

Dated: April 5, 2023.

**Sherry R. Haywood,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-97255; File No. SR-MSRB-2023-01]

### Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Amendment No. 1 to Proposed Rule Change Consisting of Amendments to MSRB Rule G-40, on Advertising by Municipal Advisors, and MSRB Rule G-8, on Books and Records

April 5, 2023.

#### I. Introduction

On January 31, 2023, the Municipal Securities Rulemaking Board (“MSRB”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule (the “original proposed rule change”) consisting of amendments to MSRB Rule G-40 on advertising by municipal advisors (“Rule G-40”), and MSRB Rule G-8 on books and records (“Rule G-8”).<sup>3</sup>

The original proposed rule change was published for comment in the **Federal Register** on February 14, 2023.<sup>4</sup> The Commission received two comment letters on the original proposed rule change.<sup>5</sup> On March 21, 2023, the MSRB granted an extension of time for the Commission to act on the filing until May 15, 2023.<sup>6</sup>

On April 4, 2023, the MSRB responded to the comments<sup>7</sup> and filed

Amendment No. 1 to the original proposed rule change (“Amendment No. 1”). The text of Amendment No. 1 is available on the MSRB’s website.<sup>8</sup> The Commission is publishing this notice to solicit comments on Amendment No. 1 from interested persons.

#### II. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Amendment

As described further below, the MSRB filed Amendment No. 1 to respond to comments on the original proposed rule change, relating to: (1) the definition of “testimonial;” (2) non-client testimonials; (3) solicitor municipal advisors; (4) social media guidance; and (5) other clarifications to rule text and design.<sup>9</sup>

##### A. Definition of Testimonial

The MSRB noted that a commenter suggested that the term “testimonial” be defined within the rule language itself.<sup>10</sup> The MSRB responded, stating it would provide a definition of a “testimonial” in Rule G-40 to avoid confusion with the term “testimonial” as used in Rule 206-4(1)<sup>11</sup> under the Investment Advisers Act of 1940 (“Advisers Act”).<sup>12</sup> Specifically, the MSRB defined “testimonial” in amended Rule G-40(a)(iv)(C)(1) as “a statement of a person’s or entity’s experience concerning the municipal advisor or concerning the municipal advisory services rendered by the municipal advisor.”<sup>13</sup> Furthermore, the MSRB also removed language from the original proposed rule change referring to the “advice, analysis, report, or other services rendered by the municipal advisor.”<sup>14</sup> The MSRB concluded that replacing this language with “municipal advisory services” in the definition of “testimonial” (and elsewhere in the original proposed rule change’s rule text) provided greater clarity.<sup>15</sup> The MSRB also made conforming numbering changes to the original proposed rule change’s Rule G-40 revisions to accommodate the addition of the

Commission, dated April 4, 2023, available at <https://msrb.org/sites/default/files/2023-04/MSRB-2023-01%20Comment%20Letter.pdf>.

<sup>8</sup> Amendment No. 1 is available at <https://msrb.org/sites/default/files/2023-04/MSRB-2023-01%20A-1.pdf>.

<sup>9</sup> The MSRB stated that Amendment No. 1 does not alter or impact the analysis in the original proposed rule change’s burden on competition or the statutory basis sections. See Amendment No. 1.

<sup>10</sup> NAMA Letter at 1-2; see also Amendment No. 1.

<sup>11</sup> 17 CFR 275.206(4)-1(b)(1).

<sup>12</sup> See Amendment No. 1; 15 U.S.C. 80b-1-80b-2.

<sup>13</sup> See Amendment No. 1.

<sup>14</sup> See *id.*

<sup>15</sup> See *id.*

definition of “testimonial” to amended Rule G-40(a)(iv)(C)(1).<sup>16</sup>

The MSRB stated that the revised rule text in amended Rule G-40(a)(iv)(C)(2) provides that, if a municipal advisor’s advertisement meets certain conditions, then a municipal advisor may, directly or indirectly, publish, circulate or distribute an advertisement which refers, directly or indirectly, to a testimonial.<sup>17</sup> The MSRB posited that this definition addresses a comment requesting that Rule G-40 include a definition of the term “testimonial,” but also a comment’s suggestion that the rule “include affirmative language that testimonials may be used if certain requirements are met.”<sup>18</sup> The MSRB also deleted a redundant phrase later in this subsection; specifically, amended Rule G-40(a)(iv)(C)(2)(b)(iv) (“the paid testimonial must include”).<sup>19</sup>

##### B. Non-Client Testimonials

The MSRB noted that both commenters suggested that it would promote further harmonization with MSRB Rule G-21 (“Rule G-21”), on advertising by brokers, dealers, and municipal securities dealers, if municipal advisors were able to use testimonials by third parties.<sup>20</sup> The MSRB stated that it will amend the original proposed rule change to permit municipal advisors to use testimonials from a third party, whether a person or entity, subject to the conditions set forth in proposed Amendment No. 1.<sup>21</sup> The MSRB reasoned that, for example, analogous to Rule 206-4(1)<sup>22</sup> under the Advisers Act,<sup>23</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 who is not a current client.<sup>24</sup> The MSRB wrote that it agreed with the Commission’s belief that this type of disclosure would provide important context for weighing the relevance of the testimonial.<sup>25</sup>

##### C. Solicitor Municipal Advisors

The MSRB stated that both commenters found the proposal to

<sup>16</sup> The MSRB also added a cross-reference to the new definition of “testimonial” in the original proposed rule change’s Rule G-8. See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> NAMA Letter at 4; see also *id.*

<sup>19</sup> See Amendment No. 1.

<sup>20</sup> See *id.*; NAMA Letter and SIFMA Letter.

<sup>21</sup> See Amendment No. 1.

<sup>22</sup> 17 CFR 275.206(4)-1(b)(1).

<sup>23</sup> 15 U.S.C. 80b-1-80b-2.

<sup>24</sup> See Amendment No. 1.

<sup>25</sup> See *id.*; see also Release No. IA-5653 (Dec. 22, 2020) (File No. S7-21-19), 86 FR 13024 (Mar. 5, 2021) (“IA Marketing Rule Adopting Release”) at 13048.

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

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

<sup>3</sup> See MSRB filing of original proposed rule change, available at <https://msrb.org/sites/default/files/2023-01/MSRB-2023-01.pdf>.

<sup>4</sup> Release No. 34-96840 (Feb. 8, 2023), 88 FR 9580 (Feb. 14, 2023) (“Notice”). The comment period closed on March 7, 2023.

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

<sup>6</sup> See “Extension of Time on File No. SR-MSRB-2023-01 to May 15, 2023,” available at <https://msrb.org/sites/default/files/2023-03/MSRB-2023-01%20eot.pdf>.

<sup>7</sup> See Letter from Salih Olgun, Interim Chief Regulatory Officer, MSRB, to Secretary,

establish a different standard for the use of testimonials by solicitor municipal advisors confusing.<sup>26</sup> In response, the MSRB revised the original proposed rule change to create uniformity in the criteria for the use of testimonials by all municipal advisors.<sup>27</sup> Specifically, the MSRB removed proposed language that would have permitted, subject to certain conditions, a solicitor municipal advisor to pay more than \$1000 in total value in cash or non-cash compensation during the preceding 12 months for a testimonial.<sup>28</sup> Additionally, the MSRB eliminated the proposed language in the original proposed rule change in Rules G-40 and G-8 concerning additional records to be maintained by a solicitor municipal advisor related to such payments.<sup>29</sup> The MSRB concluded that these revisions in Amendment No. 1 would prohibit any municipal advisor from providing any compensation to a person or entity, directly or indirectly, of more than \$1000 in total value in cash or non-cash compensation during the preceding 12 months.<sup>30</sup>

#### D. Social Media Guidance

The MSRB wrote that 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>31</sup> be updated to reflect the proposed amendments to Rule G-40.<sup>32</sup>

The MSRB responded by proposing to amend its social media guidance to reflect the proposed amendments to Rule G-40 (*inter alia*, allowing the use of testimonials in municipal advisor advertisements, subject to certain conditions).<sup>33</sup> The MSRB explained that the current social media guidance notes that, by paying for or soliciting positive comments from a third party, (i) a municipal advisor would be deemed to be entangled with those comments, and

<sup>26</sup> See NAMA Letter and SIFMA Letter; *see also* Amendment No. 1.

<sup>27</sup> See Amendment No. 1.

<sup>28</sup> See *id.*

<sup>29</sup> See *id.*

<sup>30</sup> Correspondingly, the MSRB added the phrase "directly or indirectly" to the original proposed rule change's Rule G-8. *See id.*

<sup>31</sup> These frequently asked questions ("FAQs") were filed with the Commission for immediate effectiveness. *See* Release No. 34-85222 (Feb. 28, 2019), 84 FR 8132 (Mar. 6, 2019) (File No. SR-MSRB-2019-04). These FAQs can be found on the MSRB's website at <https://www.msrb.org/FAQs-regarding-Use-Social-Media-under-MSRB-Rule-G-21-Advertising-Brokers-Dealers-or-Municipal-0> (Aug. 23, 2019).

<sup>32</sup> See NAMA Letter and SIFMA Letter; *see also* Amendment No. 1.

<sup>33</sup> See Amendment No. 1.

(ii) the posting of those third-party comments on the municipal advisor's social media page would be deemed to be an advertisement by the municipal advisor that contains a testimonial.<sup>34</sup> The MSRB stated that Amendment No. 1's revisions to the social media guidance would make clear that the advertisement containing a testimonial would be permissible so long as the advertisement meets the requirements of Rule G-40 (including having the requisite disclosures).<sup>35</sup>

In addition, the MSRB noted that the revised social media guidance would make clear that if a municipal advisor did not pay, directly or indirectly, for a testimonial, but liked, shared, or commented on a post from a third-party, the municipal advisor would be deemed to have adopted those comments and the posting of those third party comments on the municipal advisor's social media page would be deemed an advertisement that contains a testimonial.<sup>36</sup> The MSRB concluded that the advertisement containing a testimonial would be permissible so long as the advertisement meets the requirements of Rule G-40 (including having the requisite disclosures).<sup>37</sup> The MSRB also revised the social media guidance's footnotes with updated citations and conforming numbering changes.<sup>38</sup>

#### E. Other Modifications to Rule Text

As discussed further below, the MSRB also proposed other textual changes in Amendment No. 1 to provide additional clarity and facilitate compliance.<sup>39</sup>

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

The MSRB stated that it revised the original proposed rule change to clarify that a municipal advisor may only use a testimonial if the person or entity providing the testimonial has the knowledge and experience to make a statement concerning their experience with the municipal advisor or with the municipal advisory services rendered by the municipal advisor.<sup>40</sup>

#### ii. Supplementary Material .03 to Rule G-40

The MSRB added Supplementary Material .03 to Rule G-40 to the original proposed rule change, stating that this revision would clarify that, in order for a requisite disclosure in an

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> See NAMA Letter at 4.

<sup>40</sup> See Amendment No. 1.

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.<sup>41</sup> The MSRB also explained that this revision indicates that disclosures should appear close to the associated testimonial statement with the same prominence so that the statement and disclosures are read at the same time, rather than referring the reader to somewhere else in the advertisement to view the disclosures.<sup>42</sup>

### III. Date of Effectiveness of the Proposed Rule Change and Amendment No. 1

As stated in the original proposed rule change, the MSRB will publish a regulatory notice no later than one month following the Commission's approval date, which will include an implementation date that shall be no later than three months following the Commission approval date.<sup>43</sup>

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the filing as amended by Amendment No. 1 is consistent with the Act. Comments may be submitted by any of the following methods:

#### Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-MSRB-2023-01 on the subject line.

#### Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR-MSRB-2023-01. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the

<sup>41</sup> See Amendment No. 1.

<sup>42</sup> See *id.*

<sup>43</sup> See Notice.

Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the MSRB. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MSRB-2023-01 and should be submitted on or before April 26, 2023.

For the Commission, pursuant to delegated authority.<sup>44</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[SEC File No. 270-196, OMB Control No. 3235-0202]

**Proposed Collection; Comment Request; Extension: Rule 15c2-11**

*Upon Written Request, Copies Available From:* Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 ("PRA") (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission ("Commission") is soliciting comments on the existing collection of information provided for in Rule 15c2-11 (17 CFR 240.15c2-11) ("Rule"), under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*). The Commission plans to submit this existing collection of information to the Office of Management and Budget ("OMB") for extension and approval.

Rule 15c2-11 governs the publication of quotations for securities in a quotation medium other than a national securities exchange (*i.e.*, over the counter ("OTC") securities). The Rule is designed to prevent broker-dealers from publishing or submitting quotations for OTC securities that may facilitate a fraudulent or manipulative scheme. Subject to certain exceptions, the Rule prohibits broker-dealers from publishing

any quotation for a security or, directly or indirectly, submitting any quotation for publication, in a quotation medium unless they have reviewed specified information concerning the issuer.

Based on the current structure of the market, the Commission staff believes that the recordkeeping and review requirements under Rule 15c2-11<sup>1</sup> apply to 86 broker-dealers, one qualified interdealer quotation system ("Q-IDQS"), and one registered national securities association.<sup>2</sup> Based on information provided by the Financial Industry Regulatory Authority, Inc. ("FINRA"), the Commission staff understands that in the 2022 calendar year, 377 Form 211 applications were filed to initiate the publication or submission of quotations of OTC securities:<sup>3</sup> 60 of these Forms 211 concerned OTC securities of prospectus issuers, Regulation A ("Reg. A") issuers, and reporting issuers; 258 concerned OTC securities of "exempt foreign private issuers"; and 59 concerned OTC securities of "catch-all issuers." The collection of information that is submitted to FINRA for review and approval is currently not available to the public from FINRA.

The Commission staff's estimates of the ongoing annual hour burdens associated with the information collection requirements prescribed in the Rule are summarized in the chart below.

Information collection	Total annual burden industrywide (hours)
Recordkeeping associated with the initial publication or submission of a quotation in a quotation medium .....	26,231
Recordkeeping when relying on an exception under paragraph (f), that paragraph (b) information is current and publicly available .....	64,339
Recordkeeping obligations under unsolicited quotation exception under paragraph (f)(2) .....	537,954
Recordkeeping obligations regarding the frequency of a priced bid or offer quotation under paragraph (f)(3)(i)(A) .....	95,166
Recordkeeping obligations regarding determining shell status under the proviso in paragraph (f)(3)(i)(B) .....	64,339
Recordkeeping obligations regarding trading suspensions under the provision in paragraph (f)(3)(i)(B) .....	3
Recordkeeping obligations for the exceptions under paragraph (f)(5)—Asset Test .....	393
Recordkeeping obligations for the exceptions under paragraph (f)(5)—ADTV Test .....	99,053
Recordkeeping obligations of broker-dealers relying on a Q-IDQS complying with information review requirement pursuant to paragraph (a)(1)(ii) .....	28
Recordkeeping obligations related to the creation of reasonable written policies and procedures under paragraph (a)(3) .....	20

<sup>44</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> In 2021, Commission staff issued a no-action letter, stating that the staff of the Division of Trading and Markets would not recommend enforcement action under certain conditions for quotations of certain fixed-income securities on the over-the-counter markets to allow for an orderly and good faith transition into compliance with Rule 15c2-11, as amended in 2020. In 2022, this letter was withdrawn by the issuance of a new (but consistent) no-action letter, which provides a temporary staff position that expires on January 4, 2025. Because it is widely understood that broker-dealers and other respondents are relying on this no-action position so that they do not need to

comply with the requirements of Rule 15c2-11 for fixed income securities, the estimates contained herein are made with regard to equity securities only. Burden estimates that account for fixed income securities are, therefore, subject to change.

<sup>2</sup> In calendar year 2022, 86 broker-dealers published quotations on OTC Markets Group's systems. The Commission staff believes that this number reasonably estimates the number of broker-dealers that would engage in activities that would subject them to Rule 15c2-11. Based on the current structure of the market for quoted OTC securities, the Commission staff believes that only one Q-IDQS would engage in activities that would subject it to Rule 15c2-11. There currently is one registered

national securities association. 86 broker-dealers + 1 Q-IDQS + 1 registered national securities association = 88 respondents.

<sup>3</sup> A broker-dealer that initiates or resumes a quotation in an OTC equity security is subject to FINRA Rule 6432, which requires the broker-dealer to demonstrate compliance with, among other things, Rule 15c2-11 by filing Form 211. Given the alignment of this FINRA requirement and Rule 15c2-11, the Commission staff believes that the number of Forms 211 filed with FINRA in 2022 provides a reasonable baseline from which to estimate the burdens associated with the information review requirement under Rule 15c2-11.