



March 7, 2023

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

RE: Release No. 34-96840/SR-MSRB-2023-01: Notice of Filing of a 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

Dear Secretary Countryman:

The National Association of Municipal Advisors (“NAMA”) appreciates the opportunity to comment on Release No. 34-96840, Amendments to MSRB Rule G-40 on Advertising (“Amendments”) by Municipal Advisors (“MA”), and MSRB Rule G-8, on Books and Records.

NAMA supports allowing municipal advisors to use testimonials in advertisements under conditions outlined in the Amendments to Rule G-40 and Rule G-8. This Amendments level the playing field among MAs, broker-dealers, and investment advisers. Bringing regulatory consistency with the use of testimonials is critical to ensuring uniformity with rulemaking concepts between regulated entities where applicable. NAMA has long supported this approach to rulemaking and is pleased the MSRB has proposed this Amendment.

NAMA has several comments which we believe will clarify certain aspects of the Amendments, and our comment letter raises one significant policy matter regarding the definition of testimonials. We ask that the SEC not approve the Filing until these matters are resolved. Our proposed clarifications would be helpful especially for small MA firms who could rely on the Amendment language without having to refer to and seek legal interpretation about the Filing and its footnotes in order to understand this section of the Rule.

Definition of Testimonial

The Rule does not include a definition of testimonial; instead, the Filing refers in a footnote to how “the term has been understood.” This could be interpreted to allow testimonials from any entity familiar with the municipal advisory services performed by the MA and would include not only past and current clients, but others familiar with the MAs work such as attorneys, accountants, and underwriters. We believe the term should be defined within the Rule language itself. Further, the language in this section only discusses testimonials from current or past clients of the MA. 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.

Therefore, the language “as the term is understood” is more broadly interpreted by financial market participants and consequently, the Rule should be clear that any person “reasonably familiar” with the municipal advisory services provided is allowed to provide a testimonial in an MA’s advertising. For clarity and consistency the Rule should include language about how testimonials (that would be considered endorsements under the Investment Adviser Rule) from those who are not current or former clients can be utilized. Such action would bring the concept of using testimonials/endorsements from non-client parties on par with what is allowed for investment advisers, who correspondingly have a fiduciary duty to their client. As a hypothetical example of the concern here – if there is a news article with comments from someone on the deal team (but not the client/issuer), about the underwriter, municipal advisor and (again hypothetically) the investment adviser, all parties except the municipal advisor would be able to link to the story from their web site/social media accounts. Non-client testimonials/endorsements should be specifically allowed and the Rule should also discuss the requirements and parameters for testimonials/endorsements from other parties.

This change brings regulatory parity to MAs with investment advisers and broker-dealers. NAMA asks for this change to be made and to not restrict MAs in the use of testimonials/endorsements by clients and former clients.

If this section is not changed, and we emphatically believe it should be changed in the interest of fairness, and the intent of (a)(iv)(G)(a) is to limit testimonials to only current or former clients, then we suggest the following language be added and clarified to (a)(iv)(G)(a):

- (a) That the person providing the testimonial is must be a current municipal advisory client or a former municipal advisory client. Regarding the latter, the testimonial must denote the timeframe ~~denoted~~ by calendar year(s), that the person was a municipal advisory client.

Additionally, the term “former client” should be clarified to state whether this refers to the entity that was a former client and/or a person (e.g., finance director), who may have left the jurisdiction where the MA was hired, yet could provide a testimonial on their experience with the MA during a prior transaction.

Clarifications

- Below are concerns and suggested clarifications within (a)(iv)(G)(1) and (2).
 1. The language includes a statement “concerning the advice, analysis, report or other service rendered by the municipal advisor...” This is quite broad, and, given the breadth of the language, could imply that it covers services that do not constitute municipal advisory activities. Similar language is not included in advertising/testimonial rules for broker-dealers (MSRB Rule G-21(G)(1) only refers to “a technical aspect of investing” and does not refer to any other services of a broker-dealer) or investment advisers (Investment Adviser Rule 206(4)-1 does not have a parallel provision). The use of this wording is also problematic when language further in (1) states that “the person making the testimonial must have the knowledge and experience to form a valid opinion.” It is unclear why this broad language is included for MAs and also how a person giving a testimonial would be able to know or have expertise on undefined “other services rendered” offered by a MA. The language should focus on MA services experienced by the person providing the testimonial, and should be modified to read “concerning its municipal advisory services”.

2. The language underlined here “the person making the testimonial must have the knowledge and experience to form a valid opinion” is too absolute and does not exist in the investment adviser rulemaking. Particularly since the breadth of activity covered by this provision (even after making the change in language we suggest above, as compared to the much narrower scope of “technical aspect of investing” in Rule G-21 for broker-dealers), we suggest that this language should instead provide that the municipal advisor must “*reasonably believe* that the person making the testimonial *has* the knowledge and expertise to form a valid opinion” in order for this requirement to be workable and implementable. Additionally, the MSRB should consider amending the comparable provision of Rule G-21 (and FINRA amend its Rule 2210 upon which this language was based) to also apply this more workable language to broker-dealer testimonials.
 3. In this same language, it is not clear how an MA would be able to prove this point upon an SEC or FINRA exam, and that should be discussed in guidance.
- We have comments related to paid testimonials in Sections (a)(iv)(G)(2)(d) and (a)(iv)(G)(3), and believe these clarifications can help MAs understand this section of the Rule. It 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. These comments are sent with the understanding that the Amendments provide MAs regulatory allowance for paid testimonials in line with what is allowable for investment advisers and broker-dealers:
 - We suggest that (a)(iv)(G)(2)(d) could be revised to be more clear and include a key point from (a)(iv)(G)(3), and suggest the following:

“If more than \$100 in total value in cash or non-cash compensation is paid for the testimonial, the municipal advisor must (a) include the fact it is a paid testimonial, ~~and the paid testimonial must include~~ (b) include in a brief statement ~~by the municipal advisor~~ any material conflicts of interest on the part of the person providing the testimonial resulting from the municipal advisor’s relationship with such person.
 - We suggest that (a)(iv)(G)(3) be delineated to address the requirements for municipal advisors and solicitor municipal advisors separately and provide greater clarity. We suggest:

(3) A municipal advisor may not provide any compensation for a testimonial to a person, directly or indirectly of more than \$1000 in total value or cash or non-cash compensation during the proceeding 12 months.

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The \$1000 threshold can be exceeded only if ~~Unless the testimonial is from~~ the testimonial is from a solicitor municipal advisor or an investment adviser ...
 - NAMA also suggests that the disclosure of a paid testimonial directly accompany the testimonial, in the same size font and location, and not placed in a footnote.
 - We agree with the narrative in the Filing that it is unlikely that paid testimonials can be or would be utilized by MAs and their clients. NAMA also questions whether paid testimonials should be allowed, for MA and investment advisers in particular who have a fiduciary duty

standard, as well as for broker-dealers. We further note that an MA that chooses to use paid testimonials would need to carefully consider whether such use, under the particular facts and circumstances, would be consistent with Rules G-17, G-20, and G-42. It is likely that NAMA will provide guidance to its members to not utilize paid testimonials.

- In the draft language, the MSRB deleted the narrative in (a)(iv)(G) and instead inserts a series of subclauses without contextual introductory text. We suggest that the Rule include affirmative language that testimonials may be used if certain requirements are met. This would allow MAs to clearly understand the permissible use of testimonials in advertisements/Rule G-40 and would align the subsection (G) with all other subsections in the Rule that include narrative language. A suggestion for this could be taking the deleted language and turning it into the affirmative, for example:

(G) A municipal advisor ~~may~~ shall not, directly or indirectly, publish, circulate, or distribute any advertisements which ~~refers, directly or indirectly, to any~~ include a testimonial of any kind concerning the municipal advisor or ~~its concerning the advice, analysis, report or other service rendered by the municipal advisory services,~~ as long as the following requirements are met.

MSRB G-40 Compliance Resources

The Amendments allowing testimonials would also intersect with other sections of Rule G-40. This is especially true for Social Media items, particularly those that are unsolicited (e.g., linking to an article where a comment about an MA and MA services may be embedded in the article, various ways to “like” and repost postings from others where comments about the MA or MA services are discussed, etc.). The MSRB should revise its guidance, and allow for public comment and/or discussion related to ancillary resources where the allowance of testimonials will impact other sections of Rule G-40.

NAMA appreciates the opportunity to comment on this important issue, and supports the concept of allowing MAs to use testimonials. The SEC should not approve this Filing until a definition of testimonial is included in the Rule that does not restrict those who may provide testimonials to clients and former clients. Additionally, with some clarifying changes to the Amendments, the Rule and subsequent guidance can be helpful to the MA community and facilitate compliance with the Rule, especially among small MA firms.

Sincerely,



Susan Gaffney
Executive Director