NATIONAL ASSOCIATION OF MUNICIPAL ADVISORS

September 17, 2018

Mr. Ronald Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street, NW
Washington, D.C. 20005

RE: MSRB Notice 2018-19

Dear Mr. Smith:

Thank you again for allowing the draft frequently asked questions (FAQs) related to MSRB Rule G-40 (Rule) as applied to social media, in MSRB Notice 2018-19 (August 14, 2018), to be open for public comment. Such process will help the MSRB understand critical areas of interest from municipal advisors, and help municipal advisors better understand the Rule. We believe this is a beneficial new process that the MSRB should continue to pursue for future regulatory initiatives. However, we would like to continue to express our general concern with having the MSRB produce guidance that is not formally approved by the SEC. A key reason for raising this issue is that examination staff may apply statements or concepts from informational/informal guidance in a manner that is reserved for actual Rules and formal guidance.[1]

Our comments relate to two key areas that need further discussion and understanding. The first is related to application of the Rule, and the second deals with corresponding compliance procedures that will be necessary to demonstrate municipal advisor (MA) firms are adhering to the Rule. Although we realize that the FAQs apply both to municipal dealers and MAs, we limit our comments to the perspective of and applicability to MAs, unless otherwise noted. References to individual questions in the FAQs include both the question and corresponding answer.

Application of the Rule

In the past the MSRB has stated that the application of Rule G-40 is the same regardless of the medium used to advertise or potentially advertise. However, the application of the Rule to social media raises the question as to whether the traditional thresholds stated in Rule G-40 for when the advertising rule applies (information that is publically available and/or sent to more than 25 persons) are effective in social media contexts. Below are some questions and discussion that we would like to raise in this area.

[1] Of interest, see the September 13, 2018 statement from SEC Chairman Clayton on the role of staff views, https://www.sec.gov/news/public-statement/statement-clayton-091318 and the September 11, 2018 statement from the Federal Reserve and other agencies on the role of supervisory guidance at https://www.federalreserve.gov/newsevents/pressreleases/bcreg20180911a.htm.

Rules G-8 and G-9

In questions 10 and 11, there is discussion that a broad variety of individualized communications (including posts, chats and text messages, messages sent through other social media means and third party postings) related to municipal securities and advisory activities must be retained as they relate to MA activities. **While this is an important point, we believe this discussion should be separated from discussion on the advertising rule, and suggest that the information be provided separately, perhaps in a shaded box, to bring awareness to the issue without confusing it within the context of Rule G-40.** We would also argue that a separate document or FAQ on the application of electronic communications such as chat and text messages and MSRB Rules G-8 and G-9 is something that the MSRB should address. As written, the FAQs provide a blurred view as to which communications are subject to the advertising rule and may impair the ability of MAs to achieve compliance in an efficient and effective manner.

Social Media and Rule G-40 Thresholds

While we understand that advertisements on social media platforms need to be addressed in rulemaking, confusion remains as to how the Rule applies in this area. It is understood that a firm may have Twitter, LinkedIn, and Facebook accounts, available for public viewing, and are subject to analysis to determine if the posting is advertising and then, if so, the firm must review it in accordance with Rule G-40. But the FAQs need to better address the application of the Rule on individual communications.

The MSRB should clarify that a mere identification that a person is an employee of a municipal advisor is not covered by advertising rules. For example, if an individual announces on social media that s/he has just been hired as an associated person of a particular municipal advisor, without in any way marketing the firm or its capabilities, such an announcement falls outside of the Rule. Thus, as a potential third example in question 3 of the FAQs, the MSRB could modify the facts from the second example to read as follows: "I'm happy to be part of the ABC municipal advisor team as their new Managing Director!" The MSRB should confirm that such a statement would be viewed as not constituting an advertisement. Similarly, the inclusion of the name of the firm that employs an individual in that person's social media profile (as well as other factual information such as job title, location, basic duties, etc.) should not be viewed as an advertisement.[2] These are all merely factual statements, subject to Rule G-17 if the statements are made in the context of the individual's municipal advisory activities.[3] If the MSRB believes that such information (without other statements that cause the information to take on a marketing function) is not covered by the advertising rules, it should make this very clear.

Responsibility of Third Party Postings

The MSRB states in questions 8 and 9 that third parties can make posts on MA social networking pages, even testimonials, as long as the MA is not entangled with or explicitly adopts the posting, without running afoul of Rule G-40. This differs from the previous FAQ on client lists and case studies, where the

[2] A description of basic duties limited to a description of what the job is, without marketing the level of skills or specific successes, should not be viewed as rising to the level of being an advertisement.

[3] In our view, such factual statements on the individual's social media page that is not otherwise used to engage in municipal advisory activities should presumptively not be viewed as related to the municipal advisory activities of the firm, but instead personal information routinely shared among individuals in the general population, and therefore fall outside of MSRB rules.

MSRB states that the MA firm itself cannot include testimonials on its web page or use them in other advertising mediums. **We raise this point to question whether it makes sense for there to be two different applications of the Rule for testimonials, which is dependent on the medium, and whether the MSRB's position regarding testimonials relating to municipal advisors should be revisited**.

This is especially true as we note that SEC staff guidance provides some flexibility on testimonial use by investment advisers, which the MSRB previously refused to incorporate into its rulemaking on Rule G-40. Yet the FAQs cite to the SEC's IM Guidance Update No. 2014-04 (see footnote 20 of the FAQs) in justifying a prohibition on municipal advisors. It is unclear why the MSRB can rely on SEC staff guidance in establishing stricter guidance but not in establishing more flexible guidance. If the MSRB as a matter of policy believes that the substance of SEC (and FINRA) staff guidance should not apply to municipal advisors, the MSRB should clearly state that position regarding such substance with appropriate justifications, rather than rely (inconsistently) on this notion that staff guidance (regardless of its substance) should not be incorporated into how MSRB rules are to be applied. As a broader matter, it makes no logical sense for the testimonial restrictions on municipal advisors to be stricter (as both a legal and practical matter) than for investment advisers and broker-dealers. This stricter approach means either (or both) that the MSRB views (a) municipal advisors as inherently less reliable and more likely to try to mislead their clients than are investment advisers and broker-dealers, or (b) issuers and obligated persons as inherently less sophisticated and more gullible than clients (including retail investors) of investment advisers and broker-dealers.

Also, the MSRB should explicitly state after the last sentence of question 5 that, notwithstanding the prohibition on testimonials in advertisements, **an unsolicited third-party opinion or comment posted on a social network (as described in FAQ #8 in FINRA Notice 17-18) is not an advertisement or communication of a municipal advisor and therefore would not be a prohibited testimonial**.

In questions 8 and 9 we would like to also raise the following issues:

- In the definition of "Entanglement," the MSRB adds the term "encourages," which is not found in similar SEC or FINRA language regarding entanglement. That term has too broad of a meaning to be consistent with the established principles of entanglement – while encouraging a specific third-party to post a specific favorable review could be viewed as a solicitation, a more general encouragement of anyone to post any comment (positive, neutral, negative, purely factual, questions, etc.) should not be viewed as a basis for entanglement. This again becomes a "testimonials" problem, and the language in question 9 relating to encouragement is problematic without appropriate context being included.

- In the definition of "Adoption", while the language includes the notion of indicating approval or endorsement, the MSRB should acknowledge that a link or share undertaken to refute the original statement, as described below under "Disclaimers," would not be viewed as being "adopted".

- In the last paragraph of question 8, the MSRB needs to be explicit that "complaint" relates to regulated business activities – for broker-dealers, a complaint must be alleging a grievance involving the firm or the individual "with respect to any matter involving a customer's account" [see MSRB Rule G-8(a)(xii)], for municipal advisors, a complaint must be "alleging a grievance involving the municipal advisory activities" of the firm or individual [see MSRB Rule G-8(h)(vi)]. As written, readers may view the term more broadly than intended.

Our members are also concerned with the need for clarification related to the use of hyperlinks. For instance, if a city puts out a press release that contains a complimentary statement about the MA firm, including the firm's social media address, and then that press release is picked up by the local newspaper that writes a longer story about the project and includes a link to the original press release, can a MA firm post a hyperlink on its web site to the news story, without it being considered advertising? We would argue that the MA firm's link is to a news story, and therefore it is not a testimonial, and believe that the FAQ should include this type of example to show MA firms how to approach these types of situations.

Disclaimers

In question 6, while the general principle makes sense, the MA's disclaimer/disclosures do need to be read in context with the language being linked to in order to determine whether there may be a false or misleading statement. For example, in some contexts, the MA may be trying to refute negative commentary which itself may be false or misleading, and in social networking contexts that refutation will normally be linked to the original post that is being shared – thus, the MA definitely should not be viewed as adopting the language it is in fact refuting. This notion is consistent with the definition of "Adoption" in question 8 in that the MA is definitely not approving or endorsing the content. **Finally, the MSRB should provide the additional guidance provided by FINRA Notice 10-06 in FAQ #9, where FINRA states that a disclaimer is part of the facts and circumstances considered with regard to adoption or entanglement with third-party posts.**

Informational Tweets and Postings

Additional clarification is also needed in the instance where a firm may post "Visit us in Booth 72 during the Nebraska GFOA's conference." If the posting only makes that statement (as compared to "Learn About Our MA Services in Booth 72," which includes language closer to the trigger for Rule G-40[4]), then we believe it would not be considered advertising. We think this type of example, including a discussion of what type of language included in signage beyond purely identifying language might be covered by the Rule, would be beneficial in the FAQ document.

Compliance with the Rule

While the guidance provided in the FAQs is, with the exceptions described in this letter, largely consistent with existing social media guidance provided by the SEC and FINRA, in certain respects the MSRB's more succinct statement of such guidance raises questions about how certain matters that were specifically dealt with in SEC or FINRA guidance but not mentioned in the FAQs should be understood. We outline below changes the MSRB should make in order to provide greater consistency with the approach of the other regulators and to make the process of compliance and supervision more effective and efficient.

For example, FINRA draws a distinction between static and interactive content on social media platforms, which distinction is not adequately captured by the MSRB's distinction in the FAQs between posts and chats. Based on our reading of the FAQs and existing FINRA guidance, the FINRA guidance provides for a more workable supervisory process, particularly by not requiring pre-use approval by a principal prior to posting interactive content. For example, the use of the term "post" in question 3 does

[4] In fact, we believe even the second example is best not viewed as an advertisement under Rule G-40.

not adequately provide for a distinction between static and interactive content, so that depending on the specific circumstances, some posts would be viewed under FINRA rules as being interactive content not subject to pre-use approval while potentially being viewed under the FAQs as an advertisement requiring pre-use approval. **We believe it is critical for the MSRB to affirmatively incorporate the distinction between static and interactive content into its own guidance on social media, as without such a distinction many smaller MAs may effectively be shut out of the use of social media, which would be an inequitable result inconsistent with Exchange Act Section 15B(b)(2)(L)(iv). This change is critical in order to make supervisory processes workable for MAs and, probably, many broker-dealers**.

In addition, the FAQs have numerous footnotes to prior FINRA and SEC guidance. Should regulated entities assume that, by citing a particular item and absent any contrary language or disclaimer, the MSRB has adopted the positions taken by FINRA and the SEC in such guidance to the same effect as if the MSRB had provided such guidance directly? And what does that mean for portions of FINRA and SEC guidance that are not specifically cited by the MSRB?

When discussing usage restrictions, the FAQs should include the approach set out in FINRA Notice 11-39 FAQ 9, which provides a process for dealing with situations where a third-party reaches out for business to an individual through a personal social media platform that the firm has restricted from being used for business. That FINRA FAQ actually addresses the situation that the MSRB describes in the last two sentences in question 13 under "Training and Education" in a substantively more helpful way then the current MSRB language does.

The stated language that regulated entities "should consider" their recordkeeping obligations under "Recordkeeping and Record Retention" in question 13 amounts to merely issue spotting and provides no guidance. The MSRB should note that, particularly for smaller regulated entities such as the vast majority of municipal advisors, the decision not to utilize costly existing technology used by broker-dealers and investment advisers to monitor, extract and/or retain communications would not be viewed prejudicially by the MSRB (and therefore should not be so viewed by the enforcement agencies) so long as reasonable alternative methods are used. For example, where an employee uses her/his own communication device[5], FINRA allows in FINRA Notice 07-59 (page 9) for the regulated entity to establish a process of pre-approval of such usage, with the individual required to allow the firm to access the device. This approach could also apply to specific social media platforms, where the firm would pre-approve use of the platform, would require access to the individual's account on the platform, and would allow the firm to engage in required reviews and to extract and preserve required records. Regulated entities could make use of social media contingent upon the individual agreeing to these or similar requirements. For example, chat, direct messaging or other similar one-to-one or one-to-few messages could be used on the condition that a firm-designated account be made a recipient of all messages and subject to a prohibition on the individual deleting any posts, messages or other materials unless a copy of such materials is first saved and forwarded to a firm-designated file. The individual would be subject to the loss of rights if upon review it is found that the individual has not complied with the requirements.

[5] It is important to point out that some states prohibit employers from accessing their employees' social media accounts, and that key issue is not addressed in the FAQ and has significant compliance control implications.

As NAMA has stated numerous times, we understand the need to develop and implement rules over MA firms and MA professionals. That is not an issue we quibble with, nor that Rule G-40 is necessary. However, we do think that the FAQs are unclear in certain areas and would cause unnecessary compliance hurdles. These hurdles are further amplified when considering that the potentially extensive set of tasks to achieve compliance with the guidance as set forth in the current draft of the FAQs go far beyond the safeguards mandated for actual substantive MA work on which the MSRB's rulemaking to protect issuers and obligated persons is most appropriately focused. Without greater clarification and paring down of the type of monitoring that is needed, a small MA firm could have to spend more effort on this rule than one that affects the actual services they provide their clients. We would ask that the MSRB carefully review this and its other regulatory pronouncements with this in mind.

As social media will continue to evolve, we do not believe that the information provided in the FAQs should instead be provided through amending current rules or developing new ones. The nature of this medium is fluid and dynamic. The MSRB should retain sufficient flexibility to update guidance as warranted, and doing so through rulemaking would be premature and constricting.

Finally, we would like to note that the costs associated with the new Rule do not adequately take into account the costs to comply with the Rule, especially if the MSRB does not provide further clarifications in the FAQs. The issue of costs incurred by MA firms to comply with individual MSRB rules and the entire MSRB rulebook continues to be adverse to the mandate in the *Dodd Frank Act* that the MSRB must consider the effect of its actions on small MA firms. We ask once again for the MSRB to further review the costs associated with complying with Rule G-40, as it was not directly addressed in MSRB Notice 2017-04 (see attachment A).

Thank you again for the opportunity to provide comments on the FAQs. Please feel free to contact me if I can provide you with any additional information or answer any questions about NAMA's response.

Sincerely,

Susan Gaffney
Executive Director

MSRB Notice 2017-04

Pages 15-16

At the outset, the MSRB notes it is currently unable to quantify the economic effects of the proposed amendments to Rule G-21 and draft Rule G-40 because the information necessary to provide reasonable estimates is not available. For example, with regard to draft Rule G-40, the MSRB observes that there is little publicly available information on a detailed breakdown of incremental expense items as reported by the municipal advisory industry. In addition, estimating the costs for municipal advisory firms to comply with draft Rule G-40 is hampered by the fact that these costs depend on the business activities and size of these municipal advisory firms, which can vary greatly. Given the limitations on the MSRB's ability to conduct a quantitative assessment of the costs and benefits associated with draft Rule G-40, the Board has thus far considered these costs and benefits primarily in qualitative terms.

Pages 16-17

Furthermore, the MSRB believes that much of the costs associated with both draft amendments to Rule G-21 (as well as draft Rule G-40) will be up-front costs resulting from investments in advertisements that are no longer compliant. These costs can be mitigated by setting a future effective date for the rule changes, if adopted.