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SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-80699; File No. SR-MSRB-2017-02)

May 16, 2017

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval of a Proposed Rule Change Consisting of Proposed Amendments to Rule G-3, on Professional Qualification Requirements, and Rule G-8, on Books and Records, to Establish Continuing Education Requirements for Municipal Advisors and Accompanying Recordkeeping Requirements

I. Introduction

On March 22, 2017, the Municipal Securities Rulemaking Board (the “MSRB” or “Board”) filed with the Securities and Exchange Commission (the “SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change consisting of (i) proposed amendments to MSRB Rule G-3, on professional qualification requirements, to establish continuing education requirements for municipal advisors; (ii) proposed amendments to MSRB Rule G-8, on books and records to be made by brokers, dealers and municipal securities dealers (“dealers”) and municipal advisors; and (iii) proposed amendments to Rule G-3 to make minor technical changes to the rule to reflect the renumbering of sections and updates to cross-referenced provisions (collectively the “proposed rule change”). The proposed rule change was published for comment in the Federal Register on April 4, 2017.³

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR § 240.19b-4.

³ Securities Exchange Act Release No. 80327 (March 29, 2017) (the “Notice of Filing”), 82 FR 16449 (April 4, 2017).

The Commission received one comment letter on the proposed rule change.⁴ On May 10, 2017, the MSRB responded to the comments received by the Commission.⁵

II. Description of Proposed Rule Change

According to the MSRB, the purpose of the proposed rule change is to amend Rule G-3(i) to prescribe continuing education requirements for municipal advisors pursuant to the MSRB's statutory mandate under Section 15B(b) of the Act. As described in the Notice Filing, the goal of continuing education is to ensure that certain associated persons of municipal advisors stay abreast of issues that may affect their job responsibilities and of product and regulatory developments.⁶ The proposed rule change also would amend Rule G-8 to establish recordkeeping requirements related to the administration of a municipal advisor's continuing education program and make technical changes to Rule G-3 to reflect the renumbering of sections and updates to cross-referenced provisions.

As further described in the Notice of Filing and the MSRB Response, the development of the proposed rule change drew from the principles and structure of the continuing education regulatory framework currently in place for dealers.⁷

Pursuant to the proposed rule change, a municipal advisor would be required to, at least annually, conduct a needs analysis that evaluates and prioritizes their specific training needs,

⁴ See Letter to Secretary, Commission, from Susan Gaffney, Executive Director, National Association of Municipal Advisors, dated April 25, 2017 (the "NAMA Letter").

⁵ See Letter to Secretary, Commission, from Gail Marshall, Associate General Counsel, MSRB, dated May 10, 2017 (the "MSRB Response Letter"), available at <https://www.sec.gov/comments/sr-msrb-2017-02/msrb201702-1745890-151491.pdf>.

⁶ See Notice of Filing.

⁷ Id.

develop a written training plan based on the needs identified in the analysis, and deliver training concerning municipal advisory activities designed to meet those training needs. However, the proposed requirements for municipal advisors would differ from dealers with respect to identifying those individuals that are subject to the training and the content that must be covered as part of the minimum standards for the annual training.

Pursuant to proposed Rule G-3(i)(ii), a municipal advisor would be required to implement a continuing education training program for each individual qualified as either a municipal advisor representative or as a municipal advisor principal (collectively, “covered persons”).⁸ The MSRB states that the establishment of continuing education requirements for municipal advisors would assist in ensuring that all municipal advisor firms provide a minimum-level standard of training that is appropriate in the public interest and for the protection of investors and municipal entities or obligated persons.⁹

Pursuant to proposed Rule G-3(i)(ii)(B)(1), a municipal advisor would be required to, at least annually, conduct a needs analysis that evaluates and prioritizes its training needs, develop a written training plan based on the needs analysis, and deliver training applicable to its municipal advisory activities. Additionally, pursuant to the proposed rule change, in developing a written training plan, a municipal advisor must take into consideration the firm’s size,

⁸ Under MSRB Rule G-3(d)(i)(A), “municipal advisor representative” means “a natural person associated with a municipal advisor who engages in municipal advisory activities on the municipal advisor’s behalf.” Under MSRB Rule G-3(e)(i), “municipal advisor principal” means “a natural person associated with a municipal advisor who is qualified as a municipal advisor representative and is directly engaged in the management, direction or supervision of the municipal advisory activities of the municipal advisor and its associated persons.”

⁹ See Notice of Filing.

organizational structure, scope of municipal advisory activities, as well as regulatory developments.

Proposed Rule G-3(i)(ii)(B)(2) would prescribe the minimum standards for continuing education training by requiring that each municipal advisor's training include, at a minimum, training on the applicable regulatory requirements and the fiduciary duty obligations owed to municipal entity clients. Pursuant to the proposed rule change, the minimum training on the applicable regulatory requirements would require a municipal advisor's continuing education program to include training on the regulatory requirements applicable to the municipal advisory activities in which its covered persons engage. However, training on the fiduciary duty obligation owed to municipal entity clients would be a minimum component of the continuing education training for all covered persons, even those that may not engage in municipal advisory activities on behalf of a municipal entity client. The MSRB states that the fiduciary duty obligation owed to a municipal entity client is a keystone principle of the regulatory framework for municipal advisors and that the MSRB believes every covered person engaged in municipal advisory activities should be familiar with such principle.¹⁰ A municipal advisor would, under the proposed rule change, nonetheless, still have the flexibility to determine the appropriate scope of training that its covered persons need on the fiduciary duty obligation based on the municipal advisory activities in which that its covered persons engages.

Recognizing that the nature of municipal advisory activities engaged in by municipal advisors can be diverse; the proposed rule change would provide municipal advisors with the flexibility to determine their firm-specific training needs and the content and scope of the training appropriate for their covered persons. For example, a municipal advisor that only

¹⁰ Id.

provides advice to municipal entities on swap transactions would, under the proposed rule change, be permitted to design its annual training plan based upon the rules and practices applicable to its limited business model, so long as such training plan included the applicable regulatory requirements applicable to that limited business and a component regarding the fiduciary duty obligation owed to municipal entity clients. Moreover, under the proposed rule change, municipal advisors would be able to determine the method for delivering such training. For example, a municipal advisor could determine that the most effective manner for delivering the training would be to require its covered persons to attend an applicable seminar by subject matter experts and/or to utilize an on-line training resource.

The MSRB notes that the minimum requirements for continuing education training, outlined under the proposed rule change, should not be viewed by municipal advisors as the full scope of the subject matter appropriate for municipal advisors' training programs.¹¹ The minimum standard for training does not negate the need for each municipal advisor to consider whether, based on its needs analysis, additional training applicable to the municipal advisory activities it conducts is appropriate.

Proposed Rule G-3(i)(ii)(B)(3) would require a municipal advisor to administer its continuing education program in accordance with the annual evaluation and prioritization of its training needs and the written training plan developed as consistent with its needs analysis. Also, pursuant to this provision, a municipal advisor would be required to maintain records documenting the content of its training programs and a record that each of its covered persons identified completed the applicable training.

¹¹ Id.

Pursuant to proposed Rule G-3(i)(ii)(C), a municipal advisor's covered persons (each individual qualified as a municipal advisor representative or municipal advisor principal) would be required to participate in the firm's continuing education training programs. If consistent with its training plan, a municipal advisor could deliver training appropriate for all covered persons. In addition, a municipal advisor could determine that its training needs indicate that it should also deliver particular training for certain covered persons, for example, those covered persons that have been designated with supervisory responsibilities under MSRB Rule G-44, or those covered persons that have been engaged in municipal advisory activities for a short period of time.

Pursuant to proposed Rule G-3(i)(ii)(D), on specific training requirements, the appropriate examining authority could require a municipal advisor, individually or as part of a larger group, to provide specific training to its covered persons in such areas the appropriate examining authority deems appropriate.¹² Such a requirement could stipulate the class of covered persons for which it is applicable, the time period in which the requirement must be satisfied and, where appropriate, the actual training content.

The MSRB states that, in an effort to reduce regulatory overlap for dealer-municipal advisors,¹³ the proposed rule change would allow a dealer-municipal advisor to deliver continuing education training that would satisfy its training needs for the firm's dealer and

¹² For purposes of proposed Rule G-3(i)(ii)(D), "appropriate examining authority" would mean "a registered securities association with respect to a municipal advisor that is a member of such association, or the Commission, or the Commission's designee, with respect to any other municipal advisor."

¹³ A member of the Financial Industry Regulatory Authority that is a municipal securities dealer and municipal advisor is commonly referred to as a "dealer-municipal advisor."

municipal advisor activities.¹⁴ More specifically, pursuant to proposed Rule G-3(i)(ii)(E), each dealer-municipal advisor will be permitted to develop a single written training plan, if that training plan is consistent with each needs analysis that was conducted of the firm's municipal advisory activities and municipal securities activities. In addition, the proposed rule provision would allow a municipal advisor to conduct training for its covered persons and covered registered persons, which would satisfy the continuing education requirements under Rules G-3(i)(i)(B) and G-3(i)(ii), if such training is consistent with the firm's written training plan(s) and that training meets the minimum standards for the training programs, as required under the rule.

Proposed Amendments to MSRB Rule G-8

The proposed amendments to MSRB Rule G-8 address the books and records that must be made and maintained by a municipal advisor to show compliance with recordkeeping requirements related to the administration of a municipal advisor's continuing education program. The Board adopted the approach of specifying, in some detail, the information to be reflected in various records.¹⁵ Specifically, the proposed amendments to Rule G-8(h) would require each municipal advisor to make and maintain records regarding the firm's completion of its needs analysis and the development of its corresponding written training plan. Moreover, with respect to each municipal advisor's written training plan, municipal advisors would be required to make and keep records documenting the content of the firm's training programs and a record evidencing completion of the training programs by each covered person.¹⁶ The MSRB believes

¹⁴ See Notice of Filing.

¹⁵ Id.

¹⁶ MSRB Rule G-9(h) generally requires municipal advisors to preserve the books and records described in MSRB Rule G-8(h) for a period of not less than five years for purposes of consistency with SEC Rule 15Ba1-8 of the Act on books and records to be

that recordkeeping requirements are an important element of compliance and the proposed amendments to Rule G-8 are appropriately tailored to facilitate the examination of a municipal advisor's compliance with the continuing education requirements.¹⁷

Technical Amendments

The proposed rule change would make minor technical amendments to add paragraph headers, and renumber and update rule cross-references to Rule G-3(i)(i) and Rule G-3(i)(ii). Rule G-3(i)(i) would be revised by adding the paragraph header "Continuing Education Requirements for Brokers, Dealers, and Municipal Securities Dealers." Rule G-3(i)(i)(D) would be revised by adding the paragraph header "Reassociation" and renumbered Rule G-3(i)(i)(A)(4). Rule G-3(i)(i)(E) would be relocated to proposed subparagraph Rule G-3(i)(i)(A)(4). Rule G-3(i)(ii) would be re-lettered Rule G-3(i)(i)(B). Due to these changes, other paragraphs under Rule G-3(i) would be renumbered and re-lettered.

The MSRB requested in the Notice of Filing that the proposed rule change be approved with an implementation date of January 1, 2018.¹⁸ To comply with the annual training requirement for calendar year 2018, in accordance with the proposed implementation date, a municipal advisor would need to complete a needs analysis, develop a written training plan and deliver the appropriate training by December 31, 2018.

III. Summary of Comments Received and MSRB's Responses to Comments

As noted previously, the Commission received one comment letter on the proposed rule

made and maintained by municipal advisors. See Exchange Act Release No. 73415 (October 23, 2014), 79 FR 64423 (October 29, 2014) (SR-MSRB-2014-06).

¹⁷ Id.

¹⁸ See Notice of Filing.

change, as well as the MSRB Response Letter. The commenter, the National Association of Municipal Advisors (“NAMA”), expressed general support for the establishment of continuing education requirements for municipal advisors, noting that it believes it is imperative for municipal advisors to continue to expand their knowledge and improve their professional skills beyond the Municipal Advisor Representative Qualification Examination (Series 50 exam).¹⁹ NAMA also suggested that certain aspects of the proposed rule change be amended to include additional clarifications and guidance prior to its implementation.²⁰ The MSRB believes the proposed rule change is consistent with its statutory mandate and has responded to the comments, as discussed below.²¹

1. Additional Guidance on Needs Analysis Requirement and Effective Date

NAMA requested that the MSRB develop interpretive guidance to help municipal advisor firms, especially small municipal advisor firms, better understand how to conduct needs analysis and provide examples of the types of trainings that could be employed by municipal advisors to meet the requirements of the proposed rule change.²² NAMA also requested that the implementation date of the proposed rule change be delayed until the MSRB has issued the interpretive guidance regarding the need analysis requirement, which NAMA believes is necessary for municipal advisors to adequately understand and comply with the proposed rule change.²³

¹⁹ See NAMA Letter.

²⁰ Id.

²¹ See MSRB Response Letter.

²² See NAMA Letter.

²³ Id.

The MSRB responded that, as it previously noted in the Notice of Filing, it recognizes that additional guidance on conducting a needs analysis and how to implement a continuing education program may benefit municipal advisor firms.²⁴ The MSRB articulated that it intends to provide guidance to municipal advisor firms in understanding their obligations to develop a continuing education program before the proposed rule change is implemented.²⁵ According to the MSRB, such guidance will include a sample needs analysis, a sample training plan and a non-exclusive list of delivery mechanisms that a municipal advisor firm could use in delivering and documenting training.²⁶ Also, the MSRB stated that such guidance will be designed to assist a municipal advisor firm in tailoring the development and implementation of a continuing education program based on regulatory developments, the size and organizational structure of the firm and the municipal advisory activities the firm engages in.²⁷ Such guidance, the MSRB stated, will not promote a one-size-fits-all continuing education program and will not create a safe harbor.²⁸ The MSRB responded that it intends to provide implementation guidance in a webinar shortly following approval of the proposed rule change.²⁹ In addition, the MSRB stated that it intends to issue additional guidance, including sample documentation, at least 90 days prior to the implementation date.³⁰ The MSRB also noted that although it is proposed a January

²⁴ See Notice of Filing.

²⁵ Id.

²⁶ Id.

²⁷ Id.

²⁸ Id.

²⁹ Id.

³⁰ Id.

1, 2018 effective date, municipal advisors would have until December 31, 2018 to complete a needs analysis, develop a written training plan and deliver the appropriate training to comply with the annual training requirements for calendar year 2018.³¹ Accordingly, the MSRB believes that municipal advisor firms will have sufficient time to implement procedures reasonably designed to achieve compliance with the continuing education requirements.³²

2. Additional Guidance on “Appropriate Enforcement Authority”

NAMA requested that the MSRB provide additional interpretive guidance regarding the scope of the power of the “appropriate enforcement authority” to require, pursuant to amended Rule G-3(i)(ii)(D), training for individuals or a group within a municipal advisor following an examination.³³

The MSRB stated that this provision is designed to provide the appropriate examining authority the discretion to determine, in the course of examining and enforcing compliance with MSRB rules, whether an associated person(s) of a municipal advisor requires additional training.³⁴ The MSRB believes the provision is consistent with similar authority provided under MSRB Rule G-3(h)(ii)(D) with respect to the continuing education requirements for dealers.³⁵

3. Economic Impact of MSRB Rulemaking

NAMA stated that the MSRB should empirically evaluate the economic impact that the proposed rule change would have on sole practitioners and small municipal advisor firms, as

³¹ Id.

³² Id.

³³ See NAMA Letter.

³⁴ See MSRB Response Letter.

³⁵ Id.

well as the potential economic impact the entire municipal advisor regulatory regime has on municipal advisors.³⁶ In expressing its concerns, NAMA cited to a response it provided to a MSRB request for comment regarding an earlier stage of this rulemaking initiative where it stated the MSRB should recognize the multiple roles a principal in a small municipal advisor firm or a sole-practitioner municipal advisor has to their clients under the rulemaking regime already imposed by the MSRB and that the additional requirements of the proposed rule change for all municipal advisor and especially sole practitioners and smaller firms should be considered along with the already existing regulatory burden imposed by MSRB rules and not create an overwhelming economic or administrative burden on these professionals.³⁷

The MSRB stated that it has evaluated and articulated the economic impact associated with the proposed rule change in Notice of Filing in accordance with its Policy on the Use of Economic Analysis in MSRB Rulemaking³⁸ and that it believes that the proposed rule change is consistent with the requirements of Section 15B(b)(2)(L)(iv) of the Act³⁹ which provides that MSRB rules with respect to municipal advisors 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.⁴⁰ The MSRB also stated that it plans to assess

³⁶ See NAMA Letter.

³⁷ Id. See also Letter to Ronald W. Smith, MSRB, from Susan Gaffney, Executive Director, National Association of Municipal Advisors, dated November 14, 2016.

³⁸ See Policy on the Use of Economic Analysis in MSRB Rulemaking, MSRB, available at: <http://msrb.org/rules-and-interpretations/economic-analysis-policy>.

³⁹ 15 U.S.C. 78o-4(b)(2)(L)(iv).

⁴⁰ See MSRB Response Letter. See also Notice of Filing.

retrospectively the impact and effectiveness of the municipal advisory framework once it is more fully in place and that the Board has discussed the importance of this future analysis to understanding the benefits and costs of the municipal advisory regulatory regime.⁴¹

4. Standards of Conduct Applicable to Municipal Advisor Clients

NAMA requested that the MSRB adopt a clarifying amendment to proposed Rule G-3(i)(ii)(B)(2)(a) to include “obligated persons” to the language of the proposed rule change to accommodate municipal advisors that have obligated person clients and not municipal entity clients.

The MSRB believes that NAMA’s suggested change would materially change the spirit and intent of the proposed rule change.⁴² The MSRB stated that the fiduciary duty standard is a keystone principal of the regulatory framework for municipal advisors and every municipal advisor needs to address the fiduciary duty obligation in their continuing education program.⁴³ According to the MSRB, it recognizes that municipal advisory activities can vary from firm to firm and the proposed rule change therefore affords a municipal advisor sufficient flexibility to determine the extent and scope of the fiduciary duty training that needs to be included in its continuing education program based on the municipal advisory activities in which the firm engages.⁴⁴

IV. Discussion and Commission Findings

⁴¹ See MSRB Response Letter.

⁴² Id.

⁴³ Id. See also Notice of Filing.

⁴⁴ See MSRB Response Letter.

The Commission has carefully considered the proposed rule change, the comment letter received, and the MSRB Response Letter. The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the MSRB.

In particular, the proposed rule change is consistent with Sections 15B(b)(2)(A), 15B(b)(2)(L) and 15B(b)(2)(G) and of the Act.⁴⁵ Section 15B(b)(2)(A) of the Act states that the MSRB's rules shall provide that no municipal securities broker or municipal securities dealer shall effect any transaction in, or induce or attempt to induce the purchase or sale of, any municipal security, and no broker, dealer, municipal securities dealer, or municipal advisor shall provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, unless such municipal securities broker or municipal securities dealer meets such standards of operational capability and such municipal securities broker or municipal securities dealer and every natural person associated with such municipal securities broker or municipal securities dealer meets such standards of training, experience, competence, and such other qualifications as the Board finds necessary or appropriate in the public interest or for the protection of investors and municipal entities or obligated persons.⁴⁶ The Commission believes the proposed rule change is consistent with Section 15B(b)(2)(A) in that the proposed rule will provide for minimum levels of training for persons engaged in municipal advisor activities, which is in the public interest and for the protection of investors, municipal entities and obligated persons.

⁴⁵ 15 U.S.C. 78o-4(b)(2)(A), 78o-4(b)(2)(L) and 78o-4(b)(2)(G).

⁴⁶ 15 U.S.C. 78o-4(b)(2)(A).

Section 15B(b)(2)(L) of the Act⁴⁷ provides that the MSRB's rules shall, with respect to municipal advisors: prescribe means reasonably designed to prevent acts, practices, and courses of business as are not consistent with a municipal advisor's fiduciary duty to its clients; provide continuing education requirements for municipal advisors; provide professional standards; and 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 Commission believes the proposed rule change is consistent with Section 15B(b)(2)(L) in that the proposed rule will establish continuing education program requirements for municipal advisors. Requiring municipal advisors to establish a formal continuing education program for covered persons will ensure that individuals qualified as either a municipal advisor representative or as a municipal advisor principal are kept informed of issues that affect their job responsibilities and of regulatory developments, which is in furtherance of the protection of investors against fraud and misconduct. The Commission also finds that the proposed rule change is consistent with Section 15B(b)(2)(L)(iv) of the Act in that it will 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. Although the proposed rule change will affect all municipal advisors, including small municipal advisors, the proposed rule change is a necessary and appropriate regulatory burden in order to protect investors, municipal entities and obligated persons.

The Commission also finds that the proposed rule change is consistent with Section

⁴⁷ 15 U.S.C. 78o-4(b)(2)(L).

15B(b)(2)(G) of the Act⁴⁸ which provides that the MSRB's rules shall prescribe records to be made and kept by municipal securities brokers, municipal securities dealers, and municipal advisors and the periods for which such records shall be preserved. The proposed rule change will, among other things, assist in ensuring that municipal advisors are complying with the amendments to proposed MSRB Rule G-3 by extending the existing recordkeeping requirements applicable to municipal advisors to include making and maintaining records relating to their continuing education program. Establishing a requirement for municipal advisors to maintain records reflecting their continuing education programs will assist the appropriate examining authority that examines municipal advisors in monitoring and promoting compliance with the proposed rule change.

In approving the proposed rule change, the Commission also has considered the impact of the proposed rule change on efficiency, competition, and capital formation.⁴⁹ The Commission does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change grants municipal advisors flexibility to develop regulatory training based on firm size, organizational structure, and scope of business activities. In addition, the proposed rule change allows for the development of a single training plan that is consistent with each needs analysis conducted by a dealer-municipal advisor. Moreover, dealer-municipal advisors can incorporate identified, firm-specific training needs, with respect to their municipal advisory activities, into their existing training programs, as long as any offered training is consistent with the written training plan(s). Also, the Commission believes requiring municipal advisor's to meet continuing

⁴⁸ 15 U.S.C. 78o-4(b)(2)(G).

⁴⁹ 15 U.S.C. 78c(f).

education requirements will promote compliance by municipal advisors with the regulations and laws that protect investors, municipal entities and obligated person by requiring them to keep informed of current issues and regulatory developments that affect their job responsibilities and will reduce the risk that users of municipal advisory services would receive advice that results in harm or negative impact. This improved compliance, in turn, will likely improve the market for municipal advisory services and its efficient operation. Furthermore, the Commission believes that the potential burdens created by the proposed rule change are to be likely outweighed by the benefits.

For the reasons noted above, the Commission believes that the proposed rule change is consistent with the Act.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁵⁰ that the proposed rule change (SR-2017-02) be, and hereby is, approved .

For the Commission, pursuant to delegated authority.⁵¹

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⁵⁰ 15 U.S.C. 78s(b)(2).

⁵¹ 17 CFR 200.30-3(a)(12).

