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SECURITIES AND EXCHANGE COMMISSION
[Release No. 34-85222; File No. SR-MSRB-2019-04]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Consisting of Interpretive Guidance about Frequently Asked Questions Regarding the Use of Social Media under the MSRB's Advertising Rules

February 28, 2019

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on February 26, 2019 the Municipal Securities Rulemaking Board ("MSRB") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The MSRB filed with the Commission a proposed rule change consisting of interpretive guidance about frequently asked questions regarding the use of social media under MSRB Rule G-21, on advertising by brokers, dealers and municipal securities dealers, and MSRB Rule G-40, on advertising by municipal advisors (Rule G-21, together with Rule G-40, the "advertising rules"). The proposed rule change has been filed for immediate effectiveness under Section 19(b)(3)(A) of the Exchange Act[3] and Rule 19b-4(f)(6) thereunder.[4] The effective date of the

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 15 U.S.C. 78s(b)(3)(A).

4 17 CFR 240.19b-4(f)(6).

amendments to Rule G-21 and Rule G-40 will be announced in an MSRB Notice to be published on the MSRB's website following the effectiveness of this proposed rule change. To provide brokers, dealers, municipal securities dealers and municipal advisors (collectively, "regulated entities") with sufficient time to develop supervisory and compliance policies and procedures, the effective date to be announced will be no less than 30 days and no more than 180 days following publication of the MSRB Notice.[5]

The text of the proposed rule change is available on the MSRB's website at www.msrb.org/Rules-and-Interpretations/SEC-Filings/2019-Filings.aspx, at the MSRB's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the MSRB included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The MSRB has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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[5] See Exchange Act Release No. 83177 (May 7, 2018), 83 FR 21794 (May 10, 2018) (File No. SR-MSRB-2018-01). The amendments to Rule G-21 and new Rule G-40 were to become effective on February 7, 2019. However, to provide the industry with sufficient time to establish supervisory and compliance policies and procedures, the MSRB filed with the SEC for immediate effectiveness an extension of that effective date. The new effective date of the amendments to Rule G-21 and new Rule G-40 will be announced in an MSRB Notice to be published on the MSRB's website. See File No. SR-MSRB-2019-01.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to clarify for brokers, dealers, and municipal securities dealers (collectively, "dealers") and municipal advisors the application of the recent amendments to Rule G-21 and new Rule G-40 to the use of social media by regulated entities[6] in connection with their municipal securities activities and municipal advisory activities. The MSRB committed to providing that guidance[7] before the effective date of the amendments to the advertising rules, and developed draft guidance regarding the use of social media in the format of frequently asked questions (the "FAQs").[8]

While developing the proposed rule change, the MSRB was 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 inform its approach, the MSRB consulted with staff from the Financial Industry Regulatory Authority, Inc. ("FINRA"). The

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6 Consistent with MSRB Rule D-11, references in the FAQs to a dealer, municipal advisor, or a regulated entity generally include the associated persons of such dealer, municipal advisor, or regulated entity.

7 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?

8 Concurrent with the submission of this proposed rule change, the MSRB filed a proposed rule change to amend the advertising rules to exempt interactive content that is an advertisement and that would be posted or disseminated on an interactive electronic forum from the requirement that a municipal securities principal, general securities principal, or municipal advisor principal, as relevant, approve that advertisement prior to first use.

MSRB endeavored, to the extent practicable, to align the FAQs with the social media guidance published by the SEC and FINRA.[9]

The FAQs are divided into four categories: use of social media, third-party posts, recordkeeping and supervision. Further, the FAQs would provide references to additional resources that may be of use to the regulated entity.

Use of Social Media. The FAQs would provide guidance about when a regulated entity's or its associated person's use of social media becomes an "advertisement" under the advertising rules. The FAQs would clarify that, depending on the facts and circumstances and with limited exceptions, any material (including material that is posted on an associated person's personal social media) 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.

Further, the FAQs would address:

- the other MSRB rules to consider when a regulated entity uses social media as part of its municipal securities or municipal advisory activities;
- the requirement for principal pre-approval of an advertisement; and
- a regulated entity's website hyperlinking to content on an independent third-party's website.

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[9] 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) ("RN 17-18"); and FINRA Regulatory Notice 10-06 (Jan. 2010) ("RN 10-06").

In particular, the FAQs would highlight the other obligations under MSRB rules that regulated entities may have, in addition to those set forth in the advertising rules, regarding the use of social media. Those other regulatory obligations would include obligations under: Rule G-17, on conduct of municipal securities and municipal advisory activities; Rule G-27, on supervision; Rule G-44, on supervisory and compliance obligations of municipal advisors; 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.

Further, the FAQs would reinforce that a social media post that contains an advertisement, as defined under the advertising rules, would be subject to approval by a principal prior to its first use.

The FAQs would provide guidance regarding hyperlinking to an independent third-party website from a regulated entity's website. The FAQs would discuss the concepts of entanglement – i.e., whether the regulated entity involved itself in the preparation of the content on the third-party website – and adoption – i.e., whether the regulated entity implicitly or explicitly approved or endorsed the content on that third-party website. The FAQs then would state that the advertising rules would apply to hyperlinked content on an independent third-party's website if the regulated entity either were to become entangled with or adopt that content.

To assist regulated entities, the FAQs would identify various factors that would be relevant in determining whether a regulated entity has adopted or become entangled with the independent third-party hyperlinked content. Those factors would include: the context of the hyperlinked content; the potential for customer or municipal advisory client confusion about the source of the content; and the nature of the hyperlinked content (i.e., hosted by an independent third-party that is not controlled or influenced by the regulated entity with an "ongoing" link).

Further, the FAQs would provide that the inclusion by a regulated entity of a disclaimer would not, alone, be sufficient to avoid potential MSRB rule violations for hyperlinked content on an independent third-party website if the regulated entity knows, or has reason to know, that such content is materially false or misleading. However, the FAQs would highlight that MSRB rules would not apply to linked content within the independent hyperlinked content to which the regulated entity had hyperlinked.

Third-party posts. The FAQs would provide guidance regarding when a post by a customer, a municipal entity client or another third-party (collectively, a "third-party post") on a regulated entity's social media page may be considered advertising under the advertising rules. Further, the FAQs would provide that if the regulated entity were to become entangled with or adopt such third-party posts, such third-party posts would become subject to the advertising rules.

In addition, the FAQs would provide guidance regarding whether a municipal advisory client may post positive comments on a municipal advisor's social media page about the municipal advisor's municipal advisory activities without that post being deemed an advertisement containing a testimonial under Rule G-40. That guidance would provide that such post on the municipal advisor's social media page would only be deemed to be an advertisement containing a testimonial under Rule G-40 if the municipal advisor were to either be entangled with or adopt the post.

Recordkeeping. The FAQs would clarify that "posts," "chats," text messages, or messages sent through messaging applications related to a regulated entity's municipal securities or municipal advisory activities conducted through social media -- regardless of (i) whether the social media is specifically identified as business or personal, (ii) the technology used for the

messaging, or (iii) the device used for the messaging was issued by the regulated entity-- are subject to the MSRB's recordkeeping rules (i.e., Rules G-8 and G-9).

Specifically, for dealers, Rule G-9(b)(viii)(C) requires that "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" be retained. Similarly, for municipal advisors, Rule G-9(h)(i) requires the retention of 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.[10] Neither the technology used for the communication nor the distinction between a communication made through a devise issued by a regulated entity or its associated person's personal device is determinative for this requirement.

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[10] Rule G-8(f) provides in part that "[b]rokers, dealers and municipal securities dealers other than bank dealers which are in compliance with rule 17a-3 of the Commission will be deemed to be in compliance with the requirements of this rule, provided that" certain information is maintained. Rule 17a-3(a)(20) under the Exchange Act provides that every dealer shall keep a:

> record, which need not be separate from the advertisements, sales literature, or communications, documenting that the member, broker or dealer has complied with, or adopted policies and procedures reasonably designed to establish compliance with, applicable federal requirements and rules of a self-regulatory organization of which the member, broker or dealer is a member which require that advertisements, sales literature, or any other communications with the public by a member, broker or dealer or its associated persons be approved by a principal.

Rule G-8(h)(i) requires municipal advisors to make and keep current all books and records described in Rule 15Ba1-8(a) under the Exchange Act. In particular, Rule 15Ba1-8(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."

Supervision. The FAQs would list MSRB rules, including the advertising rules, Rule G-17, Rule G-8 and Rule G-9, as well as other factors, such as usage restrictions, training and education, recordkeeping and monitoring, that are relevant to the development of policies and procedures regarding social media use. The FAQs also would provide guidance under Rule G-27 and Rule G-44 about factors that may be important for a regulated entity to consider in determining the effectiveness of its policies and procedures regarding social media.

Additional materials**.** The FAQs also would refer to resources where additional information about the MSRB's advertising rules could be obtained. Those resources would include the materials submitted to the Commission in File No. SR-MSRB-2018-01 related to the recent amendments to Rule G-21 and new Rule G-40, MSRB Notice 2018-08 concerning the SEC's approval of those recent amendments to Rule G-21 and new Rule G-40 and MSRB Notice 2018-32 concerning the application of the content standards to advertisements by municipal advisors under Rule G-40.

2. Statutory Basis

Section 15B(b)(2) of the Exchange Act[11] provides that:

> [t]he Board shall propose and adopt rules to effect the purposes of this title with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers and advice provided to or on behalf of municipal entities or obligated persons by brokers, dealers, municipal securities dealers, and municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors.

Section 15B(b)(2)(C) of the Exchange Act[12] provides that the MSRB's rules shall:

be designed to prevent fraudulent and manipulative acts and practices, to promote just

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[11] 15 U.S.C. 78o-4(b)(2).

[12] 15 U.S.C. 78o-4(b)(2)(C).

> and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.

The MSRB believes that the proposed rule change is consistent with Sections 15B(b)(2)[13] and 15B(b)(2)(C)[14] of the Exchange Act. The proposed rule change would help to prevent fraudulent and manipulative practices; foster coordination with persons engaged in regulating transactions in municipal securities; and protect investors, municipal entities, obligated persons, and the public interest.

The MSRB believes that the proposed rule change is designed to prevent fraudulent and manipulative practices. The proposed rule change would provide guidance to a regulated entity regarding the use of social media under the advertising rules. By providing this guidance, the MSRB makes clear that certain social media use by a regulated entity would be advertising, and as such, that social media use must comply with the standards of the advertising rules, including the content standards. Those standards provide, among other requirements, that advertisements be based on the principles of fair dealing and good faith, be fair and balanced, and provide a sound basis for evaluating the facts and that the advertisements not make any false, exaggerated, unwarranted, promissory or misleading statement or claim.

Because the MSRB has endeavored to make its advertising rules, including its social media guidance, consistent with the communications rules and social media guidance published by other financial regulators, to the extent practicable, a regulated entity that is dually registered

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[13] 15 U.S.C. 78o-4(b)(2).

[14] 15 U.S.C. 78o-4(b)(2)(C).

as a broker, dealer or investment adviser with the SEC may be able to more easily understand and develop consistent practices across business lines, and therefore promote compliance with the MSRB's advertising rules. In turn, this improved compliance would help prevent fraudulent and manipulative practices because the proposed rule change is designed to assist with and promote compliance with the advertising rules, rules that in and of themselves are designed to prevent fraudulent and manipulative practices.[15]

In addition, the proposed rule change would foster coordination with persons engaged in regulating transactions in municipal securities. As noted under "Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change," regulatory coordination has already occurred with respect to the proposed rule change as the MSRB has consulted with FINRA staff to inform its approach to the FAQs. Further, by providing social media guidance that would be consistent with the social media guidance of other financial regulators (including the social media guidance published by the SEC and FINRA, regulators that are charged with inspecting for compliance with MSRB rules), to the extent practicable, those other financial regulators would be familiar with the social media guidance, which in turn, should foster efficient examinations by those other financial regulators of MSRB-regulated entities. In addition, a regulated entity that is dually registered with the MSRB and with FINRA would be treated the same under the advertising rules as a regulated entity that is registered with the MSRB and not with FINRA. Thus, because the MSRB has endeavored to make the proposed rule change consistent with the communications rules and social media guidance of FINRA, the proposed rule change would help ensure that all regulated entities are subject to consistent advertising regulation.

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[15] See Exchange Act Release No. 83177 (May 7, 2018), 83 FR 21794 (May 10, 2018) (File No. SR-MSRB-2018-01).

The proposed rule change also would help protect investors and the public interest. The MSRB believes that the clear guidance provided by the proposed rule change would help to ensure that social media use by a regulated entity that constitutes advertising complies in a consistent way with the advertising rules as well as relevant supervision and recordkeeping rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

Section 15B(b)(2)(C) of the Exchange Act[16] requires that MSRB rules not be designed to impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The MSRB's policy on the use of economic analysis does not apply to rulemaking proposals for which the MSRB seeks immediate effectiveness.[17] However, even though the MSRB did not conduct a full economic analysis of the proposed rule change, the MSRB still conducted an internal analysis to gauge the economic impact of the proposed rule change, with an emphasis on the burden on competition involving regulated entities.

In this regard, the MSRB believes the proposed rule change is necessary and appropriate in the furtherance of the purposes of the Exchange Act because it would promote compliance by

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16 15 U.S.C. 78o-4(b)(2)(C).

17 The scope of the Board's policy on the use of economic analysis in rulemaking provides that:

> [t]his Policy addresses rulemaking activities of the MSRB that culminate, or are expected to culminate, in a filing of a proposed rule change with the SEC under Section 19(b) of the Exchange Act, other than a proposed rule change that the MSRB reasonably believes would qualify for immediate effectiveness under Section 19(b)(3)(A) of the Exchange Act if filed as such or as otherwise provided under the exception process of this Policy.

Policy on the Use of Economic Analysis in MSRB Rulemaking, available at http://msrb.org/Rules-and-Interpretations/Economic-Analysis-Policy.aspx. For those rule changes which the MSRB seeks immediate effectiveness, the MSRB usually focuses exclusively its examination on the burden of competition on regulated entities.

regulated entities by promoting clarity regarding the intended application of the MSRB's rules and would reduce confusion concerning the application of its rules. The MSRB also believes the proposed rule change would promote regulatory consistency with the social media guidance published by the SEC and FINRA. In addition, the proposed rule change would apply the social media guidance uniformly to dealers and municipal advisors, to the extent practicable, which promotes consistency and preserves competitive balance between regulated entities with different business models.

Effect on Competition, Efficiency and Capital Formation

The MSRB does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act, as the proposed rule change is applicable to all dealers and municipal advisory firms.

Section 15B(b)(2)(L)(iv) of the Exchange Act[18] provides that MSRB rules may "not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud." The MSRB believes that, although the proposed rule change would affect all municipal advisors, including small municipal advisors, the proposed rule change is meant to clarify existing MSRB rules and therefore would not impose additional burdens on municipal advisors regardless of firm size.

[18] 15 U.S.C. 78o-4(b)(2)(L)(iv).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The MSRB sought public comment on the FAQs in draft form.[19] In response to that request for comment, the MSRB received four comment letters.[20] Commenters generally expressed support for the guidance contained in the FAQs, but also expressed various concerns and suggested certain revisions. In particular, commenters focused on three areas – interactive versus static communications, interpretations of FINRA's social media guidance, and additional guidance.[21] Below, the MSRB discusses the comments received.[22]

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19 MSRB Notice 2018-19 (Aug. 14, 2018) (the "request for comment").

20 Letter from Mike Nicholas, Chief Executive Officer, Bond Dealers of America, dated September 14, 2018 ("BDA"); Letter from Susan Gaffney, Executive Director, National Association of Municipal Advisors, dated September 17, 2018 ("NAMA"); Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated September 14, 2018 ("SIFMA"); and Letter from Robert J. McCarthy, Director, Regulatory Policy, Wells Fargo Advisors, dated September 14, 2018 ("Wells Fargo").

21 NAMA also stated that "we would like to continue to express our general concern with having the MSRB produce guidance that is not formally approved by the SEC." NAMA letter at 1. Further, NAMA stated "we do not believe that the information provided in the FAQs should instead be provided through amending current rules or developing new ones. The nature of this medium is fluid and dynamic. The MSRB should retain sufficient flexibility to update guidance as warranted, and doing so through rulemaking would be premature and constricting." The MSRB has filed the FAQs with the Commission in a format that is more flexible than rule text for making future changes as appropriate in this evolving area. In addition, the MSRB has filed a proposed rule change to amend the advertising rules that the SEC will consider. By so doing, the MSRB believes that it has been responsive to NAMA's concerns.

Further, NAMA commented that the MSRB's factors that a regulated entity "should consider their recordkeeping obligations under 'Recordkeeping and Record Retention' in question 13 amounts to merely issue spotting and provides no guidance." NAMA letter at 5. To provide municipal advisors with the flexibility to develop policies and procedures that reflect the municipal advisor's organization, the MSRB developed a primarily principles-based approach to supervision and compliance. Consistent with that determination, the guidance in FAQ question 11 (hereinafter, references to a given "question" are to a specific numbered question in the FAQs, unless otherwise noted or

Interactive versus static communications

Commenters requested that the MSRB adopt the concepts of interactive and static content posted or disseminated to social media sites as described in FINRA Regulatory Notice 10-06.[23] In that notice, FINRA provides examples of both interactive and static content, and provides guidance that the definition of public appearance under FINRA Rule 2210(f) includes unscripted participation in an interactive electronic forum.[24] Since RN 10-06, however, FINRA has amended FINRA Rule 2210 so that such communications are now defined as retail communications that are excepted from the requirement of principal pre-approval.[25] Nevertheless, such retail communications in interactive forums are subject to other supervisory requirements and are subject to content standards of FINRA's communications rule.[26] However,

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the context otherwise requires) is principles-based (question 11 was previously question 13 in the request for comment). As the MSRB believes that its response in question 11 is consistent with the MSRB's approach in Rule G-44, the MSRB has determined not to revise question 11 in response to NAMA's concerns regarding principles-based guidance.

22 Commenters expressed concerns about recordkeeping as it relates to associated persons' personal social networking pages and to the costs of recordkeeping for small municipal advisors. The MSRB determined that these FAQs were not the appropriate forum to address recordkeeping requirements under the federal securities laws. However, the MSRB may choose to address the issue, as it relates to MSRB rules, in the future.

23 BDA letter; NAMA letter at 4-5; SIFMA letter at 2; and Wells Fargo letter at 2-3.

24 RN 10-06 at 4-5.

25 FINRA Rule 2210(b)(1)(D) excepts from the requirement of principal pre-approval under FINRA Rule 2210(b)(1)(A) retail communications posted on an online interactive electronic form that the firm supervises and reviews in the same manner as correspondence set forth in Rule 3110(b). See FINRA Regulatory Notice 12-29 (June 2012) at 7 citing RN 10-06.

26 Id.

FINRA considers static content to constitute "advertisements" under FINRA Rule 2210 and requires principal approval of such content prior to posting.[27]

In response, the MSRB has determined to propose to amend its advertising rules to address commenters' suggestions. Concurrent with this proposed rule change, the MSRB has submitted a separate proposed rule change with the Commission to do so.

Interpretations of FINRA's social media guidance

Commenters requested that the MSRB adopt their interpretations of certain aspects of FINRA's social media guidance. Specifically, commenters requested that the MSRB adopt interpretations regarding the adoption of third-party content, hyperlinks, and FINRA's social media guidance.

Adoption. SIFMA commented that "SIFMA and its members "don't view 'liking' as the adoption of content" and explained that current FINRA guidance defines adoption "in regard to sharing or linking" but not 'liking'."[28] Similarly, Wells Fargo suggested that the FAQs would not align with FINRA's guidance in FINRA Regulatory Notice 17-18 regarding adoption because simply "liking" a post does not rise to the level of "sharing" or "linking."[29]

FINRA has provided guidance that it would deem adoption as explicitly or implicitly endorsing or approving third-party content, and that by liking or sharing unsolicited favorable third-party content posted on a representative's business-use social media website, the representative would be adopting that content.[30] In addition, the MSRB submits that FINRA's

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27 RN 10-06 at 5.

28 SIFMA letter at 3.

29 Wells Fargo letter at 2.

30 RN 17-18 at Q9 ("[b]y liking or sharing favorable comments, the representative has adopted them and they are subject to the communications rules. . .").

guidance relating to "shares" and "links" to which commenters refer, by its own terms, does not provide the exclusive list of how a firm can adopt independent third-party content, but rather responds to a narrow question regarding sharing and linking.[31] Consistent with the SEC's and FINRA's social media guidance, the FAQs would provide that a regulated entity may adopt the content of a third-party post if the regulated entity explicitly or implicitly approves or endorses the content. Further, based on that guidance, the FAQs would provide that, if a regulated entity "likes" or otherwise indicates approval with that third-party post, then the regulated entity has adopted that third-party post. The FAQs would provide non-exclusive factors for a regulated entity to consider when determining whether the regulated entity has adopted third-party content.

The MSRB believes that the FAQs would correctly interpret the theory of adoption as it applies to "likes" of third-party content and would promote regulatory consistency with the interpretations of other financial regulations. The MSRB has determined not to modify the FAQs in response to SIFMA's and Wells Fargo's suggestions for "liking" a post as doing so would create disharmony among the applicable regulatory interpretations.

Relatedly, NAMA provided three suggestions regarding adoption and entanglement. NAMA suggested that the FAQs' guidance regarding the entanglement or adoption by a municipal advisor of third-party content was inconsistent with the MSRB's guidance in MSRB Notice 2018-24 regarding testimonials. In particular, NAMA expressed concern that by simply

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[31] RN 17-18 provides:

> Q3: If a firm shares or links to specific content posted by an independent third-party such as an article or video, has the firm adopted the content?
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> A: By sharing or linking to specific content, the firm has adopted the content and would be responsible for ensuring that, when read in context with the statements in the originating post, the content complies with the same standards as communications created by, or on behalf of, the firm.

allowing third-parties to post on a municipal advisor's social networking page, and specifically, by allowing a municipal advisory client to post positive comments on a municipal advisor's social networking page, the municipal advisor, itself, would be allowing an advertisement that was a testimonial to be posted. As provided in question 8, a municipal advisor would only be posting an advertisement that contains a prohibited testimonial under Rule G-40 if the municipal advisor were to become entangled with or adopt the positive comments of the municipal advisory client. To provide clarity, the MSRB has revised question 8 so that it now asks "May a municipal advisory client post positive comments about its experience with the municipal advisor on the municipal advisor's social media page without such post being deemed a testimonial within Rule G-40?"

Further, NAMA suggested that the use of the term "encourage" when defining entanglement was inconsistent with SEC and FINRA language regarding entanglement.[32] To be responsive to NAMA's concerns, the MSRB has deleted references to "encourage" when discussing entanglement.

NAMA also suggested that the MSRB explicitly define the terms "customer complaint" and "municipal advisory client complaint" when discussing third-party posts on an associated person's social networking page.[33] After considering NAMA's suggestion, the FAQs provide a reference to the definition of those terms in Rule G-8.

Hyperlinks. SIFMA and Wells Fargo recommended that the MSRB align its guidance in question 4 relating to ongoing links with the guidance provided by FINRA in question 5 in RN

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[32] NAMA letter at 3.

[33] Id.

17-18.[34] In particular, those commenters suggested that FINRA has provided guidance that the determination of whether an ongoing hyperlink contains misleading information is only made at the time the firm determines to offer a particular hyperlink.[35] SIFMA and Wells Fargo note that a firm would not have the capacity to monitor the third-party website on a continual basis.[36]

Question 4 would provide guidance about ongoing links that would promote regulatory consistency with FINRA's guidance in question 5 of RN 17-18. In particular, the FAQs would define an ongoing link,[37] consistent with FINRA's definition of an ongoing link,[38] and provide

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34 SIFMA letter at 3; Wells Fargo letter at 3.

35 Id.

36 SIFMA letter at 3; see Wells Fargo letter at 3. Wells Fargo also suggested that it was unclear why it is necessary to review the link's content for testimonial status. The FAQs provide that, if the hyperlinked content on a third-party website from a regulated entity's website is an advertisement under the advertising rules, a regulated entity must consider all applicable provisions of the advertising rules including whether the hyperlinked content would be a testimonial. The need to review a hyperlink's content for testimonial status would stem from any prior determination that the hyperlinked content is advertising under the advertising rules.

37 Question 4 would provide, in part, as follows:

> 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. (footnote omitted) A regulated entity may not have adopted the content on the independent third-party's website if the link is "ongoing."

38 RN 17-18, question 5, provides, in part, as follows:

> Whether a firm has adopted the content of an independent third-party website or any section of the website through the use of a link is fact dependent. Two factors

guidance that hyperlinked content may not be advertising subject to the advertising rules if the hyperlink containing the independent third-party content is ongoing and the regulated entity has no influence or control over the independent third-party hosting the content. The FAQs then would provide guidance about the factors that a regulated entity may want to consider if the hyperlinked content is advertising subject to the advertising rules. Similar to FINRA's guidance in RN 17-18, question 4 in MSRB's FAQs would not specifically address requirements to monitor an ongoing link under the MSRB's advertising rules.[39] Because the MSRB believes that the FAQs' guidance regarding ongoing hyperlinks would promote regulatory consistency with the relevant guidance of other financial regulators, the MSRB has determined not to expand the guidance regarding ongoing hyperlinks to address commenters' suggestions.

Adoption of FINRA social media guidance. SIFMA suggested that, because FINRA has a long history of rulemaking and guidance with respect to social media issues, it would be helpful if dealers could rely on FINRA's social media or other guidance."[40] The MSRB

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are critical to the analysis: (1) whether the link is "ongoing" and (2) whether the firm has influence or control over the content of the third-party site.

The firm has not adopted the content if the link is "ongoing," meaning:

- the link is continuously available to investors who visit the firm's site;
- investors have access to the linked site whether or not it contains favorable material about the firm; and
- the linked site could be updated or changed by the independent third-party and investors would nonetheless be able to use the link.

[39] For example, a regulated entity cannot post content that it knows or has reason to know contains any untrue statement of material fact or is otherwise false or misleading.

[40] SIFMA stated that "it would be helpful if dealers could rely on outstanding FINRA enforcement actions or other guidance on social media issues." SIFMA letter at 3. The MSRB is not in a position to determine when and whether statements contained in FINRA enforcement actions, whether settled or fully litigated, involving FINRA rules even constitute or reflect official interpretations that are binding on FINRA members.

appreciates SIFMA's suggestion, and in developing the FAQs, the MSRB was 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 endeavored to align the FAQs with the social media guidance published by the SEC and FINRA.

The MSRB is aware that the use of social media is an evolving landscape, and recognizes that the MSRB will likely need to continue to issue guidance in this area as practices and technology evolve and as other regulators issue new rules and official guidance regarding social media. The MSRB will continue to monitor developments in this area (including rules and guidance of other regulators and enforcement matters) and to seek input from regulated entities regarding the need to issue additional guidance. In so doing, the MSRB will continue to be mindful of the importance of regulatory certainty for regulated entities as well as avoiding unnecessary discrepancies between the obligations of dealers and municipal advisors, including between municipal advisors that are also registered as dealers and municipal advisors that are not registered as dealers (that may include municipal advisors that are banks).

Related to SIFMA's suggestion about adopting FINRA's social media guidance, are NAMA's questions regarding the MSRB's use of footnotes to reference FINRA's social media guidance and the SEC's social media guidance in the FAQs. Specifically, NAMA questions what the footnotes mean. The MSRB endeavors to promote regulatory consistency with other financial regulators, when appropriate. The MSRB provided certain references to where the MSRB is promoting regulatory consistency with the social media guidance of other regulators. Those

footnotes, however, are not intended to suggest that regulated entities that are not already subject to the guidance issued by the SEC and FINRA are now obligated to act consistent with the MSRB's social media guidance as well as with the social guidance published by the SEC or FINRA.

Additional Guidance

The request for comment solicited suggestions where additional guidance regarding social media use would be helpful.[41] Commenters provided suggestions specifically relating to the social media guidance provided by the FAQs as discussed above, as well as to other relevant topics. NAMA suggested that the MSRB provide additional social media guidance specifically relating to disclaimers and hyperlinks. In addition, NAMA suggested that the MSRB provide municipal advisors guidance on the supervisory obligations related to the use of electronic communications technology by a firm's associated persons similar to FINRA's guidance in FINRA Regulatory Notice 07-59.[42] NAMA noted that such guidance could be particularly helpful to small municipal advisors in assessing the compliance costs associated with social media usage.[43] SIFMA also provided suggestions. Specifically, SIFMA provided a list of other issues that would benefit from further clarification that included, among other issues, the definition of advertising and exemptions thereof, and documentation standards.

Any comments that may not have been specifically addressed in the FAQs provide valuable input to inform the MSRB as it considers developing additional guidance.

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41 Request for comment at 2.

42 FINRA Regulatory Notice 07-59 (Dec. 2007).

43 NAMA letter at 5-6. In addition, NAMA provided suggestions that were beyond the scope of the social media guidance that related to the fundamental text of Rule G-40 and the economic analysis of the compliance costs associated with Rule G-40.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[44] and Rule 19b-4(f)(6) thereunder.[45]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-MSRB-2019-04 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

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[44] 15 U.S.C. 78s(b)(3)(A).

[45] 17 CFR 240.19b-4(f)(6).

All submissions should refer to File Number SR-MSRB-2019-04. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 am and 3:00 pm. Copies of the filing also will be available for inspection and copying at the principal office of the MSRB. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MSRB-2019-04 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, pursuant to delegated authority.[46]

Eduardo A. Aleman,
Deputy Secretary.

[46] 17 CFR 200.30-3(a)(12).

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