



July 27, 2018

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

RE: MSRB Notice 2018-14

Dear Mr. Smith:

The National Association of Municipal Advisors (“NAMA”) welcomes the opportunity to comment on MSRB Notice 2018-14: FAQs Regarding Rule G-40 and the Use of Municipal Advisory Client Lists and Testimonials (“the Notice”).

We agree with the MSRB that the goal of Rule G-40 should be to ensure that municipal advisors (“MAs”) do not make untrue statements of material fact or statements that are otherwise false or misleading in their advertisements. While we believe that this issue is already more than adequately addressed within MSRB Rule G-17, we know that municipal advisors will have to adhere to new Rule G-40 beginning next February. Although many MAs had specific or general policies governing advertising before this rule was proposed, Rule G-40 has some unique general prohibitions and prescriptive components. Therefore, having effective and clear FAQs is essential to compliance with the Rule G-40.

A key issue for many MA firms will be whether client lists and case studies constitute “testimonials” that are not permitted to be included in advertisements. The Notice does a good job of discussing compliance considerations where client lists include testimonials and making clear that, generally speaking, client lists and case studies are not in and of themselves testimonials. However, the Notice does not clearly address scenarios where more straightforward client lists and case studies are used in advertisements, including on websites. For the FAQs to be well utilized, providing scenarios and background information in a more clear manner, with headings for various sections, should be undertaken. Additionally, providing additional information and scenarios of how Rule G-40 applies to content on websites is a crucial – if not the crucial - issue for MA firms, as this is the main process through which “advertising” content will be delivered.

Our comments about the Notice’s FAQs are included in a redline of that portion of the Notice in Attachment A. The comments reflect three components – additional examples addressing more common fact patterns, reorganization of the document/FAQs to include relevant guidance in the introduction to the examples, and otherwise editing/streamlining the document/FAQs for clarity. The additional examples reflect the questions we have heard from our members and that will be on their minds as they develop Rule G-40 compliance policies and procedures. We also suggested adding (largely using language in your original Notice) a paragraph at the end of each example to address compliance considerations related to client lists and case studies. That is an imperative part of this rule’s implementation and it is useful to have discussions of compliance considerations in each example because users of the FAQs may not read each example when actively using the FAQs in the future.

Request for Comment

Do the proposed responses to the FAQs add to the understanding of the rule? How could they be improved to provide greater understanding?

The proposed responses attempt to provide clarity and understanding of how municipal advisors must comply with MSRB Rule G-40. However, there are areas that should provide more straightforward discussion (see redlined document). Also, specific guidance about supervisory procedures should be within the document and not located in a footnote. The Notice should also include language that clarifies that the responsibility to comply with Rule G-40 is for the principal to approve the substantive material for advertisements, and not the distribution thereof. This would apply in cases where the exact same advertisement may be published multiple times in different formats.

Are there additional questions that the MSRB should respond to relating to a municipal advisor's use of a municipal advisory client list or case study under G-40?

The questions asked could be more direct and applicable to MA firm practices. Our redlined comments include ways to better label sections and information. For instance, in the Notice there is no discussion on the simple use of client lists and case studies on a MA firm's website. We have included suggested language and new examples to provide this information in the FAQ,

Are the examples presented practical and helpful in understanding the application of the rule to municipal advisory clients lists and case studies? Do the examples realistically reflect the use of a municipal advisory client list or case study by a municipal advisor? If not, how could the examples be improved?

The original examples provided did not address the most likely and straight forward questions and concerns from municipal advisors about using case studies and client lists on websites and in other materials. We have drafted some new examples based on the examples provided by the MSRB and encourage the MSRB to include these or similar examples to provide MAs with answers to most commonly asked questions and concerns.

NAMA would appreciate the opportunity to discuss our comments and ways to ensure municipal advisor compliance with MSRB Rule G-40 with MSRB staff at their earliest convenience.

Sincerely,



Susan Gaffney
Executive Director

ATTACHMENT A

Set forth below are our comments on the text of the MSRB's proposed FAQs on Rule G-40 and on the illustrative examples.

IS A MUNICIPAL ADVISORY CLIENT LIST OR A CASE STUDY AN ADVERTISEMENT THAT IS SUBJECT TO RULE G-40?

Some municipal advisors use municipal advisory client lists to highlight their past experience or current engagements. Similarly, some municipal advisors use case studies¹ to illustrate how the municipal advisor handled, or is currently handling, a particular engagement for a municipal advisory client.² In this context both municipal advisory client lists and case studies concern the prior engagement or engagements of the municipal advisor for municipal advisory services.

Depending on the facts and circumstances, a municipal advisory client list or a case study may be an advertisement or may be part of an advertisement under Rule G-40(a). The key consideration is whether a client list or case study is included as part of material that otherwise would constitute an advertisement under Rule G-40. In part, Rule G-40(a)(i) defines an advertisement as any material:

published or used in any electronic or other public media, or any written or electronic promotional literature distributed or generally made available to municipal entities, obligated persons, municipal advisory clients or the public, concerning the services of a municipal advisor or the engagement of a municipal advisory client, including any notice, circular, report, market letter, form letter, telemarketing script, seminar text, press release concerning the services of the municipal advisor or the engagement of a municipal advisory client (as defined in paragraph (a)(iii)(B)), or reprint, or any excerpt of the foregoing or of a published article.

Circumstances Where a Client List or Case Study May Not be an Advertisement

To the extent that a municipal advisory client list or a case study is not published or used in any electronic or other public media, or written or electronic promotional literature generally made available to municipal entities, obligated persons, municipal advisory clients or the public, a municipal advisor's use of a municipal advisory client list or a case study would not be an advertisement. This includes the use of case studies or client lists in responses to RFPs or RFQs (as defined below) that do not constitute form letters.

In some instances, it is necessary to determine whether a communication (which may include a municipal advisory client list or case study), which does not otherwise meet the definition of an "advertisement," is a "form letter." Under Rule G-40(a)(ii), a written letter or electronic mail message would only be a form letter potentially constituting an advertisement if the written letter or electronic mail message is distributed to more than 25 persons within any period of 90 consecutive days.³ **To the**

¹ See, e.g., Letter from Catherine Humphry-Bennett, Municipal Advisory Compliance Officer, Public Financial Management, Inc and PFM Financial Advisors LLC, dated February 28, 2018 (stating that a municipal advisor may use a case study as an example of the types of services performed for existing or previous clients) available at <https://www.sec.gov/comments/sr-msrb-2018-01/msrb201801-3177878-161986.pdf>.

² These FAQs do not address the use of hypothetical illustrations.

³ However, an email that includes only required regulatory disclosures and does not contain any material that is promotional in nature, that is sent to more than 25 municipal advisory clients through blind carbon copies would not be an advertisement.

extent that a municipal advisory client list or a case study is a written letter or electronic mail message distributed to fewer than 25 persons within any period of 90 consecutive days and not otherwise subject to Rule G- 40(a)(i), the municipal advisory client list or case study would not be an advertisement.⁴ **[BOLD ADDED FOR EMPHASIS]**

As noted above, one example of a municipal advisory client list and/or a case study, in general, not constituting an advertisement is where a municipal advisory client list and/or a case study is included in a municipal advisor's typical response to a request for proposal (RFP), a request for qualification (RFQ) or a similar request. **[BOLD ADDED FOR EMPHASIS]** A response to an RFP, RFQ or similar request is normally distributed to one potential municipal advisory client at a time such that the municipal advisory client list and/or case study therefore would not be material that is published, made generally available to municipal entities, obligated persons, municipal advisory clients or the public, and would not otherwise meet the definition of a form letter. As provided in Supplementary Material .01 to Rule G-40, for purposes of Rule G-40(a)(ii), the number of "persons" for a response to an RFP, RFQ or similar request is determined at the entity level. Therefore, for example, if a municipal advisor were to send a response to an RFP to a municipal entity, that municipal entity would count as one "person" no matter how many employees of the municipal entity may review the response to the RFP.⁵ (see examples 2 and 2A)

Circumstances Where a Client List or Case Study May be an Advertisement

Depending on the facts and circumstances, when a client list is disseminated to more than 25 persons within a 90 day period, the client list would generally be considered advertising. This may be due to publishing or using other means to disseminate information, including posting on websites, marketing brochures and materials used at conferences, and inclusion in form letters. (see examples 1, 1A and 1B). The same is true for case studies (see examples 3, 3A and 3B).

It is important to remember that a municipal advisor needs to review both the general definition of an advertisement (above) and that of a form letter to determine how it applies. Under Rule G-40(a)(ii), a written letter or electronic mail message would only be a form letter potentially constituting an advertisement if the written letter or electronic mail message is distributed to more than 25 persons within any period of 90 consecutive days.⁶

⁴ See Letter from Pamela K. Ellis, Associate General Counsel, Municipal Securities Rulemaking Board, dated April 30, 2018, at 18-19, available at http://www.msrb.org/~media/Files/SEC-Filings/2018/MSRB-2018-01_MSRB_Letter_to_SEC.ashx (Response Letter).

⁵ Regardless of the manner of distribution of the communication, it does not constitute an advertisement for purposes of Rule G-40 unless it concerns the municipal advisory services of the municipal advisor or the engagement of a municipal advisory client.

⁵ See, e.g., Response Letter at 18. In addition, the unilateral publication of a response to an RFP or RFQ or similar request by an issuer official would not make that response an advertisement. *Id.*

⁶ However, an email that includes only required regulatory disclosures and does not contain any material that is promotional in nature, that is sent to more than 25 municipal advisory clients through blind carbon copies would not be an advertisement. See Letter from Pamela K. Ellis, Associate General Counsel, Municipal Securities Rulemaking Board, dated April 30, 2018, at 18-19, available at http://www.msrb.org/~media/Files/SEC-Filings/2018/MSRB-2018-01_MSRB_Letter_to_SEC.ashx (Response Letter).

While it may be possible for a municipal advisor to generalize about the facts and circumstances concerning the municipal advisor's past or existing engagement in a case study, a municipal advisor's use of a case study in an advertisement remains subject to the standards of Rule G-40(a)(iv). Among other things, the rule requires that all advertisements by a municipal advisor be based on the principles of fair dealing and good faith, and that the statements made in an advertisement be clear and not misleading within the context in which they are made. A municipal advisor must ensure that its use of a case study in advertising is consistent with the municipal advisor's obligations under Rule G-40(a)(iv). (original page 11)

In addition, as a municipal advisor prepares its case study, the municipal advisor should be mindful of its obligations under other MSRB rules. For example, consistent with its obligations under Rules G-17 and G-42, a municipal advisor must present any case study in a manner that complies with the MSRB's fair dealing and fair practice principles. (see example 6) (original page 11)

Circumstances Where a Client List or Case Study is an Advertisement and Violates MSRB Rule G-40.

Testimonials. Rule G-40(a)(iv)(G) prohibits the use of testimonials in advertisements. A client list or case study, generally speaking, does not constitute a "testimonial" absent additional testimonial language. However, if a municipal advisor includes testimonial languages into a case study or client list, or states or implies that the case study or client list is an endorsement of the municipal advisor, that would be in violation of MSRB Rule G-40. Rule G-40(a)(iv)(G) prohibits a municipal advisor from directly or indirectly publishing, circulating, or distributing 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. The An endorsement by a the municipal advisory client would be a prohibited testimonial under Rule G-40(a)(iv)(G). (see examples 1 and 3)

Misleading Information. While the use of client lists and case studies, depending on facts and circumstances, would be considered advertising and in most cases, would be compliant with Rule G-40. A municipal advisory firm must ensure that its representations within a client list and case study are accurate. The municipal advisor must correctly reflect the client list (e.g., partial or within a timeframe) and if needed add disclaimers as to exactly what the list represents (e.g., clients served over the past five years), and that the statements about the MA's work discussed in a case study are truthful. [bold added for emphasis]

A municipal advisor may develop a partial municipal advisory client list as long as that partial municipal advisory client list (i) does not contain any untrue statement of material fact or is otherwise false or misleading and (ii) complies with all other applicable provisions of Rule G-40, including Rule G-40(a)(iv)'s content standards. Among other things, Rule G-40(a)(iv) requires that all advertisements by a municipal advisor be based on the principles of fair dealing and good faith, be fair and balanced, and that the statements made in an advertisement be clear and not misleading within the context in which they are made. A municipal advisor must consider these obligations under Rule G-40(a)(iv) as it prepares its municipal advisory client list. While Rule G-40(a)(iv) does not, *per se*, prohibit the inclusion of partial municipal advisory client lists in an advertisement, the municipal advisor must consider whether a partial municipal advisory client list would create a false or misleading impression under the circumstances and in the context in which the partial municipal advisory list is provided.

In addition to the specific content standards of Rule G-40 for covered advertisements, in considering its use of client lists generally, the municipal advisor should be mindful of its obligations under other

MSRB rules. For example, consistent with its obligations under MSRB Rule G-17, on conduct of municipal securities and municipal advisory activities, and Rule G-42, as applicable to non-solicitor municipal advisors, a municipal advisor must present any municipal advisory client list in a manner that complies with the MSRB's fair dealing and fair practice principles.⁷

Other MSRB Rules that Apply to Case Studies and Client Lists Included in both Advertising Material and Non-Advertising Material

Rule G-42. In addition, The MSRB reminds non-solicitor municipal advisors that, whether or not a communication, such as a response to an RFP or RFQ, is an advertisement for purposes of Rule G-40, it would nevertheless be subject to MSRB Rule G-42(e)(i)(C), on duties of non-solicitor municipal advisors, which prohibits a municipal advisor from making any representation or submitting any information (including in a response to an RFP or RFQ) that the municipal advisor knows or should know is materially false or materially misleading.⁸ Therefore, the use of a municipal advisory client list in a response to an RFP or RFQ in a manner that is false or misleading would be a violation of MSRB rules even though the response is not, itself, an advertisement.

Rule G-17. Consistent with its obligations under MSRB Rule G-17, on conduct of municipal securities and municipal advisory activities, a municipal advisor must present any municipal advisory client list or case study in a manner that complies with the MSRB's fair dealing principles. (see examples 4 and 5)

Rules G-44, G-8, and G-9. Supervisory and Recordkeeping Procedures. The MSRB reminds municipal advisors that once material or promotional literature meets the definition of an advertisement, that material or promotional literature becomes subject to other provisions of Rule G-40, including Rule G-40(a)(iv)'s content standards and Rule G-40(c)'s requirement for a principal to approve the advertisement before its first use. While the same client list or case study may be used in a variety of formats, it will need to be approved once prior to its first use, and not approved each time the same document is utilized by the MA firm. In addition, the municipal advisor's advertising activities are subject to other MSRB rules, including MSRB Rule G-8, on books and records to be made by brokers, dealers, municipal securities dealers and municipal advisors, and Rule G-44, on supervisory and compliance obligations by municipal advisors.

⁷ Also, if a municipal advisor has agreed with the municipal advisory client that the municipal advisor will not use the client's name in advertisements, the breach of that agreement could be inconsistent with Rule G-17. The same general principle would apply to the use of a municipal advisory client's name in a case study.

⁸ Rule G-42(e)(i)(C) that provides a municipal advisor is prohibited from:

making any representation or the submission of any information that the municipal advisor knows or should know is either materially false or materially misleading due to the omission of a material fact about the capacity, resources or knowledge of the municipal advisor, in response to requests for proposals or qualifications or in oral presentations to a client or prospective client, for the purpose of obtaining or retaining an engagement to perform municipal advisory activities.

The MSRB has developed the examples below to illustrate the application of Rule G-40 to a municipal advisor's use of a municipal advisory client list and a case study.

As used in these examples, the hypothetical municipal advisor is Municipal Advisor ABC, a large regional municipal advisor with 25 years of experience that engages in municipal advisory activities with multiple municipal advisory clients each year, and the hypothetical municipal entity client is Issuer XYZ. The hypothetical facts are limited to the example in which they are discussed.

CLIENT LISTS

- **NEW Example 1:** Municipal Advisor ABC develops a municipal advisory client list that sets forth Municipal Advisor ABC's municipal advisory clients for the past two years. Municipal Advisor ABC posts the municipal advisory client list on its website, which is accessible to the general public on an unrestricted basis.

Advertisement: The municipal advisory client list would be an advertisement under Rule G 40(a)(i), since it is published material used in electronic media and it is electronic promotional literature generally made available to municipal entities, obligated persons, municipal advisory clients or the public concerning the services of the municipal advisor or the engagement of a municipal advisory client.⁹

Testimonial: The municipal advisory client list is not a testimonial.

Compliance considerations under Rule G-40: Under the facts and circumstances discussed in this Example 1, Municipal Advisor ABC's posting on its website of the municipal advisory client list is considered advertising under Rule G-40. The client list needs to have approval from a firm principal prior to posting on the website. The municipal advisory firm needs to ensure that the client list is accurately portrayed and does not include testimonials. The firm should seek principal approval when changes are made to the client list posted on its website. A municipal advisory firm must ensure that its representations within a client list and case study are accurate. The municipal advisor must correctly reflect the client list (e.g., partial or within a timeframe) and if needed add disclaimers as to exactly what the list represents (e.g., clients served over the past two years), and that the statements about the MA's work discussed in a case study are truthful.

Compliance considerations under other MSRB Rules. MA firms should review other MSRB rules, as indicated under "Other MSRB Rules that Apply to Case Studies and

⁹ The MSRB reminds municipal advisors that once material or promotional literature meets the definition of an advertisement, that material or promotional literature becomes subject to other provisions of Rule G-40, including Rule G-40(a)(iv)'s content standards and Rule G-40(e)'s requirement for a principal to approve the advertisement before its first use. In addition, the municipal advisor's advertising activities are subject to other MSRB rules, including MSRB Rule G-8, on books and records to be made by brokers, dealers, municipal securities dealers and municipal advisors, and Rule G-44, on supervisory and compliance obligations by municipal advisors. See heading entitled "Rules G-44, G-8, and G-9. Supervisory and Recordkeeping Procedures" for a discussion of supervisory and compliance considerations for advertisements."

Client Lists Included in both Advertising Material and Non-Advertising Material, to ensure compliance with those rules.

- **NEW Example 1A:** Municipal Advisor ABC develops a municipal advisory client list that sets forth Municipal Advisor ABC's municipal advisory clients for the past two years. Municipal Advisor ABC plans to include the client list in a brochure that will be disseminated at a public finance conference, as well as in an electronic newsletter sent to 40 clients on a single day.

Advertisement: The municipal advisory client list would be an advertisement under Rule G 40(a)(i) as both published material generally made available to municipal entities, obligated persons or municipal advisory clients concerning the services of the municipal advisor as well meeting the minimum requirements for a form letter by being distributed to over 25 persons within a 90-day period.¹⁰

Testimonial: The municipal advisory client list is not a testimonial.

Compliance considerations under Rule G-40: Under the facts and circumstances discussed in this Example 1A, Municipal Advisor ABC's use of its municipal advisory client list is considered advertising under Rule G-40. The client list needs to have approval from a firm principal prior to either including it in the brochure or the electronic newsletter, but not both. The municipal advisory firm needs to ensure that the client list is accurately portrayed and does not include testimonials. Also, a municipal advisory firm must ensure that its representations within a client list and case study are accurate. The municipal advisor must correctly reflect the client list (e.g., partial or within a timeframe) and if needed add disclaimers as to exactly what the list represents (e.g., clients served over the past two years), and that the statements about the MA's work discussed in a case study are truthful.

Compliance considerations under other MSRB Rules. MA firms should review other MSRB rules, as indicated under “Other MSRB Rules that Apply to Case Studies and Client Lists Included in both Advertising Material and Non-Advertising Material”, to ensure compliance with those rules.

- **Example 1B:** Municipal Advisor ABC develops a municipal advisory client list that sets forth Municipal Advisor ABC's municipal advisory clients for the past two years. Next to each municipal advisory client included on the list, Municipal Advisor ABC adds a brief statement from the municipal advisory client about Municipal Advisor ABC's services. For example, next to Issuer XYZ, Municipal Advisor ABC includes the statement:

“Municipal Advisor ABC gave us great advice helping us to secure low cost financing Issuer XYZ will use Municipal Advisor ABC again.”

¹⁰ See heading entitled “**Rules G-44, G-8, and G-9. Supervisory and Recordkeeping Procedures**” for a discussion of supervisory and compliance considerations for advertisements.”

Municipal Advisor ABC posts the municipal advisory client list on its website, which is accessible to the general public on an unrestricted basis.

Advertisement: The municipal advisory client list would be an advertisement under Rule G 40(a)(i), since it is published material used in electronic media and it is electronic promotional literature generally made available to municipal entities, obligated persons, municipal advisory clients or the public concerning the services of the municipal advisor or the engagement of a municipal advisory client.¹¹

Testimonial: The municipal advisory client list includes an endorsement by a municipal advisory client. Rule G-40(a)(iv)(G) prohibits a municipal advisor from directly or indirectly publishing, circulating, or distributing 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. The endorsement by the municipal advisory client would be a prohibited testimonial under Rule G-40(a)(iv)(G).

Compliance considerations under Rule G-40: Under the facts and circumstances discussed in this Example 1, Municipal Advisor ABC's posting on its website of the municipal advisory client list, because it includes a testimonial, would not comply with Rule G-40(a)(iv)(G).¹²

Compliance considerations under other MSRB Rules. MA firms should review other MSRB rules, as indicated under “Other MSRB Rules that Apply to Case Studies and Client Lists Included in both Advertising Material and Non-Advertising Material”, to ensure compliance with those rules.

CLIENT LISTS USED IN RFP

- **NEW Example 2: In its response to an RFP by a municipal entity, Municipal Advisor ABC includes a list of its municipal advisory clients for the past two years in a particular geographic region for which Municipal Advisor ABC provided advice relating to school financings.**

Municipal Advisor ABC furnishes the RFP response to the potential municipal entity client. Municipal Advisor ABC limits the distribution of the municipal entity client list to the municipal entity for which Municipal Advisor ABC prepared its response to the RFP. Municipal Advisor ABC does not distribute the municipal entity client list to more than 25 other municipal entities, obligated persons, municipal advisory clients or the public

¹¹ See heading entitled “**Rules G-44, G-8, and G-9. Supervisory and Recordkeeping Procedures**” for a discussion of supervisory and compliance considerations for advertisements.”

¹² By contrast, the mere inclusion of a client list in an advertisement would ordinarily not be considered to be a testimonial. Cf. *Cambiar Investors, Inc.* (publicly avail. Aug. 27, 1997) (under analogous situations presented under the Investment Advisers Act of 1940, as amended, SEC staff has provided guidance that a testimonial is “a statement of a client’s experience with, or endorsement of, an investment adviser”). Unless the context of the presentation of a municipal advisory client list in an advertisement states or implies a statement regarding any client’s experience with the municipal advisor or an endorsement of the municipal advisor, it would not generally be a testimonial.

within the consecutive 90-day period from the date Municipal Advisor ABC furnished its response to the RFP to the potential municipal advisory client.

Advertisement: Although the municipal advisory client list would be written promotional material made available to a municipal entity, the municipal entity client list would not be an advertisement subject to Rule G-40(a)(i). Municipal Advisor ABC includes the municipal entity client list only as part of a response to an RFP that Municipal Advisor ABC only distributes to a single municipal entity.

In general, a response to an RFP would not be an advertisement primarily because such response would not be a form letter under Rule G-40(a)(ii). The response to an RFP would only be distributed to the potential municipal entity client which under Supplementary Material .01 only counts as a single person.¹³

Testimonial: The municipal advisory client list is not a testimonial.

Compliance considerations under Rule G-40: Under the facts and circumstances discussed in this Example 2, Municipal Advisor ABC's inclusion and distribution of the municipal advisory client list in Municipal Advisor ABC's response to an RFP is not subject to Rule G-40.¹⁴ Further, for the reasons discussed above, Municipal Advisor ABC could send the same municipal advisory client list to not more than 24 additional persons within any period of 90 consecutive days without it being subject to Rule G-40.

Compliance considerations under other MSRB Rules. MA firms should review other MSRB rules, as indicated under "Other MSRB Rules that Apply to Case Studies and Client Lists Included in both Advertising Material and Non-Advertising Material", to ensure compliance with those rules.

- **Example 2A:** In its response to an RFP by a municipal entity, Municipal Advisor ABC includes list of its municipal advisory clients for the past two years in a particular geographic region for which Municipal Advisor ABC provided advice relating to school financings. Similar to Example 1B above, Municipal Advisor ABC includes a brief statement from each listed municipal advisory client about Municipal Advisor ABC's services. For example, next to Issuer XYZ, Municipal Advisor ABC includes the statement:

"Municipal Advisor ABC gave great advice helping us to secure low cost financing; Issuer XYZ will use Municipal Advisor ABC again."

Municipal Advisor ABC furnishes the RFP response to the potential municipal entity client. Municipal Advisor ABC limits the distribution of the municipal entity client list to the municipal entity for which Municipal Advisor ABC prepared its response to the RFP.

¹³ As noted above, Supplementary Material .01 to Rule G-40 provides that for purposes of Rule G-40(a)(ii), the number of "persons" for a response to an RFP is determined at the entity level, so that one recipient issuer counts as one person no matter how many personnel at the issuer might receive or review the response.

¹⁴ However, non-solicitor municipal advisors should be mindful of their obligations under Rule G-42 relating to responses to RFPs and RFQs, see supra note 7, and obligations under Rule G-17 applicable to all municipal advisors.

Municipal Advisor ABC does not distribute the municipal entity client list to more than 25 other municipal entities, obligated persons, municipal advisory clients or the public within the consecutive 90-day period from the date Municipal Advisor ABC furnished its response to the RFP to the potential municipal advisory client.

Advertisement: Although the municipal advisory client list would be written promotional material made available to a municipal entity, the municipal entity client list would not be an advertisement subject to Rule G-40(a)(i). Municipal Advisor ABC includes the municipal entity client list as part of a response to an RFP that Municipal Advisor ABC only distributes to a single municipal entity.

In general, a response to an RFP would not be an advertisement primarily because such response would not be a form letter under Rule G-40(a)(ii). The response to an RFP would only be distributed to the potential municipal entity client which under Supplementary Material .01 only counts as a single person. The response to an RFP would only be distributed to the potential municipal entity client (which is not more than 25 persons) within any period of 90 consecutive days.¹⁵

Testimonial: The municipal advisory client list would include an endorsement from a municipal advisory client that would be a testimonial under Rule G-40(a)(iv)(G) if the RFP response was subject to Rule G-40. However, because the municipal advisory client list would be included in a response to an RFP, and a response to an RFP, in general, would not be an advertisement, it would appear that Municipal Advisor ABC's use of the endorsement in the municipal advisory client list would ~~comply with~~ not violate Rule G-40(a)(iv)(G).

Compliance considerations under Rule G-40: Under the facts and circumstances discussed in this Example 2, Municipal Advisor ABC's inclusion and distribution of the municipal advisory client list in Municipal Advisor ABC's response to an RFP would not violate Rule G-40.¹⁶ Further, for the reasons discussed above, Municipal Advisor ABC could send the same municipal advisory client list to not more than 24 additional persons within any period of 90 consecutive days without violating Rule G-40.

Compliance considerations under other MSRB Rules. MA firms should review other MSRB rules, as indicated under "Other MSRB Rules that Apply to Case Studies and Client Lists Included in both Advertising Material and Non-Advertising Material", to ensure compliance with those rules.

USE OF CASE STUDY

- **NEW Example 3:** Municipal Advisor ABC develops a case study about a financing for a municipal ice rink that includes no statements from the municipal entity client or

¹⁵ As noted above, Supplementary Material .01 to Rule G-40 provides that for purposes of Rule G-40(a)(ii), the number of "persons" for a response to an RFP is determined at the entity level, so that one recipient issuer counts as one person no matter how many personnel at the issuer might receive or review the response.

¹⁶ However, non-solicitor municipal advisors should be mindful of their obligations under Rule G-42 relating to responses to RFPs and RFQs, see supra note 7, and obligations under Rule G-17 applicable to all municipal advisors.

otherwise that endorse or otherwise discuss the services or quality thereof provided by the municipal advisor.

Municipal Advisor ABC includes the case study in the firm brochure that is included in a widely distributed promotional bag at a public finance industry conference.

Advertisement: The case study would be written promotional literature distributed or made generally available to municipal entities, obligated persons, municipal advisory clients or the public. As such, the case study would be an advertisement under Rule G-40(a)(i).¹⁷

Testimonial: The case study is not a testimonial.

Compliance considerations under Rule G-40: Under the facts and circumstances discussed in this Example 3, Municipal Advisor ABC's use of the case study is considered advertising under Rule G-40. The case study needs to have approval from a firm principal prior to inclusion in the firm brochure. The municipal advisory firm needs to ensure that the case study is accurately portrayed and does not include testimonials.

- **NEW Example 3A:** Municipal Advisor ABC develops a case study about a financing for a municipal ice rink that includes no statements from the municipal entity client or otherwise that endorse or otherwise discuss the services or quality thereof provided by the municipal advisor.

Municipal Advisor ABC includes the case study on its website which is accessible to the general public on an unrestricted basis.

Advertisement: The case study would be an advertisement under Rule G 40(a)(i), since it is published material used in electronic media and it is electronic promotional literature generally made available to municipal entities, obligated persons, municipal advisory clients or the public concerning the services of the municipal advisor or the engagement of a municipal advisory client.¹⁸.

Testimonial: The case study is not a testimonial.

Compliance considerations under Rule G-40: Under the facts and circumstances discussed in this Example 3, Municipal Advisor ABC's use of the case study is considered advertising under Rule G-40. The case study needs to have approval from a firm principal prior to posting on the firm's website. The municipal advisory firm needs to ensure that the case study is accurately portrayed and does not include testimonials.

¹⁷ See heading entitled “**Rules G-44, G-8, and G-9. Supervisory and Recordkeeping Procedures**” for a discussion of supervisory and compliance considerations for advertisements.”

¹⁸ See heading entitled “**Rules G-44, G-8, and G-9. Supervisory and Recordkeeping Procedures**” for a discussion of supervisory and compliance considerations for advertisements.”

The firm should seek principal approval when changes are made to the case study posted on its website.

- **Example 3B:** Municipal Advisor ABC develops a case study about a financing for a municipal ice rink. The case study provides the following statement from Issuer XYZ:

“Municipal Advisor ABC’s expert recommendations allowed us to meet our goals - we met our timeline and secured low cost financing. Municipal Advisor ABC was terrific.”

Municipal Advisor ABC includes the case study in the firm brochure that is included in a widely distributed promotional bag at a public finance industry conference.

Advertisement: The case study would be written promotional literature distributed or made generally available to municipal entities, obligated persons, municipal advisory clients or the public. As such, the case study would be an advertisement under Rule G-40(a)(i).¹⁹

Testimonial: Because the case study includes an endorsement from Issuer XYZ, the case study would include a testimonial under Rule G-40(a)(iv)(G). Rule G-40(a)(iv)(G) prohibits a municipal advisor from distributing an advertisement that contains a testimonial.

Compliance considerations under Rule G-40: Under the facts and circumstances discussed in this Example 3, Municipal Advisor ABC’s use of the case study would violate Rule G- 40(a)(iv)(G).

Compliance considerations under other MSRB Rules. MA firms should review other MSRB rules, as indicated under “Other MSRB Rules that Apply to Case Studies and Client Lists Included in both Advertising Material and Non-Advertising Material”, to ensure compliance with those rules.

~~MUST A MUNICIPAL ADVISOR INCLUDE ALL OF ITS CLIENTS IN A MUNICIPAL ADVISORY CLIENT LIST?~~

USE OF PARTIAL CLIENT LIST

- **Example 4:** Municipal Advisor ABC publishes an advertisement regarding its municipal advisory services in an airport industry journal. Municipal Advisor ABC’s advertisement includes an accurate list of recent municipal advisory clients to which Municipal Advisor ABC has provided advice about airport financings within the past three years. Municipal

¹⁹ See heading entitled “**Rules G-44, G-8, and G-9. Supervisory and Recordkeeping Procedures**” for a discussion of supervisory and compliance considerations for advertisements.”

Advisor ABC discloses in the advertisement that the municipal advisory client list is a partial municipal advisory client list limited to Municipal Advisor ABC's municipal advisory engagements related to airport financings within the past three years. The partial municipal advisory client list does no more than list the relevant municipal advisory clients. Unlike Example 1B, Municipal Advisor ABC does not add any statement from any of the municipal advisory clients about Municipal Advisor ABC's services.

Advertisement: The municipal advisory client list would be an advertisement under Rule G 40(a)(i), since it is published material used in electronic media and it is electronic promotional literature generally made available to municipal entities, obligated persons, municipal advisory clients or the public concerning the services of the municipal advisor or the engagement of a municipal advisory client.²⁰

Testimonial: The partial client list is not a testimonial.

Compliance considerations under Rule G-40: Under the facts and circumstances discussed in this Example 4, Municipal Advisor ABC's advertisement (i) does not contain any untrue statement of material fact or is otherwise false or misleading and (ii) complies with Rule G-40(a)(iv)'s content standards. Municipal Advisor ABC's advertisement discloses that the municipal advisory client list is a partial municipal advisory client list limited to Municipal Advisor ABC's municipal advisory engagements related to airport financings within the past three years. By disclosing the relevant factors it used to develop the municipal advisory list, Municipal Advisor ABC helps ensure that the partial municipal advisory client list is not misleading. Further, Municipal Advisor ABC does not include statements from municipal advisory clients about Municipal Advisor ABC's services in the advertisement. The publication by Municipal Advisor ABC of this partial municipal advisory client list would not be prohibited by Rule G-40(a)(iv).²¹

Compliance considerations under other MSRB Rules. MA firms should review other MSRB rules, as indicated under "Other MSRB Rules that Apply to Case Studies and Client Lists Included in both Advertising Material and Non-Advertising Material", to ensure compliance with those rules.

USE OF CLIENT LIST– VIOLATING MSRB RULE G-40

- **Example 5:** Municipal Advisor ABC posts on its website a municipal advisory client list under the title "Ten Recent Representative Municipal Advisory Clients." However, that municipal advisory client list includes (i) entities that did not actually engage Municipal Advisor ABC and for which Municipal Advisor ABC only provided casual and informal input and (ii) municipal advisory clients for which Municipal Advisor ABC has not provided advice for over fifteen years. Municipal Advisor ABC included those municipal

²⁰ See heading entitled "Rules G-44, G-8, and G-9. Supervisory and Recordkeeping Procedures" for a discussion of supervisory and compliance considerations for advertisements."

²¹ As noted above, municipal advisors should consider the potential application of other MSRB rules in connection with all publications of municipal advisory client lists.

advisory clients because they are well-known large issuers of municipal securities. Municipal Advisor ABC's website does not contain any explanation about its very minor involvement with certain of the "municipal advisory clients." Also, Municipal Advisor ABC's website does not disclose that some of the municipal advisory services that Municipal Advisor ABC provided to those municipal advisory clients were from fifteen years ago.

Advertisement: The municipal advisory client list would be an advertisement under Rule G 40(a)(i), since it is published material used in electronic media and it is electronic promotional literature generally made available to municipal entities, obligated persons, municipal advisory clients or the public concerning the services of the municipal advisor or the engagement of a municipal advisory client.²²

Testimonial: The partial client list is not a testimonial.

Compliance considerations under Rule G-40: Under the facts and circumstances discussed in this Example 5, Municipal Advisor ABC's municipal advisory client list is misleading. Municipal Advisor ABC entitles the list "Ten Recent Representative Municipal Advisory Clients." However, the list includes municipal advisory clients that did not actually engage Municipal Advisor ABC for municipal advisory services and includes municipal advisory clients for which Municipal Advisor ABC has not provided advice for over fifteen years. As noted in the introduction to the hypothetic examples above, Municipal Advisor ABC is a large regional MA with 25 years of experience that engages in municipal advisory activities for multiple municipal advisory clients each year. In addition, "recent" is generally understood to be a period of time that is less than 15 years ago. Municipal Advisor ABC's use of the municipal advisory client list would not comply with Municipal Advisor ABC's obligations under Rule G-40(a)(iv).

Compliance considerations under other MSRB Rules. MA firms should review other MSRB rules, as indicated under "Other MSRB Rules that Apply to Case Studies and Client Lists Included in both Advertising Material and Non-Advertising Material", to ensure compliance with those rules.

~~WHAT STANDARDS APPLY TO A MUNICIPAL ADVISOR'S USE OF A CASE STUDY IN ADVERTISING?~~ **USE OF CASE STUDY IN BROCHURE – VIOLATING MSRB RULE G-40**

- **Example 6:** At its booth at a well-attended public finance industry conference, Municipal Advisor ABC makes available a brochure containing a case study. The case study discusses a recent bond issuance and the services that a municipal advisor provided in that bond issuance. The case study is silent about which municipal advisor advised the municipality on a long-term bond issuance and debt management plan that resulted in a bond rating upgrade but implies that it was Municipal Advisor ABC. Another municipal

²² See heading entitled "**Rules G-44, G-8, and G-9. Supervisory and Recordkeeping Procedures**" for a discussion of supervisory and compliance considerations for advertisements."

advisor, not Municipal Advisor ABC, actually provided the advice ~~to~~ to the municipality that resulted in the bond rating upgrade.

Advertisement: The case study would be an advertisement under Rule G 40(a)(i), since it is published material used in electronic media and it is electronic promotional literature generally made available to municipal entities, obligated persons, municipal advisory clients or the public concerning the services of the municipal advisor or the engagement of a municipal advisory client.²³.

Testimonial: The case study is not a testimonial.

Compliance considerations under Rule G-40: Under the facts and circumstances presented in this Example 6, Municipal Advisor ABC's use of the case study is misleading. ~~The case study is an advertisement under Rule G-40(a)(i). The case study is written material that would be generally made available to conference attendees, likely more than 25 persons. Those attendees could include representatives from municipal entities, obligated persons and municipal advisory clients.~~

Further, Municipal Advisor ABC's use of the case study would ~~and would~~ not comply with Rule G-40(a)(iv). Among other issues, Municipal Advisor ABC would be using a case study that omits material information and that is misleading.²⁴ Municipal Advisor ABC, by including the case study with its firm brochure, implies that Municipal Advisor ABC provided the services discussed in the case study, but fails to disclose that another municipal advisor actually provided those services. Municipal Advisor ABC's use of the case study would not comply with Municipal Advisor ABC's obligations under Rule G-40(a)(iv).

Compliance considerations under other MSRB Rules. MA firms should review other MSRB rules, as indicated under "Other MSRB Rules that Apply to Case Studies and Client Lists Included in both Advertising Material and Non-Advertising Material", to ensure compliance with those rules.

Additional Resources

SR-MSRB-2018-01 (January 24, 2018) available at <http://msrb.org/~/media/Files/SEC-Filings/2018/MSRB-2018-01-REVISED.ashx>.

²³ See heading entitled "Rules G-44, G-8, and G-9. Supervisory and Recordkeeping Procedures" for a discussion of supervisory and compliance considerations for advertisements."

²⁴ Cf., *In re Barcelona Strategies, LLC, et al.* Exchange Act Release No. 83191 (May 9, 2018) (order instituting cease-and-desist proceedings; finding that a municipal advisor and its associated person, among other things, violated MSRB Rule G-17 when the municipal advisor circulated a brochure to municipalities that overstated its experience). Because the conduct in question took place before the effective date of Rule G-40, Rule G-40 did not apply. Nonetheless, the facts of this case illustrate conduct that would likely be violative of Rule G-40 following its effective date.

Letter from Pamela K. Ellis, Associate General Counsel, Municipal Securities Rulemaking Board, dated Apr 30, 2018 available at <http://www.msrb.org/~/media/Files/SEC-Filings/2018/MSRB-2018-01 MSRB Letter 1SEC.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-4C 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-REVISED.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?n=1>.

Legend –

Purple underlined text – new language added by NAMA

Red double underlined text – MSRB language that was moved within document