separation Between Content Standards of Product Advertising and Professional Services Advertising. Due to the fact that the clear majority of MAs do and would only conduct professional services advertising, the rule should be written in a manner that creates clear standards for those types of advertisements.

- Sections (D), (E), and (F) are related to products, and would be difficult to apply to the types of services performed by MAs, and therefore should only be included as content standards for products. For example -
  - (D) MA must "…provide balanced treatment of risks and potential benefits…"
  - (E) MA must consider "….nature of the audience…"
  - (F) "Advertisement may not predict or project performance…"
- Sections (B), (C), (G) and (H) are related to both products and services, and should be included in the content standards for both, but redrafted to eliminate overlapping and confusing language.

MAs Should be Allowed to Indicate SEC Registration in Addition to MSRB Registration. In section (H), the MSRB states that a MA may indicate MSRB registration that complies with certain standards noted in that section. We suggest that SEC registration be added to this section.

General Comments

In addition to the specific comments noted above related to the proposal, it is also important to note that the MSRB should consider the costs that MAs will incur to comply with this rulemaking, especially small MA firms. This consideration is a requirement of the *Exchange Act*. As written, the proposed rulemaking includes overlapping and confusing content standards for professional and product advertising that will especially raise the cost of compliance for small MA firms because examiners require the development of policies and procedures even for rules that do not apply to the MA.

Finally, while again we do agree with the MSRB that MAs should not engage in advertising that is misleading or provides inaccurate information to potential clients, and that objective criteria should always be used by issuers in hiring municipal bond professionals, we do not agree that these rules would significantly "improve the selection of MAs" by issuers. This sentiment seems to overemphasize both the use of advertising by the MA community and the issuer's reliance on advertising in their decision-making process. We believe it is unlikely that most issuers hire an MA for their services based on an advertising, but rather are far more likely to use an RFP/RFQ process to choose an MA. By dispelling this notion promoted in the Notice, we again use that as an example as to why new rulemaking on advertising is unnecessary, and the same goals can be achieved by referencing MSRB Rule G-17, and providing targeted guidance related to the application of Rule G-17 to professional services advertising used by MAs.

Thank you again for the opportunity to provide comments on this issue. Please feel free to contact me if I can provide you with any additional information or answer any questions about NAMA's response to proposed rule G-40.

Sincerely,

Susan Gaffney

Susan Gaffney
Executive Director

[i] See Registration of Municipal Advisors Frequently Asked Questions – Office of Municipal Securities, 5/19/14, page 3, https://www.sec.gov/info/municipal/mun-advisors-faqs.pdf

Attachment A

G-40 Redline with Suggestions

(a) *General Provisions*.

(i) *Definition of "Advertisement."* For purposes of this rule, the term "advertisement" means any material (other than listings of offerings) published or used in any electronic or other public media, or any written or electronic promotional literature distributed or made generally available to 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 reprint, or any excerpt of the foregoing or of a published article. The term does not apply to preliminary official statements, official statements, preliminary prospectuses, prospectuses, summary prospectuses or registration statements, responses to requests for proposals, responses to requests for qualifications or similar documents, client lists and case studies, but does apply to abstracts or summaries of the foregoing and other such similar documents prepared by municipal advisors. Furthermore, the term does not apply to the items discussed in the clauses (a), (b), (d) and (e), of the "general information exclusions" listed in the MA Rule FAQ [citation].

(ii) *Definition of "Form Letter."* For purposes of this rule, the term "form letter" means any written letter or electronic mail message distributed to more than 25 persons within any period of 90 consecutive days.

(iii) *Definition of Municipal Advisory Client.* For the purposes of this rule, the term municipal advisory client shall include either a municipal entity or obligated person for whom the municipal advisor engages in municipal advisory activities as defined in Rule G-42(f)(iv), or a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser (as defined under section 202 of the Investment Advisers Act of 1940) on behalf of whom the municipal advisor undertakes a solicitation of a municipal entity or obligated person, as defined in Rule 15Ba1-1(n), 17 CFR 240.15Ba1-1(n), under the Act.

(iv) *Content Standards for Product Advertising.*

~~(A) All advertisements by a municipal advisor, must be based on the principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular municipal security or type of municipal security, municipal financial product, industry, or service.~~

(B) No municipal advisor may make any deceptive, dishonest or unfair~~false, exaggerated, unwarranted, promissory or misleading~~ statement or claim in any advertisement which includes exaggerated or misleading statements or claims.

(C) A municipal advisor may place information in a legend or footnote only in the event that such placement would not inhibit a municipal advisory client's understanding of the advertisement.

(D) A municipal advisor must ensure that statements are clear and not misleading within the context in which they are made, and that they provide balanced treatment of risks and potential benefits. An advertisement must be consistent with the risks inherent to the municipal financial product or the issuance of the municipal security.

(E) A municipal advisor must consider the nature of the audience to which the advertisement will be directed and must provide details and explanations appropriate to the audience.

(F) An advertisement may not predict or project performance, imply that past performance will recur or make any exaggerated ~~or unwarranted~~ or misleading claim, opinion or forecast; provided, however, that this paragraph (a)(iv)(F) does not prohibit:

(1) A hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of a municipal financial product; and

(2) An investment analysis tool, or a written report produced by an investment analysis tool.

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

(H) A municipal advisor may indicate registration with the Municipal Securities Rulemaking Board and the Securities and Exchange Commission in any advertisement that complies with the applicable standards of all other rules of the Board and SEC and that neither states nor implies that the SEC or Municipal Securities Rulemaking Board or any other corporate name or facility owned by the SEC or Municipal Securities Rulemaking Board, or any other regulatory organization endorses, indemnifies, or guarantees the municipal advisor's business practices, services, skills, or any specific municipal security or municipal financial product.

~~(v) *General Standard for Advertisements*. Subject to the further requirements of this rule relating to professional advertisements, no municipal advisor shall publish or disseminate, or cause to be published or disseminated, any advertisement relating to municipal securities or municipal financial products that such municipal advisor knows or has reason to know contains any untrue statement of material fact or is otherwise false or misleading.~~

(b) *Professional Advertisements*.

(i) *Definition of "Professional Advertisement."* The term "professional advertisement" means any advertisement concerning the facilities, services or skills with respect to the municipal advisory activities of the municipal advisor or of another municipal advisor.

(ii) Content *Standard for Professional Advertisements*. ~~No municipal advisor shall publish or disseminate, or cause to be published or disseminated, any professional advertisement that contains any untrue statement of material fact or is otherwise false or misleading.~~

(A) No municipal advisor may make any deceptive, dishonest or unfair statement or claim in any advertisement which includes exaggerated or misleading statements or claims.

(B) A municipal advisor may place information in a legend or footnote only in the event that such placement would not inhibit a municipal advisory client's understanding of the advertisement.

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

(D) A municipal advisor may indicate registration with the Municipal Securities Rulemaking Board in any advertisement that complies with the applicable standards of all other rules of the Board and that neither states nor implies that the Municipal Securities Rulemaking Board or any other corporate name or facility owned by the Municipal Securities Rulemaking Board, or any other regulatory organization endorses, indemnifies, or guarantees the municipal advisor's business practices, services, skills, or any specific municipal security or municipal financial product.

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

(c) *Approval by Principal*. Each advertisement subject to the requirements of this rule must be approved in writing by a municipal advisor principal prior to first use. Each municipal advisor shall make and keep current in a separate file records of all such advertisements.

March 23, 2017

VIA ELECTRONIC DELIVERY
Municipal Securities Rulemaking Board
Attention: Ronald Smith, Corporate Secretary
1300 I Street, NW Suite 1000
Washington, DC 20005

pfm

1735 Market Street
43rd Floor
Philadelphia, PA 19103
215.567.6100

pfm.com

RE: MSRB 2017-04 Request for Comment on Draft Amendments to MSRB Rule G-21, on Advertising, and on Draft MSRB Rule G-40 on Advertising by Municipal Advisors

Dear Ronald Smith:

On behalf of Public Financial Management, Inc., and PFM Financial Advisors LLC (collectively, referred to as "PFM" or "We"), PFM would like to thank the Municipal Securities Rulemaking Board (the "MSRB" or "Board") for the opportunity to comment on the MSRB's proposed draft amendments to MSRB Rule G-21 on advertising and draft MSRB Rule G-40, which establishes advertising rules for municipal advisors. As you are likely aware, PFM, which has been in existence for over 40 years, is the nation's largest independent municipal advisor and is the top-ranked municipal advisor in the nation in terms of both number of transactions and total dollar amount according to Thomson Reuters as of December 2016. We hope that you agree that our municipal market presence gives us a broad, national perspective on the proposed amendments and their potential effects on the municipal market.

PFM understands the implementation of advertising rules for municipal advisors because we believe that (a) the proposed rules will assist municipal advisors to more consistently market services to the public in a manner that promotes compliance with applicable regulations, and (b) such rules will enhance fair dealing with clients by requiring that municipal advisors not subject the municipal clients to advertising that would be false or misleading. We support the MSRB in its endeavors with respect to proposed amendments to MSRB Rule G-21 ("Rule G-21") and the new draft MSRB Rule G-40 ("Rule G-40"), however, PFM would like the Board to consider the following in its implementation of the proposed advertising rules for municipal advisors:

1) Further explicit refinement of the definition of advertising such that it includes specific exemptions for certain categories of information not typically interpreted to be advertising including, but not limited to, additional forms of Requests for Proposals (RFPs), general or educational information, case studies, and representative client lists;

2) More definitive content standards and distinctions for advertising products ("product advertising") and advertising for municipal advisor services ("professional advertising");

3) Allowance for the use of client testimonials with specific disclaimers as permitted in investment advisor advertising under corresponding SEC No-Action letters or other forms of guidance; and

4) Guidance with respect to advertising rules on websites and social media sites.

With respect to a more refined definition of what constitutes municipal advisor advertising, PFM believes that the definition of "advertising" should clearly provide for specific exclusions for certain categories of communications. While the MSRB has commented that RFPs would not be included, we feel that the statement should be expanded to include Requests for Qualifications (RFQs), Requests for Information (RFIs), statements of interest in response to municipal procurement processes, and the like, and should be more formally discussed and itemized as specific exemptions within amendments to Rule G-21 and the proposed Rule G-40 provision (a)(i). Further, in addition to RFP's being specifically exempted under the advertising rules, we also believe that the MSRB should exclude from the definition of advertising "client lists" or "representative client list" and past transaction "case studies" as these communications do not include commentary or opinions of clients, but rather are examples of the types of work that a municipal advisor has done in the past as part of the municipal advisory services performed for clients. Lastly, PFM believes that items identified as "general information exclusions" listed in Rule 15Ba1-1 (d) (ii) (the "MA Advice Rule"), should also explicitly not be considered advertising as such information constitutes general factual information or educational content about market conditions or financial information that are shared by municipal advisors with clients, and thus should explicitly not be deemed advertising under the proposed rules. Such items would include:

- Information regarding a person's professional qualifications and prior experience (e.g., lists, descriptions, terms, or other information regarding prior experience on completed transactions involving municipal financial products or issuances of municipal securities);
- General market and financial information (e.g., market statistics regarding issuance activity for municipal securities or current market interest rates or index rates for different types of bonds or categories of credits) regarding a financial institution's currently-available investments (e.g., the terms, maturities, and interest rates at which the financial institution offers these investments) or price quotes for investments available for purchase or sale in the market that meet criteria specified by a municipal entity or obligated person;

- Factual information describing various types of debt financing structures (including, but not limited to, fixed rate debt, variable rate debt, general obligation debt, debt secured by various types of revenues, or insured debt), with a comparison of the general characteristics, risks, advantages, and disadvantages of these debt financing structures; and
- Factual and educational information regarding various government financing programs and incentives (e.g., programs that promote energy conservation and the use of renewable energy).

With respect to advertising "Content Standards" of MSRB draft amendments to Rule G-21 and draft Rule G-40, while PFM firmly believes in the overriding principle that municipal advisors must not provide false or misleading information about their services to the public, we believe that provision (A) of the "Content Standards" is duplicative and should be deleted because MSRB Rule G-17 governing Conduct of Municipal Securities and Municipal Advisory Activities already addresses these standards. Further, we believe that the MSRB should provide a clearer demarcation between the content standards for advertising products within the regulatory conventions set for broker-dealers (more typically considered "product advertising") and the standards for advertising municipal advisory services more akin to regulatory conventions set for registered investment advisors who are also subject to a fiduciary standard (generally "professional advertising") because our experience clearly shows that the vast majority of municipal advisors predominately engage in the latter type of advertising. In addition to advertising services advising on methods of sale, municipal advisory services include myriad activities including, but not limited to:

- Developing the plan of finance and related transaction timetables;
- Assisting in the preparation of rating agency strategies and presentations;
- Identifying and analyzes financing solutions and alternatives for funding capital improvement plan;
- Advising on the method of sale, taking into account market conditions and near-term activity in the municipal market;
- Assisting with the selection of underwriters, syndicate structure and bond allocations;
- Developing requests for proposals and qualifications for finance team members (e.g., underwriters, bond counsel, and paying agents);
- Coordinating internal and external finance team members;
- Preparing preliminary cash flows/preliminary refunding analyses;
- Planning and coordinating bond closings;
- Evaluating market conditions and the pricing performance of the senior manager(s) and co-managers in their distribution of bonds; and

- Verifying cash flow calculations.

While Sections (B), (C), (G) and (H) of the Content Standards could be applicable to both products and services described above, and should be included in the "Content Standards" of both Rule G-21 and Rule G-40, we believe that proposed Sections (D), (E), and (F) providing that municipal advisors advertisements must "provide balanced treatment of risks and potential benefits," or "consider the nature of the audience..." and "may not predict or project performance..." should not be included under the "Content Standards" for Rule G-40 for these provisions are more directly related to advertisements for *products* distributed by brokers, dealers, or municipal securities dealers, and should not be construed as necessary to administer to the types of *services* that municipal advisors may provide. Accordingly, for the foregoing reasons, PFM requests that the MSRB delete proposed Section (D), (E), and (F) and provide provisions that would be more relevant to advertising for the services such as those articulated above.

In discussing the harmonization of Rules G-21 and G-40 with the advertising rules of other financial regulators, the MSRB noted that in adopting Rule 206(4)-1, under the Investment Advisers Act of 1940, as amended (the "Advisers Act"), the rules that applies to advertisements by registered investment advisers, the Securities and Exchange Commission ("SEC") found that the use of testimonials in advertisements by an investment adviser was misleading. In the Adviser's Act the term "testimonial" was defined as a statement of a "customer's experience with" or "endorsement of" an investment adviser. While PFM would agree that the use of testimonials should be prohibited in municipal advisor advertising as they may be misleading, in harmonizing the rules of municipal advisors to those afforded to investment advisers, we request that the prohibition from using testimonials in advertisements under draft amendments of Rule G-21, and draft Rule G-40 be similarly narrowed to prohibit statements of a "customer's experience with" or "endorsement of" municipal services, but allow for the inclusion of partial client lists in advertising consistent with prior SEC guidance associated with testimonials and the use of partial client lists. Through a series of SEC No-Action letters, Denver Investment Advisors, Inc. (Publicly Available July 30, 1993), and Cambiar Investors, Inc. (Publicly Available August 28, 1997), the SEC provided that as the definition of a "testimonial" was "a statement of a customer's experience" or an "endorsement", it would require "actual statements" to be made by clients, which in turn would be utilized in investment adviser advertising. Further the SEC stated a "partial client list" is "not a statement of a customer's experience" for it does not relay the "experience" of the clients listed, and "since the experience of clients is not listed, it cannot run the risk of fraudulently or deceptively implying the experience of listed clients or what prospective clients can expect." Therefore, these client lists should be permitted as previously asserted because they constitute communications that provide examples of the

types of work that a municipal advisor has done in the past as part of the municipal advisory services performed for clients, and such advertisement concerning the municipal advisor's services is clearly permissible as a Professional Advertisement under draft Rule G-40(b). Moreover, given the disclaimers and disclosures, which would be required to accompany client lists consistent with the requirements under the Adviser's Act, prospective clients should not be misled. Accordingly, we request that the prohibition on the use of testimonials in MSRB Rule G-21 and proposed Rule G-40 be clarified for consistency with similar registered investment adviser regulatory requirements to not include partial client lists that are accompanied by clarifying disclosures such as a description of the objective criteria in compiling the list, and a disclaimer in accordance with applicable SEC No-Action guidance.

Lastly, PFM believes that while a vast majority of municipal advisors do not engage in traditional types of advertising associated with broker-dealers, most do have web sites, where potential municipal clients may learn about the firm and through which medium firms can explain and promote their available services. Accordingly, it would be beneficial in ensuring compliance with MSRB rulemaking if the MSRB provided further clarity (ex. cross-reference to existing regulation regarding this subject matter), FAQs or guidance on how the advertising rules apply to postings on websites and the use of social media sites (e.g., LinkedIn), and how the advertising rules would impact those advertising or media outlets frequently used by financial services professionals. Alternatively, we believe the existing regulation itself could be sufficiently relied upon.

Therefore, PFM respectfully requests that the MSRB reflect and remit the proposed draft amendments to MSRB Rule G-21 and draft Rule G-40 back to the MSRB for additional analysis and further clarification in accordance with feedback received in this comment with respect to the proposed rule changes.

Sincerely,

Leo Karwejna
Chief Compliance Officer

Cheryl Maddox
General Counsel

Catherine Humphrey-Bennett
Municipal Advisory Compliance Officer

sifma
Invested in America

March 24, 2017

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street NW
Suite 1000
Washington, DC 20005

Re: MSRB Notice 2017-04: Draft Amendments to MSRB Rule G-21, on Advertising, and on Draft Rule G-40, on Advertising by Municipal Advisors

Dear Mr. Smith:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates this opportunity to respond to Notice 2017-04 [2] (the "Notice") issued by the Municipal Securities Rulemaking Board (the "MSRB") in which the MSRB is making a request for comment on draft amendments to MSRB Rule G-21, on advertising, and on new draft MSRB Rule G-40, on advertising by municipal advisors. SIFMA and its members appreciate the MSRB's efforts to update MSRB Rule G-21. We agree with the principles in the rules that communications to the public must be consistent with fair dealing duties and in good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security. We are pleased that, at long last, there will be a leveling of the regulatory playing field between brokers, dealers, and municipal securities dealers (collectively, "dealers"), who have long been regulated by MSRB Rule G-21, and non-dealer municipal advisors, whose advertising activities will become regulated under new MSRB Rule G-40. We agree that the MSRB should have two rules on public communications, and we believe the rules should be divided based on activity, not by registration category. We do feel, however, that FINRA Rule 2210

[1] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] MSRB Notice 2017-04 (Feb. 16, 2017).

should be incorporated by reference into Rule G-21, or at a minimum the two rules should be more closely harmonized.

I. Rule G-21 Should Incorporate FINRA Rule 2210 by Reference and Be Focused on Dealer Activity

MSRB Rule G-21 was adopted in 1978, and since its adoption the rule has not been regularly or uniformly harmonized with what is now Financial Industry Regulatory Authority ("FINRA") Rule 2210. This discordance leads to confusion among all market participants (investors and dealers alike) and regulatory risk for dealers. SIFMA has advocated in the past,[3] and continues to advocate for harmonization between MSRB Rule G-21 and FINRA Rule 2210.

SIFMA and its members feel that FINRA Rule 2210 should be incorporated by reference into MSRB Rule G-21 to cover any communications by a dealer in its role as a dealer, including transactions in municipal securities, with certain exceptions. A cross-reference is beneficial regulatory construction in that it both eliminates any concern that some dealers may not be covered by the rule, and eliminates concerns about a lack of harmonization between the FINRA and MSRB rules.

If a purpose of the Notice and the draft amendments is to update Rule G-21 and harmonize its provisions with FINRA Rule 2210, the best way to accomplish this is to have one governing rule that is cross-referenced by other self-regulatory organizations ("SROs"). Again, this methodology is the most efficient way to reduce confusion and risk to investors, and reduce regulatory risk to dealers. Maintaining a separate substantive Rule G-21 for dealer activity that is already clearly set forth in FINRA Rule 2210 does not efficiently further the regulatory goals as stated in the Notice. We do feel, however, that the filing requirements in FINRA 2210(c) are unnecessary and burdensome, and should be exempted from application in this context. Alternatively, the MSRB could make filing of retail communications with FINRA under FINRA Rule 2210(c) permissive. Additionally, we feel FINRA Rule 2210(e) should be exempted from application in this context. Alternatively, if the MSRB believes there is a need to have a comparable provision with regard to the use of the MSRB's name, then the MSRB could include a parallel provision that would be retained in Rule G-21 along with the municipal fund securities advertising requirements as described below.

---

[3] *See* Letter from David L. Cohen, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated Feb. 19, 2013, to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board (regarding MSRB Notice 2012-63: Request for Comment on MSRB Rules and Interpretive Guidance).

For these reasons, SIFMA and its members feel strongly that MSRB Rule G-21, should be amended to incorporate FINRA Rule 2210 by reference as follows, "Municipal securities brokers, dealers and municipal securities dealers, with respect to their activities as such, shall comply with FINRA Rule 2210, on communications with the public, and any amendments thereto, as if such Rule is part of MSRB's Rules, with the exception of sections (c) and (e)."[4]

Although we understand the MSRB has concerns about incorporating by reference other SRO's rules into its rulebook, we feel these concerns are overstated and can easily be overcome. One of the concerns discussed by MSRB staff with us was a concern about lack of notice to the regulated municipal securities community regarding a potential or approved amendment to a FINRA rule incorporated by reference. SIFMA and its members feel that a regulatory notice by the MSRB highlighting proposed or adopted rule changes would be sufficient notice, and would be no more confusing or burdensome on market participants than if the MSRB had proposed or adopted amendments itself. We point out that that the MSRB itself said in its 2013 filing to amend its suitability rule to be more consistent with FINRA's rule:

> Given the extensive interpretive guidance surrounding FINRA Rule 2111 and the impracticality and inefficiency of republishing each iteration of such FINRA guidance, substantively similar provisions of Rule G-19 will be interpreted in a manner consistent with FINRA's interpretations of Rule 2111. If the MSRB believes an interpretation should not be applicable to Rule G-19, it will affirmatively state that specific provisions of FINRA's interpretation do not apply.[5]

Certainly, rulemaking is undertaken at a more measured pace then some interpretive activity and therefore there would be abundant opportunity for the MSRB to provide appropriate notification to the municipal securities community about changes in the FINRA advertising rule, and would also provide the MSRB

---

[4] There is precedent in the MSRB Rulebook for incorporation of other regulator's rules by reference. *See* MSRB Rule G-41 on Anti-Money Laundering Compliance Program. Another alternative could be structured similarly to current MSRB Rule G-35 on Arbitration, in that bank dealers who are not NASD members are subject to the NASD Code of Arbitration Procedure as if they were a member of the NASD.

[5] *See* Proposed Rule G-47, on Time of Trade Disclosure Obligations, Proposed Revisions to Rule G-19, on Suitability of Recommendations and Transactions, and Proposed Rules D-15 and G-48, on Sophisticated Municipal Market Professionals found at http://www.msrb.org/~/media/Files/SEC-Filings/2013/MSRB-2013-07.ashx?la=en, at page 8.

with sufficient time to evaluate whether some change or interpretation of the FINRA rule should not be adhered to for the municipal market.

II. If MSRB Rule G-21 Does Not Incorporate FINRA Rule 2210 by Reference, Then the Rules Should Be More Closely Harmonized

If the MSRB decides not to incorporate FINRA Rule 2210 by reference into Rule G-21 to govern communications by a dealer in its role as a dealer, then SIFMA and its members feel that it is necessary for Rule G-21 to be more closely harmonized with FINRA Rule 2210. The current Rule G-21 and its draft amendments do not reflect the current construction of FINRA Rule 2210, which divides communications with the public into three categories: retail communications, correspondence,[6] and institutional communications. FINRA Rule 2210 establishes different requirements for retail communications and institutional communications. This approach takes into account the critical differences in the intended audiences. Generally, FINRA's rule on retail communications requires pre-use approval by a principal, while institutional communications do not; instead, dealers are given the ability to establish review procedures for institutional communications that are appropriate to their business, subject to certain specified parameters.

The MSRB has not made any effort to harmonize these concepts from FINRA Rule 2210 into Rule G-21, but instead continues to treat all advertisements as subject to one-size-fits-all pre-use approval by a principal, regardless of the audience. The definition of "advertisement" in Rule G-21 is different and broader than that of "retail communication" in FINRA Rule 2210. We strongly support removal of the definition of "advertisement", "form letter", and "professional advertisement" in favor of harmonizing Rule G-21 with the three categories of communications (retail communications, correspondence, and institutional communications) as set forth in FINRA Rule 2210.[7] Harmonization of the MSRB and FINRA rules would also necessitate the removal of the confusing and duplicative definition of "product advertisement", the only purpose of which is to add what is covered in content standards. Draft Rule G-40(c) requires that each advertisement that is subject to draft Rule G-40 be approved in writing by a municipal advisory principal before its first use.

---

[6] We recognize the regulation of correspondence is handled separately in FINRA Rule 3110, pursuant to FINRA Rule 2210(b)(2).

[7] We draw your attention to FINRA Regulatory Notice 12-29 (Communications with the Public) (June 2012), available at http://www.finra.org/industry/notices/12-29 (last visited Mar. 24, 2017), wherein FINRA specifically reduces the number of categories and definitions of communications from six categories to three.

SIFMA and its members feel strongly that the MSRB should adopt the FINRA approach to dividing the regulatory framework for communications into categories for retail and institutional communications, so that dealers can apply common approval processes for institutional communications across all asset classes. This approach is significantly preferable over requiring pre-use principal approval for municipal securities advertisements that are used exclusively with institutional customers, when FINRA permits establishment of alternate approval procedures for these institutional communications for all other asset classes.

III. MSRB Should Include Other Communications Exceptions Allowed by FINRA

SIFMA and its members note that FINRA's three categories of communications makes institutional communications exempt from the requirement of prior approval. This is a critical distinction between the rules, and we appeal to the MSRB to incorporate this concept into the MSRB rules. The MSRB should consider all the exceptions and guidance in FINRA Rule 2210(d) regarding content standards, not just (d)(1). SIFMA and its members feel very strongly about these exceptions, particularly FINRA Rule 2210(d)(6) on testimonials (as discussed in more detail in Section III(d) below); FINRA Rule 2210(d)(7) on recommendations; and FINRA Rule 2210(d)(9) on prospectuses (as discussed in more detail in Section III(a) below).

a. Private Placement Memoranda and Limited Offering Memoranda

The amendments to Rule G-21 and draft Rule G-40 do not create an exception for issuer offering and disclosure documents from the definition of an advertisement. Issuer offering and disclosure documents (including, but not limited to, private placement memoranda, commercial paper offering memoranda, offering circulars, limited offering memoranda, free writing prospectuses, official statements and prospectuses) should all be excluded from the definition of a covered communication within the rules. Even though a dealer or advisor may have potentially had a role in the preparation of these documents, these are issuer documents and not dealer or municipal advisor advertisements. For example, a "tombstone" or other offering summary would potentially be a covered communication, but the entire official statement, limited offering memorandum, or other offering and disclosure documents would be exempt from the rules. Incorporating these concepts into the draft amendments would harmonize the rules with FINRA Rule 2210(d)(9).

b. Responses to Requests for Proposals

The Notice stated that a response by a municipal advisor to a request for proposals from a municipal entity or obligated person for services in connection with a municipal financial product or the issuance of municipal securities would "most likely" not be an advertisement under draft Rule G-40. SIFMA and its members feel strongly

that the MSRB should clarify that a response by a dealer or a municipal advisor to a request for proposals is not a covered communication and won't be deemed an advertisement. The idea that a solicited response to a request for comment or qualifications is potentially an advertisement is nonsensical. It should not matter how many people receive or view the response. If twenty-six employees at one municipal securities issuer view the response, SIFMA and its members feel strongly that the communication is not an advertisement because it was solicited, and the number of people that received the response at the issuer is not relevant. If the response went to one issuer, that is the relevant number distributed, not the number of employees at that issuer that viewed the document. It is the one issuer that decides whether or not to engage the municipal advisor or dealer based on its response, and there is one potential engagement; not twenty-six potential engagements with twenty-six different employees. To that end, we would appreciate the MSRB clarifying the language in the Notice that responses to requests for proposals are not advertisements under the amendments to Rule G-21 or new draft Rule G-40.

c. Social Media

The amendments to Rule G-21 and draft Rule G-40(c) apply to advertisements, regardless of whether electronic or other public media is used with those advertisements. As such, we feel no additional guidance by the MSRB is needed regarding the use of social media by a dealer or municipal advisor at this time. We believe that FINRA is currently working on guidance regarding social media. In line with our earlier comments, we feel the MSRB should ascribe to this guidance or clearly articulate why it is not appropriate in this market.

d. The Use of Testimonials Should be Permitted

Draft Rule G-21(a)(iii) prohibits dealers from using testimonials in advertisements. The concerns the MSRB states are based on a study which analyzes the age of municipal securities investors. FINRA Rule 2210 permits testimonials, with clear limitations, which SIFMA and its members feel provide sufficient investor protections. SIFMA feels these protections are strong enough for retail communications. SIFMA and its members believe that regulatory harmonization and consistency is paramount. The MSRB should harmonize the exception for use of testimonials with FINRA Rule 2210(d)(6), subject to the content standards and requirements that apply.

Additionally, the MSRB's concerns in this area regarding retail investors are not credible when applied to communications with institutional investors or municipal advisory activity. The use of testimonials should not be prohibited by firms acting as a municipal advisor. The MSRB cites to concerns set forth in the 1961 adopting release for Securities and Exchange Commission ("SEC") Rule 206(4)-1 for investment advisors. In this case, municipal advisors can be distinguished from investment advisors due to the differences in their client base.

Municipal advisors are not selling securities to elderly retail investors; they are advising professional state and local government officials about municipal securities issuance and investments. SIFMA and its members agree there should be a level regulatory playing field between municipal advisors/investment advisers and other municipal advisors. Again, MSRB should harmonize the exception for use of testimonials with FINRA Rule 2210(d)(6), subject to the content standards and requirements that apply.

e. Investment Analysis Tools

The amendments to Rule G-21 and draft Rule G-40(c) prohibit a dealer or municipal advisor from using an advertisement that, in part, predicts or projects performance, but does not prohibit the use of an investment analysis tool. Investment analysis tools are frequently used and serve to better inform investors. The use of such tools should continue to be permitted. SIFMA and its members do not believe additional guidance about the definition of an investment analysis tool and about the use of such tools is necessary at this time. If the MSRB feels strongly about additional guidance in this area, we believe that reference to or harmonization with FINRA Rule 2214 would be acceptable.

f. The Use of Illustrations Should be Permitted

As described in the Notice, FINRA recently requested comment on proposed amendments to FINRA Rule 2210.[8] In RN 17-06, FINRA proposes to amend FINRA Rule 2210 to create an exception to the rule's prohibition on projecting performance to permit a firm to distribute a "customized hypothetical investment planning illustration that includes the projected performance of an asset allocation or other investment strategy, but not an individual security." As a general matter, SIFMA believes the proposed amendment in RN 17-06 would better align FINRA Rule 2210's investor protection benefits and economic impacts. Importantly, the proposed amendment in RN 17-06 enhances a firms' ability to provide investors with only brokerage accounts access to potentially useful projections currently available to investment advisory clients. SIFMA supports these amendments to FINRA Rule 2210,[9] and supports similar exceptions in the draft amendments to Rule G-21 and draft new Rule G-40.

---

[8] *See generally* FINRA Regulatory Notice 17-06 (Communications with the Public) (Feb. 2017), available at http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-06.pdf (last visited Mar. 6, 2017) ("RN 17-06").

[9] *See* Letter from Kevin Zambrowicz, Managing Director and Associate General Counsel, SIFMA, to Marcia E. Asquith, Office of the Corporate Secretary, FINRA, anticipated to be dated Mar. 27, 2017 (regarding RN 17-06).

IV. Municipal Fund Securities

Rule G-21(e) addresses municipal fund security product advertisements. As set forth in the Notice, these rules regulate dealer sales of these products and are largely based on the SEC's advertising rules for registered investment companies, such as mutual funds. This section can be easily separated from the rest of the rule, if necessary. SIFMA and its members support the ability to use hyperlinks in this rule, and whenever possible elsewhere within the MSRB rule set, as appropriate. We do not have further suggestions regarding the advertising rules for Achieving a Better Life Experience Act of 2014 (ABLE) programs at this time, as we believe it is too early in the product's lifecycle to ascertain the need for any additional regulatory guidance.

V. MSRB Rule G-40 Should Be Limited in Scope to Municipal Advisory Activities

MSRB Rule G-40 should cover communications by firms acting as a municipal advisor, whether they be dealer firms or non-dealer municipal advisors. Rule G-21 (whether as amended or if using incorporation of FINRA Rule 2210 by reference) should explicitly provide that it does not cover advertising or communications relating to municipal advisory activities of dealers; such municipal advisory advertising or communications of dealer municipal advisors should be governed solely by new draft Rule G-40. SIFMA strongly supports the harmonization of draft Rule G-40 with FINRA Rule 2210 with respect to the categorization of communications (retail communications, correspondence and institutional correspondence), instead of the single broad category of "advertising". SIFMA also supports the removal of the definitions of "advertisement", "form letter", "product advertisement" and "professional advertisement", as not being consistent with the concepts and terms in FINRA Rule 2210. Further, we also strongly support the same harmonization with the content standards and other communications exceptions described above.

In general, municipal advisors have little to no role in the development or the distribution of municipal security product advertisements, new issue product advertisements, and/or municipal fund security product advertisements. As stated above, we feel Rule G-40 should only cover municipal advisory activity advertisements. Thus, to the extent that municipal advisors use product advertisements, MSRB Rule G-40 should cover such advertisements but only insofar as they relate to municipal advisory activities. For example, if a municipal advisor is selling computer software, books or other products to assist their clients with municipal securities transactions, then we feel those product advertisements should be covered by the rule; if such products are unrelated to municipal advisory activities but instead relate to other business activities of the firm, then the advertisements should not be covered. SIFMA believes a nexus to municipal

advisory activities (as defined in Rule G-42(f)(iv)) is critical to establishing the MSRB's jurisdiction in this area. We feel that any activities of a municipal advisor other than municipal advisory activities are outside the scope of the rule.

VI. Economic Analysis

a. Effect on Competition, Efficiency, and Capital Formation

As noted above, SIFMA fully supports the regulation of the advertising activities of municipal advisors, which levels the regulatory playing field. Dealers have long been governed by Rule G-21, regardless of their activity or role in a transaction. However, as noted above, we believe the rules should be structured to cover the requisite activity or role, and not based on the firm's corporate structure or registration classification.

Also, SIFMA believes the proposed amendment described in RN 17-06 would help level the regulatory playing field between investment advisors, municipal advisors and broker dealers. As noted above, allowing firms to provide projections and illustrations to investors can be potentially useful, and is already permitted under the SEC rules for investment advisory clients.

b. Costs and Benefits

The draft changes to MSRB Rule G-21, as proposed, and new MSRB Rule G-40, do not substantively harmonize the rules with FINRA Rule 2210. SIFMA and its members believe that separate and distinct rules for municipal securities are valuable when there exists something unique about the market that warrants a different rule than that promulgated by FINRA. With respect to advertising or public communications for most municipal securities products (except for municipal advisory business and municipal fund securities), we feel there is no compelling reason to establish a different rule set than that which exists under FINRA Rule 2210. While SIFMA applauds the MSRB for its efforts to update MSRB Rule G-21 as well as bringing municipal advisor advertising and public communications under the regulatory regime, SIFMA feels strongly that costs of implementation and ongoing compliance would be greatly reduced if these rules more closely mirror FINRA Rule 2210.

VII. Conclusion

Again, SIFMA and its members appreciate the MSRB's efforts to update MSRB Rule G-21. We agree that the MSRB should have two advertising rules, and we believe the rules should be divided based on activity, not by registration category. We do feel, however, that FINRA Rule 2210 should be incorporated by reference into Rule G-21, or at a minimum the two rules should be more closely

harmonized. We would be pleased to discuss any of these comments in greater detail, or to provide any other assistance that would be helpful. If you have any questions, please do not hesitate to contact the undersigned at (212) 313-1130.

Sincerely yours,

Leslie M. Norwood
Managing Director and
Associate General Counsel

cc: ***Municipal Securities Rulemaking Board***
Lynnette Kelly, Executive Director
Robert Fippinger, Chief Legal Officer
Michael Post, General Counsel – Regulatory Affairs
Pamela K. Ellis, Associate General Counsel
Meghan Burns, Economic Researcher

Financial Industry Regulatory Authority
Robert Cook, President and CEO
Joseph Price, Senior Vice President of Corporate Financing and Advertising Regulation
Thomas Pappas, Vice President and Director, Advertising Regulation
Cynthia Friedlander, Director, Fixed Income Regulation

Securities and Exchange Commission
Heather Seidel, Acting Director, Division of Trading and Markets
Gary Goldsholle, Deputy Director, Division of Trading and Markets
David Shillman, Associate Director, Division of Trading and Markets
Jessica S. Kane, Director, Office of Municipal Securities
Rebecca Olsen, Deputy Director, Office of Municipal Securities

Intelligence amplified

Strategic Insight 255 State Street, 5th floor, Boston, MA 02109, US
T +1 617-670-4700 www.strategic-i.com

May 16, 2017

Ronald W. Smith, Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street, NW, Suite 1000
Washington, DC 20005

strategic insight™

Re: Comments Concerning MSRB 2017-04 (February 16, 2017)

MSRB Request for Comment on Draft Amendments to MSRB Rule G-21, on Advertising, and on Draft Rule G-40, on Advertising by Municipal Advisors

Dear Mr. Smith:

Strategic Insight commends the MSRB's efforts to improve the 529 and ABLE industry through a collaborative and engaging approach with industry organizations. For more than fifteen years, Strategic Insight (SI) has provided critical and proprietary data, business intelligence, research and marketing services to institutions throughout the 529 community. More recently, we have expanded our coverage to include ABLE programs given the product's structure and goal to help all families to successfully succeed through saving and saving efficiently.

In MSRB Notice 2017-04, the Municipal Securities Rulemaking Board ("MSRB") requested public comment on "Municipal Fund Security Product Advertisements." In observation of the request for comment, Strategic Insight provides the following response relating to Rule G-21 (e)(i)(A)(2)(b) on page 24:

- Strategic Insight appreciates the higher level of detail and clarity by expanding the description of "other benefits" to include reference to "such as financial aid, scholarship funds, and protection from creditors" as these are important factors that investors often overlook. By expanding the description, 529s will also be easier to understand which encourages use of the product. Ultimately, the added detail and clarity will enhance the value of 529s for investors and advisors, as they may not have been able to identify what the "other benefits" were referencing previously.

Thank you for providing the opportunity to respond to the Request for Comment, and please do not hesitate to contact me by phone (617-399-5621) or email (paul.curley@strategic-i.com) if you have any questions concerning our comments or require additional information.

Sincerely,

Paul Curley, CFA
Director of College Savings Research
Strategic Insight

Offices:
New York (HQ)
Boston
Denver
London
Melbourne
Munich
San Diego
San Francisco
Stamford
Toronto
Vancouver

3PM
THIRD PARTY MARKETERS ASSOCIATION

OUTSOURCED GLOBAL MARKETING OF ALTERNATIVE + TRADITIONAL INVESTMENTS

March 23, 2017

Ronald W. Smith, Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street, Suite 1000
Washington, DC 20005

***Re: MSRB Notice 2017-04: Request for Comment on* Draft Amendments to MSRB Rule G-21, on Advertising, and on Draft Rule G-40, on Advertising for Municipal Advisors.**

Dear Mr. Smith;

I am writing to you today on behalf of the Third-Party Marketer's Association ("3PM") to express the thoughts and concerns of our association regarding the draft provisions proposed in MSRB Notice 2017-03. While it is our goal to respond to requests for comments in a manner beneficial to the majority of 3PM's members, it should be noted that the views of the commenters involved in preparing this response may not be representative of the views of the entirety of the 3PM membership or our industry group in general. 3PM's response will be from the perspective of a solicitor municipal advisor and will be related solely to Rule G-40.

Municipal Advisory Client Definition

First, before commenting on the rule, we would like to ask for clarification of the definition of "municipal advisory client" discussed in Regulatory Notice 2017-04. This is an important point of clarification since the definition of this term impacts the entire reading of proposed Rule G-40.

The definition of an advertisement in Rule G-40(a)(i) has been tailored to municipal advisors and discusses the term "municipal advisory client". G40(a)(iii) defines "municipal advisory client" as identical to the definition of that term as set forth in the recent amendments to Rule G-8, effective October 13, 2017.

The definition of a "municipal advisory client as outlined in G-8 (e) as well as the definition outlined in G-40 states: "For the purposes of this rule, a municipal advisory client shall include either a municipal entity or obligated person for whom the municipal advisor engages in municipal advisory activities, as defined in Rule G-42(f)(iv), or a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser (as defined in 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."

The definition starts with the language "a 'municipal advisory client' shall include **either**" and then goes on to define the two definitions of what constitutes a "municipal advisory client".

The first part of the definition states that the definition shall include "either a municipal entity or obligated person for whom the municipal advisor engages in municipal advisory activities, as defined in Rule G-42(f)(iv)". Given that Rule G-42 is called "The duties of Non-Solicitor Municipal Advisors" our reading of this means that the first part of the definition does not apply to solicitor municipal advisors.

The second part of the definition states that a "municipal advisory client" is a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser (as defined in 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. Under this part of the definition, the investment manager that engages a solicitor municipal advisor would be considered a "municipal advisory client" under G-40 as well as the under the complaint rules.

While ours is a technical interpretation of the definition of "municipal advisory client", we do not believe that this was the intent of the MSRB. The MSRB was given purview over municipal advisors as a way to protect municipal entities from unregistered activities. Given this, it makes no sense that the only advertisements covered by G-40 for solicitor municipal advisors would be those we use to solicit investment managers and not the municipal entity which we are soliciting on behalf of our investment manager client.

Given this, a minor adjustment to this definition, would fix the issue. We believe that the MSRB should remove the language in the definition referring to Rule G-42 and instead reference a rule whereby the definition of "municipal advisory activities" apply to both solicitor and non-solicitor municipal advisors.

Furthermore, it is our belief that the term "engages", which is utilized in a multitude of rules issued by the MSRB and approved by the SEC, should be clarified especially for solicitor municipal advisors for which this word has multiple meanings.

3PM's comments going forward will be based on what we believe is the intent of the rule and will consider an advertisement to a "municipal advisory client" to apply to not only the investment manager clients that engage us, but also to any advertising that is sent to a municipal entity in regards to the advisory services we are soliciting.

Definition of an Advertisement

Generally, 3PM is not averse to the definition of an advertisement, unless otherwise noted in this response.

Form Letter

For purposes of Rule G-40, the term "form letter" is defined as any written letter or electronic mail message distributed to more than 25 persons within any period of 90 consecutive days.

When beginning an engagement with a new investment manager, marketers will often draft an introductory letter that will be sent out to prospects. These letters will likely all contain the same content, but will be personalized by a third party marketer prior to sending. Often, third party marketers will cover a segment of potential investors, and in the case of firm's marketing to institutional investors, this list of potential investors could contain, hundreds or thousands of potential investors depending on the size of the firm. Alternatively, based on the offering, these letters might only be sent to a handful of prospects. While these letters will not likely be sent out in one batch, sales professionals often send a few at a time and then follow-up by phone.

In most situations, a solicitor municipal advisor will be able to distinguish which letter will go out to more than 25 persons within 90 days, smaller firms may have a difficulty determining this up front. However, given that Rule-G40 will only require that advertisements be pre-approved if the advertisement is sent to 25 or more "municipal advisory clients", many solicitor municipal advisors may have a more difficult time discerning this fact.

Given the logistical complexities of isolating one potential investor type from an entire distribution channel most solicitor municipal advisors will instead take the more conservative route and have a Principal pre-approve the "form-letter" prior to allowing their sales professionals to send out the letter.

While this seems easy enough, there is however a cost involved. This process will require solicitor municipal advisors to dedicate more compliance resources to oversee this procedure. Compliance will now not only be responsible for pre-approving all "form-letters" but they will also be required to track who the email was sent to, segregating out the municipal entities from other prospects.

Furthermore, once the classification is put into place, pre-approval will be required from a municipal advisor Principal, requiring firms to add more municipal advisor Principals.

While this may seem like a small incremental cost, the issue is that being solicitor municipal advisors requires registration with multiple regulators. Given this, every time a regulator adds or changes a rule, it requires firms to re-evaluate their compliance functions and often, add to their compliance resources which is costly in terms of both time and dollars. Given this, we have seen many solicitors trying to

evaluate whether working with municipal entities is worthwhile. While the cost of doing business might be worth it for conducting business in an entire distribution channel, many firms do not think the cost is commensurate for the potential revenue that might be earned by engaging a municipal entity and instead may choose to exit this business altogether. Furthermore, as this rule does not apply to internal sales and marketing professionals working on behalf of an investment adviser who is their employer, entities that work in an external role and who are identify as 'solicitor municipal advisors' are constrained by this Rule when working on behalf of third party investment advisers. We believe that this creates an unfair playing field and is detrimental to the goal of fair and open markets.

Should municipal advisor solicitors choose to exit this business, investment managers will need to find other avenues to offer their services to municipal entities or also determine to exit this sub-channel. If this were to occur, public entities would have less access to the products that municipal advisor solicitors represent and the investment arena would be further monopolized by the largest firms who can afford an internal team infrastructure.

Most of our members, given that they are small in terms of number of employees, are already resource constrained when it comes to compliance. Adding additional responsibilities on to an already overwhelmed compliance staff to accommodate yet another regulatory rule that is not harmonized across the industry is frankly unfair to small firms from a competitive standpoint and will prevent the formation and growth of new small firms in this industry.

We believe that further harmonization with FINRA would help facilitate this process and alleviate an unnecessary burden that will be put on small firms.

Content Standards

The content standards in general are in line with FINRA rules, however, they specifically refer to advertisements pertaining to municipal securities, municipal financial products or the issuance of the municipal security. As mentioned earlier, 3PM's members who are municipal advisor solicitors do not offer any type of municipal security or municipal financial products. Our members offer either investment advisory services managed by investment management firms or securities issued by private issuers. Accordingly, the MSRB's content standards as written in ***Section iv (A)*** and ***(D)*** do not apply to our members.

3PM is not averse to the standards set out in ***Section iv (B), (C)*** or ***(H)***.

We believe ***Section iv (E)*** is at odds with FINRA's advertising rules which segregate institutional investors from retail investors and address the nature of the audience to which an advertisement is sent. Given this we believe that the MSRB should also consider segregating advertisements by investor group as well for solicitor municipal advisors. This would allow for further harmonization with other regulatory authorities and streamline the rules for more sophisticated investors, like muni entities with whom we

engage. Please see additional comments on this discussion below in the first question the MSRB asked firms to share their opinions on.

While we appreciate the MSRB's attempt to harmonize ***Section iv (F)*** with FINRA rules, this provision is one that we are also against in FINRA's Retroactive Rule Review of their Communications with the Public Rule. While we agree that past performance may not recur, we do believe that being allowed to discuss the targeted return for investment products and services should be permitted to at least some investors, namely institutional investors which include municipal entities.

Most investment advisers and fund sponsors want to be able to provide investors with some type of targeted return so they can better understand whether the risks and rewards of a strategy are balanced. Furthermore, when looking for an investment, investors, specifically institutional investors, which most our members with, will want to be able to tell immediately if an investment warrants a further look. In the day and age when investors are inundated with product, they need a mechanism by which they can shrink down the enormous universe of investments into a small sub-set of strategies at which they can look at more closely. Targeted return is one of the ways they do this.

If not permitted to do this, municipal advisor solicitors are put at a disadvantage when offering product to investors. Fund managers and their internal employees will always discuss the targeted return of an investment. This leads to an uneven playing field in a very competitive market place where many investors will immediately pass on a product that does not show a targeted return.

Inherently, 3PM does not believe that what information is permitted to be shared should differ by who is delivering the message. This puts solicitors at a disadvantage, and hurts the investment advisers that choose to hire solicitors rather than in-house employees. In our opinion, regulators should not be influencing the business decisions an investment manager makes in regards to whether to hire internal or external sales and marketing professionals.

3PM's members are not averse to including disclosures explaining how the targeted performance was calculated or disclosures that reinforce that there is no guarantee that the investment will actually generate the targeted return. It is important to reinforce that we do not think that targeted returns should be allowed for all investors. We do however fee that institutional investors, most of whom either have an experienced gatekeeper assisting with their investments or a knowledgeable internal staff who is accustomed to reviewing available products and ascertaining whether the targeted return is reasonable in light of the investment strategy and approach, should be permitted to receive materials with projected or targeted returns.

As such we believe both the MSRB and FINRA should further investigate this issue and allow third party marketers to operate on a level playing field with others offering product.

Section iv (G) prohibits a municipal advisor from using a testimonial in an advertisement. This is a harmonization with SEC rules, but not with FINRA rules which allow for the use of testimonials. This creates issues for municipal advisors that are registered with both the MSRB and FINRA.

We believe that It is particularly problematic for those firms that allow their Associated Persons to utilize social media sites that give users the ability to like or recommend items on the platform. Such a divergent set of rules requires firms to either further segregate their businesses to avoid these conflicts or requires them to adhere to the stricter of the conflicting standards.

While we are not necessarily against the notion of adhering to the strictest standard, this approach does require additional compliance and oversight resources to be dedicated to a function and ultimately results in additional cost to the municipal advisor.

Professional Advertisements

3PM requests some clarity be provided in regards to ***Section (b) Professional Advertisements*** of the Rule.

As we discussed in this comment letter, 3PM's municipal advisor solicitor members generally have two sets of clients. First the investment managers that contract with us to offer their services or securities to potential investors and second, the municipal entities that we solicit to invest with our investment manager clients.

3PM members will not send "professional advertisements" to municipal entities, since they are not the ones that will engage our services. Alternatively, for the purpose of "professional advertisements", our members will only advertise to investment managers. More often than not, 3PM's members are not approaching potential investment manager clients saying 'I will solicit public entities on your behalf'. Rather the conversation is generally based on the services a third-party marketer can supply to the manager in terms of capital raising and marketing support services industry wide.

Generally, third party marketers will discuss potential investors in the context of whether they are institutional investors or individual investors. Further, if a third-party marketer discussed its experience with institutional investors it will most often discuss several potential sub-channels including Corporations, Endowments, Foundations, Family Offices, Investment Consultants, RIAs, Wealth Manager Platforms and Public Funds (municipal entities). In other words, the discussion of soliciting to municipal entities is generally a part of a bigger discussion relating to institutional mandates overall, whether through public entities or private ones.

Given the above, along with the fact that a third-party marketer's advertisements may not specifically discuss offering securities or services to a municipal entity, would the advertisement of a third party marketers "general" services, constitute a "professional advertisement?" Please provide some

clarification on this issue and help us understand where the line would be drawn for a professional advertisement. For example, would the mention of the ability to solicit to a municipal entity cause the advertisement to require pre-approval by a Principal in advance or would the advertisement need to mention a specific municipal entity to trigger the requirement?

Approval by Principal

Under FINRA rules, Registered Representative generally have some latitude in sending materials to institutional investor, since these materials do not require Principal pre-approval. Given the lack of harmonization with FINRA rules, many third party marketers will be required to increase their compliance resources to accommodate this new rule. See discussion on form-letter for more information on 3PM's view point.

In addition to the information above, we also wanted to share our **opinions on some of the questions posed in 2017-04:**

- **The draft amendments to Rule G-21 and draft new Rule G-40 incorporate and/or harmonize the provisions of those rules with certain provisions of the advertising rules of other financial regulators. Are there other provisions of the advertising rules of those financial regulators which the MSRB should consider either incorporating into MSRB rules or with which the MSRB should consider harmonizing its advertising rules?**

  Although Rule G-40 may be in harmony with the SEC's advertising rule, many of 3PM's members are also registered with FINRA, not the SEC. While the definition of an advertisement is similar in scope to FINRA's retail communication definition, FINRA also separates communications with the public by the audience that will be receiving the communication. For example, most of 3PM's members deal with entities that fall under the definition of institutional investors, which does not subject the advertisement to pre-approval by a Principal of the firm.

  Given that third party marketers are soliciting investors for a private issuer who is likely to be a registered investment adviser, it is very common that the marketer will want to send out the investment adviser's quarterly review and update to potential investors. Such pieces discuss the advisory service's performance versus a stated benchmark and sometimes an applicable peer group. This type of information helps investors to determine the competitive nature of an advisory product or whether the product is performing according to characteristics the investment adviser has told them will influence performance.

  When sending out these quarterly letters, third party marketers may send them to an approved distribution list of potential institutional investors. Until now, given the institutional nature of these mailings, they have not been subject to pre-approval. Now under the MSRB's proposed

rule, such a mailing would be considered an advertisement if it is sent to more than 25 "municipal advisory clients".

In addition, third party marketers are now required to carveout one sub-set of institutional investors from their marketing efforts (municipal entities or public funds) and treat them differently because of the SEC and MSRB's oversight. This not only creates confusion with a third-party marketing firm but also requires additional man hours to monitor and carve out those potential investors that are treated differently than the rest.

This leaves third party marketers with two options:

- Carve out municipal entities from the rest of the institutional investor channel and subject just these firms to the municipal advisor rules or
- Treat all institutional investors equally but hold them to the highest standard; that of municipal entity.

The issue here is that both solutions create an uneven playing field for those third-party marketers working with municipal entities and who are registered as municipal advisors.

If a firm decides to carve out municipal entities from the rest of the institutional investor universe, it is likely that the firm will require additional compliance resources to handle the more complex processes that must now be followed.

While the second alternative would also require additional compliance resources to treat all investors the same under the municipal advisor rules, it would also complicate the reporting requirements municipal advisors have to the SEC and MSRB. In addition, this approach would create an unlevel playing field between third party marketers who are municipal advisors and those who are not registered or required to follow the MSRB's rules. It could also potentially place an investment adviser client at a disadvantage in regards to what they could send out themselves to a public entity or a municipal advisor solicitor could send out to a non-public entity

- **The MSRB drafted a new rule, draft Rule G-40, to address advertising by a municipal advisor. An alternative approach would be to address municipal advisor advertising in Rule G-21. Would the current approach of having a new rule, or an alternative approach including all advertising provisions in one rule, be preferable?**

  In 3PM's opinion, the rules for municipal advisors are already confusing enough given different requirements for solicitor and non-solicitor municipal advisors. Including municipal advisor

advertising within the body of G-21 would only complicate the issue further. We believe the municipal advisor rules should remain as Rule G-40, separate from G-21.

A perfect example of the confusion created by this is exemplified by Rule G-8. In general, the part of the rule that applies to municipal advisors is contained in section (h), Municipal Advisor Records. Alternatively, the definition of a "municipal advisory client" is buried with in the text of the rule in section (e) of this rule, definitions.

Given the rule segments out the municipal advisor records that need to be maintained, we believe that it is unrealistic to expect municipal advisors to read through pages of rule text to find this definition. This approach will only lead to confusion by municipal advisors who are trying to understand what applies to them.

It is our opinion that creating a streamlined rule-set that applies only to municipal advisors is the best course of action and the most efficient approach for those operating under these rules.

- **The draft amendments to Rule G-21 permit hyperlinks to obtain more current municipal fund security performance information. Are there other areas where the MSRB should consider expressly permitting the use of a hyperlink in an advertisement?**

  Contrary to how the rule was written, we believe that it was in fact the MSRB's intent to include sales literature relating to an investment adviser to also be covered by Rule G-40. Given this, we believe that when utilizing sales literature regarding an investment adviser's offerings that it is often necessary to create long disclosure to create a fair and balanced representation of the benefits and risks associated with the advisory service. In some instances, this results in a disclosure which is multiple pages long, even for a one page investment summary. Given this, 3PM would suggest that municipal advisor solicitors should be permitted to include a link in all advertisements to a full disclosure while including a summary disclosure in the actual advertisement.

- **A municipal advisor may market non-security products, such as a software program, to its municipal advisory clients. Draft Rule G-40(a) applies to any material (other than listings of offerings) published or used in any electronic or other public media, or any written or electronic promotional literature distributed or made generally available to 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 reprint, or any excerpt of the foregoing or of a published article. Nonetheless, should draft Rule G-40 specifically address advertisements relating to non-security products, such as any software program, that the municipal advisor may market to its municipal advisory clients?**

We believe that guidance regarding advertisements of non-security products should only be put in place for firms who are also conducting a security business and who have "municipal advisory clients" that they plan to send non-security advertisements to. Firms who have "municipal advisory clients that they are also soliciting on behalf of non-security products should be required to advise the buyers in the municipal entity of the arrangements that already exist with a municipal advisor. We also believe that the reverse should be true and any municipal advisor who has a municipal entity client for a non-securities product should have to disclose this relationship to the municipal entity if they decide to advertise a security product to the municipal entity.

- **Rule G-21 and draft Rule G-40 apply to advertisements, regardless of whether electronic or other public media is used with those advertisements. As such, Rule G-21 and draft Rule G-40 apply to an advertisement on social media. Nonetheless, should the MSRB consider specific guidance about the use of social media by a dealer or a municipal advisor? If so, what guidance would be helpful?**

  Yes, we believe that the MSRB should issue guidance for dealers and municipal advisors using social media for advertisements. Guidance should relate to profiles, posting of advertisements and other information to social media sites, static versus interactive content, comments and likes of other people's posts and whether this action is considered a testimonial. The MSRB should review FINRA's guidance as well as other regulators who have issued guidance in this area and where possible harmonize the MSRB's guidance to municipal advisors and dealers.

- **The draft amendments to Rule G-21 and draft Rule G-40 prohibit a dealer or municipal advisor from using an advertisement that, in part, predicts or projects performance, but does not prohibit the use of an investment analysis tool. How often are such tools used? Should the MSRB consider additional guidance about the definition of an investment analysis tool and about the use of such tools?**

  3PM's members do not advertise any such investment analysis tools.

- **Rule G-21 and draft Rule G-40 do not except a private placement memorandum from the definition of an advertisement. Should the MSRB consider providing guidance about (i) a dealer's potential recommendation of a private placement, (ii) a dealer's or municipal advisor's potential role in a private placement, such as with the preparation of a private placement memorandum, and/or (iii) dealer and municipal advisor supervisory obligations concerning private placements?**

  It is our understanding based on conversations with the SEC and MSRB that most of 3PM's members would not generally work with private placement memorandums under their municipal advisor registration. 3PM's members who solicit investors for private placements

offered through a commingled fund are registered with FINRA and offer interests of private placements of a third party private issuer, not a municipal entity. As such, these members would not be engaging in the solicitation of investment advisory services. Please confirm this understanding.

Furthermore, sub-bullet (i) asks about a dealer's potential recommendation of a private placement. We are also requesting clarity as to whether this refers to a municipal dealer or a traditional broker / dealer. Again, given our understanding of the definition of a municipal advisor, a broker / dealer offering securities to municipal entities would not be required to register as a municipal advisor. Please confirm this understanding.

As part of a 3PM's role, our members often provide private issuers with comments and feedback related to the content contained in private placement memorandums. This guidance is not legal advice but is related to terms and conditions contained in these offering documents and whether certain potential investors would be comfortable with such items. Given our member's experience in dealing with private placements, our feedback is often very helpful to issuers who plan to offer their securities in a variety of distribution channels.

Furthermore, given that a private placement memorandum as it related to a private issuer is a legal document, our members would never send these documents out on a wholesale basis to potential investors. Private placement memorandums are only sent to those potential investors who are interested in the offering and are conducting a due diligence review. Given the nature of a private placement memorandum for private issuers, we do not believe these documents should be classified as an advertisement and should be excepted from the rule as are preliminary official statements, official statements, preliminary prospectuses, summary prospectuses or registration statements.

- **FINRA recently requested comment on proposed amendments to FINRA Rule 2210. Those amendments would create an exception to the rule's prohibition on projecting performance to permit a firm to distribute a customized hypothetical investment planning illustration that includes the projected performance of an asset allocation or other investment strategy. How often do dealers or municipal advisors create such illustrations? Should the MSRB consider such an exception in the draft amendments to Rule G-21 and in draft new Rule G-40?**

  The text of this response was excerpted from Section iv (F) Content standards above and is added here verbatim to express our opinion on this question.

  While we appreciate the MSRB's attempt to harmonize ***Section iv (F)*** with FINRA rules, this provision is one that we are also against in FINRA's Retroactive Rule Review of their Communications with the Public Rule. While we agree that past performance may not recur, we do believe that being allowed to discuss the targeted return for investment products and

services should be permitted to at least some investors, namely institutional investors which include municipal entities. As noted previously, this is also permitted for internal marketing staff and investment managers themselves.

Most investment advisers and fund sponsors want to be able to provide investors with some type of targeted return so they can better understand whether the risks and rewards of a strategy are balanced. Furthermore, when looking for an investment, investors, specifically institutional investors, which most our members with, will want to be able to tell immediately if an investment warrants a further look. In the day and age when investors are inundated with product, they need a mechanism by which they can shrink down the enormous universe of investments into a small sub-set of strategies at which they can look at more closely. Targeted return is one of the ways they do this and is as stated—targeted—and not guaranteed in anyway.

If not permitted to do this, municipal advisor solicitors are put at a disadvantage when offering product to investors. Fund managers and their employees will always discuss the targeted return of an investment. This leads to a very uneven playing field in a very competitive market place where many investors will immediately pass on a product that does not show a targeted return. This not only puts solicitors at a disadvantage, but it also hurts the investment advisers that choose to hire solicitors rather than in-house employees. In our opinion, regulators should not be influencing the business decisions an investment manager makes in regards to whether to hire internal or external sales and marketing professionals.

3PM's members are not averse to including disclosures explaining how the targeted performance was calculated or disclosures that reinforce that there is no guarantee that the investment will actually generate the targeted return. It is important to reinforce that we are not commenting on the appropriateness of providing targeted returns to all investors. We do however feel that institutional investors, most of whom either have an experienced gatekeeper assisting with their investments or a knowledgeable internal staff who is accustomed to reviewing available products and ascertaining whether the targeted return is reasonable in light of the investment strategy and approach, should be permitted to receive materials with projected or targeted returns.

As such we believe both the MSRB and FINRA should further investigate this issue and allow third party marketers to operate on a level playing field with others offering product.

- **What is the likely impact of the draft amendments to Rule G-21 and draft Rule G-40 on competition, efficiency and capital formation?**

3PM believes that such a rule puts municipal advisors at a disadvantage to solicitors who are not registered with the MSRB or working with municipal entities. We further believe that some of

the rules also impact the investment advisers that we represent. In addition, we feel that such a rule's primary result will be to increase the oversight, reporting requirements and costs without any commensurate investor protection.

While we understand the MSRB's intent, which is to protect municipal entities, we believe that the MSRB should focus their efforts on firms with no regulatory oversight rather than focusing on municipal advisor solicitors that already fall under the purview of other regulatory bodies and layering them with additional compliance requirements.

Also, please see our comments throughout other sections of this comment letter discussing the harm this rule will bring to municipal advisor solicitors as well as the investment managers we represent.

Finally, we believe that the implementation of this Rule in its current state will bring an unintended consequence to the very constituents the MSRB is trying to protect; municipal entities. Ultimately, if Rules like proposed Rule G-40 continue to be enacted, it will leave municipal advisor solicitors with a regulatory compliance burden that far out-weighs the benefits of offering product to municipal entities. Accordingly, many municipal solicitors will choose to exit this distribution channel, in favor of ones where they can compete on a level playing field. We have already seen the universe of firms offering products to municipal entities diminish significantly in the past 3-5 years because of the additional regulation that has been enacted. As a result, municipal entities will be limited to only those investment options provided by the largest and most well-funded managers, who either choose or can afford an in-house staff to distribute their products and services directly. A decrease in available managers could potentially eliminate some of the best performing investment options, bringing harm pensioners who rely on their retirement plans to survive. A result that is not good for any one.

Thank you for the opportunity to share our thoughts with you regarding this proposal. Please feel free to reach out to me at (585) 364-3065 or by email at donna.dimaria@tesseracapital.com should you have any questions or require additional information pertaining to the proposed Advertising Rule for MAs.

Regards,

<<Donna DiMaria>>

Donna DiMaria
Third Party Marketers Association
Chairman of the Board of Directors and
Chair of the 3PM Regulatory Committee

About the Third Party Marketer's Association (3PM)

3PM is an association of independent, global outsourced sales and marketing firms that support the alternative and traditional investment management industry worldwide.

3PM Members are properly registered and licensed organizations consisting of experienced sales and marketing professionals who come together to establish and encourage best practices, share knowledge and resources, enhance professional standards, build industry awareness and generally support the growth and development of professional outsourced investment management marketing.

Members of 3PM benefit from:

- Regulatory Advocacy
- Best Practices and Compliance
- Industry Recognition and Awareness
- Manager Introductions
- Educational Programs
- Online Presence
- Conferences and Networking
- Service Provider Discounts

3PM began in 1998 with seven member-firms. Today, the Association has more than 35 member organizations, as well as significant number of prominent firms that support 3PMs and participate in the Association as 3PPs, Industry Associates, Member Benefit Providers, Media Partners and Association Partners.

A typical 3PM member-firm consists of two to five highly experienced investment management marketing executives with, on-average, more than 10 years' experience selling financial products in the institutional and/or retail distribution channels. The Association's members run the gamut in products they represent. Members work with traditional separate account managers covering strategies such as domestic and international equity, as well as fixed income. In the alternative arena, members represent fund products such as mutual funds, hedge funds, private equity, fund of funds and real estate. Some firms' business is comprised of both types of product offerings. Most 3PM's members are currently registered with FINRA or affiliated with a broker-dealer that is a member of FINRA.

For more information on 3PM or its members, please visit www.3pm.org.

Wells Fargo Advisors
Regulatory Policy
One North Jefferson Avenue
St. Louis, MO 63103
H0004-05C
314-242-3193 (t)
314-875-7805 (f)

March 24, 2017

***Via* Online Submission at: http://www.msrb.org/CommentForm.aspx**

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 Street, NW, Suite 1000
Washington, DC 20005

RE: Regulatory Notice 2017-04, Request for Comment on Draft Amendments to MSRB Rule G-21, on Advertising, and on Draft Rule G-40, on Advertising by Municipal Advisors

Dear Mr. Smith:

Wells Fargo Advisors[1] ("WFA") appreciates the opportunity to comment on the Municipal Securities Rulemaking Board's ("MSRB" or the "Board") Regulatory Notice 2017-04, Request for Comment on Draft Amendments to MSRB Rule G-21, on Advertising, and on Draft Rule G-40, on Advertising by Municipal Advisors ("Proposal").[2]

[1]"Wells Fargo Advisors" is the trade name for Wells Fargo Clearing Services, LLC ("WFCS"), a dually-registered broker-dealer and investment adviser, member FINRA/SIPC, and a separate non-bank affiliate of Wells Fargo. "First Clearing" is the trade name for WFCS's clearing business, providing services to unaffiliated introducing broker-dealers. WFCS is affiliated with Wells Fargo Advisor Financial Network ("FiNet"), a broker-dealer also providing advisory and brokerage services. For the ease of this discussion, this letter will use WFA to refer to all of those brokerage operations.

[2]MSRB Regulatory Notice 2017-04, Request for Comment on Draft Amendments to MSRB Rule G-21, on Advertising, and on Draft Rule G-40, on Advertising by Municipal Advisors (February 16, 2017), available at: http: http://www.msrb.org/~/media/Files/Regulatory-Notices/RFCs/2017-04.ashx?n=1

WFA is a dually registered broker-dealer and investment advisor that administers approximately $1.5 trillion in client assets. We employ approximately 15,086 full-service financial advisors in branch offices in all 50 states and 3,899 licensed bankers in retail bank branches across the country. WFA and its affiliates help millions of customers of varying means and investment needs obtain the advice and guidance they need to achieve their financial goals. Furthermore, WFA offers access to a full range of investment products and services that retail investors need to pursue these goals.

I. CURRENT PROPOSAL

The MSRB is proposing amendments to current Rule G-21 to largely harmonize requirements with FINRA Rule 2210. These draft amendments include enhancements to the MSRB's fair-dealing provisions, updates to municipal fund security product advertisements and harmonization of the definition of "form letter." In addition, the Proposal creates new Draft Rule G-40 to address advertising requirements specifically for Municipal Advisors.

II. DISCUSSION

As a registered broker-dealer, WFA largely supports the draft amendments to MSRB Rule G-21 and believes that harmonization with FINRA Rule 2210 creates a more consistent regulatory regime within the industry. We believe the MSRB should also consider expanding the proposal to allow the use of testimonials in municipal securities advertisements. Additionally, we reference FINRA Regulatory Notice 17-06 Communications with the Public - FINRA Requests Comments on Proposed Amendments to Rules Governing Communications with the Public [3] ("FINRA's Current Proposal"), where FINRA proposes to amend Rule 2210 to adopt an exception to allow the use of projected performance. We support FINRA's proposal and request the MSRB to extend harmonization in this Proposal to include FINRA's exception to allow limited performance projections.

A. The MSRB Should Adopt FINRA Rule 2210 Requirements Regarding Testimonials or Should Mirror SEC Relief.

The draft amendments to Rule G-21 prohibit dealers from using testimonials in advertisements stating that they could potentially mislead senior investors. As a firm that has led the industry in efforts to protect and inform senior investors of potential harm, financial and/or otherwise, WFA fully supports the MSRB's objective to protect senior investors. However, protecting senior investors is a regulatory goal not limited to the municipal market.

FINRA Rule 2210(d)(6) allows the use of testimonials in advertisements and provides associated disclosures designed to be meaningful to all investors, including senior investors and vulnerable adults. WFA includes testimonials within our advertising in accordance with FINRA Rule 2210(d)(6), and believes the required disclosures provide investors with context for the

[3] Regulatory Notice 17-06, Communications with the Public – FINRA Requests Comments on Proposed Amendments to Rules Governing Communications with the Public (February 2017). http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-06.pdf

testimonials. Rankings and testimonials appear regularly in advertising and the public therefore expects to read how others feel about a particular security. We strongly believe that having consistency across all securities, including municipal securities, in regards to the use of testimonials is essential in providing regulatory uniformity within the industry and we encourage the MSRB to follow suit in adopting similar provisions.

Furthermore, the SEC published Guidance Update ("Guidance") dated March 2014 where it provided guidance in regards to the use of testimonials for investment advisers.[4] In the Guidance, the SEC seeks to assist firms in applying Rule 206(4) of the Investment Advisers Act of 1940 and Rule 206(4)-1(a)(1) to their use of social media. The Guidance essentially provides relief in certain circumstances where the use of testimonials would not implicate the concern underlying the testimonial rule, which is that "the testimonial may give rise to a fraudulent or deceptive implication or mistaken reference." WFA supports the relief granted by the SEC and believes the MSRB should extend such relief as it relates to municipal securities should the MSRB not adopt FINRA Rule 2210 regarding the use of testimonials.

B. The MSRB Should Adopt the Proposed Exception That Would Allow the Use of Projected Performance.

WFA believes an additional opportunity for harmonization exists related to FINRA's Current Proposal to include an exception to Rule 2210's prohibition on projecting performance. The proposed amendment will allow firms to better inform investors about the recommended investment strategies, including the underlying assumptions upon which those recommendations are based. WFA notes that this exception will especially benefit those investors that may only have access to this information through investment advisors. This will help provide a "more level playing field" by allowing performance projections similar to those available for clients of investment advisors. To this point, WFA believes the MSRB should ensure the FINRA proposed exception is included in their harmonization efforts.

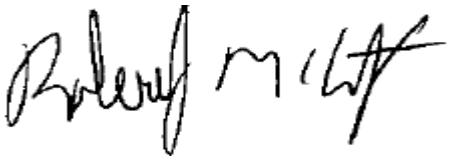
III. CONCLUSION

WFA appreciates the opportunity to provide feedback to the MSRB on the draft amendments to the MSRB's advertising rules and commends the Board on its harmonization efforts. For the reasons stated above, WFA believes additional harmonization of the Proposal with other industry rules will ultimately benefit investors through increased consistency in the communications they receive.

[4] SEC IM Guidance Update (March 2014), available at: https://www.sec.gov/investment/im-guidance-2014-04.pdf.

If you would like to further discuss this issue, please contact me at (314) 242-3193 or robert.j.mccarthy@wellsfargoadvisors.com.

Sincerely,



Robert J. McCarthy
Director of Regulatory Policy

EXHIBIT 5

Rule G-21: Advertising by Brokers, Dealers or Municipal Securities Dealers

(a) *General Provisions*.

(i) *Definition of "Advertisement."* For purposes of this rule, the term "advertisement" means any material (other than listings of offerings) published or used in any electronic or other public media, or any written or electronic promotional literature distributed or made generally available to customers or the public, including any notice, circular, report, market letter, form letter, telemarketing script, seminar text, press release concerning the products or services of the broker, dealer or municipal securities dealer, or reprint, or any excerpt of the foregoing or of a published article. The term does not apply to preliminary official statements or official statements, but does apply to abstracts or summaries of [official statements, offering circulars] the foregoing and other such similar documents prepared by brokers, dealers or municipal securities dealers.

(ii) *Definition of "Form Letter."* For purposes of this rule, the term "form letter" means any written letter or electronic mail message distributed to [25 or] more than 25 persons within any period of 90 consecutive days.

(iii) *Content Standards.*

(A) All advertisements by a broker, dealer or municipal securities dealer must be based on the principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular municipal security or type of municipal security, industry or service. No broker, dealer or municipal securities dealer may omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the advertisements to be misleading.

(B) No broker, dealer or municipal securities dealer may make any false, exaggerated, unwarranted, promissory or misleading statement or claim in any advertisement.

(C) A broker, dealer or municipal securities dealer may place information in a legend or footnote only in the event that such placement would not inhibit a customer's or a potential customer's understanding of the advertisement.

(D) A broker, dealer or municipal securities dealer must ensure that statements are clear and not misleading within the context in which they are made, and that they provide balanced treatment of risks and potential benefits. An advertisement must be consistent with the risks inherent to the investment.

(E) A broker, dealer or municipal securities dealer must consider the nature of the audience to which the advertisement will be directed and must provide details and explanations appropriate to the audience.

(F) An advertisement may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast; provided, however, that this paragraph (a)(iii)(F) does not prohibit:

(1) A hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of an investment; and

(2) An investment analysis tool, or a written report produced by an investment analysis tool.

(G) (1) If an advertisement contains a testimonial about a technical aspect of investing, the person making the testimonial must have the knowledge and experience to form a valid opinion;

(2) If an advertisement contains a testimonial about the investment advice or investment performance of a broker, dealer or municipal securities dealer or its products, that advertisement must prominently disclose the following:

(a) The fact that the testimonial may not be representative of the experience of other customers.

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

(c) If more than $100 in value is paid for the testimonial, the fact that it is a paid testimonial.

(H) A broker, dealer or municipal securities dealer may indicate registration with the Municipal Securities Rulemaking Board in any advertisement that complies with the applicable standards of all other Board rules and that neither states nor implies that the Municipal Securities Rulemaking Board or any other corporate name or facility owned by the Municipal Securities Rulemaking Board, or any other regulatory organization endorses, indemnifies, or guarantees the broker, dealer or municipal securities dealer's business practices, selling methods, the class or type of securities offered, or any specific security.

[(iii)](iv) *General Standard for Advertisements*. Subject to the further requirements of this rule relating to professional advertisements and product advertisements, no broker, dealer or municipal securities dealer shall publish or disseminate, or cause to be published or disseminated, any advertisement relating to municipal securities that such broker, dealer or municipal securities dealer knows or has reason to know [is materially] contains any untrue statement of material fact or is otherwise false or misleading.

(b) *Professional Advertisements*.

(i) No change.

(ii) *Standard for Professional Advertisements.* No broker, dealer or municipal securities dealer shall publish or disseminate, or cause to be published or disseminated, any professional advertisement that [is materially] contains any untrue statement of material fact or is otherwise false or misleading.

(c) *Product Advertisements.*

(i) No change.

(ii) *Standard for Product Advertisements.* No broker, dealer or municipal securities dealer shall publish or disseminate, or cause to be published or disseminated, any product advertisement that such broker, dealer or municipal securities dealer knows or has reason to know [is materially] contains any untrue statement of material fact or is otherwise false or misleading and, to the extent applicable, that is not in compliance with sections (d) or (e) hereof.

(d) No change.

(e) *Municipal Fund Security Product Advertisements*. In addition to the requirements of section (c), all product advertisements for municipal fund securities shall be subject to the following requirements:

(i) No change.

(ii) *Performance Data*. Each product advertisement that includes performance data relating to municipal fund securities must present performance data in the format, and calculated pursuant to the methods, prescribed in paragraph (d) of Securities Act Rule 482 (or, in the case of a municipal fund security that the issuer holds out as having the characteristics of a money market fund, paragraph (e) of Securities Act Rule 482) and, to the extent applicable, subparagraph (e)(i)(A)(4) of this rule, provided that:

(A) – (E) No change.

(F) *applicability with respect to underlying assets* – notwithstanding any of the foregoing, this subsection (e)(ii) shall apply solely to the calculation of performance relating to municipal fund securities and does not apply to, or limit the applicability of any rule of the Commission[, Financial Industry Regulatory Authority, Inc. (FINRA)] or any other regulatory body relating to, the calculation of performance for any security held as an underlying asset of the municipal fund securities.

(iii) – (v) No change.

(vi) *Underlying Registered Securities*. If an advertisement for a municipal fund security provides specific details of a security held as an underlying asset of the municipal fund security, the details included in the advertisement relating to such underlying security must be presented

in a manner that would be in compliance with any Commission or [FINRA] other advertising rules that would be applicable if the advertisement related solely to such underlying security; provided that details of the underlying security must be accompanied by any further statements relating to such details as are necessary to ensure that the inclusion of such details does not cause the advertisement to be false or misleading with respect to the municipal fund securities advertised. This subsection does not limit the applicability of any rule of the Commission[, FINRA] or any other regulatory body relating to advertisements of securities other than municipal fund securities, including advertisements that contain information about such other securities together with information about municipal securities.

(vii) No change.

(f) No change.

--- Supplementary Material:

.01 - .02 No change.

.03 Number of Persons. For purposes of Rule G-21(a)(ii), the number of "persons" for a response to a request for proposal (RFP), a request for qualifications, or similar request is determined at the entity level. Therefore, for example, if a dealer were to send a response to an RFP to a municipal entity, that municipal entity would count as one "person" no matter how many employees of the municipal entity may review the response to the RFP.

*****

Rule G-40: Advertising by Municipal Advisors

(a) General Provisions.

(i) Definition of "Advertisement." For purposes of this rule, the term "advertisement" means any material (other than listings of offerings) published or used in any electronic or other public media, or any written or electronic promotional literature distributed or made generally available to municipal entities, obligated persons, municipal advisory clients or the public, including any notice, circular, report, market letter, form letter, telemarketing script, seminar text, press release concerning the services of the municipal advisor or the engagement of a municipal advisory client (as defined in paragraph (a)(iii)(B)), or reprint, or any excerpt of the foregoing or of a published article. The term does not apply to preliminary official statements, official statements, preliminary prospectuses, prospectuses, summary prospectuses or registration statements, but does apply to abstracts or summaries of the foregoing and other such similar documents prepared by municipal advisors.

(ii) Definition of "Form Letter." For purposes of this rule, the term "form letter" means any written letter or electronic mail message distributed to more than 25 persons within any period of 90 consecutive days.

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

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

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

(iv) Content Standards.

(A) All advertisements by a municipal advisor, must be based on the principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular municipal security or type of municipal security, municipal financial product, industry, or service. No municipal advisor may omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the advertisements to be misleading.

(B) No municipal advisor may make any false, exaggerated, unwarranted, promissory or misleading statement or claim in any advertisement.

(C) A municipal advisor may place information in a legend or footnote only in the event that such placement would not inhibit a municipal advisory client's or potential municipal advisory client's understanding of the advertisement.

(D) A municipal advisor must ensure that statements are clear and not misleading within the context in which they are made, and that they provide balanced treatment of risks and potential benefits. An advertisement must be consistent with the risks inherent to the municipal financial product or the issuance of the municipal security.

(E) A municipal advisor must consider the nature of the audience to which the advertisement will be directed and must provide details and explanations appropriate to the audience.

(F) An advertisement may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast; provided, however, that this paragraph (a)(iv)(F) does not prohibit:

(1) A hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of a municipal financial product; and

(2) An investment analysis tool, or a written report produced by an investment analysis tool.

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

(H) A municipal advisor may indicate registration with the Municipal Securities Rulemaking Board in any advertisement that complies with the applicable standards of all other rules of the Board and that neither states nor implies that the Municipal Securities Rulemaking Board or any other corporate name or facility owned by the Municipal Securities Rulemaking Board, or any other regulatory organization endorses, indemnifies, or guarantees the municipal advisor's business practices, services, skills, or any specific municipal security or municipal financial product.

(v) General Standard for Advertisements. Subject to the further requirements of this rule relating to professional advertisements, no municipal advisor shall publish or disseminate, or cause to be published or disseminated, any advertisement relating to municipal securities or municipal financial products that such municipal advisor knows or has reason to know contains any untrue statement of material fact or is otherwise false or misleading.

(b) Professional Advertisements.

(i) Definition of "Professional Advertisement." The term "professional advertisement" means any advertisement concerning the facilities, services or skills with respect to the municipal advisory activities of the municipal advisor or of another municipal advisor.

(ii) Standard for Professional Advertisements. No municipal advisor shall publish or disseminate, or cause to be published or disseminated, any professional advertisement that contains any untrue statement of material fact or is otherwise false or misleading.

(c) Approval by Principal. Each advertisement subject to the requirements of this rule must be approved in writing by a municipal advisor principal, as defined in Rule G-3(e)(i), prior to first use. Each municipal advisor shall make and keep current in a separate file records of all such advertisements.

Supplementary Material:

.01 Number of Persons. For purposes of Rule G-40(a)(ii), the number of "persons" for a response to a request for proposal (RFP), a request for qualifications, or similar request is determined at the entity level. Therefore, for example, if a municipal advisor were to send a response to an RFP to a municipal entity, that municipal entity would count as one "person" no matter how many employees of the municipal entity may review the response to the RFP.

*****

Rule G-42: Duties of Non-Solicitor Municipal Advisors

(a) – (e) No change.

(f) *Definitions*.

(i) - (iii) No change.

(iv) "Municipal advisory activities" shall, for purposes of this rule, mean those activities that would cause a person to be a municipal advisor as defined in subsection [(f)(iv)] (f)(iii) of this rule.

(v) - (ix) No change.

--- Supplementary Material:

.01 - .15 No change.