SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-82616; File No. SR-MSRB-2018-01)

February 1, 2018

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 January 24, 2018 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.

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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,"

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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

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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.

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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;

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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

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[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:
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> > (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

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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

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[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

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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

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 advertisement so as to not inhibit a municipal advisory client's or potential municipal

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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.

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.

Similar to the concerns that the Commission has expressed about an advertisement by an

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[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.

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,

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[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."

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 municipal advisor 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

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[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.

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).

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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

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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,

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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

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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

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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]

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[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]

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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.

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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

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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

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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.

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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.

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 (ii) use of testimonials,[56] or by incorporating FINRA Rule 2210 by reference into Rule G-21.[57]

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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.

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]

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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

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

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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).

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.

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 FINRA Rule 2210 relating to testimonials[66] were strong enough for retail communications to

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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.

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,

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(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." 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

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]

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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.

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, 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

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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'").

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 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]

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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.

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

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

80 Id.

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.

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.

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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.

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 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

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83 See Fidelity letter at 3.

84 Id. at 2-3.

85 Request for Comment at 21.

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

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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.

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 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]

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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]

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").

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 SEC.[98] SEC staff, in its Responses to Frequently Asked Questions, provided further information

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96 3PM letter at 2.

97 Id.

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

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

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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

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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

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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.

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[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.

E. Testimonials

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

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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.

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]

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

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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).

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.

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.

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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]

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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

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

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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).

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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MSRB-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]

Eduardo A. Aleman
Assistant Secretary

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