

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- 97483; File No. SR-MSRB-2023-01)

May 11, 2023

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

I. Introduction

On January 31, 2023, the Municipal Securities Rulemaking Board (“MSRB”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change (“original proposed rule change”) to amend MSRB Rule G-40 (“Rule G-40”), on advertising by municipal advisors, and MSRB Rule G-8 (“Rule G-8”), on books and records.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 96840 (Feb. 8, 2023), 88 FR 9580 (Feb. 14, 2023) (“Notice”).

⁴ See Letter to Secretary, Commission, from Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (“SIFMA”), dated March 7, 2023 (“SIFMA Letter”); Letter to Secretary, Commission, from Susan Gaffney, Executive Director, National Association of Municipal Advisors (“NAMA”), dated March 7, 2023 (“NAMA Letter I”).

to act on the filing until May 15, 2023.⁵

On April 4, 2023, the MSRB responded to the comment letters⁶ and filed Amendment No. 1 to the original proposed rule change (“Amendment No. 1”).⁷ On April 11, 2023, the Commission published notice of Amendment No. 1 in the Federal Register.⁸ In response to Amendment No. 1, the Commission received one comment letter.⁹ On April 28, 2023, the MSRB submitted a response to the comment received on Amendment No. 1.¹⁰ This order approves the original proposed rule change, as modified by Amendment No. 1 (as so modified, the “proposed rule change”).

II. Description of Original Proposed Rule Change

The MSRB stated that, consistent with its strategic goal to modernize its rulebook, the original proposed rule change would amend Rule G-40 to allow municipal advisors to use testimonials in certain circumstances.¹¹ The MSRB stated that this change would better align Rule G-40 with, to the extent appropriate, the principles of MSRB Rule G-21 (“Rule G-21”), on

⁵ See “Extension of Time on File No. SR-MSRB-2023-01 to May 15, 2023,” available at <https://msrb.org/sites/default/files/2023-03/MSRB-2023-01%20eot.pdf>.

⁶ See Letter to Secretary, Commission, from Saliha Olgun, Interim Chief Regulatory Officer, MSRB, dated April 4, 2023 (the “MSRB Letter I”).

⁷ Amendment No. 1 is available at <https://msrb.org/sites/default/files/2023-04/MSRB-2023-01%20A-1.pdf>.

⁸ Securities Exchange Act Release No. 97255 (Apr. 5, 2023), 88 FR 21729 (Apr. 11, 2023) (“Notice of Amendment No. 1”).

⁹ See Letter to Secretary, Commission, from Susan Gaffney, Executive Director, National Association of Municipal Advisors, dated April 26, 2023 (“NAMA Letter II”).

¹⁰ See Letter to Secretary, Commission, from Saliha Olgun, Interim Chief Regulatory Officer, MSRB, dated April 28, 2023 (“MSRB Letter II”).

¹¹ Notice, 88 FR at 9580.

advertising by brokers, dealers or municipal securities, as well as Rule 206(4)-1¹² under the Investment Advisers Act of 1940 (“Advisers Act”)¹³ adopted in 2020¹⁴ by the Commission.¹⁵

Specifically, the MSRB indicated the original proposed rule change would consist of amendments to Rule G-40 to: (i) permit municipal advisors to use testimonials in advertisements, subject to certain conditions; (ii) specify additional supervisory obligations with respect to the use of testimonials; (iii) modify the definition of municipal advisory client to better align with MSRB Rule G-38, on solicitation of municipal securities business; (iv) specify the obligation to keep a record of any payment for a testimonial; and (v) create a conforming obligation under Rule G-8, on books and records to be made by brokers, dealers, municipal securities dealers and municipal advisors, to include records to correspond with the current obligation under Rule G-40 to maintain records relating to the supervision of advertisements as well as the proposed obligation to maintain records of any payments for a testimonial.¹⁶

A. Background

1. Advertisements under Rule G-40

According to the MSRB, in recognition of the fact that municipal advisors bear similarities with both brokers, dealers and municipal securities dealers (collectively and individually, “dealers”) and investment advisers, and to promote regulatory consistency for

¹² 17 CFR 275.206(4)-1.

¹³ 15 U.S.C. 80b-1 et seq.

¹⁴ See Investment Advisers Act Release No. 5653 (Dec. 22, 2020), the adopting release for Investment Adviser Marketing (the “SEC 2020 Adopting Release”), 86 FR 13024 (Mar. 5 2021).

¹⁵ Notice, 88 FR at 9580-81.

¹⁶ Notice, 88 FR at 9580.

regulated entities dually registered as a dealer and as a municipal advisor, or as an investment adviser registered with the SEC, the MSRB established advertising standards for municipal advisors in 2018.¹⁷ The MSRB noted that those advertising standards were developed by aligning with, to the extent practicable, the then existing standards for investment advisers under Rule 206(4)-1 and the then existing standards for dealers under Rule G-21.¹⁸

The MSRB stated that Rule G-40 is designed to protect municipal entities, obligated persons and the general public by requiring a municipal advisor's advertisement to adhere to specific content standards based on the principles of fair dealing and good faith.¹⁹

According to the MSRB, in establishing Rule G-40, it determined to prohibit municipal advisors, directly or indirectly, from publishing, circulating or distributing any advertisement which refers, directly or indirectly, to any testimonial of any kind concerning the municipal advisor or concerning the advice, analysis, report or other service rendered by the municipal advisor.²⁰ The MSRB stated that at that time, it expressed the view that a testimonial in a municipal advisor's advertisement would present significant issues, including the possibility of being misleading.²¹ As a basis for this view, the MSRB noted that the Commission had taken a

¹⁷ See Securities Exchange Act Release No. 83177 (May 7, 2018), 83 FR 21794 (May 10, 2018) (approving MSRB-2018-01, implementing new Rule G-40). The effective date for municipal advisors to comply with Rule G-40 was August 23, 2019. Notice, 88 FR at 9581 n. 6.

¹⁸ Notice, 88 FR at 9581.

¹⁹ Id.

²⁰ Id.; see also Rule G-40(a)(iv)(G).

²¹ Notice, 88 FR at 9581; see also Securities Exchange Act Release No. 82616 (Feb. 1, 2018), 83 FR 5474 (Feb. 7, 2018), notice of proposed rule change ("Notice of Proposed Rule G-40").

similar position in adopting Advisers Act Rule 206(4)-1 in 1961 (“Initial IA Advertising Rule” or “Initial Rule 206(4)-1”), determining that the use of a testimonial by an investment adviser would constitute a fraudulent, deceptive, or manipulative act, practice, or course of action.²² The MSRB expressed that it believed that doing so would help ensure consistent regulation between regulated entities subject to a fiduciary standard, and that the MSRB determined to act consistently with the language of Initial Rule 206(4).²³

2. Testimonials under Rule G-21

The MSRB stated that in establishing Rule G-40, it also sought, to the extent practicable, to harmonize with its existing rule governing the advertisements of dealers, Rule G-21.²⁴ The MSRB also wrote that, while not identical, the two MSRB rules are both based on principles of fair dealing and maintain rigorous content standards.²⁵ However, the MSRB noted that Rule G-40 currently prohibits a municipal advisor from using a testimonial in an advertisement.²⁶ The MSRB described that this prohibition is based in part on the fiduciary duty that a non-solicitor municipal advisor (as opposed to a dealer) owes its municipal entity clients.²⁷

²² Notice, 88 FR at 9581; see also Investment Advisers Act Release No. 121 (Nov. 1, 1961) (the “1961 Advertising Rule Adopting Release”), 26 FR 10548 (Nov. 9, 1961). The Commission adopted the 1961 Advertising Rule to target advertising practices that the Commission believed were likely to be misleading. Notice, 88 FR at 9581 n.13.

²³ Notice, 88 FR at 9581; see also Notice of Proposed Rule G-40, 83 FR at 5478 n. 26.

²⁴ Notice, 88 FR at 9581.

²⁵ Id.

²⁶ Id.

²⁷ Id.; see generally Notice of Proposed MSRB Rule G-40.

The MSRB explained that Rule G-21 permits a dealer to use a testimonial in an advertisement if certain conditions are met.²⁸ Specifically, the MSRB noted that, if a dealer’s advertisement contains a testimonial, then the person providing the testimonial concerning a technical aspect of investing must have the knowledge and experience to form a valid opinion.²⁹ Additionally, the MSRB stated that, if an advertisement contains a testimonial about the investment advice or investment performance of the dealer, the advertisement must prominently disclose: (i) the fact that the testimonial may not be representative of the experience of other customers; (ii) the fact that the testimonial is no guarantee of future performance or success; and (iii) if more than \$100 in value is paid for the testimonial, the fact that it is a paid testimonial.³⁰

3. Testimonials under Advisers Act Rule 206(4)-1

The MSRB stated that in establishing Rule G-40 in 2018, it recognized that the Commission was considering modernizing the Initial IA Advertising Rule and noted that it would monitor developments related to the testimonial ban.³¹ The MSRB recounted that, on December 22, 2020, the Commission adopted amendments to modernize and consolidate the Initial IA Advertising Rule and Rule 206(4)-3 of the Advisers Act (the “IA Solicitation Rule”)³²

²⁸ Notice, 88 FR at 9581; see generally Rule G-21.

²⁹ Notice, 88 FR at 9581; see also Rule G-21(a)(iii)(G)(1).

³⁰ Notice, 88 FR at 9581; see also Rule G-21(a)(iii)(G)(2).

³¹ Notice, 88 FR at 9581; see also Notice of Proposed MSRB Rule G-40, 83 FR at 5487.

³² Notice, 88 FR at 9581; see also 17 CFR 275.206(4)-3. The IA Solicitation Rule was adopted in 1979 "to help ensure clients are aware that paid solicitors who refer them to advisers have a conflict of interest." See SEC 2020 Adopting Release, 86 FR at 13025.

into one marketing rule for investment advisers, under the Advisers Act (the “Modernized IA Marketing Rule” or “IA Rule 206(4)-1”).³³

The MSRB indicated that when the Commission adopted the Modernized IA Marketing Rule, the Commission stated that this rule replaced the previous rule’s “broadly drawn limitations with principles-based provisions designed to accommodate the continual evolution and interplay of technology and advice and includes tailored requirements for certain types of advertisements.”³⁴ The MSRB noted that the Modernized IA Marketing Rule replaced the prior ban on testimonials under the Initial IA Advertising Rule with a permissive use of testimonials and endorsements in advertisements,³⁵ which includes traditional referral and solicitation activity, subject to certain conditions.³⁶

³³ Notice, 88 FR at 9581; see generally SEC 2020 Adopting Release. The Modernized IA Marketing Rule applies to any investment adviser registered or required to be registered with the Commission under Section 203 of the Advisers Act that directly or indirectly disseminates an advertisement.

³⁴ Notice, 88 FR at 9581-82; see also “SEC Adopts Modernized Marketing Rule for Investment Advisers,” (Dec. 22, 2020), available at <https://www.sec.gov/news/press-release/2020-334>.

³⁵ A “testimonial” is a statement made by a current client or investor in a private fund advised by the investment adviser, whereas an “endorsement” is a statement made by a person other than a current client or investor in a private fund advised by the investment adviser. See 17 CFR 275.206(4)-1(e)(17); 1(e)(5).

³⁶ Notice, 88 FR at 9582. See also 17 CFR 275.206(4)-1(b) (relating to compensated testimonials and endorsements); 17 CFR 206(4)-1(e)(1)(ii) (defining the term “advertisement” to include compensated testimonials and endorsements). These conditions differ depending on whether the testimonial or endorsement is compensated or uncompensated. 17 CFR 275.206(4)-1(b)(4)(i) (exempting a testimonial or endorsement disseminated for no compensation or de minimis compensation from paragraphs 206(4)-1(b)(2)(ii) and (3)).

The MSRB stated that the Modernized IA Marketing Rule requires advertisements that include testimonials or endorsements to provide disclosures of certain information.³⁷ The MSRB noted that all testimonials, including those that are compensated and uncompensated, are subject to oversight and compliance.³⁸

In light of the Commission's adoption of the Modernized IA Marketing Rule, the MSRB stated that it conducted a review of Rule G-40 and filed the original proposed rule change to promote regulatory consistency among regulated entities subject to a fiduciary standard.³⁹ The MSRB indicated that the original proposed rule change would permit municipal advisors to use testimonials in advertisements, subject to certain conditions, as discussed below.⁴⁰

B. Summary of the Original Proposed Rule Change

The MSRB stated that to promote regulatory consistency, where practicable, among Rule G-40, Rule G-21, and the SEC's Modernized IA Marketing Rule, proposed amended Rule G-40 would permit the use of testimonials subject to disclosures and other tailored conditions.⁴¹ The MSRB further described that the original proposed rule change would not only align Rule G-40 with the analogous requirements for dealers under Rule G-21, but, because municipal advisors have a fiduciary duty to their clients, the original proposed rule change would also include

³⁷ Notice, 88 FR at 9582. See also 17 CFR 275.206(4)-1(b)(1).

³⁸ Notice, 88 FR at 9582.

³⁹ Id.

⁴⁰ Id. The term "testimonial" is not specifically defined in Rule G-21 or Rule G-40; based on the application of each rule, the term has been understood to include a statement given by a current client or person other than a current client and does not distinguish between a testimonial and an endorsement. See Notice, 88 FR at 9582 n. 28; see also Rules G-21 and G-40.

⁴¹ Notice, 88 FR at 9582.

certain provisions, tailored to apply to municipal advisors, which align with the SEC's Modernized IA Marketing Rule.⁴² Specifically, according to the MSRB, the original proposed rule change would amend the content standards under Rule G-40(a)(iv) to permit municipal advisors to use testimonials in advertisements subject to certain conditions; amend the supervisory obligations under Rule G-40(c) to specify additional supervisory obligations with respect to the use of testimonials; modify the definition of municipal advisory client; and amend Rule G-8 to include records to correspond with the current obligation under Rule G-40 to maintain records relating to the supervision of advertisements.⁴³

1. Rule G-40 Content Standards

The MSRB stated that Rule G-40 currently prohibits the use of testimonials in advertisements by municipal advisors.⁴⁴ The MSRB explained that it is not proposing to alter the fundamental content standards of Rule G-40 that require advertisements to be based on the principles of fair dealing and good faith, be fair and balanced, and provide a sound basis for evaluating the facts and that the advertisements not make any false, exaggerated, unwarranted, promissory, or misleading statement or claim.⁴⁵ The MSRB explained that, consistent with those standards, and recognizing the fiduciary duty owed by municipal advisors to their municipal entity clients, the MSRB proposed to permit the use of testimonials in advertisements by municipal advisors subject to certain conditions that the MSRB believes would diminish the concern, expressed in establishing Rule G-40, that testimonials could cause a municipal advisor's

⁴² Id.

⁴³ Id.

⁴⁴ Id.; Rule G-40(a)(iv)(G).

⁴⁵ Notice, 88 FR at 9582; Rule G-40(a)(iv)(A) - (F); G-40(a)(v); G-40(b)(ii).

advertisement to be misleading.⁴⁶ The MSRB stated that, as proposed, Rule G-40(a)(iv)(G) would be amended to provide that municipal advisor advertisements that contain testimonials would be subject to additional content standards.⁴⁷

The MSRB explained that if a municipal advisor's advertisement contains a testimonial of any kind concerning the municipal advisor or concerning the advice, analysis, report, or other service rendered by the municipal advisor, the person making the testimonial would be required to have the knowledge and experience to form a valid opinion.⁴⁸ The MSRB stated that this obligation would standardize the content standard with that applicable to dealers' use of testimonials under Rule G-21.⁴⁹ The MSRB argued that applying this standard to municipal

⁴⁶ Notice, 88 FR at 9582.

⁴⁷ Id. Amendment No. 1 specifically defines the term "testimonial" for purposes of Rule G-40 as a "statement of a person's or entity's experience concerning the municipal advisor or concerning the municipal advisory services rendered by the municipal advisor." Furthermore, if a municipal advisor's advertisement meets certain conditions, then a municipal advisor may, directly or indirectly, publish, circulate or distribute an advertisement which refers directly or indirectly, to a testimonial. See Amendment No. 1; Notice of Amendment No. 1, 88 FR at 21729.

⁴⁸ Notice, 88 FR at 9582. In Amendment No. 1, the MSRB also removed language from the original proposed rule change that referred to the "advice, analysis or report or other services, rendered by the municipal advisor" and instead, uses "municipal advisory services" in the proposed definition of "testimonial" and elsewhere in the rule text. See Amendment No. 1; Notice of Amendment No. 1, 88 FR at 21729. The MSRB also clarified that a municipal advisor may only use a testimonial if the person or entity providing the testimonial has the knowledge and experience to make a statement concerning their experience with the municipal advisor or with the municipal advisory services rendered by the municipal advisor. See Amendment No. 1; Notice of Amendment No. 1, 88 FR at 21730.

⁴⁹ Notice, 88 FR at 9582. This content standard in Rule G-21 currently aligns with the standard established in Rule 2210, Communications with the Public, of the Financial Industry Regulatory Authority ("FINRA"). Specifically, FINRA Rule 2210(d)(6)(A) provides that "if any testimonial in a communication concerns a technical aspect of investing, the person making the testimonial must have the knowledge and experience to form a valid opinion." Notice, 88 FR at 9582 n. 33.

advisors is consistent with the existing content standards of Rule G-40 established to prevent false or misleading advertisements and would promote regulatory consistency.⁵⁰

The MSRB stated that if an advertisement contains a testimonial concerning the municipal advisor or concerning the advice, analysis, report, or other service rendered by the municipal advisor, that advertisement must include, clearly and prominently, disclosures designed to reduce the risk that the use of a testimonial in an advertisement could be misleading.⁵¹ First, the MSRB explained that the testimonial must include a clear and prominent disclosure that the person providing the testimonial is a current municipal advisory client or, if not currently a municipal advisory client, the timeframe, denoted by calendar year(s), during which the person was a municipal advisory client.⁵² The MSRB concluded that the clear and prominent disclosure standard requires that the disclosures be included within the advertisement that includes the testimonial such that the testimonial and disclosures are read at the same time and improve the salience and impact of the disclosures.⁵³

⁵⁰ Notice, 88 FR at 9582.

⁵¹ Notice, 88 FR at 9583. The MSRB added a Supplementary Material .03 to Rule G-40 to clarify that in order for a requisite disclosure in an advertisement to be clear and prominent (including that a testimonial is a paid testimonial), the disclosure must be at least as prominent in the advertisement as the testimonial. According to the MSRB, this revision indicates that disclosures should appear close to the associated testimonial statement with the same prominence so that the statement and disclosures are read at the same time, rather than referring the reader to somewhere else in the advertisement. See Amendment No. 1; Notice of Amendment No. 1, 88 FR at 21730.

⁵² Notice, 88 FR at 9583. The MSRB stated that it would amend the original proposed rule change to permit municipal advisors to use testimonials from a third party, whether a person or entity, subject to the conditions set forth in Amendment No. 1. Notice of Amendment No. 1, 88 FR at 21729.

⁵³ Notice, 88 FR at 9583.

The MSRB also wrote that the testimonial would also be required to include clear and prominent disclosures that the testimonial may not be representative of the experience of other clients, that the testimonial is no guarantee of future performance or success, and, if more than \$100 in total value in cash or non-cash compensation is paid for the testimonial, the fact that it is a paid testimonial.⁵⁴ The MSRB explained that requiring municipal advisors that use testimonials to adhere to these disclosure requirements would harmonize the content standards with those applicable to dealers' use of testimonials under Rule G-21.⁵⁵ The MSRB argued that requiring such disclosures is consistent with the existing content standards of Rule G-40 and would promote regulatory consistency.⁵⁶

Finally, the MSRB noted that the testimonial also would be required to include, clearly and prominently, a brief statement of any material conflicts of interest on the part of the person providing the testimonial resulting from the municipal advisor's relationship with such person.⁵⁷ The MSRB wrote that, recognizing the fiduciary duty owed by municipal advisors to their municipal entity clients, the MSRB considered the obligations of registered investment advisers, who, like municipal advisors, are subject to a fiduciary standard in determining the disclosures that would be appropriate for municipal advisors when using testimonials in advertisements.⁵⁸ The MSRB stated that this disclosure obligation parallels a disclosure obligation required of

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Id.

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Id. These disclosure requirements in Rule G-21 currently align with the disclosure requirements in FINRA Rule 2210(d)(6)(B)(1) – (3). Notice, 88 FR at 9583 n. 38.

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Notice, 88 FR at 9583.

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Id.

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Id.

registered investment advisers under IA Rule 206(4)-1(b)(1)(iii).⁵⁹ The MSRB explained that a brief statement of any material conflicts of interest on the part of the person providing the testimonial resulting from the municipal advisor's relationship with such person would result in information that informs the likely recipients of the advertisement (i.e., municipal entities and obligated persons) which serves to ensure that the advertisement is fair and balanced and reduces the risk that the use of a testimonial could be misleading.⁶⁰ Furthermore, the MSRB discussed that establishing the same disclosure obligation for municipal advisors under Rule G-40 promotes regulatory consistency, particularly among regulated entities subject to a fiduciary standard.⁶¹ The MSRB wrote that it expects this disclosure to be succinct.⁶²

Next, the MSRB explained that there are two broad categories of municipal advisors:⁶³ (i) those that provide certain advice to or on behalf of a municipal entity or obligated person; and (ii) those that undertake certain solicitations of a municipal entity or obligated person on behalf of certain third-party financial professionals, often referred to as solicitors.⁶⁴ The MSRB stated that it understands that municipal entity clients generally do not accept compensation for testimonials and believes that the payment of more than a de minimis amount (more than \$1000

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

⁶³ Notice, 88 FR at 9583. See also 15 U.S.C. 78o-4(e)(4); 17 CFR 240.15Ba1-1(d)(1)(i); Securities Exchange Act Release No. 70462 (Sept. 20, 2013), 78 FR 67467, n. 138 and 408 (Nov. 12, 2013).

⁶⁴ Notice, 88 FR at 9583. See also 15 U.S.C. 78o-4(e)(9); 17 CFR 240.15Ba1-1(n), 17 CFR 240.15Ba1-1(d)(1); (d)(3)(viii).

in total value in cash or non-cash compensation during the preceding 12 months) to a municipal entity client could present a potential conflict of interest.⁶⁵ Therefore, according to the MSRB, proposed Rule G-40(a)(iv)(G)(3) would prohibit a non-solicitor municipal advisor from paying more than a de minimis amount of compensation for a testimonial.⁶⁶

The MSRB stated that, to avoid this concern and to avoid creating complexity in Rule G-40 by establishing different standards for obligated person clients of non-solicitor municipal advisors, it determined to prohibit non-solicitor municipal advisors from paying any compensation for a testimonial to a person, directly or indirectly, of more than \$1000 in total value in cash or non-cash compensation during the preceding 12 months.⁶⁷ However, the MSRB noted that this change would, permit solicitor municipal advisors to pay such compensation to a municipal advisor, or an investment adviser (as defined under section 202 of the Advisers Act) on behalf of whom the municipal advisor undertakes, or has undertaken, a solicitation of a municipal entity or obligated person, as defined in Exchange Act Rule 15Ba1-1(n)⁶⁸ subject to certain conditions.⁶⁹

2. Rule G-40 Supervisory Obligations

⁶⁵ Notice, 88 FR at 9583.

⁶⁶ Id.

⁶⁷ Notice, 88 FR at 9583-84.

⁶⁸ 17 CFR 240.15Ba1-1(n).

⁶⁹ Notice, 88 FR at 9584. In response to comments that the proposal to establish a different standard for the use of testimonials by solicitor municipal advisors was confusing, the MSRB proposed in Amendment No. 1 to remove proposed language that would have permitted, subject to certain conditions, a solicitor municipal advisor to pay more than \$1000 in total value in cash or non-cash compensation during the preceding 12 months for a testimonial. Further, the MSRB eliminated the language in the original proposed rule

The MSRB identified that Rule G-40 currently requires that each advertisement subject to the requirements of the rule be approved in writing by a municipal advisor principal, as defined in MSRB Rule G-3(e)(i), prior to first use.⁷⁰ The MSRB noted that the original proposed rule change would broaden these supervisory obligations to require, with respect to an advertisement that includes a testimonial, that such approval be based on a reasonable belief that the testimonial complies with the requirements of proposed Rule G-40(a)(iv)(G).⁷¹ The MSRB wrote that this additional supervisory obligation is appropriate in allowing municipal advisors the use of testimonials in advertisements.⁷² The MSRB stated that this obligation would be consistent with the oversight obligation under the Modernized IA Marketing Rule that requires an investment adviser to have a reasonable basis for believing that a testimonial complies with the requirements of IA Rule 206(4)-1.⁷³ The MSRB argued that establishing the same obligation for municipal advisors under Rule G-40 would promote regulatory consistency, particularly among regulated entities subject to a fiduciary standard.⁷⁴

3. Rule G-40 Definitions

The MSRB stated that Rule G-40(a)(iii) currently defines “municipal advisory client,” for purposes of Rule G-40, to include either: a municipal entity or obligated person for whom the

change in Rules G-40 and G-8 concerning additional records to be maintained by a solicitor municipal advisor related to such payments. Notice of Amendment No. 1, 88 FR at 21730.

⁷⁰ Notice, 88 FR at 9584; see also Rule G-40.

⁷¹ Notice, 88 FR at 9584.

⁷² Id.

⁷³ Id.; see also 17 CFR 275.206(4)-1(b)(2)(i).

⁷⁴ Notice, 88 FR at 9584.

municipal advisor engages in municipal advisory activities, as defined in MSRB Rule G-42(f)(iv); or a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser (as defined under section 202 of the Advisers Act) on behalf of whom the municipal advisor undertakes a solicitation of a municipal entity or obligated person, as defined in Rule 15Ba1-1(n) under the Act.⁷⁵ However, the MSRB explained that MSRB Rule G-38 prohibits dealers from paying persons who are not affiliated with the dealers for a solicitation of municipal securities business on their behalf.⁷⁶ The MSRB stated that, to avoid confusion and promote standardization across MSRB rules, the proposal would modify the definition of municipal advisory client.⁷⁷ Specifically, the MSRB wrote that the amended definition would exclude a broker, dealer, and municipal securities dealer from the list of entities on behalf of whom the municipal advisor undertakes a solicitation of a municipal entity or obligated person.⁷⁸

4. Recordkeeping Requirements under Rules G-40 and G-8

The MSRB explained that Rule G-40 currently requires that each municipal advisor make and keep current in a separate file, records of all advertisements.⁷⁹ The MSRB stated that the original proposed rule change would extend that obligation to include records of any payment made to a municipal advisory client for a testimonial.⁸⁰ The MSRB noted that original proposed rule change also would make a conforming amendment to the recordkeeping obligations under

⁷⁵ Notice, 88 FR at 9584; see also Rule G-40(a)(iii).

⁷⁶ Notice, 88 FR at 9584.

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ Id.; see also Rule G-40(e).

⁸⁰ Notice, 88 FR at 9584-85.

Rule G-8(h) to add subparagraph (viii) to include records concerning compliance with Rule G-40.⁸¹ Specifically, the MSRB articulated that the original proposed rule change would amend Rule G-8(h) to specify that every municipal advisor that is registered or required to be registered under Section 15B of the Act (and the rules and regulations thereunder) would be required to make and keep current the records specified under Rule G-40.⁸² The MSRB concluded that this proposal would include not only a record of all advertisements, which is currently required under Rule G-40(e), but also, to align with the proposed amendments to Rule G-40(e), a record of any cash or non-cash compensation provided to a municipal advisory client, as that term is defined in Rule G-40(a)(iii) and a record of any written agreement with a municipal advisor or investment adviser required under proposed Rule G-40(a)(iv)(G)(3)(b), which is required to describe the scope of the agreed-upon activities with respect to the testimonial and the terms of the compensation for such.⁸³

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

⁸¹ Notice, 88 FR at 9585.

⁸² Id.

⁸³ Id.

⁸⁴ Id.

Rule G-40.⁸⁵ In addition, the MSRB wrote that the proposed amendment to Rule G-8 would align with SEC recordkeeping requirements, which require a municipal advisor to make and keep true, accurate, and current certain books and records relating to its municipal advisory activities, including originals or copies of all written communications sent, by such municipal advisor (including inter-office memoranda and communications) relating to municipal advisory activities, regardless of the format of such communications.⁸⁶

III. Description of Amendment No. 1

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

A. Definition of Testimonial

The MSRB noted that a commenter suggested that the term “testimonial” be defined within the rule language itself.⁸⁸ The MSRB responded, stating it would provide a definition of a “testimonial” in Rule G-40 to avoid confusion with the term “testimonial” as used in Rule 206-

⁸⁵ Id. Municipal advisors are also subject to the recordkeeping requirements described in Exchange Act Rule 15Ba1-8(a)(1)-(8).

⁸⁶ Notice, 88 FR at 9585; see also 17 CFR 240.15Ba1-8. Rule G-8 requires that municipal advisors make and keep current all books and records described in Exchange Act Rule 15Ba-18(a)(1)-(8).

⁸⁷ Notice of Amendment No. 1, 88 FR at 21729. The MSRB stated that Amendment No. 1 does not alter or impact the analysis in the original proposed rule change’s burden on competition or the statutory basis sections. Id.

⁸⁸ Id.

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

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

⁸⁹ 17 CFR 275.206(4)-1(b)(1).

⁹⁰ Notice of Amendment No. 1, 88 FR at 21729.

⁹¹ Id.

⁹² Id.

⁹³ Id.

⁹⁴ Id. The MSRB also added a cross-reference to the new definition of “testimonial” in the original proposed rule change’s Rule G-8. Notice of Amendment No. 1, 88 FR at 21729 n.16.

⁹⁵ Notice of Amendment No. 1, 88 FR at 21729.

suggestion that the rule “include affirmative language that testimonials may be used if certain requirements are met.”⁹⁶ The MSRB also deleted a redundant phrase later in this subsection; specifically, amended Rule G-40(a)(iv)(G)(2)(b)(iv)(“the paid testimonial must include”).⁹⁷

B. Non-Client Testimonials

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

⁹⁶ Id.

⁹⁷ Id.

⁹⁸ Id.; see also NAMA Letter I and SIFMA Letter.

⁹⁹ Notice of Amendment No. 1, 88 FR at 21729.

¹⁰⁰ 17 CFR 275.206(4)-1(b)(1).

¹⁰¹ 15 U.S.C. 80b-1-80b-2.

¹⁰² Notice of Amendment No. 1, 88 FR at 21729.

¹⁰³ Notice of Amendment No. 1, 88 FR at 21729; see also SEC 2020 Adopting Release, 86 FR at 13048.

C. Solicitor Municipal Advisors

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

D. Social Media Guidance

The MSRB wrote that both commenters suggested that the MSRB's "FAQs regarding the Use of Social Media under Rule G-21, on Advertising by Brokers, Dealers or Municipal

¹⁰⁴ Notice of Amendment No. 1, 88 FR at 21729-30; see also NAMA Letter I and SIFMA Letter.

¹⁰⁵ Notice of Amendment No. 1, 88 FR at 21730.

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ Id. Correspondingly, the MSRB added the phrase "directly or indirectly" to the original proposed rule change's Rule G-8. Notice of Amendment No. 1, 88 FR at 27130 n.30.

Securities Dealers, and Rule G-40, on Advertising by Municipal Advisors” (“social media guidance”)¹⁰⁹ be updated to reflect the proposed amendments to Rule G-40.¹¹⁰

The MSRB responded by proposing to amend its social media guidance to reflect the proposed amendments to Rule G-40 (inter alia, allowing the use of testimonials in municipal advisor advertisements, subject to certain conditions).¹¹¹ The MSRB explained that the current social media guidance notes that, by paying for or soliciting positive comments from a third party: (i) a municipal advisor would be deemed to be entangled with those comments, and (ii) the posting of those third-party comments on the municipal advisor’s social media page would be deemed to be an advertisement by the municipal advisor that contains a testimonial.¹¹² The MSRB stated that such revisions to the social media guidance would make clear that the advertisement containing a testimonial would be permissible so long as the advertisement meets the requirements of Rule G-40 (including having the requisite disclosures).¹¹³

In addition, the MSRB noted that the revised social media guidance would make clear that if a municipal advisor did not pay, directly or indirectly, for a testimonial, but liked, shared, or commented on a post from a third-party, the municipal advisor would be deemed to have adopted those comments and the posting of those third party comments on the municipal

¹⁰⁹ These frequently asked questions (“FAQs”) were filed with the Commission for immediate effectiveness. See Securities Exchange Act Release No. 85222 (Feb. 28, 2019), 84 FR 8132 (Mar. 6, 2019). These FAQs can be found on the MSRB’s website at <https://www.msrb.org/FAQs-regarding-Use-Social-Media-under-MSRB-Rule-G-21-Advertising-Brokers-Dealers-or-Municipal-0> (Aug. 23, 2019).

¹¹⁰ Notice of Amendment No. 1, 88 FR at 21730; see also NAMA Letter I and SIFMA Letter.

¹¹¹ Notice of Amendment No. 1, 88 FR at 21730.

¹¹² Id.

¹¹³ Id.

advisor's social media page would be deemed an advertisement that contains a testimonial.¹¹⁴

The MSRB concluded that the advertisement containing a testimonial would be permissible so long as the advertisement meets the requirements of Rule G-40 (including having the requisite disclosures).¹¹⁵ The MSRB also revised the social media guidance's footnotes with updated citations and conforming numbering changes.¹¹⁶

E. Other Modifications to Rule Text

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

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

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

2. Supplementary Material .03 to Rule G-40

The MSRB added Supplementary Material .03 to Rule G-40 to the original proposed rule change, stating that this revision would clarify that, in order for a requisite disclosure in an advertisement to be clear and prominent (including that a testimonial is a paid testimonial), the

¹¹⁴ Id.

¹¹⁵ Id.

¹¹⁶ Id.

¹¹⁷ Id.

¹¹⁸ Id.

disclosure must be at least as prominent in the advertisement as the testimonial.¹¹⁹ The MSRB also explained that this revision indicates that disclosures should appear close to the associated testimonial statement with the same prominence so that the statement and disclosures are read at the same time, rather than referring the reader to somewhere else in the advertisement to view the disclosures.¹²⁰

IV. Summary of Comments Received to the Original Proposed Change and Amendment No. 1 and MSRB's Responses

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

The Commission received two comment letters¹²¹ on the original proposed rule change, as well as response from the MSRB to the comment letters.¹²²

1. Definition of Testimonial

One commenter suggested that the term “testimonial” be defined within the rule language itself. The commenter wrote that, “While within a footnote in the Filing, endorsements are noted as being within the meaning of testimonial,” the MSRB does not fully explain what it “means by an endorsement in this context, which under the Investment Adviser Rule would consist of statements from persons other than a current client (but are not limited to past clients), or if/how it applies to municipal advisors.”¹²³ In response, the MSRB stated that it proposed, in Amendment No. 1, to specifically define the term “testimonial” for purposes of Rule G-40 to

¹¹⁹ Id.

¹²⁰ Id.

¹²¹ See NAMA Letter I and SIFMA Letter.

¹²² See MSRB Letter I.

¹²³ NAMA Letter I at 1.

mean a statement of a person’s or entity’s experience concerning the municipal advisor or concerning the municipal advisory services rendered by the municipal advisor.¹²⁴ In addition, the MSRB noted that the proposed rule text would specifically provide that if a municipal advisor’s advertisement meets certain conditions, then a municipal advisor may, directly or indirectly, publish, circulate or distribute an advertisement which refers, directly or indirectly, to a testimonial.¹²⁵

The MSRB responded that this not only addresses the comment requesting that Rule G-40 include a definition of the term “testimonial,” but also the commenter’s suggestion that the rule “include affirmative language that testimonials may be used if certain requirements are met.”¹²⁶

2. Non-client Testimonials

Both commenters suggested that the proposal would promote further harmonization with Rule G-21, on advertising by brokers, dealers or municipal securities dealers, if municipal advisors were able to use testimonials by third parties. Specifically, one commenter stated that non-client testimonials/endorsements should be specifically allowed and the rule should also discuss the requirements and parameters for testimonials/endorsements from other parties¹²⁷ and another discussed that municipal advisor testimonials by third parties should be permitted, in

¹²⁴ MSRB Letter I at 2.

¹²⁵ Id.

¹²⁶ NAMA Letter I at 4; see also MSRB Letter I at 2.

¹²⁷ NAMA Letter I at 2.

order to harmonize Rule G-40 with the Advisers Act as well as Rule G-21 covering brokers, dealers, and municipal securities dealers.¹²⁸

The MSRB responded that it was amending the original proposed rule change to permit municipal advisors to use testimonials from any third party, whether a person or entity, subject to the conditions set forth in Amendment No. 1.¹²⁹ The MSRB explained, for example, that similar to IA Rule 206-4(1)9, an advertisement of a municipal advisor that includes a testimonial would need to include a disclosure indicating whether the testimonial is from a current client or from someone that is not a current client.¹³⁰ The MSRB added that it agreed with the Commission's belief that this type of disclosure (in the context of testimonials pertaining to investment advisers) would provide important context for weighing the relevance of the testimonial.¹³¹

3. Solicitor Municipal Advisors

Both commenters found the original proposed change to establish a different standard for the use of testimonials by solicitor municipal advisors to be confusing. Specifically, one commenter noted “[i]t is important for the Rule to be very clear on the requirements of municipal advisors (the vast majority of MAs) and solicitor municipal advisors, and separate the requirements for each”¹³² and another noted “MSRB Rule G-40 will be unnecessarily complicated by including solicitor municipal advisors.”¹³³

¹²⁸ SIFMA Letter at 1.

¹²⁹ MSRB Letter I at 3.

¹³⁰ Id.

¹³¹ Id.

¹³² NAMA Letter I at 3.

¹³³ SIFMA Letter at 1.

In response to these comments, the MSRB stated that Amendment No. 1 harmonized the criteria for the use of testimonials by all municipal advisors, no longer making a distinction between the use of testimonials by solicitor municipal advisors and non-solicitor municipal advisors.¹³⁴ As part of Amendment No. 1, the MSRB removed originally proposed language that would have permitted, subject to certain conditions, a solicitor municipal advisor to pay more than \$1000 in total value in cash or non-cash compensation during the preceding 12 months for a testimonial. As a result, the MSRB noted that the proposed rule change would prohibit any municipal advisor from providing any compensation to a person or entity, directly or indirectly, of more than \$1000 in total value in cash or non-cash compensation during the preceding 12-months.¹³⁵

4. Other Clarifications to Rule Text and Design

One commenter also suggested additional clarifications to the proposed text and design of Rule G-40, suggesting that such changes would be helpful to facilitate compliance, especially for small municipal advisor firms.¹³⁶ For example, the commenter stated that the phrase “concerning the advice, analysis, report or other service rendered by the municipal advisor...” is too broad and could be problematic.¹³⁷ The MSRB responded that, to provide additional clarity and facilitate compliance, the MSRB had Amendment No. 1 remove that phrase and replace it with “concerning the municipal advisor or concerning the municipal advisory services rendered

¹³⁴ MSRB Letter I at 3.

¹³⁵ MSRB Letter I at 3-4.

¹³⁶ See NAMA Letter I.

¹³⁷ NAMA Letter I at 2.

by the municipal advisor.”¹³⁸ Additionally, the commenter wrote that the language that a person providing a testimonial must have the knowledge and experience to form a valid opinion is too absolute and does not exist in the investment adviser rulemaking.¹³⁹ In response, the MSRB explained that while this standard may not exist in the Investment Adviser Marketing Rule, it does exist, to some degree, in Rule G-21.¹⁴⁰

The MSRB further noted that it could be misleading if a municipal advisor’s advertisement included a testimonial from a person or entity that has no knowledge or experience to make a statement as to their experience with the municipal advisor or the municipal advisory services rendered by the municipal advisor.¹⁴¹ To address the concern that the text of the rule could be interpreted as overly broad, the MSRB indicated that it proposed Amendment No. 1 to clarify that a municipal advisor may only use a testimonial if the person or entity providing the testimonial has the knowledge and experience to make a statement concerning their experience with the municipal advisor or with the municipal advisory services rendered by the municipal advisor.¹⁴²

One commenter also noted that the disclosure required for a paid testimonial should be in the same size font and location as the testimonial and not placed in a footnote.¹⁴³ The MSRB responded that, in Amendment No. 1, Supplementary Material .03 to Rule G-40 would adopt a

¹³⁸ MSRB Letter I at 4.

¹³⁹ NAMA Letter I at 3.

¹⁴⁰ MSRB Letter I at 4.

¹⁴¹ Id.

¹⁴² Id.

¹⁴³ NAMA Letter I at 3.

standard consistent with the views expressed by the SEC in adopting the Investment Adviser Marketing Rule.¹⁴⁴ Specifically, according to the MSRB, Amendment No. 1 clarified that, for a requisite disclosure in an advertisement to be clear and prominent (including a disclosure that a testimonial is a paid testimonial), the disclosure must be at least as prominent in the advertisement as the testimonial.¹⁴⁵ The MSRB added that disclosures should appear close to the associated testimonial statement with the same prominence so that the statement and disclosures are read at the same time, rather than referring the reader to somewhere else in the advertisement to view the disclosures.¹⁴⁶

5. Social Media Guidance

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

The MSRB wrote that, in response to commenters, it drafted Amendment No. 1 to revise its social media guidance so that such guidance, as amended, incorporates the proposed amendments to Rule G-40, which would allow municipal advisors to use testimonials, subject to certain conditions, in their advertisements.¹⁴⁸ The MSRB explained that its current social media guidance notes that by paying for or soliciting positive comments from a third party, a municipal

¹⁴⁴ MSRB Letter I at 4; see also SEC 2020 Adopting Release, 86 FR at 13048.

¹⁴⁵ MSRB Letter I at 4-5.

¹⁴⁶ Id. at 5.

¹⁴⁷ See NAMA Letter I and SIFMA Letter.

¹⁴⁸ MSRB Letter I at 5.

advisor would be deemed to be entangled with those comments, and the posting of those third-party comments on the municipal advisor's social media page would be deemed to be an advertisement by the municipal advisor that contains a testimonial.¹⁴⁹ The MSRB argued that the updated guidance would make clear that the advertisement containing a testimonial would be permissible so long as the advertisement meets the requirements of Rule G-40, including having the requisite disclosures.¹⁵⁰ The MSRB also noted that, in further response to comments, the updated guidance would make clear that if a municipal advisor did not pay, directly or indirectly, for a testimonial, but liked, shared, or commented on a post from a third party, the municipal advisor would be deemed to have adopted those comments and the posting of those third-party comments on the municipal advisor's social media page would be deemed an advertisement that contains a testimonial.¹⁵¹ The MSRB explained that, similarly, the advertisement containing a testimonial would be permissible so long as the advertisement meets the requirements of Rule G-40, including having the requisite disclosures.¹⁵²

One commenter also requested additional amendments to the social media guidance, and noted that technology and social media have changed dramatically over the past few years, and SIFMA members feel it would be helpful for the MSRB to review the FAQs in light of these changes and the proposed amendments to MSRB Rule G-40.¹⁵³ The MSRB responded that in initially developing its social media guidance, the MSRB's goal was to align the FAQs with the

¹⁴⁹ Id.

¹⁵⁰ Id.

¹⁵¹ Id.

¹⁵² Id.

¹⁵³ SIFMA Letter at 2.

social media guidance published by the SEC and FINRA, and not to create unnecessary inconsistencies between its guidance and similar guidance issued by other regulators that may be applicable to other aspects of the regulated entity's business.¹⁵⁴ The MSRB also replied that it believes that its social media guidance remains appropriately aligned with other regulators, and therefore, other than amendments to reflect proposed amendments to Rule G-40, the MSRB is not otherwise making substantive changes to its social media guidance.¹⁵⁵

The MSRB also noted that in establishing Rule G-40, it developed compliance resources to help facilitate compliance¹⁵⁶ and will undertake a review of these compliance resources to ensure that they undergo an update to reflect any amendments to Rule G-40.¹⁵⁷ In doing so, the MSRB stated that it expects to engage with stakeholders in some capacity (e.g., via discussions with the MSRB's Compliance Advisory Group and/or discussions with key stakeholders) to help ensure that the resources meet the needs of municipal advisors.¹⁵⁸

B. Comment Received in Response to Amendment No. 1

¹⁵⁴ MSRB Letter I at 6.

¹⁵⁵ Id.

¹⁵⁶ Application of the Content Standards to Advertisements by Municipal Advisors under MSRB Rule G-40 [effective Aug. 23, 2019], FAQs on Use of Municipal Advisory Client Lists and Case Studies [effective Aug. 23, 2019], Assessing Supervision of Municipal Advisor Advertising Regulations. MSRB Letter I at 6.

¹⁵⁷ Id.

¹⁵⁸ Id.

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

V. Discussion of Commission’s Findings

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

¹⁵⁹ See NAMA Letter II.

¹⁶⁰ See MSRB Letter II.

¹⁶¹ See NAMA Letter II.

¹⁶² Id. at 2.

¹⁶³ Id.

¹⁶⁴ MSRB Letter II at 2.

In particular, the Commission believes that the proposed rule change is consistent with the provisions of Section 15B(b)(2)(C), which provides, in part, that the MSRB's rules shall be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.¹⁶⁵ The Commission finds that the proposed rule change will: (i) prevent fraudulent and manipulative acts and practices; (ii) protect investors, municipal entities, obligated persons, and the public interest; (iii) promote just and equitable principles of trade; and (iv) foster cooperation and coordination with persons engaged in regulating transactions in municipal securities.

A. Prevent Fraudulent and Manipulative Acts and Practices

The Commission finds that the proposed rule change would help prevent fraudulent and manipulative acts and practices. The proposed rule change does not alter the standards that advertisements be based on the principles of fair dealing and good faith, be fair and balanced, and provide a sound basis for evaluating the facts and that the advertisements do not include any false, exaggerated, unwarranted, promissory or misleading statement or claim. As a result, permitting municipal advisors to use only testimonials that are consistent with these standards would help ensure that Rule G-40 continues to prevent fraudulent and manipulative acts and practices. The Commission further believes that the proposed amendment to Rule G-8 (with the related application of existing MSRB Rule G-9 on records preservation) would help municipal

¹⁶⁵ 15 U.S.C. 78o-4(b)(2)(C).

advisors create an audit trail for compliance and, in turn, would assist examination and enforcement authorities in their examination for compliance with Rule G-40, which would further help prevent fraudulent and manipulative acts and practices.

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

The Commission finds that the proposed Rule G-40 also would protect municipal entities, obligated persons and the public interest. It would do so by ensuring that recipients of any advertisement containing a testimonial have the necessary context to evaluate the testimonial because the proposed rule change would only permit the use of testimonials if certain conditions are met, including that specified disclosures are made. Municipal entities and obligated persons are the likely audience for municipal advisors' testimonials. As such, the requisite disclosures would help ensure that the proposed rule change would further the protection of municipal entities, obligated persons, and the public interest.

The Commission further notes that the amendments to Rule G-40 are intended to align Rule G-40's provision governing the use of testimonials by municipal advisors to the analogous requirements under the SEC's Modernized IA Marketing Rule, by prohibiting the use of testimonials in an advertisement unless a municipal advisor complies with disclosure and oversight provisions. Therefore, the Commission finds that the proposed rule change's associated requirements for testimonials (like the Modernized IA Marketing Rule) are meant to protect potential clients from misleading advertisements. In this way, the Commission finds that the proposed amendments to Rule G-40 would enhance protections for potential recipients of municipal advisor testimonials, including issuers, obligated persons, and other market participants.

C. Promote Just and Equitable Principles of Trade

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

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

Furthermore, the Commission believes the proposed rule change would foster coordination with persons engaged in regulating transactions in municipal securities. The amendments to Rule G-40 would more tightly align the content standards for Rule G-40 with the content standards of the SEC's Modernized IA Marketing Rule.¹⁶⁶ The proposed change thereby provides a more uniform standard for regulated entities subject to a fiduciary standard (i.e., investment advisers and municipal advisors). This uniformity allows the examining authorities to coordinate examinations of municipal advisors and municipal advisors dually registered as investment advisers more effectively. Moreover, the proposed rule change will allow examiners to compare content standard practices across all municipal advisors (regardless of dually register status) more clearly. As such, the Commission finds that the proposed rule change serves to foster greater cooperation and coordination among the examining authorities responsible for ensuring compliance with MSRB rules.

¹⁶⁶ Notice, 88 FR at 9585-86.

Section 15B(b)(2)(C) of the Act¹⁶⁷ requires that MSRB rules not be designed to impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In approving the proposed rule change, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation.¹⁶⁸

The Commission does not believe the proposed rule change to amend Rule G-40 and Rule G-8 would impose any new burden on competition or have an impact on competition, as the proposed rule change would apply a similar regulatory regime to all municipal advisors. Further, the Commission believes that the proposed changes to Rules G-40 and G-8 would promote regulatory consistency and would benefit municipal advisors by removing the prohibition that an advertisement does not refer, directly or indirectly, to any testimonial of any kind concerning the municipal advisors. By aligning MSRB rules with the SEC's Modernized IA Marketing Rule, as well as Rule G-21, the proposed amendments to Rules G-40 and G-8 would also improve efficiency by providing regulatory consistency for regulated entities dually registered as a dealer and as a municipal advisor, or as an investment adviser registered with the SEC and as a municipal advisor.

The Commission also finds that the proposed rule change will not hinder capital formation, as the proposed amendments to Rule G-40 and Rule G-8 would be applicable to all municipal advisors. As such, the Commission finds that the proposed rule change would help ensure that all regulated entities dually registered (as a dealer and as a municipal advisor, or as an investment adviser with the SEC and as a municipal advisor), are subject to consistent standards on the use of testimonials in advertisements. The Commission finds that the proposed

¹⁶⁷ 15 U.S.C. 78o-4(b)(2)(C).

¹⁶⁸ 15 U.S.C. 78c(f).

amendments to Rules G-40 and G-8 would therefore promote efficiency in the marketplace.

Therefore, the Commission concludes that the amendments to Rule G-40 and Rule G-8 would not negatively affect competition and capital formation.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,¹⁶⁹ that the proposed rule change (SR-MSRB-2023-01) be, and hereby is, approved.

For the Commission, by the Office of Municipal Securities, pursuant to delegated authority.¹⁷⁰

Sherry R. Haywood
Assistant Secretary

¹⁶⁹ 15 U.S.C. 78s(b)(2).

¹⁷⁰ 17 CFR 200.30-3(a)(12).