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Invested in America

March 24, 2017

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

Re: MSRB Notice 2017-04: Draft Amendments to MSRB Rule G-21, on Advertising, and on Draft Rule G-40, on Advertising by Municipal Advisors

Dear Mr. Smith:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates this opportunity to respond to Notice 2017-04 [2] (the "Notice") issued by the Municipal Securities Rulemaking Board (the "MSRB") in which the MSRB is making a request for comment on draft amendments to MSRB Rule G-21, on advertising, and on new draft MSRB Rule G-40, on advertising by municipal advisors. SIFMA and its members appreciate the MSRB's efforts to update MSRB Rule G-21. We agree with the principles in the rules that communications to the public must be consistent with fair dealing duties and in good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security. We are pleased that, at long last, there will be a leveling of the regulatory playing field between brokers, dealers, and municipal securities dealers (collectively, "dealers"), who have long been regulated by MSRB Rule G-21, and non-dealer municipal advisors, whose advertising activities will become regulated under new MSRB Rule G-40. We agree that the MSRB should have two rules on public communications, and we believe the rules should be divided based on activity, not by registration category. We do feel, however, that FINRA Rule 2210

[1] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] MSRB Notice 2017-04 (Feb. 16, 2017).

should be incorporated by reference into Rule G-21, or at a minimum the two rules should be more closely harmonized.

I. Rule G-21 Should Incorporate FINRA Rule 2210 by Reference and Be Focused on Dealer Activity

MSRB Rule G-21 was adopted in 1978, and since its adoption the rule has not been regularly or uniformly harmonized with what is now Financial Industry Regulatory Authority ("FINRA") Rule 2210. This discordance leads to confusion among all market participants (investors and dealers alike) and regulatory risk for dealers. SIFMA has advocated in the past,[3] and continues to advocate for harmonization between MSRB Rule G-21 and FINRA Rule 2210.

SIFMA and its members feel that FINRA Rule 2210 should be incorporated by reference into MSRB Rule G-21 to cover any communications by a dealer in its role as a dealer, including transactions in municipal securities, with certain exceptions. A cross-reference is beneficial regulatory construction in that it both eliminates any concern that some dealers may not be covered by the rule, and eliminates concerns about a lack of harmonization between the FINRA and MSRB rules.

If a purpose of the Notice and the draft amendments is to update Rule G-21 and harmonize its provisions with FINRA Rule 2210, the best way to accomplish this is to have one governing rule that is cross-referenced by other self-regulatory organizations ("SROs"). Again, this methodology is the most efficient way to reduce confusion and risk to investors, and reduce regulatory risk to dealers. Maintaining a separate substantive Rule G-21 for dealer activity that is already clearly set forth in FINRA Rule 2210 does not efficiently further the regulatory goals as stated in the Notice. We do feel, however, that the filing requirements in FINRA 2210(c) are unnecessary and burdensome, and should be exempted from application in this context. Alternatively, the MSRB could make filing of retail communications with FINRA under FINRA Rule 2210(c) permissive. Additionally, we feel FINRA Rule 2210(e) should be exempted from application in this context. Alternatively, if the MSRB believes there is a need to have a comparable provision with regard to the use of the MSRB's name, then the MSRB could include a parallel provision that would be retained in Rule G-21 along with the municipal fund securities advertising requirements as described below.

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[3] *See* Letter from David L. Cohen, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated Feb. 19, 2013, to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board (regarding MSRB Notice 2012-63: Request for Comment on MSRB Rules and Interpretive Guidance).

For these reasons, SIFMA and its members feel strongly that MSRB Rule G-21, should be amended to incorporate FINRA Rule 2210 by reference as follows, "Municipal securities brokers, dealers and municipal securities dealers, with respect to their activities as such, shall comply with FINRA Rule 2210, on communications with the public, and any amendments thereto, as if such Rule is part of MSRB's Rules, with the exception of sections (c) and (e)."[4]

Although we understand the MSRB has concerns about incorporating by reference other SRO's rules into its rulebook, we feel these concerns are overstated and can easily be overcome. One of the concerns discussed by MSRB staff with us was a concern about lack of notice to the regulated municipal securities community regarding a potential or approved amendment to a FINRA rule incorporated by reference. SIFMA and its members feel that a regulatory notice by the MSRB highlighting proposed or adopted rule changes would be sufficient notice, and would be no more confusing or burdensome on market participants than if the MSRB had proposed or adopted amendments itself. We point out that that the MSRB itself said in its 2013 filing to amend its suitability rule to be more consistent with FINRA's rule:

> Given the extensive interpretive guidance surrounding FINRA Rule 2111 and the impracticality and inefficiency of republishing each iteration of such FINRA guidance, substantively similar provisions of Rule G-19 will be interpreted in a manner consistent with FINRA's interpretations of Rule 2111. If the MSRB believes an interpretation should not be applicable to Rule G-19, it will affirmatively state that specific provisions of FINRA's interpretation do not apply.[5]

Certainly, rulemaking is undertaken at a more measured pace then some interpretive activity and therefore there would be abundant opportunity for the MSRB to provide appropriate notification to the municipal securities community about changes in the FINRA advertising rule, and would also provide the MSRB

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[4] There is precedent in the MSRB Rulebook for incorporation of other regulator's rules by reference. *See* MSRB Rule G-41 on Anti-Money Laundering Compliance Program. Another alternative could be structured similarly to current MSRB Rule G-35 on Arbitration, in that bank dealers who are not NASD members are subject to the NASD Code of Arbitration Procedure as if they were a member of the NASD.

[5] *See* Proposed Rule G-47, on Time of Trade Disclosure Obligations, Proposed Revisions to Rule G-19, on Suitability of Recommendations and Transactions, and Proposed Rules D-15 and G-48, on Sophisticated Municipal Market Professionals found at http://www.msrb.org/~/media/Files/SEC-Filings/2013/MSRB-2013-07.ashx?la=en, at page 8.

with sufficient time to evaluate whether some change or interpretation of the FINRA rule should not be adhered to for the municipal market.

II. If MSRB Rule G-21 Does Not Incorporate FINRA Rule 2210 by Reference, Then the Rules Should Be More Closely Harmonized

If the MSRB decides not to incorporate FINRA Rule 2210 by reference into Rule G-21 to govern communications by a dealer in its role as a dealer, then SIFMA and its members feel that it is necessary for Rule G-21 to be more closely harmonized with FINRA Rule 2210. The current Rule G-21 and its draft amendments do not reflect the current construction of FINRA Rule 2210, which divides communications with the public into three categories: retail communications, correspondence,[6] and institutional communications. FINRA Rule 2210 establishes different requirements for retail communications and institutional communications. This approach takes into account the critical differences in the intended audiences. Generally, FINRA's rule on retail communications requires pre-use approval by a principal, while institutional communications do not; instead, dealers are given the ability to establish review procedures for institutional communications that are appropriate to their business, subject to certain specified parameters.

The MSRB has not made any effort to harmonize these concepts from FINRA Rule 2210 into Rule G-21, but instead continues to treat all advertisements as subject to one-size-fits-all pre-use approval by a principal, regardless of the audience. The definition of "advertisement" in Rule G-21 is different and broader than that of "retail communication" in FINRA Rule 2210. We strongly support removal of the definition of "advertisement", "form letter", and "professional advertisement" in favor of harmonizing Rule G-21 with the three categories of communications (retail communications, correspondence, and institutional communications) as set forth in FINRA Rule 2210.[7] Harmonization of the MSRB and FINRA rules would also necessitate the removal of the confusing and duplicative definition of "product advertisement", the only purpose of which is to add what is covered in content standards. Draft Rule G-40(c) requires that each advertisement that is subject to draft Rule G-40 be approved in writing by a municipal advisory principal before its first use.

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[6] We recognize the regulation of correspondence is handled separately in FINRA Rule 3110, pursuant to FINRA Rule 2210(b)(2).

[7] We draw your attention to FINRA Regulatory Notice 12-29 (Communications with the Public) (June 2012), available at http://www.finra.org/industry/notices/12-29 (last visited Mar. 24, 2017), wherein FINRA specifically reduces the number of categories and definitions of communications from six categories to three.

SIFMA and its members feel strongly that the MSRB should adopt the FINRA approach to dividing the regulatory framework for communications into categories for retail and institutional communications, so that dealers can apply common approval processes for institutional communications across all asset classes. This approach is significantly preferable over requiring pre-use principal approval for municipal securities advertisements that are used exclusively with institutional customers, when FINRA permits establishment of alternate approval procedures for these institutional communications for all other asset classes.

III. MSRB Should Include Other Communications Exceptions Allowed by FINRA

SIFMA and its members note that FINRA's three categories of communications makes institutional communications exempt from the requirement of prior approval. This is a critical distinction between the rules, and we appeal to the MSRB to incorporate this concept into the MSRB rules. The MSRB should consider all the exceptions and guidance in FINRA Rule 2210(d) regarding content standards, not just (d)(1). SIFMA and its members feel very strongly about these exceptions, particularly FINRA Rule 2210(d)(6) on testimonials (as discussed in more detail in Section III(d) below); FINRA Rule 2210(d)(7) on recommendations; and FINRA Rule 2210(d)(9) on prospectuses (as discussed in more detail in Section III(a) below).

a. Private Placement Memoranda and Limited Offering Memoranda

The amendments to Rule G-21 and draft Rule G-40 do not create an exception for issuer offering and disclosure documents from the definition of an advertisement. Issuer offering and disclosure documents (including, but not limited to, private placement memoranda, commercial paper offering memoranda, offering circulars, limited offering memoranda, free writing prospectuses, official statements and prospectuses) should all be excluded from the definition of a covered communication within the rules. Even though a dealer or advisor may have potentially had a role in the preparation of these documents, these are issuer documents and not dealer or municipal advisor advertisements. For example, a "tombstone" or other offering summary would potentially be a covered communication, but the entire official statement, limited offering memorandum, or other offering and disclosure documents would be exempt from the rules. Incorporating these concepts into the draft amendments would harmonize the rules with FINRA Rule 2210(d)(9).

b. Responses to Requests for Proposals

The Notice stated that a response by a municipal advisor to a request for proposals from a municipal entity or obligated person for services in connection with a municipal financial product or the issuance of municipal securities would "most likely" not be an advertisement under draft Rule G-40. SIFMA and its members feel strongly

that the MSRB should clarify that a response by a dealer or a municipal advisor to a request for proposals is not a covered communication and won't be deemed an advertisement. The idea that a solicited response to a request for comment or qualifications is potentially an advertisement is nonsensical. It should not matter how many people receive or view the response. If twenty-six employees at one municipal securities issuer view the response, SIFMA and its members feel strongly that the communication is not an advertisement because it was solicited, and the number of people that received the response at the issuer is not relevant. If the response went to one issuer, that is the relevant number distributed, not the number of employees at that issuer that viewed the document. It is the one issuer that decides whether or not to engage the municipal advisor or dealer based on its response, and there is one potential engagement; not twenty-six potential engagements with twenty-six different employees. To that end, we would appreciate the MSRB clarifying the language in the Notice that responses to requests for proposals are not advertisements under the amendments to Rule G-21 or new draft Rule G-40.

c. Social Media

The amendments to Rule G-21 and draft Rule G-40(c) apply to advertisements, regardless of whether electronic or other public media is used with those advertisements. As such, we feel no additional guidance by the MSRB is needed regarding the use of social media by a dealer or municipal advisor at this time. We believe that FINRA is currently working on guidance regarding social media. In line with our earlier comments, we feel the MSRB should ascribe to this guidance or clearly articulate why it is not appropriate in this market.

d. The Use of Testimonials Should be Permitted

Draft Rule G-21(a)(iii) prohibits dealers from using testimonials in advertisements. The concerns the MSRB states are based on a study which analyzes the age of municipal securities investors. FINRA Rule 2210 permits testimonials, with clear limitations, which SIFMA and its members feel provide sufficient investor protections. SIFMA feels these protections are strong enough for retail communications. SIFMA and its members believe that regulatory harmonization and consistency is paramount. The MSRB should harmonize the exception for use of testimonials with FINRA Rule 2210(d)(6), subject to the content standards and requirements that apply.

Additionally, the MSRB's concerns in this area regarding retail investors are not credible when applied to communications with institutional investors or municipal advisory activity. The use of testimonials should not be prohibited by firms acting as a municipal advisor. The MSRB cites to concerns set forth in the 1961 adopting release for Securities and Exchange Commission ("SEC") Rule 206(4)-1 for investment advisors. In this case, municipal advisors can be distinguished from investment advisors due to the differences in their client base.

Municipal advisors are not selling securities to elderly retail investors; they are advising professional state and local government officials about municipal securities issuance and investments. SIFMA and its members agree there should be a level regulatory playing field between municipal advisors/investment advisers and other municipal advisors. Again, MSRB should harmonize the exception for use of testimonials with FINRA Rule 2210(d)(6), subject to the content standards and requirements that apply.

e. Investment Analysis Tools

The amendments to Rule G-21 and draft Rule G-40(c) prohibit a dealer or municipal advisor from using an advertisement that, in part, predicts or projects performance, but does not prohibit the use of an investment analysis tool. Investment analysis tools are frequently used and serve to better inform investors. The use of such tools should continue to be permitted. SIFMA and its members do not believe additional guidance about the definition of an investment analysis tool and about the use of such tools is necessary at this time. If the MSRB feels strongly about additional guidance in this area, we believe that reference to or harmonization with FINRA Rule 2214 would be acceptable.

f. The Use of Illustrations Should be Permitted

As described in the Notice, FINRA recently requested comment on proposed amendments to FINRA Rule 2210.[8] In RN 17-06, FINRA proposes to amend FINRA Rule 2210 to create an exception to the rule's prohibition on projecting performance to permit a firm to distribute a "customized hypothetical investment planning illustration that includes the projected performance of an asset allocation or other investment strategy, but not an individual security." As a general matter, SIFMA believes the proposed amendment in RN 17-06 would better align FINRA Rule 2210's investor protection benefits and economic impacts. Importantly, the proposed amendment in RN 17-06 enhances a firms' ability to provide investors with only brokerage accounts access to potentially useful projections currently available to investment advisory clients. SIFMA supports these amendments to FINRA Rule 2210,[9] and supports similar exceptions in the draft amendments to Rule G-21 and draft new Rule G-40.

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[8] *See generally* FINRA Regulatory Notice 17-06 (Communications with the Public) (Feb. 2017), available at http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-06.pdf (last visited Mar. 6, 2017) ("RN 17-06").

[9] *See* Letter from Kevin Zambrowicz, Managing Director and Associate General Counsel, SIFMA, to Marcia E. Asquith, Office of the Corporate Secretary, FINRA, anticipated to be dated Mar. 27, 2017 (regarding RN 17-06).

IV. Municipal Fund Securities

Rule G-21(e) addresses municipal fund security product advertisements. As set forth in the Notice, these rules regulate dealer sales of these products and are largely based on the SEC's advertising rules for registered investment companies, such as mutual funds. This section can be easily separated from the rest of the rule, if necessary. SIFMA and its members support the ability to use hyperlinks in this rule, and whenever possible elsewhere within the MSRB rule set, as appropriate. We do not have further suggestions regarding the advertising rules for Achieving a Better Life Experience Act of 2014 (ABLE) programs at this time, as we believe it is too early in the product's lifecycle to ascertain the need for any additional regulatory guidance.

V. MSRB Rule G-40 Should Be Limited in Scope to Municipal Advisory Activities

MSRB Rule G-40 should cover communications by firms acting as a municipal advisor, whether they be dealer firms or non-dealer municipal advisors. Rule G-21 (whether as amended or if using incorporation of FINRA Rule 2210 by reference) should explicitly provide that it does not cover advertising or communications relating to municipal advisory activities of dealers; such municipal advisory advertising or communications of dealer municipal advisors should be governed solely by new draft Rule G-40. SIFMA strongly supports the harmonization of draft Rule G-40 with FINRA Rule 2210 with respect to the categorization of communications (retail communications, correspondence and institutional correspondence), instead of the single broad category of "advertising". SIFMA also supports the removal of the definitions of "advertisement", "form letter", "product advertisement" and "professional advertisement", as not being consistent with the concepts and terms in FINRA Rule 2210. Further, we also strongly support the same harmonization with the content standards and other communications exceptions described above.

In general, municipal advisors have little to no role in the development or the distribution of municipal security product advertisements, new issue product advertisements, and/or municipal fund security product advertisements. As stated above, we feel Rule G-40 should only cover municipal advisory activity advertisements. Thus, to the extent that municipal advisors use product advertisements, MSRB Rule G-40 should cover such advertisements but only insofar as they relate to municipal advisory activities. For example, if a municipal advisor is selling computer software, books or other products to assist their clients with municipal securities transactions, then we feel those product advertisements should be covered by the rule; if such products are unrelated to municipal advisory activities but instead relate to other business activities of the firm, then the advertisements should not be covered. SIFMA believes a nexus to municipal

advisory activities (as defined in Rule G-42(f)(iv)) is critical to establishing the MSRB's jurisdiction in this area. We feel that any activities of a municipal advisor other than municipal advisory activities are outside the scope of the rule.

VI. Economic Analysis

a. Effect on Competition, Efficiency, and Capital Formation

As noted above, SIFMA fully supports the regulation of the advertising activities of municipal advisors, which levels the regulatory playing field. Dealers have long been governed by Rule G-21, regardless of their activity or role in a transaction. However, as noted above, we believe the rules should be structured to cover the requisite activity or role, and not based on the firm's corporate structure or registration classification.

Also, SIFMA believes the proposed amendment described in RN 17-06 would help level the regulatory playing field between investment advisors, municipal advisors and broker dealers. As noted above, allowing firms to provide projections and illustrations to investors can be potentially useful, and is already permitted under the SEC rules for investment advisory clients.

b. Costs and Benefits

The draft changes to MSRB Rule G-21, as proposed, and new MSRB Rule G-40, do not substantively harmonize the rules with FINRA Rule 2210. SIFMA and its members believe that separate and distinct rules for municipal securities are valuable when there exists something unique about the market that warrants a different rule than that promulgated by FINRA. With respect to advertising or public communications for most municipal securities products (except for municipal advisory business and municipal fund securities), we feel there is no compelling reason to establish a different rule set than that which exists under FINRA Rule 2210. While SIFMA applauds the MSRB for its efforts to update MSRB Rule G-21 as well as bringing municipal advisor advertising and public communications under the regulatory regime, SIFMA feels strongly that costs of implementation and ongoing compliance would be greatly reduced if these rules more closely mirror FINRA Rule 2210.

VII. Conclusion

Again, SIFMA and its members appreciate the MSRB's efforts to update MSRB Rule G-21. We agree that the MSRB should have two advertising rules, and we believe the rules should be divided based on activity, not by registration category. We do feel, however, that FINRA Rule 2210 should be incorporated by reference into Rule G-21, or at a minimum the two rules should be more closely

harmonized. We would be pleased to discuss any of these comments in greater detail, or to provide any other assistance that would be helpful. If you have any questions, please do not hesitate to contact the undersigned at (212) 313-1130.

Sincerely yours,

Leslie M. Norwood
Managing Director and
Associate General Counsel

cc: ***Municipal Securities Rulemaking Board***
Lynnette Kelly, Executive Director
Robert Fippinger, Chief Legal Officer
Michael Post, General Counsel – Regulatory Affairs
Pamela K. Ellis, Associate General Counsel
Meghan Burns, Economic Researcher

Financial Industry Regulatory Authority
Robert Cook, President and CEO
Joseph Price, Senior Vice President of Corporate Financing and Advertising Regulation
Thomas Pappas, Vice President and Director, Advertising Regulation
Cynthia Friedlander, Director, Fixed Income Regulation

Securities and Exchange Commission
Heather Seidel, Acting Director, Division of Trading and Markets
Gary Goldsholle, Deputy Director, Division of Trading and Markets
David Shillman, Associate Director, Division of Trading and Markets
Jessica S. Kane, Director, Office of Municipal Securities
Rebecca Olsen, Deputy Director, Office of Municipal Securities