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Invested in America

February 28, 2018

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street NE.
Washington, DC 20549-1090

Re: File No. SR-MSRB-2018-01; 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

Dear Mr. Fields:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates this opportunity to respond to the Municipal Securities Rulemaking Board's (the "MSRB's") rule filing SR-MSRB-2018-01(the "Proposal"),[2] which would amend Rule G-21, on advertising, proposed new Rule G-40, on advertising by municipal advisors, and a technical amendment to Rule G-42 on the duties of non-solicitor municipal advisors. SIFMA and its members appreciate the MSRB's efforts to update MSRB Rule G-21. We agree with the principles in the rules that communications to the public must be consistent with fair dealing duties and in good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security. We are pleased that, at long last, there will be a move towards leveling of the regulatory playing field between brokers, dealers, and municipal securities dealers (collectively, "dealers"), who have long been regulated by MSRB Rule G-21, and non-dealer municipal advisors, whose advertising activities will become regulated under new MSRB Rule G-40.

[1] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] 83 Fed Reg. 5474 (Feb. 7, 2018) (File No. SR-MSRB-2018-01).

However, for the reasons stated below, SIFMA urges the Securities Exchange Commission ("SEC" or Commission") to institute disapproval proceedings regarding the proposal in its current form, as the rule amendments still do not put dealer municipal advisors and non-dealer municipal advisors on a level regulatory playing field, lack clarity in critical areas, unnecessarily fail to harmonize the rules with existing Financial Industry and Regulatory Authority ("FINRA") rules, and unnecessarily increase compliance burdens.

I. If MSRB Rule G-21 Does Not Incorporate FINRA Rule 2210 by Reference, Then the Rules Should Be More Closely Harmonized

The MSRB has summarily dismissed SIFMA request to harmonize FINRA Rule 2210 and MSRB Rule G-21 to govern communications by a dealer. SIFMA and its members feel that it is necessary for Rule G-21 to be more closely harmonized with FINRA Rule 2210. The current Rule G-21 and its draft amendments do not reflect the current construction of FINRA Rule 2210, which divides communications with the public into three categories: retail communications, correspondence,[3] and institutional communications. FINRA Rule 2210 establishes different requirements for retail communications and institutional communications. This approach takes into account the critical differences in the intended audiences. Generally, FINRA's rule on retail communications requires pre-use approval by a principal, while there is no such requirement for institutional communications. Instead, dealers are given the ability to establish review procedures for institutional communications that are appropriate to their business, subject to certain specified parameters.

The MSRB made minimal effort to harmonize these concepts from FINRA Rule 2210 into Rule G-21, and continues to treat all advertisements as subject to one-size-fits-all pre-use approval by a principal, regardless of the audience. The definition of "advertisement" in Rule G-21 is different and broader than that of "retail communication" in FINRA Rule 2210. We strongly support removal of the definitions of "advertisement", "form letter", and "professional advertisement" in favor of harmonizing Rule G-21 with the three categories of communications (retail communications, correspondence, and institutional communications) as set forth in FINRA Rule 2210.[4] Harmonization of the MSRB and FINRA rules would also necessitate the removal of the

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[3] We recognize the regulation of correspondence is handled separately in FINRA Rule 3110, pursuant to FINRA Rule 2210(b)(2).

[4] We draw your attention to FINRA Regulatory Notice 12-29 (Communications with the Public) (June 2012), available at http://www.finra.org/industry/notices/12-29 (last visited Mar. 24, 2017), wherein FINRA specifically reduces the number of categories and definitions of communications from six categories to three.

confusing and duplicative definition of "product advertisement", the only purpose of which is to add what is covered in content standards.

SIFMA and its members feel strongly that the MSRB should adopt the FINRA approach to dividing the regulatory framework for communications into categories for retail and institutional communications, so that dealers can apply common approval processes for institutional communications across all asset classes. This approach is significantly preferable over requiring pre-use principal approval for municipal securities advertisements that are used exclusively with institutional customers, when FINRA permits establishment of alternate approval procedures for these institutional communications for all other asset classes.

II. Dealer Municipal Advisors are Covered by G-21 and G-40, and Non-Dealer Advisors are Covered only be G-40

SIFMA and its members reiterate our comments made in our prior comment letter[5] in that the MSRB should have two rules on public communications, and the rules should be divided based on activity, not by registration category. Dealer advertising that does not concern municipal advisory activity or qualifications should be subject to Rule G-21. Dealer municipal advisor activity and non-dealer municipal advisory activity or qualifications should only be covered by Rule G-40. Having dealer municipal advisors covered by both rules creates ambiguity as to which of the two rules applies. For example, Rule G-21 covers product advertisements; Rule G-40 does not. Rule G-21 permits testimonials in certain circumstances; Rule G-40 does not. Since all financial advisory activity as the term is used in Section 15B(e)(4)(B) of the Securities Exchange Act of 1934, as amended, and Rule G-3 is also municipal advisory activity, there is no need for separate conflicting rules governing that activity. Clarity is necessary to ensure which rule controls.

III. Clarification in Definition of Advertisement

In an effort to provide greater clarity, SIFMA suggests the MSRB add the word "otherwise" before "made generally available to customers or the public" in the current definition of advertisement in Rule G-21 and Rule G-40.[6]

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[5] *See* Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated Mar. 24 2017, to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board (regarding MSRB Notice 2017-04: Draft Amendments to MSRB Rule G-21 on Advertising, and on Draft Rule G-40 on Advertising by Municipal Advisors (the "Original Notice")).

[6] An advertisement, as defined by in G-21(a) and proposed Rule G-40(a)(i) would then be defined as:

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IV. MSRB Should Exclude Limited Offering Documents and Private Placement Memoranda from the Definition of "Advertisement"

a. Private Placement Memoranda and Limited Offering Memoranda

The amendments to Rule G-21 and draft Rule G-40 do not create an exception for all issuer offering and disclosure documents from the definition of an advertisement. In fact, even the description of issuer offering documents exempt under draft Rule G-40 differs from what is exempted under current Rule G-21. While Rule G-21 and draft Rule G-40 both specifically exempt "preliminary official statements" and "official statements" from the definition of "advertisement", proposed Rule G-40 also exempts "preliminary prospectuses, prospectuses, summary prospectuses or registration statements". However, neither rule exempts other similar forms of issuer offering and disclosure documents that function in the same way as these documents but that may be called by different names. SIFMA and its members reiterate our position that issuer offering and disclosure documents (including, but not limited to, private placement memoranda, commercial paper offering memoranda, offering circulars, term sheets, limited offering memoranda, free writing prospectuses, official statements and prospectuses; both preliminary and final) should all be excluded from the definition of a covered communication within the rules. Even though a dealer or advisor may have potentially had a role in the preparation of these documents, these are issuer documents for which issuers appropriately should have primary liability and not dealer or municipal advisor advertisements. Indeed, the MSRB has not articulated how such documents could be considered dealer or municipal advisor advertisements. Again, our position remains that a "tombstone" or other dealer created offering summary would potentially be a covered communication, but the entire official statement or limited offering memorandum or other offering and disclosure documents should be exempt from the rules. The Proposal leaves open the question as to whether an entire limited offering memorandum or other offering and disclosure documents would be considered an advertisement or merely the part

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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 otherwise* 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 (emphasis added).

the dealer or dealer municipal advisor provided , as product advertisements are covered by Rule G-21 but not Rule G-40. SIFMA also has serious concerns that the Proposal is seeking to indirectly impose liability on a municipal advisor pursuant to Rule 10b-5 of the Securities and Exchange Act of 1934. SIFMA respectfully requests that the list of issuer offering documents that are exempt from the term "advertisement" be harmonized between Rule G-21 and proposed Rule G-40; and that the language in both rules be broadened to include all forms of issuer offering documents that may apply to various forms of offerings. Using a more generic term like "preliminary and final issuer offering documents" may be better than attempting to create a comprehensive laundry list of all possible types of issuer offering documents.

Incorporating these concepts into the draft amendments would harmonize the rules with FINRA Rule 2210(d)(9). SIFMA and its members are disappointed the MSRB has summarily dismissed the industry's suggestions for further harmonization in this area.

b. Responses to Requests for Proposals

The Original Notice stated that a response by a municipal advisor to a request for proposals from a municipal entity or obligated person for services in connection with a municipal financial product or the issuance of municipal securities would "most likely" not be an advertisement under draft Rule G-40. A footnote in the Proposal states, "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." The footnote does not comport with the rule text. SIFMA and its members believe that the MSRB should craft an explicit exception for RFP responses, and make clear that RFP responses are not communications subject to review under G-21 or proposed G-40. Again, although we appreciate the clarification in the Proposal that responses sent to multiple issuer officials of the same issuer count as one recipient, this relief sidesteps the key issue, which is that RFP responses should not be a covered communication and should not be deemed an advertisement. The idea that a solicited response to a request for comment or qualifications is potentially an advertisement is nonsensical. Further, such communications to potential clients are subject to Rule G-17 and Rule G-27. Making RPF responses also potentially subject to Rule G-21 and proposed Rule G-40 is duplicative and unnecessary. To that end, we would appreciate the MSRB clarifying the language in the Notice that responses to requests for proposals are not advertisements under the amendments to Rule G-21 or new proposed Rule G-40.

c. The Use of Testimonials Should be Permitted

SIFMA and its members appreciate the changes to draft Rule G-21(a)(iii) to permit dealers using testimonials in advertisements. This change harmonized this section of the rule with FINRA Rule 2210, which permits testimonials, with clear limitations. SIFMA and its members believe that regulatory harmonization and consistency is paramount.

The MSRB should also harmonize the exception for use of testimonials by municipal advisors with FINRA Rule 2210(d)(6), subject to the content standards and requirements that apply. The MSRB's stated concerns in this area regarding retail investors are not credible when applied to municipal advisory activity. The use of testimonials should not be prohibited by firms acting as a municipal advisor. The MSRB cites to concerns set forth in the 1961 adopting release for SEC Rule 206(4)-1 for investment advisors. In this case, municipal advisors can be distinguished from investment advisors due to the differences in their client base. Municipal advisors are not selling securities to elderly retail investors; they are advising professional state and local government officials about municipal securities issuance and investments. Again, MSRB should harmonize the exception for use of testimonials by municipal advisors with FINRA Rule 2210(d)(6), subject to the content standards and requirements that apply.[7]

d. The Use of Illustrations Should be Permitted

As described in the Notice, FINRA recently requested comment on proposed amendments to FINRA Rule 2210.[8] In RN 17-06, FINRA proposes to amend FINRA Rule 2210 to create an exception to the rule's prohibition on projecting performance to permit a firm to distribute a "customized hypothetical investment planning illustration that includes the projected performance of an asset allocation or other investment strategy, but not an individual security." As a general matter, SIFMA believes the proposed amendment in RN 17-06 would better align FINRA Rule 2210's investor protection benefits and economic impacts. Importantly, the proposed amendment in RN 17-06 enhances a firms' ability to provide investors with only brokerage accounts access to potentially useful projections currently available to investment advisory clients. SIFMA supports these amendments to FINRA Rule 2210,[9] and supports

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[7] See also reference to conflicting treatment of testimonials in Section II above.

[8] *See generally* FINRA Regulatory Notice 17-06 (Communications with the Public) (Feb. 2017), available at http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-06.pdf (last visited Mar. 6, 2017) ("RN 17-06").

[9] *See* Letter from Kevin Zambrowicz, Managing Director and Associate General Counsel, SIFMA, to Marcia E. Asquith, Office of the Corporate Secretary, FINRA, anticipated to be dated Mar. 27, 2017 (regarding RN 17-06).

similar exceptions in the draft amendments to Rule G-21 and draft new Rule G-40. We trust the MSRB will address harmonizing Rule G-21 to amended FINRA Rule 2210 promptly after adoption of the amendments.

V. Form Letters

Municipal advisors are required to make certain disclosures to their municipal advisor clients after they are engaged (e.g., updated Rule G-42 disclosures on legal and disciplinary events and annual disclosures under Rule G-10). If those are disclosures are sent in one email to more than 25 municipal advisor clients blind copied, SIFMA and its members assume that these regulatory disclosures do not constitute a form letter for the purposes of Rule G-40. SIFMA and its members would appreciate clarification and confirmation of this point.

VI. Approvals

It is worthy to note that some firms have special teams of professionals dedicated to reviewing advertising materials for compliance with all applicable laws, such as investment advisor rules, MSRB Rules, FINRA Rules, etc. Under Rule G-21(f), each advertisement subject to the requirements of the rule must be approved in writing by a municipal securities principal or general securities principal prior to first use. Under proposed Rule G-40(c), each advertisement subject to the requirements of the rule must be approved in writing by a municipal advisor principal. In light of the dedicated advertising review teams that some firms employ, SIFMA and its members request that Rule G-40(c) allow for approval by a municipal advisor principal or a general securities principal, consistent with Rule G-21. Limiting approval authority to only municipal advisor principals in Rule G-40(c) is unnecessarily restrictive and burdensome without justification.

VII. Economic Analysis

a. Effect on Competition, Efficiency, and Capital Formation

As noted above, SIFMA fully supports the regulation of the advertising activities of municipal advisors, which levels the regulatory playing field. Dealers have long been governed by Rule G-21, regardless of their activity or role in a transaction. However, as noted above, we believe the rules should be structured to cover the requisite activity or role, and not based on the firm's corporate structure or registration classification.

b. Costs and Benefits

The draft changes to MSRB Rule G-21, as proposed, and new MSRB Rule G-40, do not substantively harmonize the rules with FINRA Rule 2210.[10] Again, SIFMA and its members believe that separate and distinct rules for municipal securities are valuable when there exists something unique about the market that warrants a different rule than that promulgated by FINRA. With respect to advertising or public communications for most municipal securities products (except for municipal advisory business and municipal fund securities), we feel there is no compelling reason to establish a different rule set than that which exists under FINRA Rule 2210. SIFMA feels strongly that costs of implementation and ongoing compliance would be greatly reduced if these rules more closely mirror FINRA Rule 2210, and the MSRB has not stated a justification for such additional costs.

VIII. Conclusion

Again, SIFMA and its members urge the SEC to consider our comments on the MSRB's proposed amendment to Rule G-21 and new Rule G-40, and ask the SEC to institute proceedings for disapproval if SIFMA's comments are not otherwise incorporated into the Proposal. The MSRB has not justified the need for differences from the FINRA advertising rule. By not harmonizing the proposed rule changes with the FINRA rule, the MSRB will unnecessarily increase compliance burdens. The MSRB can and should optimize burdens without decreasing investor protection. We would be pleased to discuss any of these comments in greater detail,

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[10] We note that FINRA has acknowledged, "[M]embers are permitted to employ a more flexible supervisory structure where a communication reaches fewer parties, as in the case of correspondence; where the communication reaches a more sophisticated audience, as in the case of institutional communications; and where the communication does not promote the product or service of the member." See letter from John P. Savage, FINRA, to Elizabeth M. Murphy, SEC, dated December 22, 2011, available at: https://www.sec.gov/comments/sr-finra-2011-035/finra2011035-19.pdf.

or to provide any other assistance that would be helpful. If you have any questions, please do not hesitate to contact the undersigned at [redacted].

Sincerely yours,

Leslie M. Norwood
Managing Director and
Associate General Counsel

cc: ***Securities and Exchange Commission***
Rebecca Olsen, Director, Office of Municipal Securities

Municipal Securities Rulemaking Board
Lynnette Kelly, Executive Director
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