



Municipal Securities Rulemaking Board

April 4, 2023

Vanessa Countryman  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**Re: Response to Comments on File No. SR-MSRB-2023-01**

Dear Ms. Countryman:

On January 31, 2023, the Municipal Securities Rulemaking Board (“MSRB”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change, File No. SR-MSRB-2023-01, to amend MSRB Rule G-40, on advertising by municipal advisors. Specifically, File No. SR-MSRB-2023-01 consisted of amendments to MSRB 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 MSRB 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 MSRB 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 (together “the original proposed rule change”).<sup>1</sup>

**Background**

The original proposed rule change was published in the Federal Register on February 14, 2023.<sup>2</sup> The Commission received a total of two comment letters.<sup>3</sup> The MSRB appreciates the participation of commenters in the rulemaking process and after carefully considering the comments, the MSRB is filing this day Amendment No. 1 to File No. SR-MSRB-2023-01

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<sup>1</sup> The original proposed rule change is available at [MSRB-2023-01.pdf](#). Except as expressly defined herein, the defined terms used in this letter shall have the meanings as defined in the original proposed rule change.

<sup>2</sup> See Exchange Act Release No. 96840 (Feb. 8, 2023), 88 FR 9580 (Feb. 14, 2023) (File No. SR-MSRB-2023-01 (“Notice of Proposed Rule Change.”))

<sup>3</sup> See Letter from Susan Gaffney, Executive Director, National Association of Municipal Advisors (“NAMA”) (Mar. 7, 2023) (“NAMA Letter”), and Letter from Leslie Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (“SIFMA”) (Mar. 7, 2023) (“SIFMA Letter”).

(“Amendment No. 1”). This letter describes the MSRB’s response to the material aspects of the comments on the original proposed rule change, including proposed changes incorporated into Amendment No. 1.

## **Discussion of Comments on the Original Proposed Rule Change**

### **Definition of Testimonial**

NAMA suggested that the term “testimonial” be defined within the rule language itself. “While within a footnote in the Filing, endorsements are noted as being within the meaning of testimonial for purposes of the Rule, the Rule does not fully explain what the MSRB means by an endorsement in this context, which under the Investment Advisor 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.”<sup>4</sup>

To avoid any confusion as to the application of the term “testimonial” as used in SEC Rule 206-4(1),<sup>5</sup> the MSRB is proposing, in Amendment No. 1, to specifically define the term “testimonial” for purposes of Rule G-40 to 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. In addition, 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.

The MSRB believes this not only addresses NAMA’s comment requesting that Rule G-40 include a definition of the term “testimonial,” but also NAMA’s suggestion that the rule “include affirmative language that testimonials may be used if certain requirements are met.”<sup>6</sup>

### **Non-client Testimonials**

Both commenters suggested that it would promote further harmonization with MSRB Rule G-21, on advertising by brokers, dealers or municipal securities dealers, if municipal advisors were able to use testimonials by third parties. Specifically, NAMA stated “[n]on-client testimonials/endorsements should be specifically allowed and the Rule should also discuss the requirements and parameters for testimonials/endorsements from other parties”<sup>7</sup> and SIFMA

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<sup>4</sup> NAMA Letter at 1.

<sup>5</sup> 17 CFR 275.206(4)-1(b)(1).

<sup>6</sup> NAMA Letter at 4.

<sup>7</sup> NAMA Letter at 2.

noted “[m]unicipal advisor testimonials by third parties should be permitted, in order to harmonize MSRB G-40 with the Investment Advisers Act as well as Rule G-21 covering brokers, dealers, and municipal securities dealers.”<sup>8</sup>

After carefully considering these comments, the MSRB is 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. For example, similar to SEC Rule 206-4(1)<sup>9</sup> under the Investment Advisers Act of 1940,<sup>10</sup> 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. We agree 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.<sup>11</sup>

#### Solicitor Municipal Advisors

Commenters found the proposal to establish a different standard for the use of testimonials by solicitor municipal advisors to be confusing. Specifically, NAMA 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”<sup>12</sup> and SIFMA noted “MSRB Rule G-40 will be unnecessarily complicated by including solicitor municipal advisors.”<sup>13</sup>

In response to these comments, the MSRB is proposing, in Amendment No. 1, to harmonize 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. As part of Amendment No. 1, the MSRB is removing originally proposed

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<sup>8</sup> SIFMA Letter at 1.

<sup>9</sup> 17 CFR 275.206(4)-1(b)(1).

<sup>10</sup> Investment Advisers Act of 1940 (54 Stat. 847, 15 U.S.C. 80b-1 – 80b-2).

<sup>11</sup> The SEC noted that “an investor might reasonably give more weight to a statement made about an adviser by a current investor rather than someone who was never an investor.” *See* Investment Advisers Act Release No. 5653 (Dec. 22, 2020), the adopting release for Investment Adviser Marketing (the “SEC 2020 Adopting Release”), 86 FR 13024-13147 (Mar. 5, 2021) at 13048.

<sup>12</sup> NAMA Letter at 3.

<sup>13</sup> SIFMA Letter at 1.

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 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.

#### Other Clarifications to Rule Text and Design

In addition to the comments noted above, NAMA 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.<sup>14</sup>

- The phrase “concerning the advice, analysis, report or other service rendered by the municipal advisor...” is confusing and could be problematic.

To provide additional clarity and facilitate compliance, the MSRB is proposing, in Amendment No. 1, to remove that phrase and replace it with “concerning the municipal advisor or concerning the municipal advisory services rendered by the municipal advisor.”

- 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.

While this standard may not exist in the Investment Adviser Marketing Rule, it does exist, to some degree, in Rule G-21. The MSRB continues to believe 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. To address the concern that the text of the rule could be interpreted as overly broad, the MSRB is proposing, in 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.

- 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.

In light of this comment, the MSRB is proposing, in Amendment No. 1, Supplementary Material .03 to Rule G-40 to adopt a standard consistent with the views expressed by the SEC in adopting the Investment Adviser Marketing Rule.<sup>15</sup> Specifically, Amendment No. 1 clarifies that

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<sup>14</sup> See NAMA Letter.

<sup>15</sup> See SEC 2020 Adopting Release, 86 FR 13024-13147 (Mar. 5, 2021) at 13048.

in order 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. 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.

### 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")<sup>16</sup> be updated to reflect the proposed amendments to Rule G-40.<sup>17</sup> In response to commenters, as part of Amendment No. 1, the MSRB is proposing to amend 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.

The current social media guidance notes that by paying for or soliciting positive comments from a third party, a municipal 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. In response to comments, 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.

In addition, 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. 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.

SIFMA also requested additional amendments to the social media guidance, noting that "[t]echnology and social media have changed dramatically over the past few years, and SIFMA

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<sup>16</sup> The social media guidance was filed in 2019 with the SEC for immediate effectiveness. *See* Securities and Exchange Act Release No. 85222 (Feb. 28, 2019), 84 FR 8132 (Mar. 6, 2019) (File No. SR-MSRB-2019-04). This interpretive guidance can be found on the MSRB's website at <https://msrb.org/FAQs-regarding-Use-Social-Media-under-MSRB-Rule-G-21-Advertising-Brokers-Dealers-or-Municipal-0>.

<sup>17</sup> *See* NAMA Letter and SIFMA Letter.

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.”<sup>18</sup> In initially developing its social media guidance, the MSRB’s goal was to align the FAQs with the 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.<sup>19</sup> The MSRB believes that its social media guidance remains appropriately aligned with other regulators. For this reason, other than amendments to reflect proposed amendments to MSRB Rule G-40, the MSRB is not otherwise making substantive changes to its social media guidance.

In establishing Rule G-40, the MSRB developed compliance resources to help facilitate compliance:

- Application of the Content Standards to Advertisements by Municipal Advisors under MSRB Rule G-40 (effective Aug. 23, 2019)<sup>20</sup>
- FAQs on Use of Municipal Advisory Client Lists and Case Studies (effective Aug. 23, 2019)<sup>21</sup>
- Assessing Supervision of Municipal Advisor Advertising Regulations<sup>22</sup>

The MSRB will undertake a review of these compliance resources to ensure that they undergo an update to reflect any amendments to Rule G-40. In doing so, the MSRB would expect 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.

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<sup>18</sup> SIFMA Letter at 2.

<sup>19</sup> As examples, the MSRB noted: National Examination Risk Alert, Office of Compliance Inspections and Examinations, U.S. Securities and Exchange Commission (Jan. 4, 2012); Exchange Act Release No. 58288 (Aug. 1, 2008); FINRA Regulatory Notice 17-18 (Apr. 2017) (“RN 17-18”); and FINRA Regulatory Notice 10-06 (Jan. 2010) (“RN 10-06”).

<sup>20</sup> Published on May 1, 2019, available on the MSRB’s website at <https://msrb.org/sites/default/files/Content-Standards-Rule-G-40.pdf>.

<sup>21</sup> Published on May 1, 2019, available on the MSRB’s website at <https://msrb.org/sites/default/files/FAQs-On-Use-of-MA-Client-Lists.pdf>.

<sup>22</sup> Published on August 1, 2019, available on the MSRB’s website at <https://msrb.org/sites/default/files/Assessing-Supervision-MA-Ad-Regs.pdf>.

**Conclusion**

The MSRB believes that the foregoing responds to the material issues raised by the commenters on the original proposed rule filing. The MSRB will continue to engage with stakeholders to support the implementation of the amendments.

The attachment to this letter sets forth Amendment No. 1.

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If you have any questions, please feel free to contact me, at 202-838-1500.

Sincerely,

A handwritten signature in black ink, appearing to read 'Saliha Olgun', with a long horizontal flourish extending to the right.

Saliha Olgun  
Interim Chief Regulatory Officer

## 1. Text of the Proposed Rule Change

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934, as amended (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> the Municipal Securities Rulemaking Board (“MSRB”) is filing with the Securities and Exchange Commission (the “Commission”) a proposed amendment (“Amendment No. 1”) to File No. SR-MSRB-2023-01, a proposed rule change consisting of amendments to MSRB Rule G-40, on advertising by municipal advisors. Specifically, the proposed rule change proposed amendments to MSRB 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 MSRB 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 MSRB 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 (together “the original proposed rule change”).

The original proposed rule change, together with Amendment No. 1 (collectively, “the proposed rule change”) is designed to govern the use of testimonials in advertising by municipal advisors.<sup>3</sup> Amendment No. 1 makes amendments to improve the clarity of the proposed rule change and enhance readability and understanding of the obligations under Rule G-40 to facilitate compliance.

### Background

The original proposed rule change was filed with the Commission on January 31, 2023. The Commission published the proposed rule change in the Federal Register for comment on February 14, 2023,<sup>4</sup> and received two comment letters in response.<sup>5</sup> After carefully considering these comments, the MSRB is proposing Amendment No. 1 to modify proposed rule text,

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Consistent with MSRB Rule D-11, unless the context otherwise requires or a rule of the Board otherwise specifically provides, the term "municipal advisor" shall refer to and include the municipal advisor’s respective associated persons.

<sup>4</sup> See Exchange Act Release No. 96840 (Feb. 8, 2023), 88 FR 9580 (Feb. 14, 2023) (File No. SR-MSRB-2023-01) (“Notice of Proposed Rule Change”).

<sup>5</sup> See Letter from Susan Gaffney, Executive Director, National Association of Municipal Advisors (“NAMA”) (Mar. 7, 2023) (“NAMA Letter”), and Letter from Leslie Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (“SIFMA”) (Mar. 7, 2023) (“SIFMA Letter”).



primarily, as suggested by commenters, to provide certain clarifications in the proposed rule change designed to enhance readability and understanding to facilitate compliance with the proposed rule change. In addition, Amendment No.1 includes proposed amendments to 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”)<sup>6</sup> to reflect the proposed amendments to Rule G-40.<sup>7</sup>

The MSRB requests that the proposed rule change be approved with an implementation date to be announced by the MSRB in a regulatory notice published no later than one month following the Commission approval date, which implementation date shall be no later than three months following the Commission approval date.

## **Discussion of Amendment No.1**

### **Definition of Testimonial**

One commenter suggested that the term “testimonial” be defined within the rule language itself.<sup>8</sup> To avoid any confusion as to the application of the term “testimonial” as used in SEC Rule 206-4(1),<sup>9</sup> the MSRB is proposing, in Amendment No. 1, to specifically define the term “testimonial” for purposes of Rule G-40 to 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. The MSRB believes the proposed definition provides greater clarity. To that end, the MSRB 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 the language municipal advisory services in the proposed definition of “testimonial” and elsewhere in the rule text.

In addition, the proposed rule text 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. The MSRB believes this not only addresses the comment requesting that MSRB Rule G-40 include a

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<sup>6</sup> The social media guidance was filed with the SEC in 2019 for immediate effectiveness. See Securities and Exchange Act Release No. 85222 (Feb. 28, 2019), 84 FR 8132 (Mar. 6, 2019) (File No. SR-MSRB-2019-04). This interpretive guidance can be found on the MSRB’s website at <https://msrb.org/FAQs-regarding-Use-Social-Media-under-MSRB-Rule-G-21-Advertising-Brokers-Dealers-or-Municipal-0>.

<sup>7</sup> See NAMA Letter and SIFMA Letter.

<sup>8</sup> See NAMA Letter at 1-2.

<sup>9</sup> 17 CFR 275.206(4)-1(b)(1).

definition of the term “testimonial,” but also the suggestion that the rule “include affirmative language that testimonials may be used if certain requirements are met.”<sup>10</sup>

### Non-client Testimonials

Both commenters suggested that it 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.<sup>11</sup> In response, the MSRB is amending the original proposed rule change to permit a municipal advisor to use a testimonial from any third party, whether a person or entity, in an advertisement, subject to the conditions set forth in Amendment No. 1. For example, similar to SEC Rule 206-4(1)<sup>12</sup> under the Investment Advisers Act of 1940,<sup>13</sup> 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. We agree with the Commission’s belief that this type of disclosure would provide important context for weighing the relevance of the testimonial.<sup>14</sup>

### Solicitor Municipal Advisors

Both commenters found the proposal to establish a different standard for the use of testimonials by solicitor municipal advisors to be confusing.<sup>15</sup> In response, the MSRB proposes, in Amendment No. 1, to standardize the criteria for the use of testimonials by municipal advisors, no longer making a distinction between the use of testimonials by solicitor municipal advisors. Amendment No.1 removes 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. Amendment No. 1 also removes the proposed language concerning additional records to be maintained by a solicitor municipal advisor related to such payments. As a result, 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.

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<sup>10</sup> NAMA Letter at 4.

<sup>11</sup> See NAMA Letter and SIFMA Letter.

<sup>12</sup> 17 CFR 275.206(4)-1(b)(1).

<sup>13</sup> Investment Advisers Act of 1940 (54 Stat. 847, 15 U.S.C. 80b-1 – 80b-2).

<sup>14</sup> The SEC noted that “an investor might reasonably give more weight to a statement made about an adviser by a current investor rather than someone who was never an investor.” See Investment Advisers Act Release No. 5653 (Dec. 22, 2020), the adopting release for Investment Adviser Marketing (the “SEC 2020 Adopting Release”), 86 FR 13024-13147 (Mar. 5, 2021) at 13048.

<sup>15</sup> See NAMA Letter and SIFMA Letter.

## Other Clarifications to Rule Text and Design

To provide additional clarity and facilitate compliance, the MSRB is also proposing other textual changes to MSRB Rule G-40, in Amendment No. 1, that would:

- 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.
- Add 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. 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.

## Social Media Guidance

Both commenters suggested that the MSRB's social media guidance be updated to reflect the proposed amendments to Rule G-40. In response to commenters, Amendment No. 1 includes proposed amendments to the MSRB's 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.<sup>16</sup>

The current social media guidance notes that by paying for or soliciting positive comments from a third party, a municipal 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. In response to comments, 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.

In addition, 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. 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.

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<sup>16</sup> The MSRB believes that its social media guidance remains appropriately aligned with other regulators. For this reason, other than amendments to reflect proposed amendments to MSRB Rule G-40, the MSRB is not otherwise making substantive changes to its social media guidance at this time.

The MSRB believes the proposed rule change addresses the comments made on the original proposed rule change. Amendment No. 1 provides greater clarification to the amendments than the original proposed rule change and the changes described above are designed to enhance readability and understanding to facilitate compliance with the proposed rule change. The proposed rule change does not alter or impact the analysis of the burden on competition or the statutory basis with respect to the original proposed rule change.

Exhibit 4      The change made by Amendment No. 1 to the original proposed rule change is indicated in attached Exhibit 4. Material proposed to be added is underlined. Material proposed to be deleted is enclosed in brackets.

Exhibit 5      The text of the proposed rule change is attached as Exhibit 5. Material proposed to be added is underlined. Material proposed to be deleted is enclosed in brackets.

## TEXT OF DRAFT AMENDMENTS

**Rule G-40: Advertising by Municipal Advisors**(a) *General Provisions.*

(i) – (iii) No change.

(iv) Content Standards.

(A) – (F) No change.

(G) Testimonials.

(1) Definition of “Testimonial.” For purposes of this rule, the term “testimonial” means 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.

(2) A municipal advisor may, directly or indirectly, publish, circulate or distribute an advertisement which includes or refers, directly or indirectly, to a testimonial if the following conditions are met:

[(1)](a) [If an 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, t]The person or entity making the testimonial [must have] has the knowledge and experience to [form a valid opinion] make a statement concerning their experience with the municipal advisor or with the municipal advisory services rendered by the municipal advisor.

[(2)](b) If an advertisement contains a testimonial of any kind concerning the municipal advisor or concerning the [advice, analysis, report, or other] municipal advisory services rendered by the municipal advisor, that advertisement must clearly and prominently disclose the following:

[(a)](i) That the testimonial was given by [person providing the testimonial is] a current municipal advisory client or given by a person or entity other than a current municipal advisory client[, if not a current municipal advisory client, the timeframe, denoted by calendar year(s), that the person was a municipal advisory client].

[(b)](ii) The fact that the testimonial may not be representative of the experience of other clients.

[(c)](iii)The fact that the testimonial is no guarantee of future performance or success.

[(d)](iv) If more than \$100 in total value in cash or non-cash compensation is paid for the testimonial, (a) the fact that it is a paid testimonial; and (b) [the paid testimonial must include] a brief statement by the municipal advisor of any material conflicts of interest on the part of the person or entity providing the testimonial resulting from the municipal advisor's relationship with such person or entity.

(3) A municipal advisor may not provide any compensation for a testimonial 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.[, unless the testimonial is from a municipal advisor or an investment adviser (as defined under section 202 of the Investment Advisers Act of 1940) on behalf of whom the municipal advisor undertakes, or has undertaken, a solicitation of a municipal entity or obligated person, as defined in Rule 15Ba1-1(n), 17 CFR 240.15Ba1-1(n), under the Act, and the municipal advisor:

(a) based on the exercise of reasonable diligence, concludes that the municipal advisor or investment adviser who will provide the testimonial is currently registered with the Commission; and

(b) has a written agreement with the municipal advisor or investment adviser that describes the scope of the agreed-upon activities with respect to the testimonial and the terms of the compensation for such.]

(H) No change.

(v) No change.

(b) – (d) No change.

(e) *Records*. Each municipal advisor shall make and keep current in a separate file, records of all advertisements[, ] and records of any [payment made] compensation provided to a [municipal advisory client] person or entity, directly or indirectly, for a testimonial[, ] and records of any written agreements required under Rule G-40(a)(iv)(G)(3)(b)].

## **Supplementary Material**

.01-.02 No change.

.03 Clear and Prominent Disclosures. In order for disclosures to be clear and prominent, the disclosures must be at least as prominent in the advertisement as the testimonial. Specifically, such 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.

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**Rule G-8: Books and Records to be Made by Brokers, Dealers and Municipal Securities Dealers and Municipal Advisors**

(a) - (g) No change.

(h) Municipal Advisor Records. Every municipal advisor that is registered or required to be registered under Section 15B of the Act and the rules and regulations thereunder shall make and keep current the following books and records:

(i) - (vii) No change.

(viii) Records Concerning Compliance with Rule G-40

(A) A record of all advertisements required by Rule G-40(e); and

(B) 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),] person or entity, directly or indirectly, for a testimonial as that term is defined in Rule G-40(a)(iv)(G).]; and

(C) A record of any written agreement required under Rule G-40(a)(iv)(G)(3)(b).]

**Supplementary Material**

.01-.02 No change.

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**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**

The Municipal Securities Rulemaking Board (MSRB) provides these answers to frequently asked questions (FAQs) to enhance market participants' understanding of permissible and impermissible uses of social media as part of their municipal securities business or municipal advisory activities under MSRB Rule G-21, on advertising by brokers, dealers or municipal securities dealers (collectively, "dealers"), and under MSRB Rule G-40, on advertising by municipal advisors (Rule G-21, together with Rule G-40, the "advertising rules"). These FAQs can assist dealers and municipal advisors (collectively, "regulated entities") with their compliance with the MSRB's advertising rules.

In developing these FAQs, the MSRB has been mindful of the potential burden on a regulated entity if there were to be unnecessary inconsistencies between any adopted MSRB social media guidance and similar guidance issued by other regulators that may be applicable to other aspects of the regulated entity's business. To that end, and to the extent practicable, the MSRB has endeavored to align these FAQs with the social media guidance published by the U.S. Securities and Exchange Commission (SEC) and the Financial Industry Regulatory Authority, Inc. (FINRA).<sup>1</sup>

The FAQs discuss compliance with MSRB rules; regulated entities are reminded that they also may be subject to the rules of other financial regulators, including state regulators. Further, a regulated entity's use of social media to conduct municipal securities or municipal advisory activities is optional, and the responsibilities that follow from that social media usage are not new here. In particular, a regulated entity should consider its ability to comply with the existing recordkeeping requirements under the federal securities laws and incorporated into MSRB rules when determining whether to use social media to conduct municipal securities or municipal advisory activities and whether to permit its associated persons to use social media to conduct municipal securities or municipal advisory activities.

## **Background**

[Amended] Rule G-21 and [new] Rule G-40, effective as of the date of these FAQs, set forth general provisions, address professional advertisements by the relevant regulated entity and require principal approval, in writing, for advertisements by regulated entities before their first use.

These FAQs were initially developed in 2019 as a result of [During the development of the amendments to Rule G-21 and of new Rule G-40, the MSRB received] requests for guidance regarding the use of social media by a regulated entity under [those rules] MSRB Rules G-21 and G-40 and were updated thereafter. These FAQs provide the requested guidance.

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<sup>1</sup> See, e.g., [IM Guidance Update, No. 2014-04, Division of Investment Management, U.S. Securities and Exchange Commission (Mar. 2014) ("2014 IM Guidance Update"); National Examination Risk Alert, Office of Compliance Inspections and Examinations, U.S. Securities and Exchange Commission (Jan. 4, 2012) ("2012 Risk Alert"); Exchange Act Release No. 58288 (Aug. 1, 2008); FINRA Regulatory Notice 17-18 (Apr. 2017); and FINRA Regulatory Notice 19-31 (Sep. 2019). These materials are identified for reference and such reference is not intended to suggest that regulated entities that are not subject to the guidance issued by the SEC or FINRA are responsible for compliance with that guidance. In addition, the MSRB does not intend for the guidance provided by these FAQs to modify or otherwise affect the guidance contained in [the] any of the referenced materials published by the SEC or FINRA.



Consistent with MSRB Rule D-11, references in the FAQs to a dealer, municipal advisor or regulated entity generally include the associated persons of such dealer, municipal advisor or regulated entity.<sup>2</sup>

## Use of Social Media

### **1. Is social media use by a regulated entity relating to its municipal securities business or municipal advisory activities considered advertising under the MSRB’s advertising rules?**

Yes, depending on the facts and circumstances. With limited exceptions, any material that relates to (i) the products or services of the dealer, (ii) the services of the municipal advisor, or (iii) the engagement of a municipal advisory client by the municipal advisor, may constitute an advertisement under the MSRB’s advertising rules, if it is:

- published or used in any electronic or other public media; or
- written or electronic promotional literature distributed or made generally available to either customers or municipal entities, obligated persons, municipal advisory clients or the public.

To the extent that the use of social media, including blogs, microblogs and social and professional networks, by a regulated entity is deemed advertising based on its content and distribution, that advertising would be subject to all applicable provisions of Rules G-21 and G-40. Those provisions include content standards and a requirement that an advertisement be pre-approved by a principal before its first use.

Further, dealers and municipal advisors should bear in mind that “posts” or “chats” on social media, including those deemed advertising, are subject to all other applicable MSRB rules.

Those rules include:

- MSRB Rule G-17, on conduct of municipal securities and municipal advisory activities;
- MSRB Rule G-27, on supervision;

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<sup>2</sup> Rule D-11 provides that:

Unless the context otherwise requires or a rule of the Board otherwise specifically provides, the terms “broker,” “dealer,” “municipal securities broker,” “municipal securities dealer,” “bank dealer,” and “municipal advisor” shall refer to and include their respective associated persons. Unless otherwise specified, persons whose functions are solely clerical or ministerial shall not be considered associated persons for purposes of the Board’s rules.

- MSRB Rule G-44, on supervisory and compliance obligations of municipal advisors;
- MSRB Rule G-8, on books and records to be made by brokers, dealers, municipal securities dealers, and municipal advisors; and
- MSRB Rule G-9, on retention of records.

**2. Can an associated person’s personal social media use be deemed “advertising” that is subject to the MSRB’s advertising rules?**

Potentially, yes. An associated person’s personal social media use would not *per se* be advertising that is subject to the MSRB’s advertising rules. Whether an associated person’s personal social media use is advertising depends on whether the content of the social media relates to (i) the products or services of the dealer, (ii) the services of the municipal advisor, or (iii) the engagement of a municipal advisory client by the municipal advisor, as relevant.

- For example, an associated person of a regulated entity “posts” the following on his personal social media that is viewable by the public rather than a selected audience:

Let’s help our children! ABC Youth Group is having a car wash to raise funds for a new basketball court on May 18th at 3:00 pm at XYZ address. Get your car washed and help out.

The content in the “post” in the above example does not relate to (i) the products or services of the dealer, (ii) the services of the municipal advisor, or (iii) the engagement of a municipal advisory client by the municipal advisor. Even though the “post” is publicly available, the “post” would not be advertising that is subject to the MSRB’s advertising rules.

Similarly, an associated person may hyperlink from his or her personal social media to content on his or her dealer’s or municipal advisor’s social media. The “hyperlinking” by the associated person to the regulated entity’s social media would not constitute an advertisement if that hyperlinked content does not relate to the matters referenced in the preceding paragraph.<sup>3</sup>

- For example, a “post” from associated person FGH’s personal social media contains a hyperlink to an article on municipal advisor ABC’s website about an animal shelter rebuilding after recent flooding. The “post” is viewable by the public.

The “post” would not be advertising that is subject to the MSRB’s advertising rules. The “post,” although it contains a hyperlink to a regulated entity’s website, links to content that does not

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<sup>3</sup> For example, such hyperlinked content may include information about a charity event sponsored by the dealer or municipal advisor, a human interest article, an employment opportunity, or employer information covered by state and federal fair employment laws. *See, e.g.,* FINRA Regulatory Notice 17-18 (Apr. 2017) at 4.

relate to the municipal advisory services of the municipal advisor or the engagement of a municipal advisory client by a municipal advisor.

By contrast, to the extent that an associated person of a dealer or municipal advisor engages in advertising, as defined by Rules G-21 and G-40, on his or her personal social media, that advertising would be subject to the requirements of the MSRB's advertising rules.

- For example, an associated person of ABC municipal advisor posts the following on his or her personal social networking page that is viewable by the general public:

I'm happy to be part of the team! ABC municipal advisor was rated the best in XYZ state for airport financings during 2017 according to DEF rating service. ABC municipal advisor has great experience in airport financings, and can help you with your next project.

The "post" would be an advertisement, as defined in Rule G-40(a)(i). The content of the electronically distributed "post" (i) promotes the expertise and experience of ABC municipal advisor and solicits inquiries about its services and (ii) is generally available to municipal entities, obligated persons, municipal advisory clients or the public. As such, even though the advertisement was "posted" on the associated person's personal social networking page, the "post" would be subject to the requirements of Rule G-40 as well as all other applicable MSRB rules. *See* question 1.

### **3. Do the MSRB's advertising rules apply to hyperlinked content on an independent third-party website from a regulated entity's website?**

The MSRB's advertising rules would apply to hyperlinked content on an independent third-party's website from a regulated entity's website in those instances where the regulated entity either:

- involved itself in the preparation of content on that third-party website — this is known as **entanglement**,<sup>4</sup> or
- implicitly or explicitly approved or endorsed the content on that third-party website — this is known as **adoption**.<sup>5</sup>

Accordingly, if a regulated entity either becomes entangled with or adopts the hyperlinked content, the regulated entity has obligations under MSRB's advertising rules for that content.

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<sup>4</sup> *See, e.g.*, Exchange Act Release No. 58288 (Aug. 1, 2008) at 32, 73 FR 45862 (Aug. 7, 2008) at 45870 (the "2008 release"); Exchange Act Release No. 42728 (Apr. 28, 2000), 65 FR 25843 (May 4, 2000) at 25848 (the "2000 release").

<sup>5</sup> *Id.*

- For example, on its website, ABC dealer states that XYZ municipal entity has a great article about the financing for its new school (ABC dealer was the underwriter for that financing), and ABC dealer provides a hyperlink to that article.

In this case, ABC dealer, by stating it was a great article, would have adopted the article on XYZ's website, and the content of that article would be subject to Rule G-21. Further, depending on the facts and circumstances, ABC may have adopted the article by linking to its specific content even without stating that the article was a great article. See question 4. A regulated entity should consider whether the context of the hyperlink and the content of the hyperlinked information together create a reasonable inference that the regulated entity has approved or endorsed the hyperlinked information.<sup>6</sup>

Similarly, a regulated entity may become entangled with hyperlinked content.

- For example, CDE municipal advisor assists XYZ issuer with the preparation of a press release about a financing to build a new school. The press release discusses how the financing method will save taxpayer dollars, but does not mention CDE municipal advisor. CDE municipal advisor then posts a hyperlink on its website to the press release on XYZ issuer's website.

In this case, CDE municipal advisor, because it helped prepare the press release, would have become entangled with the press release, and the hyperlinked content would be an advertisement subject to Rule G-40.

See Question 7 for discussion regarding third-party posts.

#### **4. What factors are relevant for a regulated entity to consider as it determines whether it has adopted the hyperlinked content on an independent third-party's website?**

While non-exclusive, some factors to consider are:<sup>7</sup>

- **Does the context suggest that the regulated entity has approved or endorsed the hyperlinked content?** The regulated entity may want to consider its disclosure about the hyperlink and what a reader may imply by the location and presentation of the hyperlink. For example:
  - Does the regulated entity state that it approves or endorses the prominently-featured hyperlinked content (in which case, the regulated entity would have adopted the hyperlinked content), or does the regulated entity have a portion of its website that links to recent general news articles and provides hyperlinks to the

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<sup>6</sup> 2008 Release at 34.

<sup>7</sup> See 2008 release at 33; 2000 release at 25849.

websites of various newspapers or magazines (depending on the facts and circumstances, in most cases, the regulated entity would not have adopted such content)?<sup>8</sup>

- Does the hyperlinked content indicate a degree of selective choice by the regulated entity, such as a hyperlink to a specific news article that is laudatory of the regulated entity, as compared to a hyperlink to the website of the newspaper?<sup>9</sup>
- Does the regulated entity provide an explanation about the source of a hyperlinked article and why the regulated entity is hyperlinking to it in order to avoid the inference that the regulated entity is adopting the hyperlinked content?<sup>10</sup>

Although a regulated entity's hyperlink to specific independent third-party content may indicate adoption of that content, if the hyperlinked content itself is not an advertisement, the regulated entity's hyperlink to that content would not be an advertisement under Rules G-21 and G-40.

- For example, ABC dealer includes a hyperlink on its website to an article regarding the importance of saving for college on an independent third-party's website. The article does not identify any particular 529 savings plan, any dealer, or any municipal security.

In this case, ABC dealer hyperlinks to an article that is purely educational. Because the hyperlinked content does not address ABC dealer or a municipal security offered through ABC dealer, the hyperlinked content would not be an advertisement, and ABC dealer's hyperlink to that content would not be an advertisement that is subject to Rule G-21.

- **Does the hyperlink create customer or municipal advisory client confusion?** The regulated entity may want to consider whether a customer or municipal advisory client would be confused and not fully appreciate that the hyperlink is to third-party content. Does the regulated entity provide disclosure to explain that the hyperlink is to third-party content?<sup>11</sup>
- **Is the hyperlink to content that is not controlled by the regulated entity and is the hyperlink ongoing?** When a regulated entity links to content that is hosted by an independent third-party that is not controlled or influenced by the regulated entity, that content may not be advertising subject to the MSRB's advertising rules if the hyperlink is "ongoing."

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<sup>8</sup> See 2008 release at 34; 2000 release at 25849.

<sup>9</sup> See 2008 release at 35.

<sup>10</sup> *Id.*

<sup>11</sup> 2000 release at 25849.

An “ongoing” link is one which: (i) is continuously available to visitors to the regulated entity’s website; (ii) visitors to the regulated entity’s site have access to even though the independent third-party site may or may not contain favorable material about the regulated entity; and (iii) visitors to the regulated entity’s website have access to even though the independent third-party’s website may be revised.<sup>12</sup> A regulated entity may not have adopted the content on the independent third-party’s website if the link is “ongoing.”

However, where a regulated entity has become entangled with the hyperlinked content on a third-party website (to the extent that hyperlinked content otherwise meets the definition of an advertisement), that hyperlinked content would be an advertisement under Rules G-21 and G-40 and the regulated entity must consider all applicable provisions of the MSRB’s advertising rules, including with respect to the hyperlinked content.<sup>13</sup> Therefore, a regulated entity should not include hyperlinked content on its website if there are any red flags that indicate that the hyperlinked content contains false or misleading material.<sup>14</sup>

**5. May a regulated entity use a disclaimer alone to disclaim potential MSRB rule violations for hyperlinked content on an independent third-party website?**

No, the MSRB generally would not view a disclaimer alone as sufficient to insulate a regulated entity from potential MSRB rule violations related to hyperlinked content on an independent third-party website that the regulated entity knows or has reason to know is materially false or misleading. A regulated entity that hyperlinks to content that the regulated entity knows or has reason to know is materially false or misleading may violate Rules G-17, G-21 and/or G-40.<sup>15</sup>

**6. Do the MSRB’s advertising rules apply to linked content within independent third-party content to which a regulated entity hyperlinked?**

No, Rules G-21 and G-40, in general, would not apply to linked content within content to which the regulated entity linked (“secondary links”). However, to avoid triggering the application of Rules G-21 and G-40:

- The regulated entity must not have adopted or become entangled with the content in the secondary link – *See* question 3;

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<sup>12</sup> *See* FINRA Regulatory Notice 17-18 (Apr. 2017) at 5.

<sup>13</sup> *See* MSRB Notice 2018-14 (Jun. 27, 2018).

<sup>14</sup> *See* FINRA Regulatory Notice 11-39 (Aug. 2011) at 3.

<sup>15</sup> *See* 2008 Release at 36-37; 2000 Release at 25849.

- The regulated entity must have no influence or control over the content in the secondary links – *See* question 4;
- The original linked content must not be a mere vehicle for the secondary links or not rely completely on the information available in the secondary links; and
- The regulated entity must not know or have reason to know that the information contained in the secondary links contains any untrue statement of material fact or is otherwise false or misleading.<sup>16</sup> A regulated entity should not include a link on its website if there are any red flags that indicate that the hyperlinked website contains false or misleading content.<sup>17</sup>

### Third-Party Posts

#### 7. Do Rules G-21 and G-40 apply to posts by a customer, municipal entity client or another third-party (collectively, “third-party posts”) on a regulated entity’s or its associated person’s social networking page?

In general, no. Rules G-21 and G-40 generally would not apply to posts by a third-party on a regulated entity’s or its associated person’s social networking page. The post would not be considered material that is published, distributed or made available by the dealer or municipal advisor.

Notwithstanding, Rules G-21 and G-40 may apply to such third-party posts under certain circumstances. For example, Rules G-21 and G-40 would apply to such posts if the dealer or municipal advisor becomes entangled with or adopts the content of such posts. *See also* question 3.

- **Entanglement.** A regulated entity becomes entangled with a post by a third-party on the regulated entity’s social networking page if the regulated entity has involved itself with the preparation of the third-party content.<sup>18</sup> For example, a regulated entity or its associated person may become entangled with a third-party post if the regulated entity or its associated person pays for or solicits a third-party to post certain comments on the regulated entity’s social networking page.

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<sup>16</sup> *See* FINRA Regulatory Notice 17-18 at Q:4; *see* Q:5.

<sup>17</sup> *See* FINRA Regulatory Notice 11-39 (Aug. 2011) at 3.

<sup>18</sup> *See* 2008 release at 32; 2000 release at 25848-49; FINRA Regulatory Notice 10-06 (Jan. 2010) at 7-8. The MSRB’s definition of the entanglement and adoption theories is consistent with the definition of those theories set forth by the SEC and FINRA in those materials.

- **Adoption.** A regulated entity adopts the content of the third-party post if the regulated entity explicitly or implicitly approves or endorses the content.<sup>19</sup> A regulated entity or its associated person may adopt a third-party post if it “likes,” “shares,” or otherwise indicates approval or endorsement of the content.

See question 3 above for a discussion of hyperlinked content on an independent third-party website; see question 4 above for a discussion of the non-exclusive factors to consider when determining whether a regulated entity or its associated person has adopted third-party content.

### **8. May a municipal advisory client post positive comments about its experience with the municipal advisor on the municipal advisor’s social media page without such post being a testimonial under Rule G-40?**

As with question 7 above, if a municipal advisory client posts positive comments on a municipal advisor’s social media page and the municipal advisor does not become entangled with or adopt that content, the municipal advisor could allow such content on its social media page. This would be true even if the municipal advisory client’s comments were to include a testimonial.

[However, i]f the municipal advisor paid for or solicited a municipal advisory client to post positive comments about its experience with the municipal advisor on the municipal advisor’s social media page, that post would be deemed to be an advertisement by the municipal advisor that contains a testimonial within Rule G-40.

Specifically, by paying for or soliciting positive comments from a third-party, the municipal advisor would become 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. [within] Accordingly, the municipal advisor would need to ensure that the advertisement meets the requirements of Rule G-40 and that the requisite disclosures under Rule G-40(a)(iv)(G)(2)(b) are clearly and prominently posted to the social media page in close proximity to the testimonial. [See question 7. As such, the municipal advisor’s use of that testimonial content would be prohibited.<sup>20</sup> Similar considerations would prohibit the municipal advisor from “liking” the municipal advisory client’s post or by forwarding the municipal advisory client’s post to others, thereby adopting the content.]

If the municipal advisor did not pay, directly or indirectly, for the testimonial, but liked, shared or commented on a post from a third-party, the municipal advisor would 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 by the municipal advisor that contains a testimonial. Accordingly, the municipal advisor would need to ensure that the advertisement meets the requirements of Rule G-40 and that the requisite disclosures under Rule G-40(a)(iv)(G)(2)(b) are clearly and prominently posted to the social media page in close proximity to the testimonial.

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<sup>19</sup> *Id.*

<sup>20</sup> See 2014 IM Guidance Update at 3.]



## Recordkeeping

### **9. Must regulated entities retain records of “posts,” “chats,” text messages or messages sent through messaging applications related to the regulated entity’s business conducted through social media?**

Yes, the MSRB’s recordkeeping and record retention requirements apply to all written, including electronic, communications sent or received as well as records of advertisements under the MSRB’s advertising rules.

Specifically, for dealers, Rule G-9(b)(viii)(C) requires that “all written and electronic communications received and sent, including inter-office memoranda, relating to the conduct of the activities of such municipal securities broker or municipal securities dealer with respect to municipal securities” be retained. Similarly, Rule G-9(h)(i) requires that a municipal advisor retain records, which include, among other things, originals or copies of all written and electronic communications received and sent, including inter-office memoranda, relating to municipal advisory activities.<sup>[21]</sup><sup>20</sup> Neither the technology used for the communication nor the distinction between a communication made through a device issued by the regulated entity or its associated person’s personal device is determinative for this analysis. *See* questions 10 and 11 regarding supervision.

## Supervision<sup>[22]</sup><sup>21</sup>

### **10. Should a regulated entity consider establishing policies and procedures as part of its supervisory system to address the use of social media by the regulated entity and its associated persons?**

Yes, given that recordkeeping requirements apply to electronic communications, a regulated entity should establish policies and procedures to address the use by the regulated entity and its associated persons of social media.<sup>[23]</sup><sup>22</sup> As a baseline, those policies and procedures would

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<sup>[21]</sup><sup>20</sup> Rule G-8(h)(i) requires municipal advisors to make and keep current all books and records described in Rule 15Ba1-8(a) under the Exchange Act. Particularly, Rule 15Ba1-8(a)(1) requires that municipal advisors make and keep true, accurate, and current “originals or copies of all written communications received, and 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.”

<sup>[22]</sup><sup>21</sup> While many regulated entities may find the guidance in these FAQs useful when establishing their supervisory systems, each regulated entity should develop a supervisory system that is tailored to its own business model, recognizing that some considerations may not apply in the same manner for every firm and others may not apply at all.

<sup>[23]</sup><sup>22</sup> In part, Rules G-27(b) and Rule G-44(a) require that a regulated entity establish a supervisory system to supervise the municipal securities and municipal advisory activities

reflect the regulated entity's permitted and/or prohibited practices. Such permitted practices may include restrictions on the use of certain technologies or the prohibition of the use of social media to engage in municipal securities business or municipal advisory activities. Further, the supervisory system for a regulated entity that permits the use of social media would address all applicable MSRB rules, including, but not limited to:

- The MSRB's advertising rules;
- Rule G-17;
- Rule G-8; and
- Rule G-9.

See question 1.

**11. What are some factors that a regulated entity should consider as it develops policies and procedures about the use of social media?**

As with any policy and procedure, a regulated entity's social media policies and procedures would be tailored to reflect, among other things, its size, organizational structure and the nature and scope of its municipal securities or municipal advisory activities. Social media policies and procedures are not expected to be "one size fits all."

Among the factors that a regulated entity should consider as it develops social media policies and procedures are:

- **Usage Restrictions.** While some regulated entities may prohibit an associated person from engaging in municipal securities business or municipal advisory activities through social media, other regulated entities may permit the use of social media for such purposes. A regulated entity that permits the use of social media by its associated persons, in whole or in part, should consider providing associated persons with a clear and concise list of permitted social media for the conduct of municipal securities business or municipal advisory activities. That list also may include any restrictions to the use of particular social media (for example, a regulated entity may permit certain messaging applications to be used only for internal communications among the regulated entity and

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of the regulated entity and its associated persons. In general, a supervisory system includes:

(i) compliance policies and procedures that describe the practices that associated persons must adhere to in order to meet the standards of conduct established by the regulated entity consistent with applicable securities laws and regulations, including MSRB rules; and

(ii) written supervisory procedures that describe the practices that the supervisory personnel follow in order to reasonably ensure that associated persons meet the standards of conduct and the regulated entity can evidence a supervisory system.

its associated persons). If applicable, a regulated entity should consider making the list of permitted social media widely available and easily accessible to its associated persons.<sup>[24]23</sup>

Further, recognizing the need to have policies and procedures that are reasonably designed to ensure compliance with MSRB rules as well as with other applicable securities laws and regulations, and in light of the pace of technology innovations, a regulated entity that permits the use of social media should consider periodically reviewing its list of permitted social media. As part of that review, the regulated entity should determine whether any updates to the list of permitted social media would be warranted.<sup>[25]24</sup>

Along with the list of permitted social media, the regulated entity should consider addressing the consequences of non-compliance with its social media policies and procedures.<sup>[26]25</sup>

- **Training and Education.** The regulated entity’s social media policies and procedures may address the training that the regulated entity will provide related to those policies and procedures. For example, will the training include an initial training as well as training that is required on a periodic basis? In addition, a regulated entity’s training on social media may address various topics likely to occur such as an explanation of the differences between business and personal social media use and how the lines between business and personal social media usage could be blurred. For example, an associated person could receive a request on his or her personal social media relating to municipal securities business or municipal advisory activities. A regulated entity may want to consider how the associated person should respond to such a request.
- **Recordkeeping and Record Retention.** As noted in question 1, it is possible that social media posts relating to the regulated entity’s municipal securities business or municipal advisory activities would be subject to the MSRB’s recordkeeping and record retention rules. A regulated entity should consider its recordkeeping and record retention obligations as it designs its social media compliance policies and procedures.<sup>[27]26</sup>

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<sup>[24]23</sup> See, e.g., 2012 Risk Alert at 3; FINRA Regulatory Notice 07-59 (Dec. 2007) at 7.

<sup>[25]24</sup> See, e.g., 2012 Risk Alert at 4.

<sup>[26]25</sup> See FINRA Regulatory Notice 07-59 (Dec.2007) at 7; see also National Exam Program Risk Alert, Observations from Investment Adviser Examinations Relating to Electronic Messaging, Office of Compliance Inspections and Examinations, U.S. Securities and Exchange Commission (modified Dec. 14, 2018) available at <https://www.sec.gov/ocie/announcement/ocie-risk-alert-electronic-messaging> (“2018 Risk Alert”) at 4.

<sup>[27]26</sup> See FINRA Regulatory Notice 07-59 (Dec. 2007) at 6-7; 2018 Risk Alert at 3-4.

- **Monitoring.** As a regulated entity develops its social media policies and procedures, the regulated entity should consider how it will monitor for compliance with those policies and procedures. For example, a regulated entity may determine to more frequently monitor various social media activities based on the potential risks that the regulated entity has determined may be associated with those activities. *See* question 12 below for a discussion of various factors that the regulated entity may want to consider as it develops its policies and procedures. As a reminder, a regulated entity’s supervisory procedures concerning social media should address not only the MSRB’s advertising rules, but all applicable MSRB rules and other applicable federal securities laws and regulations.

**12. What factors may be important in determining the effectiveness of policies and procedures concerning social media?**

As noted in question 10, MSRB Rules G-27 and G-44 generally require that a regulated entity establish, implement and maintain a supervisory system that is reasonably designed to achieve compliance with MSRB rules as well as with other applicable federal securities laws and regulations. To help test whether that goal is being met with regard to its social media compliance policies and procedures, a regulated entity may want to consider the following non-exclusive factors:

- **Content standards.** A regulated entity should consider whether there are certain risks associated with content created by the regulated entity for its social media and whether that content may create regulatory issues. For example, non-solicitor municipal advisors owe a fiduciary duty to their municipal entity clients. Is the social media content consistent with that duty (*e.g.*, such as content that contains information on specific municipal advisory activity or a recommendation regarding that activity)? Further, [is] if the social media content [consistent with the] contains a testimonial, does that content [restrictions] include the requisite disclosures set forth in the MSRB’s advertising rules?
- **Monitoring of third-party sites.** To the extent that the regulated entity permits the use of social networking sites, a regulated entity should consider how it will monitor for compliance with the regulated entity’s social media policies and procedures on those sites.
- **Criteria for approving participation in social networking sites.** A regulated entity should consider whether to develop standards relating to social networking participation. For example, at a minimum, a regulated entity must ensure compliance with record retention requirements. As the regulated entity develops its criteria for approving the use of certain sites, the regulated entity also should address whether it has a process in place for revoking approval to participate in a particular social networking site should certain circumstances change.

- **Personal social networking sites.** A regulated entity should address whether the regulated entity or its associated persons may engage in municipal securities business or municipal advisory activities on personal social networking sites.
- **Enterprise-wide sites.** A regulated entity that is a part of a larger financial services organization should consider whether it needs to develop usage guidelines reasonably designed to prevent the larger financial services organization in organizational-wide advertisements from violating the MSRB's advertising rules [including, for municipal advisors, the prohibition on the use of testimonials in municipal advisor advertising].

[Additional Resources

SR-MSRB-2018-01 (January 24, 2018)

Letter from Pamela K. Ellis, Associate General Counsel, Municipal Securities Rulemaking Board, dated April 30, 2018

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval of a Proposed Rule Change, Consisting to 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

MSRB Notice 2018-08 SEC Approves Advertising Rule Changes for Dealers and Municipal Advisors

MSRB Notice 2018-32 Application of Content Standards to Advertisements by Municipal Advisors under MSRB Rule G-40]

**Rule G-40: Advertising by Municipal Advisors**

## (a) General Provisions.

(i) – (ii) no change.

(iii) Definition of Municipal Advisory Client. For the purposes of this rule, the term municipal advisory client shall include either:

(A) a municipal entity or obligated person for whom the municipal advisor engages in municipal advisory activities, as defined in Rule G-42(f)(iv) or

(B) a [broker, dealer, municipal securities dealer,] municipal advisor, or investment adviser (as defined under section 202 of the Investment Advisers Act of 1940) on behalf of whom the municipal advisor undertakes a solicitation of a municipal entity or obligated person, as defined in Rule 15Ba1-1(n), 17 CFR 240.15Ba1-1(n), under the Act.

## (iv) Content Standards.

(A)– (F) No change.

(G) [A municipal advisor shall not, directly or indirectly, publish, circulate or distribute 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] Testimonials.

(1) Definition of “Testimonial.” For purposes of this rule, the term “testimonial” means 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.

(2) A municipal advisor may, directly or indirectly, publish, circulate or distribute an advertisement which includes or refers, directly or indirectly, to a testimonial if the following conditions are met:

(a) The person or entity making 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.

(b) If an advertisement contains a testimonial of any kind concerning the municipal advisor or concerning the municipal advisory services rendered by the municipal advisor, that advertisement must clearly and prominently disclose the following:

(i) That the testimonial was given by a current municipal advisory client or given by a person or entity other than a current municipal advisory client.

(ii) The fact that the testimonial may not be representative of the experience of other clients.

(iii) The fact that the testimonial is no guarantee of future performance or success.

(iv) If more than \$100 in total value in cash or non-cash compensation is paid for the testimonial, (a) the fact that it is a paid testimonial; and (b) a brief statement by the municipal advisor of any material conflicts of interest on the part of the person or entity providing the testimonial resulting from the municipal advisor's relationship with such person or entity.

(3) A municipal advisor may not provide any compensation for a testimonial 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.

(H) No change.

(v) No change.

(b) No change.

(c) *Approval by Principal.* Each advertisement subject to the requirements of this rule must be approved in writing by a municipal advisor principal, as defined in Rule G-3(e)(i), prior to first use and, with respect to an advertisement that includes a testimonial, such approval must also be based on a reasonable belief that the testimonial complies with the requirements under Rule G-40(a)(iv)(G).

(d) No change.

(e) *Records.* Each municipal advisor shall make and keep current in a separate file, records of all advertisements and records of any compensation provided to a person or entity, directly or indirectly, for a testimonial.

### **Supplementary Material**

**.01-.02** No change.

**.03 Clear and Prominent Disclosures.** In order for disclosures to be clear and prominent, the disclosures must be at least as prominent in the advertisement as the testimonial. Specifically, such 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.

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### **Rule G-8 Books and Records to be Made by Brokers, Dealers and Municipal Securities Dealers and Municipal Advisors**

(a) - (g) No change.

(h) Municipal Advisor Records. Every municipal advisor that is registered or required to be registered under Section 15B of the Act and the rules and regulations thereunder shall make and keep current the following books and records:

(i) - (vii) No change.

#### (viii) Records Concerning Compliance with Rule G-40

(A) A record of all advertisements required by Rule G-40(e); and

(B) A record of any cash or non-cash compensation provided to a person or entity, directly or indirectly, for a testimonial as that term is defined in Rule G-40(a)(iv)(G).

### **Supplementary Material**

**.01-.02** No change.

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### **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**

The Municipal Securities Rulemaking Board (MSRB) provides these answers to frequently asked questions (FAQs) to enhance market participants' understanding of permissible and impermissible uses of social media as part of their municipal securities business or municipal advisory activities under MSRB Rule G-21, on advertising by brokers, dealers or municipal securities dealers (collectively, "dealers"), and under MSRB Rule G-40, on advertising by municipal advisors (Rule G-21, together with Rule G-40, the "advertising rules"). These FAQs can assist dealers and municipal advisors (collectively, "regulated entities") with their compliance with the MSRB's advertising rules.

In developing these FAQs, the MSRB has been mindful of the potential burden on a regulated entity if there were to be unnecessary inconsistencies between any adopted MSRB social media guidance and similar guidance issued by other regulators that may be applicable to other aspects of the regulated entity's business. To that end, and to the extent practicable, the MSRB has endeavored to align these FAQs with the social media guidance published by the U.S. Securities



and Exchange Commission (SEC) and the Financial Industry Regulatory Authority, Inc. (FINRA).<sup>1</sup>

The FAQs discuss compliance with MSRB rules; regulated entities are reminded that they also may be subject to the rules of other financial regulators, including state regulators. Further, a regulated entity's use of social media to conduct municipal securities or municipal advisory activities is optional, and the responsibilities that follow from that social media usage are not new here. In particular, a regulated entity should consider its ability to comply with the existing recordkeeping requirements under the federal securities laws and incorporated into MSRB rules when determining whether to use social media to conduct municipal securities or municipal advisory activities and whether to permit its associated persons to use social media to conduct municipal securities or municipal advisory activities.

## Background

[Amended] Rule G-21 and [new] Rule G-40, effective as of the date of these FAQs, set forth general provisions, address professional advertisements by the relevant regulated entity and require principal approval, in writing, for advertisements by regulated entities before their first use.

These FAQs were initially developed in 2019 as a result of [During the development of the amendments to Rule G-21 and of new Rule G-40, the MSRB received] requests for guidance regarding the use of social media by a regulated entity under [those rules] MSRB Rules G-21 and G-40 and were updated thereafter. These FAQs provide the requested guidance.

Consistent with MSRB Rule D-11, references in the FAQs to a dealer, municipal advisor or regulated entity generally include the associated persons of such dealer, municipal advisor or regulated entity.<sup>2</sup>

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<sup>1</sup> See, e.g., [IM Guidance Update, No. 2014-04, Division of Investment Management, U.S. Securities and Exchange Commission (Mar. 2014) (“2014 IM Guidance Update”); National Examination Risk Alert, Office of Compliance Inspections and Examinations, U.S. Securities and Exchange Commission (Jan. 4, 2012) (“2012 Risk Alert”); Exchange Act Release No. 58288 (Aug. 1, 2008); FINRA Regulatory Notice 17-18 (Apr. 2017); and FINRA Regulatory Notice 19-31 (Sep. 2019)]. These materials are identified for reference and such reference is not intended to suggest that regulated entities that are not subject to the guidance issued by the SEC or FINRA are responsible for compliance with that guidance. In addition, the MSRB does not intend for the guidance provided by these FAQs to modify or otherwise affect the guidance contained in [the] any of the referenced materials published by the SEC or FINRA.

<sup>2</sup> Rule D-11 provides that:

Unless the context otherwise requires or a rule of the Board otherwise specifically provides, the terms “broker,” “dealer,” “municipal securities broker,” “municipal securities dealer,” “bank dealer,” and “municipal advisor” shall refer to and include their

## Use of Social Media

### **1. Is social media use by a regulated entity relating to its municipal securities business or municipal advisory activities considered advertising under the MSRB's advertising rules?**

Yes, depending on the facts and circumstances. With limited exceptions, any material that relates to (i) the products or services of the dealer, (ii) the services of the municipal advisor, or (iii) the engagement of a municipal advisory client by the municipal advisor, may constitute an advertisement under the MSRB's advertising rules, if it is:

- published or used in any electronic or other public media; or
- written or electronic promotional literature distributed or made generally available to either customers or municipal entities, obligated persons, municipal advisory clients or the public.

To the extent that the use of social media, including blogs, microblogs and social and professional networks, by a regulated entity is deemed advertising based on its content and distribution, that advertising would be subject to all applicable provisions of Rules G-21 and G-40. Those provisions include content standards and a requirement that an advertisement be pre-approved by a principal before its first use.

Further, dealers and municipal advisors should bear in mind that “posts” or “chats” on social media, including those deemed advertising, are subject to all other applicable MSRB rules.

Those rules include:

- MSRB Rule G-17, on conduct of municipal securities and municipal advisory activities;
- MSRB Rule G-27, on supervision;
- MSRB Rule G-44, on supervisory and compliance obligations of municipal advisors;
- MSRB Rule G-8, on books and records to be made by brokers, dealers, municipal securities dealers, and municipal advisors; and
- MSRB Rule G-9, on retention of records.

### **2. Can an associated person's personal social media use be deemed “advertising” that is subject to the MSRB's advertising rules?**

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respective associated persons. Unless otherwise specified, persons whose functions are solely clerical or ministerial shall not be considered associated persons for purposes of the Board's rules.

Potentially, yes. An associated person’s personal social media use would not *per se* be advertising that is subject to the MSRB’s advertising rules. Whether an associated person’s personal social media use is advertising depends on whether the content of the social media relates to (i) the products or services of the dealer, (ii) the services of the municipal advisor, or (iii) the engagement of a municipal advisory client by the municipal advisor, as relevant.

- For example, an associated person of a regulated entity “posts” the following on his personal social media that is viewable by the public rather than a selected audience:

Let’s help our children! ABC Youth Group is having a car wash to raise funds for a new basketball court on May 18th at 3:00 pm at XYZ address.  
Get your car washed and help out.

The content in the “post” in the above example does not relate to (i) the products or services of the dealer, (ii) the services of the municipal advisor, or (iii) the engagement of a municipal advisory client by the municipal advisor. Even though the “post” is publicly available, the “post” would not be advertising that is subject to the MSRB’s advertising rules.

Similarly, an associated person may hyperlink from his or her personal social media to content on his or her dealer’s or municipal advisor’s social media. The “hyperlinking” by the associated person to the regulated entity’s social media would not constitute an advertisement if that hyperlinked content does not relate to the matters referenced in the preceding paragraph.<sup>3</sup>

- For example, a “post” from associated person FGH’s personal social media contains a hyperlink to an article on municipal advisor ABC’s website about an animal shelter rebuilding after recent flooding. The “post” is viewable by the public.

The “post” would not be advertising that is subject to the MSRB’s advertising rules. The “post,” although it contains a hyperlink to a regulated entity’s website, links to content that does not relate to the municipal advisory services of the municipal advisor or the engagement of a municipal advisory client by a municipal advisor.

By contrast, to the extent that an associated person of a dealer or municipal advisor engages in advertising, as defined by Rules G-21 and G-40, on his or her personal social media, that advertising would be subject to the requirements of the MSRB’s advertising rules.

- For example, an associated person of ABC municipal advisor posts the following on his or her personal social networking page that is viewable by the general public:

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<sup>3</sup> For example, such hyperlinked content may include information about a charity event sponsored by the dealer or municipal advisor, a human interest article, an employment opportunity, or employer information covered by state and federal fair employment laws. *See, e.g.,* FINRA Regulatory Notice 17-18 (Apr. 2017) at 4.

I'm happy to be part of the team! ABC municipal advisor was rated the best in XYZ state for airport financings during 2017 according to DEF rating service. ABC municipal advisor has great experience in airport financings, and can help you with your next project.

The “post” would be an advertisement, as defined in Rule G-40(a)(i). The content of the electronically distributed “post” (i) promotes the expertise and experience of ABC municipal advisor and solicits inquiries about its services and (ii) is generally available to municipal entities, obligated persons, municipal advisory clients or the public. As such, even though the advertisement was “posted” on the associated person’s personal social networking page, the “post” would be subject to the requirements of Rule G-40 as well as all other applicable MSRB rules. *See* question 1.

### **3. Do the MSRB’s advertising rules apply to hyperlinked content on an independent third-party website from a regulated entity’s website?**

The MSRB’s advertising rules would apply to hyperlinked content on an independent third-party’s website from a regulated entity’s website in those instances where the regulated entity either:

- involved itself in the preparation of content on that third-party website — this is known as **entanglement**,<sup>4</sup> or
- implicitly or explicitly approved or endorsed the content on that third-party website — this is known as **adoption**.<sup>5</sup>

Accordingly, if a regulated entity either becomes entangled with or adopts the hyperlinked content, the regulated entity has obligations under MSRB’s advertising rules for that content.

- For example, on its website, ABC dealer states that XYZ municipal entity has a great article about the financing for its new school (ABC dealer was the underwriter for that financing), and ABC dealer provides a hyperlink to that article.

In this case, ABC dealer, by stating it was a great article, would have adopted the article on XYZ’s website, and the content of that article would be subject to Rule G-21. Further, depending on the facts and circumstances, ABC may have adopted the article by linking to its specific content even without stating that the article was a great article. *See* question 4. A regulated entity should consider whether the context of the hyperlink and the content of the hyperlinked

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<sup>4</sup> *See, e.g.*, Exchange Act Release No. 58288 (Aug. 1, 2008) at 32, 73 FR 45862 (Aug. 7, 2008) at 45870 (the “2008 release”); Exchange Act Release No. 42728 (Apr. 28, 2000), 65 FR 25843 (May 4, 2000) at 25848 (the “2000 release”).

<sup>5</sup> *Id.*

information together create a reasonable inference that the regulated entity has approved or endorsed the hyperlinked information.<sup>6</sup>

Similarly, a regulated entity may become entangled with hyperlinked content.

- For example, CDE municipal advisor assists XYZ issuer with the preparation of a press release about a financing to build a new school. The press release discusses how the financing method will save taxpayer dollars, but does not mention CDE municipal advisor. CDE municipal advisor then posts a hyperlink on its website to the press release on XYZ issuer's website.

In this case, CDE municipal advisor, because it helped prepare the press release, would have become entangled with the press release, and the hyperlinked content would be an advertisement subject to Rule G-40.

See Question 7 for discussion regarding third-party posts.

#### **4. What factors are relevant for a regulated entity to consider as it determines whether it has adopted the hyperlinked content on an independent third-party's website?**

While non-exclusive, some factors to consider are:<sup>7</sup>

- **Does the context suggest that the regulated entity has approved or endorsed the hyperlinked content?** The regulated entity may want to consider its disclosure about the hyperlink and what a reader may imply by the location and presentation of the hyperlink. For example:
  - Does the regulated entity state that it approves or endorses the prominently-featured hyperlinked content (in which case, the regulated entity would have adopted the hyperlinked content), or does the regulated entity have a portion of its website that links to recent general news articles and provides hyperlinks to the websites of various newspapers or magazines (depending on the facts and circumstances, in most cases, the regulated entity would not have adopted such content)?<sup>8</sup>
  - Does the hyperlinked content indicate a degree of selective choice by the regulated entity, such as a hyperlink to a specific news article that is laudatory of the regulated entity, as compared to a hyperlink to the website of the newspaper?<sup>9</sup>

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<sup>6</sup> 2008 Release at 34.

<sup>7</sup> See 2008 release at 33; 2000 release at 25849.

<sup>8</sup> See 2008 release at 34; 2000 release at 25849.

<sup>9</sup> See 2008 release at 35.

- Does the regulated entity provide an explanation about the source of a hyperlinked article and why the regulated entity is hyperlinking to it in order to avoid the inference that the regulated entity is adopting the hyperlinked content?<sup>10</sup>

Although a regulated entity's hyperlink to specific independent third-party content may indicate adoption of that content, if the hyperlinked content itself is not an advertisement, the regulated entity's hyperlink to that content would not be an advertisement under Rules G-21 and G-40.

- For example, ABC dealer includes a hyperlink on its website to an article regarding the importance of saving for college on an independent third-party's website. The article does not identify any particular 529 savings plan, any dealer, or any municipal security.

In this case, ABC dealer hyperlinks to an article that is purely educational. Because the hyperlinked content does not address ABC dealer or a municipal security offered through ABC dealer, the hyperlinked content would not be an advertisement, and ABC dealer's hyperlink to that content would not be an advertisement that is subject to Rule G-21.

- **Does the hyperlink create customer or municipal advisory client confusion?** The regulated entity may want to consider whether a customer or municipal advisory client would be confused and not fully appreciate that the hyperlink is to third-party content. Does the regulated entity provide disclosure to explain that the hyperlink is to third-party content?<sup>11</sup>
- **Is the hyperlink to content that is not controlled by the regulated entity and is the hyperlink ongoing?** When a regulated entity links to content that is hosted by an independent third-party that is not controlled or influenced by the regulated entity, that content may not be advertising subject to the MSRB's advertising rules if the hyperlink is "ongoing."

An "ongoing" link is one which: (i) is continuously available to visitors to the regulated entity's website; (ii) visitors to the regulated entity's site have access to even though the independent third-party site may or may not contain favorable material about the regulated entity; and (iii) visitors to the regulated entity's website have access to even though the independent third-party's website may be revised.<sup>12</sup> A regulated entity may not have adopted the content on the independent third-party's website if the link is "ongoing."

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<sup>10</sup> *Id.*

<sup>11</sup> 2000 release at 25849.

<sup>12</sup> *See* FINRA Regulatory Notice 17-18 (Apr. 2017) at 5.

However, where a regulated entity has become entangled with the hyperlinked content on a third-party website (to the extent that hyperlinked content otherwise meets the definition of an advertisement), that hyperlinked content would be an advertisement under Rules G-21 and G-40 and the regulated entity must consider all applicable provisions of the MSRB's advertising rules, including with respect to the hyperlinked content.<sup>13</sup> Therefore, a regulated entity should not include hyperlinked content on its website if there are any red flags that indicate that the hyperlinked content contains false or misleading material.<sup>14</sup>

**5. May a regulated entity use a disclaimer alone to disclaim potential MSRB rule violations for hyperlinked content on an independent third-party website?**

No, the MSRB generally would not view a disclaimer alone as sufficient to insulate a regulated entity from potential MSRB rule violations related to hyperlinked content on an independent third-party website that the regulated entity knows or has reason to know is materially false or misleading. A regulated entity that hyperlinks to content that the regulated entity knows or has reason to know is materially false or misleading may violate Rules G-17, G-21 and/or G-40.<sup>15</sup>

**6. Do the MSRB's advertising rules apply to linked content within independent third-party content to which a regulated entity hyperlinked?**

No, Rules G-21 and G-40, in general, would not apply to linked content within content to which the regulated entity linked ("secondary links"). However, to avoid triggering the application of Rules G-21 and G-40:

- The regulated entity must not have adopted or become entangled with the content in the secondary link – *See* question 3;
- The regulated entity must have no influence or control over the content in the secondary links – *See* question 4;
- The original linked content must not be a mere vehicle for the secondary links or not rely completely on the information available in the secondary links; and
- The regulated entity must not know or have reason to know that the information contained in the secondary links contains any untrue statement of material fact or is otherwise false or misleading.<sup>16</sup> A regulated entity should not include a link on its

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<sup>13</sup> *See* MSRB Notice 2018-14 (Jun. 27, 2018).

<sup>14</sup> *See* FINRA Regulatory Notice 11-39 (Aug. 2011) at 3.

<sup>15</sup> *See* 2008 Release at 36-37; 2000 Release at 25849.

<sup>16</sup> *See* FINRA Regulatory Notice 17-18 at Q:4; *see* Q:5.

website if there are any red flags that indicate that the hyperlinked website contains false or misleading content.<sup>17</sup>

### Third-Party Posts

#### 7. Do Rules G-21 and G-40 apply to posts by a customer, municipal entity client or another third-party (collectively, “third-party posts”) on a regulated entity’s or its associated person’s social networking page?

In general, no. Rules G-21 and G-40 generally would not apply to posts by a third-party on a regulated entity’s or its associated person’s social networking page. The post would not be considered material that is published, distributed or made available by the dealer or municipal advisor.

Notwithstanding, Rules G-21 and G-40 may apply to such third-party posts under certain circumstances. For example, Rules G-21 and G-40 would apply to such posts if the dealer or municipal advisor becomes entangled with or adopts the content of such posts. *See also* question 3.

- **Entanglement.** A regulated entity becomes entangled with a post by a third-party on the regulated entity’s social networking page if the regulated entity has involved itself with the preparation of the third-party content.<sup>18</sup> For example, a regulated entity or its associated person may become entangled with a third-party post if the regulated entity or its associated person pays for or solicits a third-party to post certain comments on the regulated entity’s social networking page.
- **Adoption.** A regulated entity adopts the content of the third-party post if the regulated entity explicitly or implicitly approves or endorses the content.<sup>19</sup> A regulated entity or its associated person may adopt a third-party post if it “likes,” “shares,” or otherwise indicates approval or endorsement of the content.

*See* question 3 above for a discussion of hyperlinked content on an independent third-party website; *see* question 4 above for a discussion of the non-exclusive factors to consider when determining whether a regulated entity or its associated person has adopted third-party content.

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<sup>17</sup> *See* FINRA Regulatory Notice 11-39 (Aug. 2011) at 3.

<sup>18</sup> *See* 2008 release at 32; 2000 release at 25848-49; FINRA Regulatory Notice 10-06 (Jan. 2010) at 7-8. The MSRB’s definition of the entanglement and adoption theories is consistent with the definition of those theories set forth by the SEC and FINRA in those materials.

<sup>19</sup> *Id.*



**8. May a municipal advisory client post positive comments about its experience with the municipal advisor on the municipal advisor’s social media page without such post being a testimonial under Rule G-40?**

As with question 7 above, if a municipal advisory client posts positive comments on a municipal advisor’s social media page and the municipal advisor does not become entangled with or adopt that content, the municipal advisor could allow such content on its social media page. This would be true even if the municipal advisory client’s comments were to include a testimonial.

[However, i]f the municipal advisor paid for or solicited a municipal advisory client to post positive comments about its experience with the municipal advisor on the municipal advisor’s social media page, that post would be deemed to be an advertisement by the municipal advisor that contains a testimonial within Rule G-40.

Specifically, by paying for or soliciting positive comments from a third-party, the municipal advisor would become 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. [within] Accordingly, the municipal advisor would need to ensure that the advertisement meets the requirements of Rule G-40 and that the requisite disclosures under Rule G-40(a)(iv)(G)(2)(b) are clearly and prominently posted to the social media page in close proximity to the testimonial. [See question 7. As such, the municipal advisor’s use of that testimonial content would be prohibited.<sup>20</sup> Similar considerations would prohibit the municipal advisor from “liking” the municipal advisory client’s post or by forwarding the municipal advisory client’s post to others, thereby adopting the content.]

If the municipal advisor did not pay, directly or indirectly, for the testimonial, but liked, shared or commented on a post from a third-party, the municipal advisor would 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 by the municipal advisor that contains a testimonial. Accordingly, the municipal advisor would need to ensure that the advertisement meets the requirements of Rule G-40 and that the requisite disclosures under Rule G-40(a)(iv)(G)(2)(b) are clearly and prominently posted to the social media page in close proximity to the testimonial.

### **Recordkeeping**

**9. Must regulated entities retain records of “posts,” “chats,” text messages or messages sent through messaging applications related to the regulated entity’s business conducted through social media?**

Yes, the MSRB’s recordkeeping and record retention requirements apply to all written, including electronic, communications sent or received as well as records of advertisements under the MSRB’s advertising rules.

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<sup>[20]</sup> See 2014 IM Guidance Update at 3.]

Specifically, for dealers, Rule G-9(b)(viii)(C) requires that “all written and electronic communications received and sent, including inter-office memoranda, relating to the conduct of the activities of such municipal securities broker or municipal securities dealer with respect to municipal securities” be retained. Similarly, Rule G-9(h)(i) requires that a municipal advisor retain records, which include, among other things, originals or copies of all written and electronic communications received and sent, including inter-office memoranda, relating to municipal advisory activities.<sup>[21]20</sup> Neither the technology used for the communication nor the distinction between a communication made through a device issued by the regulated entity or its associated person’s personal device is determinative for this analysis. *See* questions 10 and 11 regarding supervision.

### Supervision<sup>[22]21</sup>

#### **10. Should a regulated entity consider establishing policies and procedures as part of its supervisory system to address the use of social media by the regulated entity and its associated persons?**

Yes, given that recordkeeping requirements apply to electronic communications, a regulated entity should establish policies and procedures to address the use by the regulated entity and its associated persons of social media.<sup>[23]22</sup> As a baseline, those policies and procedures would reflect the regulated entity’s permitted and/or prohibited practices. Such permitted practices may

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<sup>[21]20</sup> Rule G-8(h)(i) requires municipal advisors to make and keep current all books and records described in Rule 15Ba1-8(a) under the Exchange Act. Particularly, Rule 15Ba1-8(a)(1) requires that municipal advisors make and keep true, accurate, and current “originals or copies of all written communications received, and 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.”

<sup>[22]21</sup> While many regulated entities may find the guidance in these FAQs useful when establishing their supervisory systems, each regulated entity should develop a supervisory system that is tailored to its own business model, recognizing that some considerations may not apply in the same manner for every firm and others may not apply at all.

<sup>[23]22</sup> In part, Rules G-27(b) and Rule G-44(a) require that a regulated entity establish a supervisory system to supervise the municipal securities and municipal advisory activities of the regulated entity and its associated persons. In general, a supervisory system includes:

(i) compliance policies and procedures that describe the practices that associated persons must adhere to in order to meet the standards of conduct established by the regulated entity consistent with applicable securities laws and regulations, including MSRB rules; and

(ii) written supervisory procedures that describe the practices that the supervisory personnel follow in order to reasonably ensure that associated persons meet the standards of conduct and the regulated entity can evidence a supervisory system.

include restrictions on the use of certain technologies or the prohibition of the use of social media to engage in municipal securities business or municipal advisory activities. Further, the supervisory system for a regulated entity that permits the use of social media would address all applicable MSRB rules, including, but not limited to:

- The MSRB’s advertising rules;
- Rule G-17;
- Rule G-8; and
- Rule G-9.

See question 1.

**11. What are some factors that a regulated entity should consider as it develops policies and procedures about the use of social media?**

As with any policy and procedure, a regulated entity’s social media policies and procedures would be tailored to reflect, among other things, its size, organizational structure and the nature and scope of its municipal securities or municipal advisory activities. Social media policies and procedures are not expected to be “one size fits all.”

Among the factors that a regulated entity should consider as it develops social media policies and procedures are:

- **Usage Restrictions.** While some regulated entities may prohibit an associated person from engaging in municipal securities business or municipal advisory activities through social media, other regulated entities may permit the use of social media for such purposes. A regulated entity that permits the use of social media by its associated persons, in whole or in part, should consider providing associated persons with a clear and concise list of permitted social media for the conduct of municipal securities business or municipal advisory activities. That list also may include any restrictions to the use of particular social media (for example, a regulated entity may permit certain messaging applications to be used only for internal communications among the regulated entity and its associated persons). If applicable, a regulated entity should consider making the list of permitted social media widely available and easily accessible to its associated persons.<sup>[24]23</sup>

Further, recognizing the need to have policies and procedures that are reasonably designed to ensure compliance with MSRB rules as well as with other applicable securities laws and regulations, and in light of the pace of technology innovations, a regulated entity that permits the use of social media should consider periodically reviewing its list of permitted social media. As part of that review, the regulated entity

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<sup>[24]23</sup> See, e.g., 2012 Risk Alert at 3; FINRA Regulatory Notice 07-59 (Dec. 2007) at 7.

should determine whether any updates to the list of permitted social media would be warranted.<sup>[25]24</sup>

Along with the list of permitted social media, the regulated entity should consider addressing the consequences of non-compliance with its social media policies and procedures.<sup>[26]25</sup>

- **Training and Education.** The regulated entity’s social media policies and procedures may address the training that the regulated entity will provide related to those policies and procedures. For example, will the training include an initial training as well as training that is required on a periodic basis? In addition, a regulated entity’s training on social media may address various topics likely to occur such as an explanation of the differences between business and personal social media use and how the lines between business and personal social media usage could be blurred. For example, an associated person could receive a request on his or her personal social media relating to municipal securities business or municipal advisory activities. A regulated entity may want to consider how the associated person should respond to such a request.
- **Recordkeeping and Record Retention.** As noted in question 1, it is possible that social media posts relating to the regulated entity’s municipal securities business or municipal advisory activities would be subject to the MSRB’s recordkeeping and record retention rules. A regulated entity should consider its recordkeeping and record retention obligations as it designs its social media compliance policies and procedures.<sup>[27]26</sup>
- **Monitoring.** As a regulated entity develops its social media policies and procedures, the regulated entity should consider how it will monitor for compliance with those policies and procedures. For example, a regulated entity may determine to more frequently monitor various social media activities based on the potential risks that the regulated entity has determined may be associated with those activities. *See* question 12 below for a discussion of various factors that the regulated entity may want to consider as it develops its policies and procedures. As a reminder, a regulated entity’s supervisory procedures concerning social media should address not only the MSRB’s advertising rules, but all applicable MSRB rules and other applicable federal securities laws and regulations.

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<sup>[25]24</sup> *See, e.g.,* 2012 Risk Alert at 4.

<sup>[26]25</sup> *See* FINRA Regulatory Notice 07-59 (Dec.2007) at 7; *see also* National Exam Program Risk Alert, Observations from Investment Adviser Examinations Relating to Electronic Messaging, Office of Compliance Inspections and Examinations, U.S. Securities and Exchange Commission (modified Dec. 14, 2018) available at <https://www.sec.gov/ocie/announcement/ocie-risk-alert-electronic-messaging> (“2018 Risk Alert”) at 4.

<sup>[27]26</sup> *See* FINRA Regulatory Notice 07-59 (Dec. 2007) at 6-7; 2018 Risk Alert at 3-4.

## 12. What factors may be important in determining the effectiveness of policies and procedures concerning social media?

As noted in question 10, MSRB Rules G-27 and G-44 generally require that a regulated entity establish, implement and maintain a supervisory system that is reasonably designed to achieve compliance with MSRB rules as well as with other applicable federal securities laws and regulations. To help test whether that goal is being met with regard to its social media compliance policies and procedures, a regulated entity may want to consider the following non-exclusive factors:

- **Content standards.** A regulated entity should consider whether there are certain risks associated with content created by the regulated entity for its social media and whether that content may create regulatory issues. For example, non-solicitor municipal advisors owe a fiduciary duty to their municipal entity clients. Is the social media content consistent with that duty (e.g., such as content that contains information on specific municipal advisory activity or a recommendation regarding that activity)? Further, [is] if the social media content [consistent with the] contains a testimonial, does that content [restrictions] include the requisite disclosures set forth in the MSRB's advertising rules?
- **Monitoring of third-party sites.** To the extent that the regulated entity permits the use of social networking sites, a regulated entity should consider how it will monitor for compliance with the regulated entity's social media policies and procedures on those sites.
- **Criteria for approving participation in social networking sites.** A regulated entity should consider whether to develop standards relating to social networking participation. For example, at a minimum, a regulated entity must ensure compliance with record retention requirements. As the regulated entity develops its criteria for approving the use of certain sites, the regulated entity also should address whether it has a process in place for revoking approval to participate in a particular social networking site should certain circumstances change.
- **Personal social networking sites.** A regulated entity should address whether the regulated entity or its associated persons may engage in municipal securities business or municipal advisory activities on personal social networking sites.
- **Enterprise-wide sites.** A regulated entity that is a part of a larger financial services organization should consider whether it needs to develop usage guidelines reasonably designed to prevent the larger financial services organization in organizational-wide advertisements from violating the MSRB's advertising rules [including, for municipal advisors, the prohibition on the use of testimonials in municipal advisor advertising].

[Additional Resources

SR-MSRB-2018-01 (January 24, 2018)

Letter from Pamela K. Ellis, Associate General Counsel, Municipal Securities Rulemaking Board, dated April 30, 2018

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval of a Proposed Rule Change, Consisting to 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

MSRB Notice 2018-08 SEC Approves Advertising Rule Changes for Dealers and Municipal Advisors

MSRB Notice 2018-32 Application of Content Standards to Advertisements by Municipal Advisors under MSRB Rule G-40]