



March 24, 2017

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

RE: MSRB Notice 2017-04

Dear Mr. Smith:

The National Association of Municipal Advisors (NAMA) appreciates the opportunity to respond to the MSRB's Request for Comment on Draft Rule G-40, Advertising by Municipal Advisors. NAMA represents Municipal Advisory Firms and Municipal Advisors (MA) from across the country and serves to promote and provide educational efforts, and assist its members navigate through the federal regulatory and municipal marketplace landscapes.

NAMA supports the general intent of the proposal to protect the public, and potential MA clients, from being misled by MA advertisements. However, this general point is already covered in Rule G-17 (Conduct of Municipal Securities and Municipal Advisory Activities - *In the conduct of its municipal securities or municipal advisory activities, each broker, dealer, municipal securities dealer, and municipal advisor shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice.*), making this present proposal unnecessary.

The unnecessary nature of the proposal is further underscored because the answer to the MSRB's question if MAs have any role "with the development or distribution of municipal security product advertisements, new issue product advertisements, and/or municipal fund security product advertisements" is "no." The proposed rulemaking contains many provisions that are framed for advertising of securities or "products" offered by underwriters and investment advisors to retail customers, rather than speaking to the *services performed* by municipal advisors to issuer clients.

It is also worth commenting that while respecting the MSRB's work and goals to regulate broker/dealers and municipal advisors impartially and in most ways equally to avoid harm to investors and issuers respectively, the need to automatically develop rules for MAs to mirror current broker/dealer rules should not be done just for the sake of doing so and is not proper rationale for regulation under the *Exchange Act*. While some MSRB Rules such as G-20 and G-37 certainly should apply in the same fashion to both broker/dealers and MAs, the proposed rules on advertising cannot be as easily applied to different types of professionals and actually creates a wholly unnecessary rule in the proposed Rule G-40.

Therefore, we respectfully request that the Proposed Rule G-40 be withdrawn as the same results of ensuring falsehood or misleading statements are not used in advertising for MA professional services can already be found in Rule G-17. The MSRB could further explore the application of advertising for MA services under Rule G-

17, with additional guidance or FAQs to ensure that MAs have a full understanding of the broad scope and reach of Rule G-17 related to the services that they offer and perform.

If the MSRB chooses to not withdraw proposed Rule G-40, then we would strongly suggest that significant changes be made to the proposal. First, there are numerous areas where clarifications are needed, as noted below. Second, the focus of the rulemaking should apply to professional advertisements for MA services. If the MSRB has identified any meaningful subset of MAs that advertise products, then a separate section should apply solely to product advertisements. We have noted below how the Rulemaking could be bifurcated to better acknowledge different types of advertising.

For further presentation of our comments, please see Attachment A, which provides a redline of the proposal with NAMA's suggestions.

Suggestions for Additional Exclusions and Clarifications

SEC Rule "General Information Exclusions" Should be Excluded from the Definition of Advertising. The items discussed in the clauses (a), (b), (d) and (e), of the "general information exclusions" listed in the MA Rule FAQⁱ, should not be considered advertising within MSRB rulemaking, and be included as an exemption in section (a)(i):

- *(a) information regarding a person's professional qualifications and prior experience (e.g., lists, descriptions, terms, or other information regarding prior experience on completed transactions involving municipal financial products or issuances of municipal securities); (b) general market and financial information (e.g., market statistics regarding issuance activity for municipal securities or current market interest rates or index rates for different types of bonds or categories of credits); (c) information regarding a financial institution's currently-available investments (e.g., the terms, maturities, and interest rates at which the financial institution offers these investments) or price quotes for investments available for purchase or sale in the market that meet criteria specified by a municipal entity or obligated person; (d) factual information describing various types of debt financing structures (e.g., fixed rate debt, variable rate debt, general obligation debt, debt secured by various types of revenues, or insured debt), including a comparison of the general characteristics, risks, advantages, and disadvantages of these debt financing structures; and (e) factual and educational information regarding various government financing programs and incentives (e.g., programs that promote energy conservation and the use of renewable energy).*

RFPs/RFQs Should Be Excluded from the Definition of Advertisements. The Rule should make clear that responses to RFPs, RFQs, and similar types of documents do not fall into the advertising category. While the Notice refers to this notion, the proposed rule does not encompass all types of responses an MA may provide to an issuer's request, and these should be a specific exemption within the Rule itself, in (a)(i).

Client Lists Should Be Excluded From the Definition of Advertisements, per SEC Guidance for Investment Advisors. The SEC has stated that client lists may be used within certain parameters, for Investment Advisors. We request that the MSRB allow client lists to be used by MAs in accordance with this guidance.

- *The staff has stated that an advertisement that contains a partial client list that does no more than identify certain clients of the adviser cannot be viewed either as a statement of a client's experience with, or endorsement of, the investment 206(4)-1(a)(5) depending on the facts and circumstances. (<https://www.sec.gov/investment/im-guidance-2014-04.pdf>)*

Testimonials Should Be Defined as Noted in the SEC No Action Letter Related to this Same Issue for Investment Advisors.

- See *DALBAR, Inc., SEC No-Action Letter (pub. avail. Mar. 24, 1998)* (“Although the term ‘testimonial’ is not defined in Rule 206(4)-1, we consistently have interpreted that term to include a statement of a client’s experience with, or endorsement of, an investment adviser.”).

Case Studies Should be Excluded from the Definition of Advertising. We request that Case Studies bearing factual information, without discussion by a client of experience with or endorsement of an MA, should be permissible. This would allow MAs to provide information about their experiences in the MA services field to assist with the public’s and potential client’s understanding of their background.

Specific Guidance Needed Related to the Application of the Rulemaking for MA Firm Websites. Most MA Firms do not use common forms of advertising but rather use web sites to explain and promote their services. FAQs or guidance on how Rule G-40 would apply to this most commonly used platform, would be essential to ensure compliance with the rulemaking.

Specific Guidance Needed for Use of Social Media Platforms. The MSRB should also provide guidance or FAQs on how the proposed rule would apply to the use of “LinkedIn” and other social media platforms.

General Guidance on the Application of Rule G-40 on Advertisements of Professional Advertisements for MA Services. In addition to the two areas notes above where specific guidance is necessary, the MSRB should also develop more general guidance on the application of the Rule to professional advertisements for MA services.

(iv) Content Standards

Delete Provision Already Covered in MSRB Rule G-17. Most of the language in the Content Standards section of the proposal is repetitive to the overriding principle that MAs must not provide misleading information to the public, which is part of MSRB Rule G-17. Therefore, we suggest that (A) be deleted from this proposal.

There Should Be a Clear Separation Between Content Standards of Product Advertising and Professional Services Advertising. Due to the fact that the clear majority of MAs do and would only conduct professional services advertising, the rule should be written in a manner that creates clear standards for those types of advertisements.

- Sections (D), (E), and (F) are related to products, and would be difficult to apply to the types of services performed by MAs, and therefore should only be included as content standards for products. For example -
 - (D) MA must “...provide balanced treatment of risks and potential benefits...”
 - (E) MA must consider “....nature of the audience...”
 - (F) “Advertisement may not predict or project performance...”
- Sections (B), (C), (G) and (H) are related to both products and services, and should be included in the content standards for both, but redrafted to eliminate overlapping and confusing language.

MAs Should be Allowed to Indicate SEC Registration in Addition to MSRB Registration. In section (H), the MSRB states that a MA may indicate MSRB registration that complies with certain standards noted in that section. We suggest that SEC registration be added to this section.

General Comments

In addition to the specific comments noted above related to the proposal, it is also important to note that the MSRB should consider the costs that MAs will incur to comply with this rulemaking, especially small MA firms. This consideration is a requirement of the *Exchange Act*. As written, the proposed rulemaking includes overlapping and confusing content standards for professional and product advertising that will especially raise the cost of compliance for small MA firms because examiners require the development of policies and procedures even for rules that do not apply to the MA.

Finally, while again we do agree with the MSRB that MAs should not engage in advertising that is misleading or provides inaccurate information to potential clients, and that objective criteria should always be used by issuers in hiring municipal bond professionals, we do not agree that these rules would significantly “improve the selection of MAs” by issuers. This sentiment seems to overemphasize both the use of advertising by the MA community and the issuer’s reliance on advertising in their decision-making process. We believe it is unlikely that most issuers hire an MA for their services based on an advertising, but rather are far more likely to use an RFP/RFQ process to choose an MA. By dispelling this notion promoted in the Notice, we again use that as an example as to why new rulemaking on advertising is unnecessary, and the same goals can be achieved by referencing MSRB Rule G-17, and providing targeted guidance related to the application of Rule G-17 to professional services advertising used by MAs.

Thank you again for the opportunity to provide comments on this issue. Please feel free to contact me if I can provide you with any additional information or answer any questions about NAMA’s response to proposed rule G-40.

Sincerely,



Susan Gaffney
Executive Director

ⁱ See Registration of Municipal Advisors Frequently Asked Questions – Office of Municipal Securities, 5/19/14, page 3, <https://www.sec.gov/info/municipal/mun-advisors-faqs.pdf>

(a) *General Provisions.*

(i) *Definition of "Advertisement."* For purposes of this rule, the term "advertisement" means any material (other than listings of offerings) published or used in any electronic or other public media, or any written or electronic promotional literature distributed or made generally available to municipal advisory clients or the public, including any notice, circular, report, market letter, form letter, telemarketing script, seminar text, press release concerning the services of the municipal advisor, or reprint, or any excerpt of the foregoing or of a published article. The term does not apply to preliminary official statements, official statements, preliminary prospectuses, prospectuses, summary prospectuses or registration statements, responses to requests for proposals, responses to requests for qualifications or similar documents, client listsⁱ and case studies, -but does apply to abstracts or summaries of the foregoing and other such similar documents prepared by municipal advisors. Furthermore, the term does not apply to the items discussed in the clauses (a), (b), (d) and (e), of the "general information exclusions" listed in the MA Rule FAQ [citation].

(ii) *Definition of "Form Letter."* For purposes of this rule, the term "form letter" means any written letter or electronic mail message distributed to more than 25 persons within any period of 90 consecutive days.

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

~~(A) All advertisements by a municipal advisor, must be based on the principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular municipal security or type of municipal security, municipal financial product, industry, or service.~~

(B) No municipal advisor may make any deceptive, dishonest or unfairfalse, exaggerated, unwarranted, promissory or misleading statement or claim in any advertisement which includes exaggerated or misleading statements or claims.

(C) A municipal advisor may place information in a legend or footnote only in the event that such placement would not inhibit a municipal advisory client's understanding of the advertisement.

(D) A municipal advisor must ensure that statements are clear and not misleading within the context in which they are made, and that they provide balanced treatment of risks and potential

benefits. An advertisement must be consistent with the risks inherent to the municipal financial product or the issuance of the municipal security.

(E) A municipal advisor must consider the nature of the audience to which the advertisement will be directed and must provide details and explanations appropriate to the audience.

(F) An advertisement may not predict or project performance, imply that past performance will recur or make any exaggerated ~~or unwarranted or misleading~~ claim, opinion or forecast; provided, however, that this paragraph (a)(iv)(F) does not prohibit:

(1) A hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of a municipal financial product; and

(2) An investment analysis tool, or a written report produced by an investment analysis tool.

(G) A municipal advisor shall not, directly or indirectly, publish, circulate or distribute any advertisement which refers, directly or indirectly, to any testimonial¹ of any kind concerning the municipal advisor or concerning the advice, analysis, report or other service rendered by the municipal advisor.

(H) A municipal advisor may indicate registration with the Municipal Securities Rulemaking Board ~~and the Securities and Exchange Commission~~ in any advertisement that complies with the applicable standards of all other rules of the Board ~~and SEC~~ and that neither states nor implies that the ~~SEC or~~ Municipal Securities Rulemaking Board or any other corporate name or facility owned by the ~~SEC or~~ Municipal Securities Rulemaking Board, or any other regulatory organization endorses, indemnifies, or guarantees the municipal advisor's business practices, services, skills, or any specific municipal security or municipal financial product.

~~(v) *General Standard for Advertisements.* Subject to the further requirements of this rule relating to professional advertisements, no municipal advisor shall publish or disseminate, or cause to be published or disseminated, any advertisement relating to municipal securities or municipal financial products that such municipal advisor knows or has reason to know contains any untrue statement of material fact or is otherwise false or misleading.~~

(b) *Professional Advertisements.*

(i) *Definition of "Professional Advertisement."* The term "professional advertisement" means any advertisement concerning the facilities, services or skills with respect to the municipal advisory activities of the municipal advisor or of another municipal advisor.

(ii) *Content Standard for Professional Advertisements.* ~~No municipal advisor shall publish or disseminate, or cause to be published or disseminated, any professional advertisement that contains any untrue statement of material fact or is otherwise false or misleading.~~

(A) No municipal advisor may make any deceptive, dishonest or unfair statement or claim in any advertisement which includes exaggerated or misleading statements or claims.

(B) A municipal advisor may place information in a legend or footnote only in the event that such placement would not inhibit a municipal advisory client's understanding of the advertisement.

(C) 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.

(D) A municipal advisor may indicate registration with the Municipal Securities Rulemaking Board in any advertisement that complies with the applicable standards of all other rules of the Board and that neither states nor implies that the Municipal Securities Rulemaking Board or any other corporate name or facility owned by the Municipal Securities Rulemaking Board, or any other regulatory organization endorses, indemnifies, or guarantees the municipal advisor's business practices, services, skills, or any specific municipal security or municipal financial product.

(E) 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.

(c) *Approval by Principal.* Each advertisement subject to the requirements of this rule must be approved in writing by a municipal advisor principal prior to first use. Each municipal advisor shall make and keep current in a separate file records of all such advertisements.