MSRB
Municipal Securities Rulemaking Board

April 30, 2018

Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20540-1090

Re: **Response to Comments on File No. SR-MSRB-2018-01**

On January 24, 2018, the Municipal Securities Rulemaking Board (the "MSRB" or "Board") filed with the U.S. Securities and Exchange Commission (the "SEC" or "Commission"), a proposed rule change.[1] That proposed rule change consisted 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") (proposed amended Rule G-21, together with proposed Rule G-40 and proposed amended Rule G-42, the "proposed rule change"). The MSRB believes that the proposed rule change would enhance the MSRB's core fair practice rules relating to advertising by helping to prevent fraud from entering the municipal securities market and by helping to ensure consistent regulation among regulated entities in the municipal securities market.

The Commission published the proposed rule change for comment in the Federal Register on February 7, 2018,[2] and on March 16, 2018, the MSRB granted an extension of the time period for Commission action under Section 19(b) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), until May 7, 2018. In response to its notice about the proposed rule change, the Commission received four comment letters.[3] This letter responds to the comment

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1 File No. SR-MSRB-2018-01.

2 *See* Exchange Act Release No. 82616 (Feb. 1, 2018), 83 FR 5474 (Feb. 7, 2018).

3 Letter from Michael Nicholas, Chief Executive Officer, Bond Dealers of America, dated February 28, 2018 ("BDA"); Letter from Susan Gaffney, Executive Director, National Association of Municipal Advisors, dated February 28, 2018 ("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 February 28, 2018 ("PFM"); and Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated February 28, 2018 ("SIFMA").

letters, and supplements the responses that the MSRB provided to the comments made to its Request for Comment[4] that are discussed in the proposed rule change.

Background

i. Rule G-21

Congress charged the MSRB, in part, with a mandate to protect investors,[5] including the many retail investors who invest in municipal securities, and Rule G-21 is one of the initial rules that the MSRB developed to protect those investors.[6] The MSRB designed Rule G-21, in part, to help prevent fraud from entering the municipal securities market by prohibiting a broker, dealer, or municipal securities dealer (collectively, "dealer") from publishing an advertisement, as defined by Rule G-21(a)(i),[7] that the dealer knows is materially false or misleading. 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

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4 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).

5 Section 15B(b)(2)(C) of the Exchange Act.

6 Notice of Filing of Fair Practice Rules (Sept. 20, 1977) [1977-1987 Transfer Binder] Municipal Securities Rulemaking Board Manual (CCH) ¶10,030 at 10,371.

7 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.

book.[8] In response, two market participants requested that the MSRB harmonize its advertising rules with FINRA Rule 2210, on communications with the public.[9] Market participants echoed those requests more generally in their latest responses to a 2016 request for comment on the MSRB's strategic priorities.[10] Further, and apart from the MSRB's broader or more general requests for comment, the MSRB solicited input about possible amendments to Rule G-21 from market participants, including industry groups that represent dealers.[11]

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

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.

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

9 *See* Letter from David L. Cohen, Managing Director, Associate General Counsel, SIFMA, 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.

10 MSRB Notice 2016-25, MSRB Seeks Input on Strategic Priorities (Oct. 12, 2016); *see* Letter from Michael Decker, Managing Director, SIFMA, 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.

11 *See supra* note 4.

ii. Proposed Rule G-40

In August 2011, in the exercise of its new rulemaking authority over municipal advisors,[12] 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.[13] 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").[14] 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.[15] 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

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

13 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.

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

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

advisors.[16] 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
- 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, 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).

Discussion

i. Proposed Amended Rule G-21

The SEC received two comment letters that primarily focused on proposed amended Rule G-21.[17] Specifically, commenters focused on (i) proposed amended Rule G-21's promotion of regulatory consistency with FINRA Rule 2210, (ii) additional exclusions from the definition of an "advertisement," (iii) hypothetical illustrations, (iv) jurisdictional guidance under Rule G-21 relating to dealer/municipal advisors, and (v) the economic analysis. Both commenters recommended that the SEC disapprove the proposed rule change in its current state.[18]

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16 *See supra* note 4 at 4.

17 *See* BDA and SIFMA letters. To the extent that the two commenters that focused on proposed Rule G-40 provided comments relevant to the proposed amended Rule G-21, those comments are also included in the discussion below.

18 *See* BDA and SIFMA letters.

A. Promotion of Regulatory Consistency

Commenters supported proposed amended Rule G-21's promotion of regulatory consistency with FINRA Rule 2210, but believed that the amendments should be further harmonized with FINRA Rule 2210 by adopting that rule's (i) definition of "communications" and the distinctions in FINRA Rule 2210 that follow from that definition[19] and (ii) provisions on the use of testimonials,[20] or by merely incorporating FINRA Rule 2210 by reference into Rule G-21.[21] Further, commenters suggested that because of the promotion of regulatory consistency among proposed amended Rule G-21 and proposed Rule G-40 and FINRA Rule 2210, the definitions and product advertisement and professional advertisement sections could be deleted from proposed amended Rule G-21 and proposed Rule G-40.[22]

(i) Definition of Communications

BDA and SIFMA suggested that the MSRB go beyond the MSRB's stated purpose of the proposed amendments, *i.e*., to promote, in part, regulatory consistency among proposed amended Rule G-21 and the advertising rules of other financial regulators. Instead, BDA and SIFMA suggested that the MSRB "harmonize" Rule G-21 with FINRA Rule 2210 by adopting FINRA Rule 2210's definition of "communications" and the distinctions in the rule that follow from that definition.[23] Of note, BDA stated that "[i]n order for harmonization of MSRB rules with FINRA rules to be successful, MSRB must follow this general framework for MSRB Rule G-21."[24] Further, SIFMA posited that the "MSRB has not justified the need for differences from the FINRA advertising rule."[25] In particular, commenters favored the harmonization with FINRA

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19 *Id.*

20 *Id.*

21 BDA letter.

22 BDA letter; *see* SIFMA letter at 2.

23 BDA letter ("the MSRB did not appropriately harmonize the Proposed Rule Change with FINRA rules"); SIFMA letter at 2 (the proposed rule change "unnecessarily fail[s] to harmonize the rules with existing Financial Industry and Regulatory Authority ("FINRA") rules").

24 BDA letter.

25 SIFMA letter at 8. Alternatively, SIFMA suggested that, to provide even greater clarity, the MSRB revise proposed amended Rule G-21(a)(i) and proposed Rule G-40(a)(i) to add

Rule 2210's communications definition because institutional communications would no longer be subject to pre-approval by a principal. BDA and SIFMA submitted that, if the MSRB were to do so, dealers then could apply common approval processes for institutional communications across all asset classes.[26]

BDA's and SIFMA's comments, however, fail to recognize the statutory principles set forth in the Exchange Act that underlie the differences between FINRA's communications rule and the MSRB's advertising rule.

Background

a. FINRA's statutory charge and communications rule

Section 15A of the Exchange Act relating to registered securities associations governs FINRA's rulemaking authority. FINRA designs its rules to regulate its members' activities in the broader corporate securities market, that includes the corporate equity and fixed income markets, as well as to protect investors and the public interest.[27] Further, Section 15A of the Exchange Act provides FINRA with the authority to enforce its rules.[28] As a result, FINRA has the jurisdiction to provide substantive regulation of its members' advertisements, and FINRA does so.

Specifically, FINRA Rule 2210 defines "communications" as consisting of correspondence, retail communications, and institutional communications.[29] Based on the type of communication, FINRA Rule 2210 then may require pre-approval by a principal before the communication's first

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the term "otherwise" before the phrase "made generally available to municipal entities, obligated persons, municipal advisory clients or the public . . ." *See* SIFMA letter at note 6. The addition of the word "otherwise" could cause ambiguity in language that has existed for twelve years by suggesting that publication or use in public media would be insufficient without a specific showing of general availability to municipal entities, obligated persons, or municipal advisory clients. Thus, after considering SIFMA's suggestion, the MSRB determined not to revise the definition of an advertisement in either proposed amended Rule G-21 or proposed Rule G-40.

26 *See* BDA letter and SIFMA letter at 3.

27 *See, e.g.,* Section 15A(b)(6) of the Exchange Act. Dealers also are registered with the SEC under the Exchange Act.

28 Section 15A(b)(2) of the Exchange Act.

29 *See* FINRA Rule 2210(a)(1).

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.[30]

b. MSRB's statutory charge and advertising rule

i. Statutory charge

By contrast, Section 15B of the Exchange Act relating to municipal securities governs the MSRB's rulemaking authority. Unlike FINRA, there are not "members" of the MSRB. Rather, a dealer or municipal advisor becomes subject to MSRB rules based on the dealer's or municipal advisor's activities; those activities may require the dealer or municipal advisor to register with the SEC and the MSRB.[31] Further, as recognized in the Senate Report to the Securities Acts Amendments of 1975 (the "1975 Senate Report") (those amendments created the MSRB), the corporate securities markets and municipal securities markets are different – if only because, unlike with a corporate bond, interest on a municipal security may not be subject to federal income tax.[32] As stated in the 1975 Senate Report:

> Unlike corporate securities, which are relatively homogenous within major categories (e.g., common stocks, preferred stocks, debentures, warrants), municipal bonds constitute a highly individualized type of securities. In addition to the differences in investment quality indicated by ratings assigned by Moody's Investors' Services, Inc. or Standard & Poor's Corporation, or both, bonds vary according to the nature of the debt. For example, such securities may be general obligations of the issuer, backed by the "full faith and credit" of the issuing government to the extent of its powers of taxation; or they may be revenue bonds, payment of which is secured only by funds generated by use of the facility financed by the proceeds of the bond issue. In addition, municipal securities include special assessment and industrial revenue bonds. In short, the term

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30 *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 pre-approval and filing with FINRA; however, there must be supervisory policies and procedures in place relating to such communications).

31 *See* Sections 15B(a)(1) and 15B(b)(2)(A) of the Exchange Act.

32 S.R. Rep. No. 94-75 at 38 (Apr. 14, 1975).

> "municipal bonds" embraces a multi-faceted, complex array of state and local public debt.[33]

For example, as noted by the SEC, in 2011, there were over one million different municipal bonds outstanding compared to fewer than 50,000 different corporate bonds outstanding.[34] Moreover, the secondary market for corporate securities and municipal securities differ significantly.[35] In addition to the municipal bonds discussed in the 1975 Senate Report, municipal securities include conduit revenue bonds and municipal fund securities, such as interests in 529 savings plans.

Because the Exchange Act limits the MSRB's jurisdiction to the municipal securities market, the MSRB's rulemaking authority also is limited, in part, to dealers effecting transactions in municipal securities and advice provided to or on behalf of municipal entities by such dealers, and by municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by dealers and municipal advisors.[36]

Similar to FINRA's rules, the MSRB's rules are designed to protect investors and the public interest.[37] However, unlike FINRA's rules, Section 15B of the Exchange Act requires that the

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33 *Id.*

34 Report on the Municipal Securities Market, U.S. Securities and Exchange Commission (July 31, 2012) at 5 (footnotes omitted) available at https://www.sec.gov/news/studies/2012/munireport073112.pdf.

35 As noted in the 1975 Senate Report:

> Because of the varied characteristics of each municipal bond issue (*e.g.,* the rating status of the issuer, yield, term and other factors relating to the securities themselves) and the various series within each particular issue, municipal bonds are not fungible in the same way that corporate securities are. In addition, while municipal securities are generally traded in only fairly large dollar amounts (a trade of less than $10,000 is considered an odd lot) the volume of secondary trades is small compared to the trading volume in corporate securities.

1975 Senate Report at 40.

36 Section 15B(b)(2) of the Exchange Act.

37 *See, e.g.,* Sections 15B(b)(2)(C) and 15A(b)(6) of the Exchange Act.

MSRB's rules also be designed to protect municipal entities and obligated persons.[38] Moreover, Section 15B of the Exchange Act does not provide the MSRB with the authority to enforce its own rules. Rather, the MSRB's rules are enforced by other financial regulators, including FINRA and the SEC.[39]

Advertising rules

Specifically, in furtherance of the intent of Congress that the MSRB develop a prophylactic framework of regulation for the municipal securities industry, the MSRB developed its fair practice rules, including its advertising rules, to codify basic standards of fair and ethical business conduct for municipal securities professionals.[40] The MSRB's advertising rules serve an important function to help prevent fraud from entering the marketplace and to protect investors, particularly retail investors,[41] consistent with the MSRB's mission to protect municipal securities investors.

Since 1978, when the MSRB first adopted its advertising rules, the MSRB has based its advertising regulation on the MSRB's fair practice principles and the important supervisory function of principal pre-approval along with liability provisions and document retention requirements to regulate advertisements by dealers.[42] By so doing, the MSRB's regulatory regime in general relied on the firm and its policies and procedures related to the supervision of an advertisement, with the degree of liability for the advertisement based on advertisement type. Consistent with the MSRB's reliance on other financial regulators to enforce MSRB rules, a dealer neither files any of its advertisements with, nor receives a substantive review of any of

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38 *Id.*

39 *See, e.g.,* Section 15B(b)(4) of the Exchange Act.

40 Notice of Filing of Fair Practice Rules (Sept. 20, 1977) [1977-1987 Transfer Binder] Municipal Securities Rulemaking Board Manual (CCH) ¶10,030 at 10,371. Those core fair practice rules consisted of rules relating to, among other things, suitability, advertising, gifts and gratuities, and supervision.

41 *See, e.g.,* Notice of Proposed Rule G-34 on Product Advertising (Feb. 17, 1978) [1977-1987 Transfer Binder] Municipal Securities Rulemaking Board Manual (CCH), ¶10,059 at 10,441.

42 *See*, *e.g*., Notice of Filing of Fair Practice Rules (Sept. 20, 1977) [1977-1987 Transfer Binder] Municipal Securities Rulemaking Board Manual (CCH) ¶10,030 at 10,371; Fair Practice Rules, Exposure Draft (Apr. 7, 1977) 1977-1987 Transfer Binder] Municipal Securities Rulemaking Board Manual (CCH) ¶10,003 at 10,322-10,323.

those advertisements, by the MSRB.[43] Rather, the dealer must retain records relating to the advertisement, and those records must be available for inspection by other financial regulators. Thus, the MSRB's advertising regulations in general draw a sharp distinction from FINRA Rule 2210.

Discussion

BDA submitted that principal pre-approval of advertisements imposes "completely unnecessary burdens on dealers"[44] and that "[i]f MSRB has a rule that applies different definitions and different sets of responsibilities to municipal securities and does not differentiate between communications sent to retail and institutional customers, it will have created a new and unnecessarily increased regulatory burden along with considerable confusion for broker-dealers."[45] These requirements, however, are not newly proposed here. They have been, and continue to be, core principles on which the MSRB's advertising regulation is based.[46] Rule G-21 currently requires that a municipal securities principal or general securities principal approve each advertisement in writing prior to first use.[47]

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43 The MSRB does not enforce its own rules. *See* Section 15B of the Exchange Act.

44 BDA letter. Similarly, BDA posits that the "Proposed Rule Change represents a fundamental departure from dealer responsibilities under FINRA 2210. . ." As noted below, however, Rule G-21(f), as currently in effect, requires that each advertisement be approved in writing by a municipal securities principal or general securities principal before its first use.

45 *Id*.

46 *See, e.g.,* Notice of Filing of Proposed Rule G-34 on Product Advertising (Feb. 17, 1978) [1977-1987 Transfer Binder] Municipal Securities Rulemaking Board Manual (CCH) ¶10,059 at 10,441 ("The reference in the proposed rule to approval by supervisory personnel prior to 'first use' is intended to establish a minimum supervisory requirement. Further supervisory review of an advertisement may be appropriate depending on the period of time during which the advertisement will be published, as well as other factors. Proposed rule G-34 does not require advertisements to be filed with a regulatory authority. Advertisements will, however, be subject to inspection in the course of compliance examinations").

47 In fact, until November 2003, NASD Rule 2210, on communications with the public, required that a registered principal pre-approve institutional communications. *See* NASD Notice to Members (July 2003).

The MSRB continues to believe that it is an important supervisory function to have a principal pre-approve an advertisement regardless of the intended recipient of the advertisement along with the liability provisions associated with the advertisement type. Supervisory pre-approval, as opposed to submission of an advertisement and substantive review of an advertisement by MSRB staff, serves as an important investor protection in what has been recognized as a municipal bond market that "embraces a multi-faceted, complex array of state and local public debt."[48] The MSRB has determined not to depart from the longstanding principles on which the MSRB has based its advertising regulations.

(ii) Use of testimonials

BDA urged the MSRB to permit testimonials in dealer advertising to better harmonize Rule G-21 with FINRA Rule 2210.[49] BDA argued that to do otherwise would result in confusion and an inconsistent "patchwork" approach to make portions of FINRA rules applicable to dealers under MSRB rules.[50] Proposed amended Rule G-21, in fact, would permit dealer advertisements to contain testimonials under the same conditions as are currently set forth in FINRA Rule 2210(d)(6).

(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.[51] 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

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48 *See supra* note 32.

49 BDA letter and SIFMA letter at 2-3.

50 *See, e.g.,* BDA letter and SIFMA letter at 2-3.

51 SIFMA letter at 2. *See also* Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated March 24, 2017 (the "2017 SIFMA letter") and Letter from Mike Nicholas, Chief Executive Officer, Bond Dealers of America, dated March 24, 2017 ("[t]here is no compelling policy reason to have different communication standards for municipal securities and corporate securities").

with FINRA and the review procedures for those advertisements were unnecessary and burdensome and should not be included.

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."[52]

As discussed under "Promotion of Regulatory Consistency -- Definition of Communications" above, the differences between FINRA's and the MSRB's statutory mandates account for certain of the differences between FINRA's communications rules and the MSRB's advertising rule; commenters' suggestions fail to recognize the importance of those differences. FINRA's communications rules regulate the activities of its members in the broader corporate securities markets, where the securities "are relatively homogenous within major categories."[53] Further, FINRA enforces its own rules. By contrast, the MSRB's statutory mandate is limited to the regulation of dealers and municipal advisors in the municipal securities market, a market that includes municipal bonds that, as noted earlier "embraces a multi-faceted, complex array of state and local public debt[,]"[54] as well as municipal fund securities, such as interests in 529 savings plans. Moreover, the MSRB does not enforce its rules; other financial regulators enforce MSRB rules.

Further, as noted under "Background" above and as discussed in the proposed rule change, 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."[55] As noted under "Promotion of Regulatory Consistency -- Definition of Communications" above, the MSRB has based its advertising rules on the MSRB's fair practice principles and the important supervisory function of principal pre-approval along with liability provisions to regulate advertisements by dealers. The MSRB believes that it would not fully meet its responsibilities under the Exchange Act to promote a fair and efficient municipal market with appropriately tailored regulation if it were to simply incorporate an advertising rule designed for other

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52 2017 SIFMA letter at 9.

53 *See supra* note 32.

54 *Id.*

55 *See supra* note 40 ¶10,030 at 10,371.

markets, as suggested by SIFMA, particularly when advertising regulation has been the subject of a long-standing MSRB fair practice rule to help prevent fraud from entering the municipal securities market.

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 MSRB could appear to be adopting that interpretation without considering the interpretation's ramifications for the special characteristics of the municipal securities market. As noted under "Promotion of Regulatory Consistency -- Definition of Communications" above, consistent with its statutory mandate, FINRA adopts rules for the broader corporate securities markets that include the corporate equity and debt markets. FINRA's rules are not tailored with the unique regulatory needs of the municipal securities market in mind. At a minimum, if the MSRB were to incorporate FINRA Rule 2210 by reference, the MSRB would have to consider the ramifications of any interpretations of FINRA Rule 2210 for the municipal securities market. In addition, there are municipal securities dealers that are not members of FINRA; those municipal securities dealers should not necessarily be expected to keep abreast of FINRA rule interpretations.

After carefully considering SIFMA's suggestions, including the recognition of the important differences between the municipal securities market and the corporate securities market, the MSRB determined not to incorporate FINRA Rule 2210 by reference into Rule G-21.

(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 inclusion of the proposed general and content standards of proposed G-21 and G-40[,]" and that "these provisions should be deleted to signify that these types of communications are covered by the general and content standards of the proposed rule."[56] Although the provisions in proposed amended Rule G-21 and proposed Rule G-40 are analogous to the current provisions in Rule G-21, there are differences in those provisions. 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."[57] As noted above

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56 BDA letter. *See also* SIFMA letter at 2-3 (strongly supporting the removal of the definitions 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'").

57 *See supra* note 42 ¶10,030 at 10,376.

under "Promotion of Regulatory Consistency -- Definition of Communications," the MSRB has based its advertising regulation on the MSRB's long-standing fair practice principles and the important supervisory function of principal pre-approval along with liability and document retention provisions to regulate advertisements by dealers. 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[58] and responses to RFPs or RFQs.[59]

(i) Private placement memoranda and limited offering memoranda

BDA and SIFMA suggested that, as part of its harmonization effort, the MSRB should exclude private placement memoranda and limited offering memoranda from the definition of advertisement in proposed amended Rule G-21.[60] SIFMA suggested that such harmonization would be consistent with the exception from FINRA's content standards found in FINRA Rule 2210(d)(9).[61] SIFMA also suggested that private placement memoranda and limited offering memoranda be excluded from the definition of an "advertisement" in proposed Rule G-40. BDA noted that "private placement memoranda and limited offering memoranda are frequently used as offering memoranda and thus should be excluded alongside preliminary offering statements [from the definition of an "advertisement"]."[62] The MSRB understands

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58 *See* BDA letter and SIFMA letter at 4.

59 *See*, *e.g.*, BDA letter and SIFMA letter at 5.

60 BDA letter; SIFMA letter at 4-5.

61 FINRA Rule 2210(d)(9) provides:

> Prospectuses, preliminary prospectuses, fund profiles and similar documents that have been filed with the SEC and free writing prospectuses that are exempt from filing with the SEC are not subject to the standards of this paragraph (d); provided, however, that the standards of this paragraph (d) shall apply to an investment company prospectus published pursuant to Securities Act Rule 482 and a free writing prospectus that is required to be filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii).

62 *See* BDA letter. BDA also submitted that:

BDA's comment as follows: because private placement memoranda and limited offering memoranda are used as a preliminary offering statement would be used, a private placement memorandum and a limited offering memorandum should be excluded from the definition of an "advertisement" on the same basis that a preliminary offering statement is excluded from that definition. The MSRB, however, after careful consideration, has determined not to exclude private placement memoranda and limited offering memoranda from the definition of an advertisement.

The purpose of the proposed rule change, in part, was not to fully harmonize Rule G-21 with FINRA Rule 2210, as suggested by commenters -- for the reasons set forth above under

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> As part of its harmonization effort, the MSRB should exclude [from the scope of Rule G-21] materials that are comparable to offering materials that accompany preliminary official statements, such as investor roadshow presentations and other similar materials information [sic].

BDA letter.

An investor road show may be a written offer that contains a presentation about an offering by one or more members of the issuer's management and includes discussion of one or more of the issuer, such management and the securities being offered. *See* Rule 433(h)(4) under the Securities Act of 1933, as amended (the "Securities Act"). A written investor road show in general is a free writing prospectus that is not required to be filed with the SEC. *See* Rule 433(d)(8)(i) under the Securities Act.

The MSRB recognizes that an investor road show may be used in connection with a private placement, as well as to accompany a preliminary official statement provided to institutional investors, and, in some cases, the investor road show may be made available to retail investors in municipal securities. *See NetRoadshow, Inc.* (publicly available Jan. 29, 2013) (providing no-action relief concerning the transmission of electronic road shows to retail investors subject to certain conditions).

However, for almost 40 years, the MSRB has limited the exclusions to the definition of an advertisement to issuer prepared documents that are widely disseminated. The MSRB understands that investor road shows are generally prepared with the assistance of an underwriter and are generally not widely disseminated. Therefore, for the reasons stated below with regard to private placement memoranda, the MSRB determined not to exclude investor roadshows or "other similar materials" from the definition of an advertisement.

"Promotion of Regulatory Consistency – Definition of Communications," the proposed rule change simply could not fully harmonize with FINRA's communications rule – rather, the purpose of the proposed rule change, in part, was to promote regulatory consistency among the advertising rules of other financial regulators. In any event, FINRA Rule 2210 does not provide a similar exclusion.

For almost 40 years, the MSRB has limited the exclusions to the definition of an advertisement to issuer prepared documents that are widely disseminated. Similarly, FINRA Rule 2210 does not exclude a private placement memorandum from the definition of a "communication." Rather, FINRA Rule 2210 provides limited exclusions from FINRA Rule 2210(c)'s filing requirements[63] and from Rule 2210(d)'s content standards[64] for prospectuses, preliminary prospectuses, fund profiles, offering circulars and similar documents that have been filed with the SEC or any state and similar offering documents concerning securities offerings that are exempt from SEC and state registration requirements and free writing prospectuses that are exempt from filing with the SEC.[65] The exclusions from FINRA Rule 2210 avoid regulatory duplication.

Moreover, SIFMA states that dealers or municipal advisors may have played a role in preparing the private placement memoranda or limited offering memoranda.[66] FINRA clearly has stated that in such cases, FINRA Rule 2210 would apply to dealers.[67] The MSRB continues to believe

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63 *See* FINRA Rule 2210(c)(7)(F).

64 *See* FINRA Rule 2210(d)(9).

65 However, investment company prospectuses published pursuant to Rule 482 under the Securities Act and a free writing prospectus that is required to be filed with the SEC pursuant to Rule 433(d)(1)(ii) under the Securities Act are subject to FINRA Rule 2210's filing and content standards. FINRA Rules 2210(c)(7)(F) and 2210(d)(9).

66 SIFMA letter at 4. SIFMA also stated that it had "serious concerns that the Proposal is seeking to indirectly impose liability on a municipal advisor pursuant to Rule 10b-5 of the Securities and Exchange Act of 1934." SIFMA letter at 5. The proposed rule change would have no effect on the potential liability on a municipal advisor pursuant to Rule 10b-5 under the Exchange Act.

67 *Regulation D Offerings, Obligation of Broker-Dealers to Conduct Reasonable Investigations in Regulation D Offerings,* FINRA Regulatory Notice 10-22 (April 2010) (stating "[a] BD that assists in the preparation of a private placement memorandum or other offering document should expect that it will be considered a communication with the public by that BD for purposes of NASD Rule 2210, FINRA's advertising rule").

that it can best fulfill its mission to protect investors, municipal entities, obligated persons, and the public interest by retaining the narrow exclusions from the definition of an advertisement that are currently set forth in Rule G-21 and that would be set forth in proposed Rule G-40. In so doing, the MSRB believes, consistent with its regulatory charge and mission, that the MSRB is best able to prevent potential fraud from entering the municipal securities market. Thus, the MSRB has determined, consistent with FINRA Rule 2210, not to exclude those materials from the scope of proposed amended Rule G-21.

(ii) Response to an RFP or RFQ

BDA and SIFMA commented that the Board should amend Rule G-21 (BDA, SIFMA, and NAMA also made similar comments with respect to proposed Rule G-40) to exclude a response to an RFP or RFQ from the definition of an advertisement.[68] 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, and as SIFMA recognized, the MSRB provided supplementary material in the proposed rule change to provide clarification to proposed amended Rule G-21's definition of a form letter. The MSRB believes that a response to an RFP or RFQ would generally not be within the definition of an advertisement primarily because such responses would not meet the definition of a form letter in proposed amended Rule G-21(a)(ii) and proposed Rule G-40(a)(ii).

Supplementary Material .03 to proposed amended Rule G-21 and Supplementary Material .01 to proposed Rule G-40 explain that an entity that receives a response to an RFP, RFQ or similar request would count as one "person" for the purposes of the definition of a form letter no matter the number of employees of the entity who may review the response. Further, the unilateral publication of a response to an RFP or RFQ or similar request by an issuer official would not make that response an advertisement. Nevertheless, such responses are subject to MSRB Rule G-17, on conduct of municipal securities and municipal advisory activities. Given the supplementary material contained in proposed amended Rule G-21 and proposed Rule G-40, the Board believes that no additional provisions are necessary at this time to address commenters' concerns.

In addition, SIFMA requested guidance under proposed Rule G-40 about whether an e-mail that only includes required regulatory disclosures that is sent to more than 25 municipal advisory clients through blind carbon copies would constitute an advertisement. Such e-mails containing only required regulatory disclosures would not constitute advertisements under proposed Rule G-40. Those emails would not be published or used in any electronic or other public media and

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68 *See* BDA letter and SIFMA letter at 5.

would not constitute written or electronic promotional literature. Nevertheless, if an e-mail that contained a required regulatory disclosure also included material that was promotional in nature and sent to more than 25 persons within any period of 90 consecutive days, that e-mail could constitute an advertisement and would be subject to proposed Rule G-40.[69]

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 to promote regulatory consistency among the advertising regulations of financial regulators, the MSRB asked whether it should consider a similar proposal. SIFMA commented that the MSRB should include a similar exception in the proposed rule change.[70]

The comment period on FINRA's draft amendments to FINRA Rule 2210 closed March 27, 2017, and FINRA has not yet announced any next rulemaking steps.[71] 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 and before the SEC has taken action with respect to the proposed rule change. In addition, such action currently would not promote regulatory consistency among the advertising regulations of financial regulators. The MSRB will continue to monitor the FINRA initiative.

D. Dealer/Municipal Advisor Jurisdictional Guidance

SIFMA suggested that the MSRB provide guidance and/or exemptions from proposed amended 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 proposed

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69 Further, the MSRB notes the clause "or the engagement of a municipal advisory client (as defined in paragraph (a)(iii)(B))" refers to solicitor municipal advisors.

70 *See* SIFMA letter at 6-7.

71 FINRA received 22 comment letters in response to Regulatory Notice 17-06, FINRA Requests Comment on Proposed Amendments to Rules Governing Communications with the Public.

Rule G-40 when those dealer/municipal advisors are engaging in municipal advisor advertising.[72]

As discussed previously under "Promotion of Regulatory Consistency – Communications," consistent with the statutory mandate for the MSRB, a dealer or a municipal advisor only becomes subject to MSRB rules based on its activities – unlike FINRA, the MSRB does not have members. Following from that mandate, the MSRB's advertising rules are based, in part, on the activities in which the dealers or municipal advisors engage. For example, if a dealer/municipal advisor publishes a print advertisement relating to the sale of municipal bonds, those activities would be subject to Rule G-21. Similarly, if the dealer/municipal advisor prepares a professional advertisement about its municipal advisory services that it then circulates to municipal entities, that advertisement would be subject to proposed Rule G-40. As currently drafted, certain provisions of proposed amended Rule G-21 and proposed Rule G-40 are similar. For example, as noted by commenters, the content standards of each rule are similar. To the extent that there are differences between proposed amended Rule G-21 and proposed Rule G-40, those differences are based, in part, on the activities in which a dealer or municipal advisor engages.[73] Thus, such jurisdictional guidance may not be needed at this time because of the similarities between proposed amended Rule G-21 and proposed Rule G-40. Nevertheless, jurisdictional guidance relating to dealer/municipal advisors under Rule G-21 may be beneficial in the future, and as noted below, the MSRB expects to begin to address such issues in its next fiscal year.

The MSRB believes that its regulation of financial advisory activities (as an element of municipal securities activity) should remain in place at least until its advertising rule for municipal advisors is approved by the Commission and the professional qualification examinations for municipal advisors has been filed by the MSRB with the Commission.[74] During its April 25-26, 2018 Board

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72 SIFMA letter at 3.

73 By way of illustration, it is the MSRB's understanding that municipal advisors generally do not publish product advertisements, and based on that understanding, proposed Rule G-40 does not address product advertisements. *See, e.g.,* Letter from Noreen P. White, Co-President, and Kim M. Whelan, Co-President, Acacia Financial Group, Inc., dated April 7, 2017 at 2 ("[m]unicipal advisors advise clients on the use of various securities and do not advertise these products [municipal security products, new issue products, and municipal fund security products] and generally have no role in development of advertisements used to sell these products").

74 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,

meeting, the MSRB approved the filing of the Municipal Advisor Principal Qualification Examination Content Outline (Series 54) to formally establish the Series 54 examination. However, in recognition, in part, of the challenges faced by dealer/municipal advisors, the MSRB expects to begin to address such jurisdictional issues during its next fiscal year. Thus, after careful consideration of commenters' suggestions, the Board determined not to revise proposed amended Rule G-21 to reflect commenter's suggestions.

E. Economic Analysis

SIFMA submitted that the advertising rules should be structured based on activity and not by registration. However, the MSRB does consider the nature and scope of dealer and municipal advisor activities when it develops rules; the proposed rule change, in fact, is based on respective activities of dealers and municipal advisors.[75] Additionally, although dealer/municipal advisors will be governed by both proposed amended Rule G-21 and proposed Rule G-40, dual-registrants should recognize that advertisements that are solely related to dealer activities shall only be subject to proposed amended Rule G-21. Likewise, advertisements that are solely related to municipal advisory activities shall only be subject to proposed Rule G-40.

Moreover, because the baseline is existing Rule G-21, the MSRB believes that at least some of the costs associated with dealer advertising compliance are already reflected in existing costs. As stated in the proposed rule change, the MSRB believes that many of the new or increased costs associated with proposed amended Rule G-21 would be up-front costs from initial compliance development such as updating or rewriting policies and procedures. Proposed amended Rule G-21 will promote regulatory consistency with FINRA's rules that should, in fact, promote efficiency and be beneficial to regulated entities.

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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.

75 *See* Exchange Act Release No. 74384 (Feb. 26, 2015), 80 FR 11706 (Mar. 4, 2015) (File No. SR-MSRB 2014-08); Exchange Act Release No. 80699 (May 16, 2017), 82 FR 23394 (File No. SR-MSRB 2017-02).

ii. Proposed Rule G-40

The SEC received two comment letters that primarily focused on proposed Rule G-40.[76] Specifically, commenters focused on (i) the ability of the MSRB to regulate advertising by municipal advisors through other MSRB rules without proposed Rule G-40, (ii) suggested revisions to proposed Rule G-40's content standards, (iii) the suggested adoption of the relief that SEC staff provided to investment advisers relating to testimonials in advertisements, (iv) principal pre-approval, (v) guidance relating to municipal advisor websites and the use of social media, and (vi) the economic analysis. One commenter agreed with many of the provisions of proposed new Rule G-40.[77] The other commenter, although in agreement that municipal advisors should engage in advertisements based on the principles of fair dealing and good faith, recommended that the MSRB withdraw proposed Rule G-40.[78]

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, NAMA submitted that the protections offered by Rule G-17 provide sufficient investor protection from misleading statements such that proposed Rule G-40 is not necessary.[79] However, such a course of action not only would be inconsistent with the MSRB's statutory mandate, but also would create an unlevel playing field in the municipal securities market.

Congress charged the MSRB with the responsibility to create a new regulatory regime for municipal advisors that, in part, requires the MSRB to protect municipal entities as well as obligated persons. To fulfill those statutory responsibilities, the MSRB has tailored its developing municipal advisor regulatory regime, as appropriate, to reflect the differences in the roles and responsibilities of municipal advisors and dealers in the municipal securities market.

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76 *See* NAMA and PFM letters. To the extent that the two other commenters that focused on proposed amended Rule G-21 provided comments relevant to proposed Rule G-40, those comments are included in the discussion below.

77 *See* PFM letter at 1.

78 *See* NAMA letter at 1.

79 NAMA letter at 1 ("[w]e concur with the MSRB that municipal advisors should engage in advertisements based on principles of fair dealing and good faith . . . as we have previously stated, such elements could be achieved with existing rulemaking, MSRB Rule G-17").

The MSRB has long recognized that the "market for municipal advisory services is separate and distinct from the market for services of municipal securities brokers and dealers,"[80] and as such, it is appropriate and reasonable to tailor MSRB rules for municipal advisors.

One of the ways that fraud may enter the market for municipal advisory services is through advertising. Consistent with the MSRB's statutory mandate, the MSRB designed proposed Rule G-40 to help prevent fraudulent and manipulative practices in the market for municipal advisory services, and tailored Rule G-40 to reflect the types of advertisements that municipal advisors publish.

The MSRB believes that it would be inconsistent with the MSRB's statutory mandate to protect municipal entities and obligated persons to regulate advertising by municipal advisors through Rule G-17. Rule G-17 sets forth the MSRB's fair dealing principles; Rule G-17 does not provide particular guidance on how a municipal advisor should apply those principles to its advertisements. By contrast, proposed Rule G-40 provides the detail needed to enable municipal advisors through specific conduct to better comply with those fair dealing principles as they relate to advertising.

Moreover, to rely on Rule G-17 to regulate municipal advisor advertising would create an unlevel playing field, and would be contrary to the recommendations of other market participants.[81] This unlevel playing field would be between municipal advisors (subject to Rule

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80 *See, e.g.,* Letter from Lawrence P. Sandor, Deputy General Counsel, Municipal Securities Rulemaking Board, dated February 5, 2015, in File No. SR-MSRB-2014-08.

81 *See, e.g.,* SIFMA letter at 1 ([w]e are pleased that, at long last, there will be a move towards 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"). *See also*, Testimony of Mr. Timothy Ryan, President and CEO of SIFMA, as cited in the Senate Report to accompany The Restoring American Financial Stability Act of 2010:

> we feel it is important to level the regulatory playing field by increasing the Municipal Securities Rulemaking Board's authority to encompass the regulation of financial advisors, investment brokers and other intermediaries in the municipal market to create a comprehensive regulatory framework that prohibits fraudulent and manipulative practices; requires fair treatment of investors, state and local government issuers of municipal bonds and other market participants; ensures rigorous standards of professional qualifications; and promotes market efficiencies.

G-17, but not Rule G-21) and dealers (subject to both Rules G-17 and G-21) and among municipal advisors that are not registered as dealers and municipal advisors that are also registered as dealers or investment advisers (subject to Rule G-21 and FINRA Rule 2210 or Rule 206(4)-1 under the Investment Advisers Act of 1940, as amended, (the "Advisers Act"), as relevant).[82] Further, other commenters submitted that having a separate rule to address advertising by municipal advisors would be helpful as dealers and municipal advisors have different roles and responsibilities in the municipal securities market.[83]

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

B. 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.[84] 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."[85] NAMA submitted that those general exclusions from the term "advice"

S. Rep. No. 111-176 at 148 (2010).

82 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.

83 *See, e.g.,* 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.

84 17 CFR 240.15Ba1-1(d)(1)(ii).

85 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

that would permit a municipal advisor to not register with the SEC should equally apply as exclusions to the MSRB's municipal advisor advertising rule.[86]

As explained in the proposed rule change, the purpose of proposed Rule G-40, in part, is to ensure that municipal advisor advertising does not contain any untrue statement of material fact and is not otherwise false or misleading. Regardless of whether certain information rises to the level of advice, that information may be advertising used to market to potential municipal advisory clients, which the MSRB believes should be covered by proposed Rule G-40, as the MSRB is obligated to protect municipal entities under the Exchange Act. As noted previously, Congress mandated that the MSRB protect investors; municipal entities, including issuers of municipal securities; obligated persons; and the public interest.[87] Thus, after considering

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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.

86 NAMA letter at 2. *See also* Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated March 24, 2017 (the "March 2017 SIFMA letter"). In addition, PFM made a similar request in its letter responding to the Request for Comment. *See* 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 (the "March 2017 PFM letter") at 2.

87 Notice of Filing of Fair Practice Rules (Sept. 20, 1977) [1977-1987 Transfer Binder] Municipal Securities Rulemaking Board Manual (CCH) ¶10,030 at 10,371.

commenters' suggestions, the Board determined not to include additional exceptions from the definition of an "advertisement" in proposed Rule G-40.[88]

C. Proposed Rule G-40's Content Standards

NAMA requested that the MSRB revise proposed Rule G-40 to provide more definitive content standards.[89] In particular, NAMA stated that the content standards in proposed Rule G-40 should reflect a clearer separation between the content standards applicable to product advertisements and the content standards applicable to professional advertisements.[90] NAMA suggested that this separation was important because the clear majority of municipal advisors only engage in professional services advertising.[91] To that end, NAMA suggested that there should be separate content standards for product advertisements and for professional advertisements, that the liability provisions in proposed Rule G-40 should be lessened, and that the requirement that all advertisements be fair and balanced should be deleted.[92]

The Board appreciates and considered the commenter's suggestions. With regard to the suggestions about creating two sets of content standards, the MSRB believes that such separate standards could needlessly increase the complexity of proposed Rule G-40 without any offsetting benefit of enhancing the ability of a municipal advisor to comply with proposed Rule G-40.

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88 However, as discussed under "Proposed Rule G-40 – Testimonials" below, the MSRB will provide guidance relating to the use by a municipal advisor of a municipal advisory client list and of a case study.

89 *See* NAMA letter at 2. *See also* March 2017 PFM letter at 3.

90 Letter from Susan Gaffney, Executive Director, National Association of Municipal Advisors, dated March 24, 2017 (the "March 2017 NAMA letter") at 3.

91 *See* NAMA letter at 3; *see also* March 2017 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").

92 *See* NAMA letter at 2 and March 2017 NAMA letter at 5-6.

Moreover, NAMA's suggestions about the content standards for professional advertisements would lessen the strict liability provisions set forth in proposed Rule G-40(b)(ii) that would apply to professional advertisements. In addition, NAMA suggested that the MSRB completely delete the MSRB's general standard for advertisements set forth in proposed Rule G-40(a)(v). That general standard for advertisements requires, in part, that a municipal advisor shall not publish an advertisement relating to municipal securities or municipal financial products that the municipal advisor knows or has reason to know contains any untrue statement of material fact or is otherwise false or misleading.

As discussed in the proposed rule change as well as above under "Proposed Amended Rule G-21 – Promotion of Regulatory Consistency – Definition of standards for product and professional advertisements," the liability provisions are important to the MSRB's advertising regulation, and since 1978, the MSRB has imposed strict liability with respect to professional advertisements. In fact, the MSRB has resisted prior suggestions that the MSRB lessen that standard for professional advertisements.[93] The MSRB continues to believe that (i) the liability provisions are key elements to its advertising regulation, (ii) the liability provisions in its advertising regulations should be consistent between dealers and municipal advisors, and (iii) the liability provisions in the MSRB's advertising regulations should not be lessened.

Finally, NAMA submitted that proposed Rule G-40(a)(iv)(A) is not clear, and NAMA deleted that provision in the suggested revisions that it submitted to proposed Rule G-40, as NAMA believed it was repetitive of Rule G-17. Proposed Rule G-40(a)(iv)(A) would require, in part, that an advertisement be fair and balanced, and those principles would apply to an advertisement of any service. The MSRB developed the content standards based, in part, on analogous

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93 *See* File No. SR-MSRB-80-4 (Apr. 7, 1980) at 8. The Board stated:

> Under the Board's advertising rules, two liability standards are used: rule G-21 applies a strict standard of liability for professional advertisements; rule G-34 utilizes a knowledge standard for product advertisements. The NASD suggested that a single "knowledge" standard be used in connection with all types of advertisements.
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> A similar suggestion was made when the rules were in draft form. The Board decided, however, that a knowledge standard is not appropriate for advertisements regarding a municipal securities professional's "facilities, services, or skills." In the case of such advertisements, the Board concluded that a dealer should be absolutely responsible for all substantive errors, other than those attributable to typographical or clerical mistakes. The Board continues to be of this view.

advertising regulations of other financial regulators, primarily those of FINRA,[94] as well as those of the SEC[95] and the National Futures Association.[96] Similar content standards to those set forth in proposed Rule G-40(a)(iv)(A) have long been understood by the financial entities subject to regulation by those financial regulators. In addition, as discussed under "Proposed Rule G-40 – Ability to Regulate Municipal Advisor Advertising through Other Rules," the MSRB submits that reliance only on Rule G-17 to regulate municipal advisor advertising would result in municipal advisors not having the specificity needed based on their activities to enable municipal advisors to better comply with those principles. Nevertheless, if the SEC were to approve proposed Rule G-40, the MSRB would publish guidance about proposed Rule G-40's content standards before proposed Rule G-40 were to become effective.

Thus, after careful consideration and for the reasons stated above, the Board determined not to revise proposed Rule G-40's content standards.

D. Testimonials

NAMA, PFM, and SIFMA commented on proposed Rule G-40(iv)(G)'s prohibition on the use of testimonials in municipal advisor advertisements.[97] Their comments ranged from the view that testimonials should be excluded from proposed Rule G-40[98] to the view that, while the prohibition on the use of testimonials may be warranted, the MSRB should provide guidance under proposed Rule G-40(iv)(G) relating to the use of client lists and case studies.[99]

Specifically, NAMA suggested that "if any version of Rule G-40 is ultimately adopted, then the current circumstances argue strongly in favor of the MSRB removing testimonials from Rule G-40 for now and, if necessary, consider any future amendment to deal with testimonials in a way that is consistent with FINRA's and the SEC's overall treatment."[100] SIFMA, however, took a

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94 *See* FINRA Rule 2210.

95 *See* 17 CFR 275.206(4)-1.

96 *See* NFA Rule 2-29.

97 NAMA letter at 3; PFM letter at 1-2; and SIFMA letter at 6.

98 NAMA letter at 2-3.

99 PFM letter at 1-2.

100 NAMA letter at 2. In footnote 26 of the proposed rule change, the MSRB noted that the SEC has announced that the Division of Investment Management is considering

somewhat different approach and suggested that proposed Rule G-40 be harmonized with FINRA Rule 2210(d)(6) which permits testimonials in advertisements by dealers, "subject to the content standards and requirements that apply."[101] NAMA also submitted that at a minimum, testimonials should "be treated the same under both Rules G-21 and G-40."[102]

NAMA and PFM commented that, if proposed Rule G-40 were to prohibit testimonials by municipal advisors, then the MSRB should provide certain interpretive relief from that prohibition. NAMA suggested that the MSRB narrow that prohibition by adopting all the SEC staff's guidance that is applicable to investment advisers relating to testimonials.[103] NAMA also commented that the definition of advertisement should "provide for client lists and case studies to be exempt from advertising consistent with the SEC's prior action and current investment adviser practices."[104] PFM requested that the MSRB provide clarification relating to the use of client lists and case studies.[105]

The Board considered commenters' suggestions, and the Board continues to believe that a testimonial presents significant issues, including the ability of the testimonial to be misleading. Dealers and municipal advisors have different types of relationships and roles with their customers or municipal advisory clients and have different models for providing advice. Those differences between dealers and municipal advisors are recognized in the Exchange Act, particularly with regard to the fiduciary duties owed by a municipal advisor to its municipal entity clients.

The Exchange Act provides that a:

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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 MSRB believes that NAMA's comment is addressing that footnote.

101 SIFMA letter at 6.

102 NAMA letter at 2, underlining original.

103 NAMA letter at 3.

104 NAMA letter at 3, underlining original. However, NAMA provided no support for its statement that the SEC or current investment adviser practices permit the use of case studies.

105 PFM letter at 1-2.

> municipal advisor and any person associated with such municipal advisor shall be deemed to have a fiduciary duty to any municipal entity for whom such municipal advisor acts as a municipal advisor, and no municipal advisor may engage in any act, practice, or course of business which is not consistent with a municipal advisor's fiduciary duty or that is in contravention of any rule of the Board."[106]

Dealers do not owe a similar fiduciary duty to their customers.

Recognizing the fiduciary duty owed by municipal advisors to their municipal entity clients, the MSRB considered the regulations of other financial regulators where the regulated entity owes a fiduciary duty to its clients. Thus, as discussed in the proposed rule change, the MSRB recognizes that other comparable financial regulations, such as Rule 206(4)-1 under the Advisers Act, prohibit advisers from including testimonials in advertisements (investment advisers are subject to fiduciary standards). Also, as discussed in the proposed rule change, the MSRB is aware of the interpretive guidance provided by the SEC staff relating to testimonials.

For the reasons set forth in the proposed rule change and the Request for Comment, the MSRB determined not to revise proposed Rule G-40 to delete the testimonial ban or to adopt all SEC staff guidance related to the testimonial ban under Rule 206(4)-1.[107] Nevertheless, if the SEC were to approve proposed Rule G-40, the MSRB would publish guidance about the use of municipal advisory client lists and case studies by municipal advisors[108] before Rule G-40 were to become effective.

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106 Section 15B(c)(1) of the Exchange Act.

107 The MSRB notes that the guidance related to the testimonial ban under the Advisers Act rule is SEC staff guidance, not guidance issued by the Commission. The SEC staff generally conditions its guidance to the facts and limitations set forth in the incoming letter. Further, the SEC staff generally states that its guidance expresses the staff's position on enforcement action only and does not purport to express any legal conclusion on the issues presented. *See, e.g.*, *Denver Investment Advisors, Inc.* (publicly avail. July 30, 1993).

108 The MSRB understands that a case study generally is a one page document that may or may not identify the municipal advisory client, but that explains how the municipal advisor handled a particular situation for that municipal advisory client. The MSRB also understands that a municipal advisor may present a case study to a municipal advisory client or potential municipal advisory client during a client visit or as part of an RFP process. In addition, the MSRB understands that a case study may be posted on a municipal advisor's website.

E. Principal Pre-Approval

BDA argued that principal pre-approval was not needed or could be limited to certain types of advertisements.[109] 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."[110] BDA submitted that it "does not believe that a principal needs to approve every municipal advisor advertisement . . . [but that] the MSRB should allow either a municipal advisor principal or a general securities principal to approve advertisements, consistent with Rule G-21."[111] Similarly, SIFMA submitted that proposed Rule G-40(c) allow for a general securities principal to approve advertisements consistent with Rule G-21.[112]

As discussed under "Proposed Amended Rule G-21- Promotion of Regulatory Consistency – Definition of Communications," an important element of the MSRB's statutory mandate is to protect municipal entities and obligated persons. Congress determined that municipal entities do need protection under the federal securities laws, and charged the MSRB with developing a municipal advisor regulatory scheme to so do.

Moreover, there is no general securities principal qualification applicable to municipal advisors. Therefore, the MSRB interprets BDA's and SIFMA's comments as suggesting that a general securities principal who may review dealer advertisements under Rule G-21 should also be able to review municipal advisor advertising under proposed Rule G-40. However, in that case, the MSRB believes that it would be inconsistent with the MSRB's regulatory framework for municipal advisors to have a general securities principal review municipal advisor advertising, as a general securities principal would not be qualified under Rule G-3, on professional qualification requirements, to do so.[113] Qualification as a general securities principal under FINRA's Series 24 examination would not ensure that the general securities principal would be aware of the regulatory requirements applicable to municipal advisors as those requirements are not tested as part of that examination. Further, as noted above, it would be inconsistent with an important part of the MSRB's mission to protect state and local governments and other

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109 BDA letter.

110 *Id*.

111 *Id.*

112 SIFMA letter at 7.

113 The MSRB only accepts general securities principal qualifications under limited circumstances. *See* Rule G-27, on supervision.

municipal entities to have a general securities principal, with little regulatory assurance of minimum knowledge of applicable MSRB rules, approve advertising by a municipal advisor. Thus, the MSRB determined not to revise proposed Rule G-40 to permit a general securities principal to approve advertising by municipal advisors.

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

NAMA requested more specific guidance about the content posted on a municipal advisor's website and about the use of social media by a municipal advisor. Specifically, NAMA requested guidance about whether material posted on a municipal advisor's website would constitute an advertisement under proposed Rule G-40.[114] The definition of advertisement under proposed Rule G-40 is broad, and similar to Rule G-21, would apply to any "material . . . published or used in any electronic or other public media . . . ." Thus, because a website is electronic and public, any material posted on a municipal advisor's website would be an advertisement if that material comes within the definition of an advertisement. Simply publishing material on a website would not exclude material that otherwise would qualify as an advertisement under proposed Rule G-40(a)(i). As such, proposed Rule G-40 would apply to any material posted on a municipal advisor's public website or more generally, on any website, if that material comes within the other terms of the definition of an advertisement as set forth in proposed Rule G-40(a)(i).[115]

Further, NAMA requested guidance on the use of social media.[116] The MSRB believes that such guidance would be timely after any SEC approval of an advertising rule for municipal advisors. If the SEC were to approve proposed Rule G-40, such that the terms of a rule that will be going into effect are determined, the MSRB would publish social media guidance before the effective date of such rule.

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114 NAMA letter at 3.

115 In addition, under Rule 15Ba1-8(a) under the Exchange Act, on books and records to be made and maintained by municipal advisors, materials posted on a municipal advisor's website relating to municipal advisory activities are written communications sent by the municipal advisor for purposes of that rule. Exchange Act Release No. 70462, note 1341 (Sept. 20, 2013), 78 FR 67467 (Nov. 12, 2013).

116 NAMA letter at 3-4.

G. Economic Analysis

The MSRB received comments on the Economic Analysis that it performed on the proposed rule change from both NAMA and SIFMA. NAMA suggested that the MSRB has not properly considered the aggregate burden that rulemaking has placed on municipal advisor firms. As noted in the proposed rule change, the MSRB is planning to conduct a retrospective analysis on the cumulative impact of the municipal advisor regulatory framework on the municipal advisory industry once the entire framework is implemented. That analysis is currently planned for 2019 when proposed Rule G-40 would become effective, if approved by the SEC. Thus, the MSRB does not believe that a formal analysis of the municipal advisor regulatory framework could commence prior to 2019. As a part of the municipal advisor regulatory framework retrospective analysis, the MSRB is also planning to specifically examine the frequency with which issuers use municipal advisors over time, pending availability of data.

NAMA also commented that the MSRB did not appropriately consider the burden placed on small firms. The MSRB believes the costs associated with this rulemaking should not be unduly 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 recordkeeping requirements, as well as sunk investments in advertisements previously developed but no longer compliant, the costs should be proportionate to the size of the firm, assuming that small firms generally advertise less than larger firms.[117] Thus, it is unlikely that proposed Rule G-40 would have an outsized impact on small firms.

SIFMA suggested that proposed Rule G-40 mirror proposed amended Rule G-21 to reduce costs for dual-registrants. The MSRB believes that proposed Rule G-40 and proposed amended Rule G-21 are already substantially similar; the main differences between the two rules are proposed Rule G-40's ban on testimonials and omission of three provisions that concern product advertisements. In developing the substantially similar provisions, the MSRB was sensitive to the burdens on dealer/municipal advisors and the efficiencies resulting from consistent provisions. The degree to which proposed Rule G-40 and proposed amended Rule G-21 mirror each other is a result of these considerations. Differences are attributable to aspects of municipal advisory activity that differs from broker-dealer activity, irrespective of whether the municipal advisor is a dealer or non-dealer municipal advisor.

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117 Most of the economic studies on advertising and economies of scale indicate that there is little support for the proposition that large brands support their market shares with a disproportionately small share of advertising expenditure and thus achieve an economy of scale. *See* Bagwell, Kyle, *The Economic Analysis of Advertising*, Discussion Paper No. 0506-01, Department of Economics Discussion Paper Series, Columbia University, August 2005.

Conclusion

The MSRB believes that the proposed rule change will enhance the MSRB's fair practice rules for dealers by promoting regulatory consistency among Rule G-21 and the advertising rules of other financial regulators. Further, as the proposed rule change is a key element of the MSRB's development of its core regulatory framework for municipal advisors, the proposed rule change will enhance the MSRB's fair practice rules by, for the first time, providing rules about advertising by municipal advisors through proposed Rule G-40.

Consistent with the MSRB's goal of providing tools to enhance the ability of dealers and municipal advisors to comply with MSRB rules, if the SEC were to approve the proposed rule change, the MSRB would provide the following guidance before proposed amended Rule G-21 and proposed Rule G-40 would become effective:

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

If you have any questions, please feel free to contact me.

Sincerely,

Pamela K. Ellis
Associate General Counsel