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[Rule G-21](#), [Rule G-40](#)

## Request for Comment on Draft Frequently Asked Questions Regarding Use of Social Media under MSRB Advertising Rules

### Overview

The Municipal Securities Rulemaking Board (MSRB) requests comment on a draft set of frequently asked questions (FAQs) regarding the use of social media by brokers, dealers or municipal securities dealers (collectively, “dealers”), as part of their municipal securities activities, or municipal advisors, as part of their municipal advisory activities. In particular, these draft FAQs illustrate the application to social media of MSRB G-21, on advertising by dealers, and of MSRB Rule G-40, on advertising by municipal advisors (Rule G-21, together with Rule G-40, the “advertising rules”).

The MSRB invites market participants and the public to submit comments in response to this request, along with any other information that they believe would be useful to the MSRB in developing these FAQs. Information may be submitted through September 14, 2018 in electronic or paper form. [Information provided in response to this request may be submitted electronically by clicking here.](#) Information submitted in paper form should be sent to Ronald W. Smith, Corporate Secretary, MSRB, 1300 I Street, NW, Washington, DC 20005. Generally, the MSRB will make available for public inspection on the MSRB’s website all information submitted.<sup>1</sup>

Questions about this request for comment should be directed to Pamela K. Ellis, Associate General Counsel, at 202-838-1500.

<sup>1</sup> Comments are generally posted on the MSRB’s website without change. For example, personal identifying information such as name, address, telephone number or email address will not be edited from submissions. Therefore, commenters only should submit information that they wish to make publicly available.



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## Background

Recent amendments to Rule G-21 and new Rule G-40 become effective on February 7, 2019. 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 dealer or municipal advisor (dealers, together with municipal advisor, a “regulated entity”) under those rules, and the MSRB committed to providing such guidance.<sup>2</sup> In addition, since the Securities and Exchange Commission (SEC) approved the amendments to Rule G-21 and new Rule G-40,<sup>3</sup> the MSRB has continued to engage with dealers, municipal advisors, and other industry stakeholders about the MSRB’s advertising rules, including the application of such rules to a regulated entity’s use of social media.<sup>4</sup> The MSRB views the guidance that it committed to provide as part of the recent rulemaking process as the initial set of guidance; the MSRB anticipates that it will provide additional guidance, as appropriate, under those rules and related rules (such as rules concerning supervision), and welcomes suggestions about the topics that the additional guidance may address.

In developing the draft 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 SEC and the Financial Industry Regulatory Authority (FINRA).<sup>5</sup>

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<sup>2</sup> See Letter from Pamela K. Ellis, Associate General Counsel, Municipal Securities Rulemaking Board, dated April 30, 2018 available at <http://msrb.org/~media/Files/SEC-Filings/2018/MSRB-2018-01%20MSRB%20Letter%20to%20SEC.ashx?>.

<sup>3</sup> Exchange Act Release No. 83177 (May 7, 2018), 83 FR 21794 (May 10, 2018), File No. SR-MSRB-2018-01.

<sup>4</sup> MSRB Establishes Advertising Rule for Municipal Advisors and Enhances Dealer Advertising Rule (May 7, 2018) available at <http://msrb.org/News-and-Events/Press-Releases/2018/MSRB-Establishes-Advertising-Rule-for-Municipal-Advisors-and-Enhances-Dealer-Advertising-Rule.aspx>.

<sup>5</sup> See, e.g., 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).

## Request for Comment

The MSRB believes that public comment will provide useful insight to help ensure that the FAQs provide practical compliance assistance. Therefore, the MSRB is seeking comment regarding the content and appropriateness of the proposed FAQs, as well as the usefulness of the draft responses. In addition to any other comment in this regard, the MSRB specifically seeks comment on the following questions:

- Do the proposed responses to the FAQs add to the understanding of the MSRB's advertising rules? How could they be improved to provide greater understanding?
- Are there additional questions that need to be addressed relating to a regulated entity's use of social media under Rules G-21 and G-40?
- Would it be more useful if the MSRB were to provide one set of social media guidance specifically tailored for dealers under Rule G-21 and another set of social media guidance specifically tailored for municipal advisors under Rule G-40?
- Are there distinctions in how dealers and/or municipal advisors use social media that may warrant deviating from the social media guidance that has been provided by other financial regulators?
- Should the MSRB consider amending MSRB rules to prescriptively address social media usage, rather than providing guidance in the form of frequently asked questions? In particular, should the MSRB amend Rules G-8, G-9, G-27 and/or G-44 to address regulated entities' use of social media?
- Should the MSRB consider providing guidance or amending its rules to address the supervisory issues pertaining to social media?

August 14, 2018

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## Text of Draft FAQs

### **Draft 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<sup>1</sup> 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, 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 brokers, dealers or municipal securities dealers (collectively, "dealers") and municipal advisors (collectively, "regulated entities") with their compliance with the MSRB's advertising rules.<sup>2</sup>

In developing these draft 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 SEC and the Financial Industry Regulatory Authority (FINRA).<sup>3</sup>

The FAQs discuss compliance with MSRB rules. The MSRB reminds regulated entities that they also may be subject to the rules of other financial regulators, including state regulators.

#### **Background**

The amendments to Rule G-21 and new Rule G-40 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.

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. These FAQs provide the requested guidance.

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<sup>1</sup> As used in this guidance, social media refers to electronic communications through which dealers and municipal advisors create and share information online. Further, social networking refers to the creation of personal and business relationships online.

<sup>2</sup> The obligations under Rules G-21 and G-40 outlined in these FAQs also apply, consistent with MSRB Rule D-11, "associated person," to the associated persons of the dealer or municipal advisor, as applicable.

<sup>3</sup> See, e.g., 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).

## Use of Social Media

### 1. Is social media use by a regulated entity or an associated person 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, including its associated persons, 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.<sup>4</sup> 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.

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<sup>4</sup> For the purposes of this guidance, a "post" is disseminated among multiple parties; by contrast, a "chat" is typically disseminated between two parties.

**2. Does a “post” by a regulated entity or an associated person that contains an advertisement about the products or services of the dealer, or that relates to the services of the municipal advisor or the engagement of a municipal advisory client by the municipal advisor, have to be approved by a principal under Rules G-21 and G-40, as applicable, before use?**

Yes. A “post” (which, for purposes of this document, includes a “tweet”) might contain an image of an advertisement 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. If the “post” includes content that is an advertisement<sup>5</sup> as defined in Rule G-21(a)(i) and Rule G-40(a)(i), as applicable, a principal must approve that advertisement before its first use, regardless of whether the “post” is on a business or personal social networking site. Further, a “post” may be an advertisement, as defined in Rule G-21(a)(i) and Rule G-40(a)(i), even if the “post” does not contain an image of an advertisement. See questions 3 and 10.

**3. 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 18<sup>th</sup> 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

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<sup>5</sup> For example, an advertisement in the context of a “post” may include sponsored or paid promotional content.

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 paragraphs.<sup>6</sup>

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

The "post" in the above example 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 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 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 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" in the above example 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.

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

Depending on the facts and circumstances, the MSRB's advertising rules may apply to hyperlinked content on an independent third-party's website from a regulated entity's website.

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<sup>6</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 FINRA Regulatory Notice 17-18 (Apr. 2017) at 4.

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

- involved itself in the preparation of content on that third-party website— this is known as **entanglement**;<sup>7</sup> or
- implicitly or explicitly approved or endorsed the content on the third-party website —this is known as **adoption**.<sup>8</sup>

Accordingly, if a regulated entity either becomes entangled with or adopts the hyperlinked content, the regulated entity becomes subject to the 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 link 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.

## 5. What factors may a regulated entity consider to determine whether it has adopted the hyperlinked content on an independent third-party’s website?

To help determine whether a regulated entity has adopted hyperlinked content on an independent third-party’s website, the regulated entity may want to consider the following non-exclusive factors:<sup>9</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 hyperlink. For example, does the regulated entity state that it approves or endorses the prominently-featured hyperlinked content, or does the regulated entity simply state that the hyperlinked content contains additional information, such as a news article, that may be of interest to the reader?<sup>10</sup>

<sup>7</sup> See Exchange Act Release No. 58288 (Aug. 1, 2008) at 32 (the “2008 release”); Exchange Act Release No. 42728 (Apr. 28, 2000), 65 F.R. 25843 (May 4, 2000) at 25848 (the “2000 release”).

<sup>8</sup> *Id.*

<sup>9</sup> See 2008 release at 33; 2000 release at 25849.

<sup>10</sup> See 2008 release at 34; 2000 release at 25849.

- **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 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.”

Assuming that the hyperlinked content on a third-party website from a regulated entity’s website is an advertisement under Rules G-21 and G-40, a regulated entity must consider all applicable provisions of the MSRB’s advertising rules, including whether the hyperlinked content (i) contains any untrue statement of material fact or is otherwise false or misleading and (ii) would be a testimonial. The MSRB’s advertising rules prohibit a regulated entity from publishing or disseminating advertisements that the regulated entity knows or has reason to know contains any untrue statement of material fact or is otherwise false or misleading.<sup>13</sup> Moreover, for dealers, an advertisement that contains a testimonial must comply with the disclosure requirements set forth in Rule G-21(a)(iv)(G). However, for municipal advisors, an advertisement that contains a testimonial generally would be prohibited under Rule G-40(a)(iv)(G).<sup>14</sup>

## 6. **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

<sup>11</sup> See 2008 release at 36; 2000 release at 25849.

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

<sup>13</sup> See Rule G-21(a)(iv) and Rule G-40(a)(v); 2008 release at 36; FINRA Regulatory Notice 11-39 (Aug. 2011) at 3.

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

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>

**7. 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 4;
- The regulated entity must have no influence or control over the content in the secondary links – See question 5;
- 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>

### Third-Party Posts

**8. 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.

<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.

Nevertheless, 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 4.

- **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>17</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, solicits or encourages 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>18</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 5 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.

Even though Rules G-21 and G-40 generally would not apply, the MSRB’s recordkeeping and record retention rules would apply to a third-party post on a regulated entity’s or its associated person’s social networking page if that post constituted a complaint by a customer. Rule G-8 requires that a regulated entity maintain records of all written customer or municipal advisory complaints that are received by a dealer or municipal advisor and defines “written” as including electronic correspondence, such as posts on social networking sites.<sup>19</sup> Rule G-9 requires that a regulated entity retain records of those complaints for six years (Rule G-8, together with Rule G-9, the “MSRB’s recordkeeping and record retention rules”). *See* question 11.

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

As with question 8 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 to remain on its social media page without taking “down” such content.

<sup>17</sup> *See* 2008 release at 32; 2000 release at 25848-49; FINRA Regulatory Notice 10-06 (Jan. 2010) at 7-8.

<sup>18</sup> *Id.*

<sup>19</sup> *See* Rule G-8(a)(xii); Rule G-32 Interpretation – Notice Regarding Electronic Delivery and Receipt of Information by Brokers, Dealers and Municipal Securities Dealers (Nov. 20, 1998).

However, if the municipal advisor paid for, solicited, or encouraged 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, soliciting, or encouraging 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 Rule G-40(a)(iv)(G). See question 8. As such, the advertisement's use by the municipal advisor would be prohibited.<sup>20</sup> Similar considerations would prohibit the municipal advisor from adopting a municipal advisory client's post, such as by "liking" it.

## Recordkeeping

### 10. **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 applicable recordkeeping and record retention requirements would apply, regardless of whether the record is for an advertisement under the MSRB's advertising rules.

In this case, Rule G-9 requires that a regulated entity retain records of such "posts," "chats," text messages, and messages sent through messaging applications. Specifically, Rule G-9(b)(viii)(C) requires that a dealer retain "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." 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> See IM Guidance Update, No. 2014-04, U.S. Securities and Exchange Commission, Division of Investment Management (Mar. 2014) at 3.

<sup>21</sup> Rule G-8(h)(i) requires municipal advisors to make and keep current all books and records described in Rule 15Ba1-8(a)(1)-(8) under the Exchange Act. Particularly, Rule 15Ba1-8(a)(1)-(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."

**11. Do the MSRB's recordkeeping and record retention rules apply to posts by third-parties on an associated person's personal social networking page?**

In general, assuming that the third-party posts do not concern municipal securities or municipal advisory activities, Rules G-8 and G-9 would not apply to such posts by third parties on an associated person's personal social networking page. However, even though posted to a personal social networking page, if those third-party posts relate to the associated person's municipal securities or municipal advisory activities, then the MSRB's recordkeeping and record retention rules would apply.

## Supervision<sup>22</sup>

**12. 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, as social media is becoming a more common communications tool, a regulated entity should consider establishing policies and procedures to address the use by the regulated entity and its associated persons of social media.<sup>23</sup> As a baseline, those policies and procedures would 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;

<sup>22</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 other may not apply to same manner for every firm and other may not apply at all.

<sup>23</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.

- Rule G-8; and
- Rule G-9.

See question 1.

**13. 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 "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</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</sup>

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

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

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</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 training requested by the associated person 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 a social media posts relating to the regulated entity's municipal securities business or municipal advisory activities would be subject the MSRB's recordkeeping and record retention requirements. A regulated entity should consider its recordkeeping and record retention obligations as it designs its social media compliance policies and procedures.<sup>27</sup>
- **Security.** Among the issues of concern to regulated entities in general, is the security of customer, municipal advisory client, and regulated entity proprietary information. As a regulated entity develops its social media policies and procedures, a regulated entity should consider how issues regarding security may be heightened by the use of social media. For example, a regulated entity may want to consider establishing firewalls between sensitive customer, municipal advisory client, and the regulated entity's proprietary information, and any social media site to the extent that the regulated entity permits access to those sites by its associated persons.
- **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 14 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

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<sup>26</sup> See FINRA Regulatory Notice 07-59 (Dec. 2007) at 7.

<sup>27</sup> *Id.* at 6-7.

social media should address not only the MSRB's advertising rules, but all applicable MSRB rules and other applicable federal securities laws and regulations.

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

As noted in question 12, 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 the social media content consistent with the testimonial restrictions 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 the MSRB's record retention standards. As the regulated entity develops its criteria for approving the use of certain sites, the regulated entity also should address whether it has controls in place to revoke 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) available at <http://msrb.org/~media/Files/SEC-Filings/2018/MSRB-2018-01-REVISED.ashx>

Letter from Pamela K. Ellis, Associate General Counsel, Municipal Securities Rulemaking Board, dated April 30, 2018 available at <http://msrb.org/~media/Files/SEC-Filings/2018/MSRB-2018-01%20MSRB%20Letter%20to%20SEC.ashx?>

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 available at <http://msrb.org/~media/Files/SEC-Filings/2018/MSRB-2018-01-Approval-Order.ashx?>

MSRB Notice 2018-08 SEC Approves Advertising Rule Changes for Dealers and Municipal Advisors available at <http://msrb.org/~media/Files/Regulatory-Notices/Announcements/2018-08.ashx?>