



March 24, 2017

*Submitted electronically*

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

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

Dear Mr. Smith:

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

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

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

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

<sup>3</sup> Fidelity Brokerage Services, LLC, National Financial Services LLC, and Fidelity Investments Institutional Services Company are affiliates of Fidelity Investments and MSRB, SEC and FINRA registered broker-dealers.

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

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

### **EXECUTIVE SUMMARY**

- The MSRB should review and endeavor to adopt FINRA rules and guidance under FINRA Rule 2210, in particular FINRA guidance on hyperlinks, investment analysis tools, and social media;
- The MSRB should permit the use of testimonials in dealer communications; and
- The MSRB should consider additional ways to stay engaged on current methods by which dealers communicate with their customers.

Each of these points is discussed in further detail below.

### **The MSRB should review and endeavor to adopt FINRA interpretations under FINRA Rule 2210.**

Because municipal and municipal fund securities are regulated by the MSRB, their sales material must comply with MSRB rules, including MSRB Rule G-21, concerning dealer advertisements. Additionally, certain sales materials for municipal fund securities must comply with the advertising rules of the SEC and FINRA, including FINRA Rule 2210. Thus, in creating a communication that references municipal securities and/or municipal fund securities, dealers who are registered with both the MSRB and FINRA must consult at minimum, three different rule sets (MSRB, FINRA, SEC) to ensure that their communications are compliant. In practice this can result in advertisements that are short on substantive content, but lengthy in regulatory disclosures.

We acknowledge challenges in designing rules that are consistent across regulators, dealers, and similar products, but believe that retail investors and market participants are well served by rules that are uniform in design and approach. This is particularly true in the area of public communications which are by their nature intended to advertise and help educate investors about specific products.

To help make regulations more efficient and effective, we encourage the MSRB to review existing and upcoming FINRA guidance concerning communications with the public and where at all possible adopt this guidance as their own. We encourage the MSRB to engage with FINRA during the rulemaking process or comment on FINRA proposals directly, so that

potential MSRB concerns and questions can be addressed.<sup>5</sup> Coordinated SRO regulation of dealer communications with the public is a more efficient and effective form of regulation than two different set of regulations governing similar content.

Moreover, greater alignment of FINRA and MSRB advertising rules will help facilitate compliance across MSRB and FINRA registered firms through the creation of common standards. In contrast, to the extent that the MSRB does not adopt particular FINRA guidance or rules regarding communications with the public, we urge the MSRB to clearly articulate its reasons for not doing so, and publicize this difference to dealer firms. Our comments that follow emphasize this approach.

### *Hyperlinks*

In our experience, simple, clear communications help empower investors to make investing decisions that are in their best interest. Too much information can overwhelm investors, leading to confusions and/or inaction. Clear communications increase a retail investor's ability to make informed investment decisions, particularly if the information is packaged in a format and context that is understandable and actionable by the average investor.

The draft amendments to Rule G-21 would permit the use of hyperlinks to obtain more current municipal fund security performance information. We fully support these draft amendments and believe that hyperlinks are a commonly used method of communication, well understood by investors, through which investors can obtain additional details on facts that matter to them.

We also encourage the MSRB to permit the use of hyperlinks more broadly and in other advertising contexts outside of municipal fund security performance information. For example, the MSRB should allow dealers to provide hyperlinks to EMMA as a way to convey more information to retail investors outside of the four corners of an advertisement. As the official repository for information on virtually all municipal bonds and municipal fund securities, EMMA contains a significant amount of detailed information for investors. Moreover, based on MSRB improvements to the site, EMMA has been designed as an easy to navigate site.

We also foresee that ABLE Program communications will have some additional complexities, which will result in significantly more disclosure in these advertisements. For example, ABLE Program advertisements will likely reference disability benefits and governmental programs, and the ability for dealers' to include hyperlinks to certain external governmental sources (*i.e.*, the Social Security Administration or Internal Revenue Service) would be helpful to dealers while also providing guidance to prospective and current customers on where to find more information on these important and complicated topics.

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<sup>5</sup> We similarly encourage FINRA to work with the MSRB on MSRB proposals concerning communications with the public, and also look to the SEC to help coordinate rules governing communications with the public between FINRA and the MSRB.

Lastly, over the past few years, FINRA has been more receptive to the use of hyperlinks in member firm communications. We encourage the MSRB to consider ascribing to FINRA interpretations regarding hyperlinks as FINRA continues to develop guidance on this topic, and to work with FINRA so these interpretations reflect MSRB input.

### *Investment Analysis Tools*

The draft amendments to Rule G-21 prohibit a dealer from using an advertisement that, in part, predicts or projects performance, but do not prohibit the use of an investment analysis tool. We support MSRB advertising rules that permit the use of investment analysis tools under certain conditions.

Investment analysis planning tools can help retail investors in a number of ways. For example, in the college planning context, such tools can help investors determine their savings goals and how much they will need to save to reach them; how inflation could increase the cost of college; and what the investor's savings might be worth when it's time for college. The use of investment analysis in these tools, typically through Monte Carlo simulation, can help investors understand a range of potential outcomes and how uncertainty affects planning for future college expenses.

FINRA rules permit the presentation of projections in certain contexts. FINRA Rule 2210 provides a limited exception to FINRA's general prohibition against predictions or projections of performance for investment analysis tools and hypothetical illustrations of mathematical principals, among other areas. Moreover, as the MSRB references in the Proposal, FINRA has issued a request for comment on a new exception to FINRA Rule 2210 which would permit a firm to distribute a customized hypothetical investment planning illustration that includes the projected performance of an asset allocation or other investment strategy subject to specified conditions, but would not permit performance projections of individual securities.<sup>6</sup>

We encourage the MSRB to review and adopt FINRA guidance on predictions and projections. If the MSRB is attempting to harmonize certain of its advertising rules to those of FINRA, we do not see the need for a different regulatory approach on this particular topic.

### *Social Media*

MSRB Rule G-21 applies to advertisements, regardless of whether electronic or other public media, including social media, is used with those advertisements. The MSRB has not yet issued specific guidance on the use of social media by MSRB registered dealers and we agree that such guidance would be helpful. Dealers can use social media in many different ways to communicate with retail investors, and regulatory guidance on this topic can help ensure that dealers are using social media pursuant to guidelines established by the MSRB.

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<sup>6</sup> See FINRA Regulatory Notice 17-06 *Communications with the Public, FINRA Requests Comment on Proposed Amendments to Rules Governing Communications with the Public*. (February 2017) available at: [http://finra.complinet.com/net\\_file\\_store/new\\_rulebooks/r/e/Regulatory-Notice-17-06.pdf](http://finra.complinet.com/net_file_store/new_rulebooks/r/e/Regulatory-Notice-17-06.pdf)

In recent years, different financial regulators have considered and provided guidance on the application of their communications rules to new technologies. This is often an iterative process as new technologies continue to develop and their application to communication rules needs to be continuously assessed. On the topic of social media, FINRA has provided guidance on the application of its rules governing communications with the public to social media sites and has provided periodic clarification concerning application of these rules to new technologies. For example, we understand that FINRA is currently working on a new social media Q & A that will permit the use of hyperlinks to layer disclosure. We encourage the MSRB to review this guidance with FINRA prior to its public release to address any MSRB concerns with the goal of its wholesale application to municipal securities and municipal fund securities.

### Testimonials.

Draft Rule G-21(a)(iii) prohibits dealers from using testimonials in advertisements. The MSRB states that “the use of a testimonial by a dealer presents significant issues – including the potential for the testimonial to mislead investors who may not be fully aware of the facts and circumstances that led to the testimonial” and further notes that “Many investors in municipal securities are senior investors, who may not appreciate the limits of a testimonial, even if certain limits are disclosed.”<sup>7</sup>

We do not understand the MSRB’s blanket prohibition on testimonials in dealer advertising, particularly given the Proposal’s intent to harmonize certain provisions of Rule G-21 with FINRA and SEC rules. FINRA allows testimonials in their communications with the public under certain circumstances<sup>8</sup> and the SEC has provided guidance that allows investment advisers to use testimonials in certain contexts.<sup>9</sup> Moreover, both FINRA and the SEC have articulated a clear priority to address concerns specific to senior investors.<sup>10</sup>

If the MSRB has investor protection concerns with the use of testimonials in dealer advertisements, we believe that there are more targeted and tailored ways to address these

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<sup>7</sup> The Proposal at page 6.

<sup>8</sup> FINRA Rule 2210(d)(6)(A) currently provides that, if any testimonial in a communication with the public concerns a technical aspect of investing, the person making the testimonial must have the knowledge and experience to form a valid opinion. FINRA Rule 2210(d)(6)(B) requires any advertisement or sales literature that includes a testimonial concerning the investment advice or investment performance of a firm or its products to prominently disclose the fact that: (i) the testimonial may not be representative of the experience of other customers; (ii) the testimonial is no guarantee of future performance or success; and (iii) if more than \$100 in value is paid for the testimonial, the fact that it is a paid testimonial.

<sup>9</sup> Securities and Exchange Commission Division of Investment Management Guidance Update 2014-04 *Guidance on the Testimonial Rule and Social Media* (March 2014) available at: <https://www.sec.gov/investment/im-guidance-2014-04.pdf>

<sup>10</sup> For example, the SEC recently approved a FINRA proposed rule change to amend FINRA Rule 4512 (Customer Account Information) and adopt FINRA Rule 2165 (Financial Exploitation of Specified Adults). Securities and Exchange Commission Release No. 34-79964 (February 3, 2017) available at: <https://www.sec.gov/rules/sro/finra/2017/34-79964.pdf>

Ronald W. Smith

March 24, 2017

Page 6 of 7

concerns than through a blanket prohibition on the use of testimonials. For example, the MSRB might allow the use of testimonials in dealer advertisements but place restrictions and requirements on their use, much like FINRA Rule 2210(d)(6). Also, since many municipal fund security communications by a dealer registered with FINRA and the MSRB must be filed with FINRA and reviewed by FINRA staff, the MSRB might consider a pilot program with FINRA to determine if dealer advertisements using testimonials appropriately address the MSRB's investor protection concerns. Regardless of the specific approach taken, we urge the MSRB to reconsider its prohibition on the use of testimonials in dealer advertisements.

#### The Need for Continued Industry Outreach.

Given the pace of growth in different methods of communication, we encourage the MSRB to consider different ways in which it can stay informed on new communications technologies.

To this end, we observe that from time to time regulators create advisory committees on specific topics to help keep apprised of emerging areas. Advisory committees are typically comprised of a cross section of market participants and are typically charged with providing the regulator diverse perspectives on specific topics as well as advice and recommendations on matters related to those topics. For example, FINRA has a member firm committee on communications with the public. To continue to understand market developments the MSRB might similarly consider forming a committee that would meet periodically and be charged with providing recommendations to the MSRB on municipal and municipal fund security communications topics. Fidelity is fortunate to have a number of qualified professionals available to offer perspectives to the MSRB in this area and if the MSRB creates an advisory committee on communications with the public, we would be honored to serve in any manner the MSRB believes appropriate.

The MSRB might also look to ways to partner with FINRA on topics concerning communications with the public. Given the large number of dealer firms that are both MSRB and FINRA registered and that advertise municipal and municipal fund security products, a coordinated and collaborative approach to regulating dealer communications with the public would work to the benefit of regulators, dealers, and retail investors.

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Ronald W. Smith  
March 24, 2017  
Page 7 of 7

Fidelity thanks the MSRB for considering our comments. We would be pleased to provide any further information and respond to any questions that you may have.

Sincerely,



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